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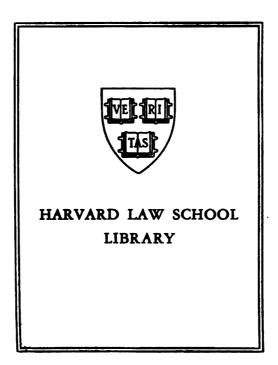
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ATLANTIC REPORTER,

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CASES REPORTED.

Page	Page
Abbot v. La Point (Vt.)	Baltimore, Thillman v. (Md.) 722
Abbott v. Rockland (Me.) 865	Baltimore, United Rys. & Electric Co. of
Abraham Lincoln Mut. Life Ins. Co., Gott-	Baltimore_v. (Md.)
lieb v. (Pa.)	Baltimore, Wannenwetsch v. (Md.) 701 Baltimore, C. & A. R. Co., Mills v. (Md.) 885
Abrahams v. King (Md.)	Baltimore, C. & A. R. Co., Mills v. (Md.) 885
Acker, Merrall & Condit Co., McGaw v.	Baltimore & O. R. Co., Black v. (Pa.) 903
(Md.)	Baltimore & O. R. Co. v. Howard County
Etne Indomesia Co. of Heatford Com.	Com'rs (Md.)
Etna Indemnity Co. of Hartford, Conn. v.	Baltimore & O. R. Co., Meitzner v. (Pa.) 434 Baltimore & O. R. Co. v. Strube (Md.) 697
George A. Fuller Co. (Md.)	Baltzell v. Church Home & Infirmary of
Ætna Life Ins. Co., Sloss-Sheffield Steel &	Baltimore City (Md.)
Iron Co. v. (N. J.)	Bannon, Thrift v. (Md.)
Albertalli, State v. (N. J. Sup.)	Barber v. Vinton (Vt.)
Aldrich, Nugent v. (R. I.)	Baron, St. John the Baptist Creek Catholic
Aldrich, Nugent v. (R. I.)	Church v. (N. J. Ch.)
(a. (Pa.)	Barrish v. Orben (N. J. Sup.)
Allemannia Fire Ins. Co. of Pittsburg, Standard Leather Co. of Pittsburg v.	Barris, State v. (N. J.) Sup.) 248
Standard Leather Co. of Pittsburg v.	Bashaw, Angell v. (Vt.)
(Pa.)	Bassett v. United States Cast Iron Pipe
Allen, In re (N. H.)	& Foundry Co. (N. J.)
Allen, Ex parte (Vt.)1078	Bateman v. Riley (N. J. Ch.)1008
Allen, Day v. (Pa.)	Battey v. Lunt, Moss & Co. (R. I.) 353 Batura v. McBride (N. J.) 600
American Agricultural Chamical Co. Halan	Datura v. McDride (N. J.)
American Agricultural Chemical Co., Haley	Baynes v. Billings (R. I.)
v. (Pa.)	Beechwood Park Land Co. v. Summit (N.
Nat. Bank v. (Md.)	J. Sun.) 57
American Bridge Co., Valente v. (Del.) 395	10 a 10 b 4 a AY T C/b
American Bridge Co. v. Valente (Del.) 400	Bennett v. Lloyd (N. J. Sup.)
American Can Co., Vulcan Detinning Co. v.	Benz v. Gifford (R. I.)
(N. J.)	Derdan, McCarter V. (IV. D. Bup.)
American ice Co. v. Pennsylvania R. Co.	Berlin Mills Co., Lapointe v. (N. H.) 406
(Pa.)	Bernards Land & Sand Co., Prout v. (N.
American Ins. Co. of Boston, Wiener v.	J.) 486
(Pa.)	Bertchey, State v. (N. J.)
American Natural Gas Co., Kittanning	Bienstock, State v., two cases (N. J. Sup.) 530
Brewing Co. v. (Pa.)	Rillings Raymon w (D 1)
American Surety Co. of New York, Morrison v. (Pa.)	Biggs, Bullock v. (N. J. Sup.)
son v. (Pa.)	Black v. Baltimore & O. R. Co. (Pa.) 903
(N. J.)	Blaisdell, Bonney v. (Me.)
Anderson v. Public Service Corp. (N. J.	Blake v. Mason (Conn.)
Sup.)	Blanchard & Crowley, Fraser v. (Vt.) 995
Anderson, Simpson v. (N. J.)	Blodgett v. Central Vermont R. Co. (Vt.) 590
Anderson, State v. (Conn.)	Bloomfield, Gillman v. (N. J. Sup.) 604
Anderson, State v. (Conn.)	Board of Chosen Freeholders of Bergen
Andrews, State v. (vt)	County, Browning v. (N. J. Sup.) 90
Angell v. Bashaw (Vt.)	Board of Education of Borough of Chatham, Fuller v. (N. J. Sup.)
Anne Arundel County Com'rs v. Carr (Md.) 668	Board of Excise of Elizabeth, Kidd v. (N.
Anne Arundel County Com'rs, Nutwell v. (Md.)	J. Sup.)
Appleby, In re (R. I.)	Rodfish v. Rodfish (Me.)
Arbuckle v. Kelly (N. J. Sup.)	Bogert v. MacChesney (N. J.)
Aschenbach v. Carey (Pa.)	Bogert v. MacChesney (N. J.)
A. Schoenhut Co., McLean v. (Pa.)1058	Bonner v. Jennings (Pa.) 449
Ashland Borough, Mahanoy City, S., G.	Bonney v. Blaisdell (Me.)
& A. St. R. Co. v. (Pa.)	Booth v. Von Beren (Conn.)
Atlantic City, Fishblatt v. (N. J. Sup.) 125	Booth v. Wollf Process Leather Co. (Pa.) 909
Atlantic Coast Electric R. Co., Oakerson v.	Borough of South Amboy v. Pennsylvania R. Co. (N. J. Ch.)
(N. J.)	R. Co. (N. J. Ch.)
Atldorfer's Estate, In re (Pa.)	Boston & M. R. R., Cushman & Rankin
Atwood v. Carmer (N. J. Ch.) 114	Co. v. (Vt.)
Austin, Burnham v. (Me.)1089	Co. v. (Vt.)
Anstrian v. Laubheim (N. J. Sup.) 226	Bowden, Staples v. (Me.) 999
	Bowes, Trustees of Stevens' Institute of
Babcock, Manville Covering Co. v. (R. I.) 1086	Technology v. (N. J. Sup.) 38
Bader, Manning v. (Pa.)	Boyd, Rock Creek Steamboat Co. v. (Md.) 662
BRIGGWITZ V. West Jersey & S. R. Co. (N.	Boyer, Appeal of (Pa.)
J.)	Boyer v. Lengel (Pa.)
Baily, Rogers v. (N. J. Ch.)	Boyer, Seltzer v. (Pa.)
73 A. (vi	uj

Page	Pag
Brady v. Brady (Md.)	Chester Traction Co., Gaines v. (Pa.)
Brady, Brink v. (Pa.)	Chester Traction Co., Gaines v. (Pa.) 188
Brady, Buck v. (Md.)	Childs, Ware v. (Vt.)
Brady, Fowler v. (Md.)	Chittick v. Philadelphia Rapid Transit Co.
Briant, Westcott v. (N. J. Sup.) 66	(Pa.) 4
Brink v. Brady (Pa.)	Church Home & Infirmary of Baltimore
Brinsfield v. Howeth (Md.)	City, Baltzell v. (Md.)
Bristol Borough, Dorrance v. (Pa.)1015	City of Baltimore, Lauer v. (Md.) 162
Brockhurst v. Cox (N. J.)	City of Barre v. McFarland (Vt.) 577 City of Barre v. Perry & Scribner (Vt.) 574
Brown, Hageman v. (N. J. Ch.) 862	City of Newark v. East Side Coal Co. (N.
Browning w Board of Chosen Fresholders	. J.)
Browning v. Board of Chosen Freeholders of Bergen County (N. J. Sup.)	City of Newark, Groel v. (N. J. Sup.) 522
Bryn Mawr Trust Co., Wilson v. (Pa.)1070	City of Passaic v. Public Service Corpo-
Bryn Mawr Trust Co., Wilson v. (Pa.)1070 Bryn Mawr Trust Co., Wilson v. (Pa.)1071	ration of New Jersey (N. J. Ch.) 12
Buck v. Brady (Md.)	ration of New Jersey (N. J. Ch.) 122 City of Philadelphia v. Philadelphia Rapid
Buckley, Fidelity & Deposit Co. v. (N. H.) 641	Transit Co. (Pa.)
Bullock v. Biggs (N. J. Sup.)	City of Rockland v. Deer Isle (Me.) 88 City of Trenton v. Standard Fire Ins. Co.
Bulls Head Coal Co., Pellio v. (Pa.) 451	City of Trenton v. Standard Fire Ins. Co.
Burd v. Philadelphia (Pa.)	of New Jersey, two cases (N. J. Sup.) 600
Burford, Commonwealth v. (Pa.)1004	City Trust Safe Deposit & Surety Co.,
Burgess v. Vesta Knitting Mills (R. I.) 305	Commonweath is (Ed.)
Burlington County R. Co. v. New Jersey Rapid Transit Co. (N. J.)	Clanton, Metropolitan Ins. Co. v. (N. J. Ch.)
Burnham v. Austin (Me.)	Ch.)
Burnham, Wagner v. (Pa.)	Class & Nachod Brewing Co., Veit v.
Burt, Atwood v. (N. H.)1117	
Butler, State v. (Me.)	(Pa.) 98. Clavin v. William Tinkham Co. (R. I.) 39.
	Cline, Koogle v. (Md.)
Cadwalader v. Price (Md.)	Coast Realty Co. v. Newgold (N. J. Sup.) 4
Calais, Huntington v. (Me.) 829	Comman. Smith v. (Pa.)
Caldwell, Commonwealth v., two cases	Cohen, Keller v. (Pa.)
(Pa.)	Cole Don't Anamaki Co (N. H.) 170
Caldwell, Commonwealth v. (Pa.) 219	Cole v. Davis Automobile Co. (R. I.) 374
Cale, Cramer v. (N. J. Ch.) 813 Callahan, State v. (N. J.) 235	Commonwealth v. Burford (Pa.)1064 Commonwealth v. Caldwell (Pa.)219
Camdan Carrary (N. I. Sun.) 47	Commonwealth v. Caldwell, two cases (Pa.) 22
Camden, Manufacturers' Land & Improve-	Commonwealth v. City Trust. Safe De-
Camden, Manufacturers' Land & Improvement Co. v. (N. J. Sup.)	Commonwealth v. City Trust, Safe Deposit & Surety Co. (Pa.)
Camphell v. Camphell (R. 1.J 504)	Commonwealth v. Fidelity & Deposit Co.
Campbell, Morrelf & Co. v. Lehocky (N. J.) 515 Canadian Pac. R. Co., Libby v. (Vt.) 593	l of Marvland (Pa.)
Canadian Pac. R. Co., Libby v. (Vt.) 593	Commonwealth v. McDermott, two cases
Canton Nat. Bank v. American Bonding	(Pa.)
& Trust Co. (Md.)	Commonwealth v. Magee (Pa.)346 Commonwealth v. Magee (Pa.)
J. Sup.)	Commonwealth v. Nazarko (Pa.) 210
J. Sup.)	Commonwealth v. Racco (Pa)106
Carmer, Atwood v. (N. J. Ch.) 114	Commonwealth v. Randall (Pa.)110
Carmer, Wiebke v. (N. J. Ch.) 114	Commonwealth v. Snyder (Pa.) 910
Carpenter v. Gibson (Vt.)	Commonwealth v. Stewart, three cases
Carpenter v. Shanley (N. J. Ch.) 64	(Pa.)
Carr, Anne Arundel County Com'rs v.	Concord Iron & Metal Co. v. Couch (N. H.) 301
(Md.)	Congress Hall Hotel Co., Curry v. (N. J.) 124 Congress Hall Hotel Co., Harris v. (N. J.)1118
(Pa)	Conn v. Hunsberger (Pa.) 324
(Pa.) 432 Carroll v. Manganese Steel Safe Co. (Md.) 665	Consolidated Ice Co. v. Pennsylvania R. Co.
Carroll, State v. (Conn.)	(Pa.) 93
Carter v. Henderson & Co. (Pa.)	Consolidation Coal Co., Harris v. (Md.) 805
Carthage, Hutchinson v. (Me.) 825	Consumers' Brewing Co., Fishman v. (N.
Carver v. Camden (N. J. Sup.) 47	J. Sup.)
Casasanta, State v. (R. I.)	Continental Automobile Mfg. Co., Knight
Castor v. Schaefer (Pa.)	Cooke v Independent Telephone & Tele-
Catlin. Monroe Nat. Bank v. (Conn.) 3	graph Const. Co. (N. J.)
C. Cowles & Co., Elie v. (Conn.) 258	v. (Conn.)
Cecil, Pennsylvania R. Co. v. (Md.) 820	Co-operative Diug. Dank v. Llawains (16, 1.) Or
Central R. Co. of New Jersey, Green v.	Cornely v. Zentmyer (Pa.) 967
(Pa.) 459	Cornely v. Zentmyer (Pa.) 967 Cotter v. Cotter (Conn.) 908
Central R. Co. of New Jersey, Horandt	Couch, Concord Iron & Metal Co. v. (N.
v. (N. J. Sup.)	H.)
Central R. Co. v. State Board of Assessors (N. J. Sup.)	Cowles & Co., Elie v. (Conn.)
(N. J. Sup.)	Coxon v. Trenton (N. J. Sun.)
Central Vermont R. Co., Wedge v. (Vt.) 580	Coxon v. Trenton (N. J. Sup.) 253 Cramer v. Cale (N. J. Ch.) 813
C. F. S. Zimmerman & Co., National Shut-	Crocheron v. Savage (N. J.) 3:
ter Bar Co. v. (Md.)	Cronin_v: Pace (Conn.)
Chaloux v. International Paper Co. (N. H.) 301	C. R. Pease House Furnishing Co., Cun-
Chambersburg & Gettysburg Electric R. Co., Lehman v. (Pa.)	ningham v. (N. H.)
Co., Lehman v. (Pa.)	Cumberland, Manuel V. (Md.)
Chapman Decorative Co. v. Philadelphia &	Cummisky's Estate, In re (Pa.) 916
R. Terminal R. Co. (Pa.)	Cunningham v. C. R. Pease House Furnishing Co. (N. H.)
(Conn.)	Cunningham v. Rogers (Pa.)
Cherry & Webb, Henry v. (R. I.) 97	Curry v. Congress Hall Hotel Co. (N. J.) 12
Cherry & Webb, Henry v. (R. I.) 97 Chester v. Cape May Real Estate Co. (N.	Curry v. Congress Hall Hotel Co. (N. J.) 12. Curtis & Jones, Landis v. (Pa.) 424

Page	Page
Cushman & Rankin Co. v. Boston & M. R.	Equitable Trust Co., Appeal of (Pa.)927
R. (Vt)	Eric Electric Motor Co., Cook v. (Pa.). 1060 Errickson, Kaighn v. (N. J.)
Cuthbert v. Laing (N. H.)	Errickson, Kaighn v. (N. J.)
• • • • • •	Essex County Park Commission v. West Orange (N. J.)
Dague v. Grand Lodge Brotherhood of	Excessor Renning Co. v. Murphey (Del.
Railroad Trainmen (Md.) 735 Dale, Harrier v. (Pa.) 945	Super.)1040
Darby Candy Co. of Baltimore City v. Hoff-	Faber, Pagnacco v. (Pa.)
herger (Md.)	Farraday Improvement Co. v. Pennsylva-
Davis Automobile Co., Cole v. (R. I.) 374 Day v. Allen (Pa.)	nia & N. R. Co. (N. J.)
Day v. Pennsylvania R. Co. (Pa.) 206	Farrington v. Cheponis & Parnarusky
Deaton v. Dorsey (N. J. Sup.) 239	(Conn.) 139 Faust v. Rodelheim (N. J.) 491
De Camp v. Newark (N. J. Sup.) 247	Feist v. Jerolamon (N. J.)
Decon v. Dexheimer (N. J. Sup.) 49 De Dietrich Import Co., Setterstorm v. (N.	Fenton v. Mansfield (Conn.)
J. Sup.)	Ferguson, First Nat. Bank v. (Pa.)
Deer Isle, City of Rockland v. (Me.) 885	Ferry-Hallock Co. v. Progressive Paper
Defiance Fruit Co. v. Fox (N. J. Ch.) 851 Delamarre v. Bott (N. J. Sup.) 74	Ferry-Hallock Co. v. Progressive Paper Box Co. (N. J. Ch.)
Delaware, L. & W. R. Co., Fritts v. (N.	Fidelity Trust Co., Appeal of (Pa.)1114
J. Ch.) 92	Fidelity Trust Co., Amparo Min. Co. v. (N. J.)
Delaware, L. & W. R. Co., Mikula v. (N.	Fidenty & Deposit Co. v. Buckley (N. H.) 041
J.) Delaware, L. & W. R. Co., Millard v. (Pa.) 904	Fidelity & Deposit Co. of Maryland, Com- monwealth v. (Pa.)
Delaware, L. & W. R. Co., Scranton Gas	monwealth v. (Pa.)
& Water Co. v. (Pa.)1097	H.) 705
Delaware, L. & W. R. Co.'s Tax Assessment, In re (Pa.)	Fink v. Wilkes-Barre & W. V. Traction Co.
Delaware, L. & W. R. Co.'s Tax Assess-	(Pa.) 938 Firemen's Ins. Co., McCarter v. (N. J.)80, 414
ment, In re two cases (Pa.)	First Nat. Bank v. Ferguson (Pa.) 551
Delaware, L. & W. R. Co., Vosler v. (N. J.) 483 Delaware & Atlantic Telegraph & Tele-	First Nat. Bank v. New Castle (Pa.) 331
phone Co.'s Petition (Pa.)	Fishhlatt v. Atlantic City (N. J. Sup.) 125
Delaware & H. Co. v. Olyphant Borough	Fisher, Miller v. (Md.)
(Pa.) 458 Delaware & H. Co., Olyphant Borough v.	J. Sup.)
(Pa.)	Flaacke's Estate, In re (N. J.)
Dell. Hite v. (N. d. Subdenses 12	Fleishman v. Swentek (Pa.)
Dexheimer, Decou v. (N. J. Sup.) 49 Diamond State Steel Co., Somerset Coal	Flint v. Holman (Vt.)
Co. v. (Pa.)	Follett's Estate, Walker v. (Me.)1092 Forbes, State v. (N. H.)
Dixon v. Kussell (N. J. Sup.) 51	Fortescue, Sparks v. (N. J.)
Dobbs v. West Jersey & S. R. Co. (N. J.	Foss v. McRae (Me.)
Sup.)	Foster, Garcia v. (N. J.) 514 Fowler v. Brady (Md.) 15
Dunance, State v. (Cont.)	Fox, Defiance Fruit Co. v. (N. J. Ch.) 851.
Donnell, Floresch v. (N. J.)	Fox, Kaighn v. (N. J.)
	Fraser v. Blanchard & Crowley (Vt.) 995
Dorrance v. Bristoi Borough (Pa.)1015	Fredericks v. Pennsylvania R. Co. (Pa.) 965
Dorsey, Deaton v. (N. J. Sup.) 239 Downs v. State (Md.) 893	Freund v. Freund (N. J.)1117
Downs v. Swann (Md.)	Frey v. Stipp (Pa.)
Dredden, State v. (Del. Gen. Sess.)1042	Fritts v. Delaware, L. & W. R. Co. (N.
Duke v. Duke (N. J. Ch.)	J. Ch.)
Dunigan v. Woodbridge Tp. in Middlesex	Froelich, Synnott v. (N. J.)
County (N. J. Sup.)	of Chatham (N. J. Sup.)
Duross v. Singer (Pa.)	Fuller V. Perkins (R. I.)
D. Wolff & Co., Levine v. (N. J. Sup.) 73	ford, Conn. v. (Md.)
D. W. Pingree Co., Tuttle v. (N. H.) 407	· Colu, Colum v. (and.)
Eastburn v. United States Exp. Co. (Pa.) 977	Gaines v. Chester Traction Co. (Pa.) 7
Easter v. Easter (N. H.)	Garcia v. Foster (N. J.)
Rast Side Coal Co., City of Newark v.	General Fire Extinguisher Co., Carr v.
(N. J.)	George A. Fuller Co., Ætna Indemnity Co.
(R. I.)	l of Hartford, Conn. v. (Md.)
Eiswald v. Nautical Preparatory School (R.	George v. Newmarket Mfg. Co. (N. H.)1117 Gerli v. National Mill Supply Co. (N. J.
I.)	Sup.)
Elizabeth, O'Neill & Viscount v., two cases	Gibbons' Estate, In re (Pa.)
(N. J. Sup.)	Gibson, Wevler v. (Md.)
Elizabeth, Summerton v. (N. J.)1119	Gifford, Benz v. (R. I.)
Elliott v. Wilmington City R. Co. (Del.	Gifford, McKeough v. (R. I.)1085
Super.)	Gillen v. Hadley (N. J. Ch.)
Emmons v. Stevane (N. J.)	Sup.)
Emmons v. Stevane (N. J.)	
Fire Ins. Co. of Pittsburgh, Pa., v. (N. J. Sup.)	Co. (Pa.)
Emporium, Newton v. (Pa.) 984	Girard v. Grosvenordale Co. (Conn.) 747

Goldberg v. West End Homestead Co. (N.	Howes v. Scott (Pa.)
J. Sup.)	Howeth, Brinsfield v. (Md.) 289
Golden v. Mt. Jessup Coal Co. (Pa.)1103	Hoxie v. New York, N. H. & H. R. Co.
Goodheart, Haley v. (N. J.)	(Conn.)
Good v. Queen's Run Fire Brick Co. (Pa.) 906	Hoyt, Roche v. (N. J.)
Gottlieb v. Abraham Lincoln Mut. Life	Hughes' Estate, In re (Pa.)
Ins. Co. (Pa.)	Hugo, McCarthy v. (Conn.)
Gould, Randal v. (Pa.) 986	Humbrecht v. Pennsylvania & N. R. Co.
Grand Lodge Brotherhood of Railroad	(N. J.)
Trainmen, Dague v. (Md.)	Hunsberger, Conn. v. (Pa.) 324
Grant v. Haworth (N. J. Sup.)	Hunt, Landon v. (Vt.)
Green v. Central R. Co. of New Jersey	Hunt v. Philadelphia & R. R. Co. (Pa.) 968
(Pa.)	Hunt v. Philadelphia & R. R. Co. (Pa.) 970
Green v. Irvington (N. J.)	Huntington v. Calais (Me.)
Green v. Knooe Island Co. (K. 1.) 505	Huppert v. Huppert (Pa.)
Green v. T. A. Shoemaker & Co. (Md.) 688	Hutchinson v. Carthage (Me.)
Greene v. Taylor (R. I.)	Traceminou (. Carmage (me.)
Griggs, Holcombe v. (N. J. Sup.) 37	Independent Telephone & Telegraph Const.
Grill v. O'Dell (Md.)	Co., Cooke v. (N. d.)
Grill v. O'Dell (Md.)	Industrial Trust Co., Wallace v. (R. I.) 25
Grosvenordale Co., Girard v. (Conn.) 747	Insurance Co. of North America, Standard
Guemple v. Philadelphia Rapid Transit Co.	Leather Co. v. (Pa.)
(Pa.)	International Paper Co., Chaloux v. (N. H.) 301
Gustine v. Westenberger (Pa.) 913	International Silver Co., Thomas v. (N.
Hadley, Gillen v. (N. J. Ch.) 847	J. Ch.)
Hadley, Gillen v. (N. J.)	Intoxicating Liquor, State v. (Vt.) 586 Irvington, Green v. (N. J.) 602
Hageman v. Brown (N. J. Ch.) 862	arvington, Green v. (14. 5.)
Haley v. American Agricultural Chemical	Jackson v. Union (Conn.)
Co. (Pa.)	James Leo Co. v. Jersey City Bill Posting
Haley v. Goodheart (N. J.) 1118 Hallock v. Lebanon City (Pa) 333	Co. (N. J. Sup.)
Hallock v. Lebanon City (Pa)	Jennings Bonner v. (Pa.)
Hamilton v. New Haven (Conn.) 1	Jerolamon, Feist v. (N. J.)
Hamilton Ice Mfg. Co., Parsons Mfg. Co.	Jersey City Bill Posting Co., James Leo
	Co. v. (N. J. Sup.)
Hancock Ice Co. v. Perkiomen R. Co. (Pa.) 194	Jersey City, H. & P. St. R. Co., Najarlan
Hannah, In re (N. J. Ch.)	v. (N. J.) 527 Jersey City v. North Jersey St. R. Co.
Hano, Samuel Hano Co. v. (Pa.) 341	(N. J. Sup.)
Hardman Rubber Co., Johnson v. (N. J.)1118	(N. J. Sup.)
Harrier v. Dale (Pa.)	Sup.) 110
Harris v. Congress Hall Hotel Co. (N. J.)1118	Sup.) John Hancock Ice Co. v. Perkiomen R. Co.
Harris v. Consolidation Coal Co. (Md.) 805	(Pa.) 194
Harris v. Speziano (R. I.)1086	Johnson v. Adams (Vt.)
Harrison v. Clarke (N. J. Sup.)	Johnson v. Hardman Rubber Co. (N. J.)1118
Harrison v. New York Bay Cemetery (N. J.)	Johnson, Martin v. (Me.)
Hartford Inv. Corporation, Mahoney v.	Johnson v. Taylor (B. I.)
(Conn.)	Development Co (N. J. Ck)
Haskins v. Ryan (N. J.)	Development Co. (N. J. Ch.) 60 Jones, In re (R. I.) 553
Hasselbusch v. Mohmking (N. J.) 961	Jones. ()ffuff v. (Md.)
Hawkins, Co-operative Bldg. Bank v. (R. I.) 617 Haworth, Grant v. (N. J. Sup.)	Jones v. Whittier (N. J.)
Haworth, Grant v. (N. J. Sup.) 241	Josselson v. Sonneborn (Md.)
Heiges v. Pifer (Pa.) 950 Heinisch v. Pennington (N. J.) 1118 Helmuth v. Helmuth (N. J.) 1118	J. S. Rogers Co., Loid's Adm'x v. (N. J.) 488
Heinisch v. Pennington (N. J.)	Judge v. Pyle (Pa.)
Hemenway v. Lincoln (Vt.)	Junkins v. Sullivan (Md.) 264
Hemming Bros., Malken v. (Conn.) 752	Kaighn v. Errickson (N. J.) 540
Henderson & Co., Carter v. (Pa.) 554	Kaighn v. Fox (N. J.)
Henry v. Cherry & Webb (R. I.) 97	Kaighn v. Friday (N. J.)
Herron, In re (N. J. Sup.)	Kapicsky, State v. (Me.) 830
Hignett v. Norridgewock (Me.)1086	Karr v. New York Jewell Filtration Co.
Hilliard v. Sterlingworth Ry. Supply Co.	(N. J. Sup.). 132 Kauffman v. Nelson (Pa.). 1105
(Pa.) 191 Hill v. Maxwell (N. J.)	Kaufman v. Nelson (Pa.)
Hill v. Maxwell (N. J.)	Kaufherr, Zelman v. (N. J. Ch.)1048 Keazer v. Colebrook Nat. Bank (N. H.) 170
of Protection v. (Conn.)	Keene Electric R. Co., Finkelstein v. (N.
Hite v. Dell (N. J. Sup.)	H.)
Hopps, in re (N. H.)	Keller v. Cohen (Pa.)
Hoboken, Livelli v. (N. J. Sup.) 77	Keller v. Cohen (Pa.)
Hoffberger, Darby Candy Co. of Baltimore	Kelley, Holt v. (Pa.)
City v. (Md.). 565 Holcombe v. Griggs (N. J. Sup.). 37 Holman, Flint v. (Vt.). 585 Holt v. Kelley (Pa.). 947	Kelley, Loraine v. (Pa.)
Holman Flint w (Vt)	Keller Arbustlers (N. J. Sup.) 67
Holt v. Kelley (Pa)	Kelly, Arbuckle v. (N. J. Sup.)
Holt v. Kelley (Pa.)	Kelly v. Waterbury (Conn.)
Hopkins v. West Jersey & S. R. Co. (Pa.)1104	Kendall v. Luther (Conn.)
Hopson, McCarter v. (N. J. Sup.) 884	Kidd v. Board of Excise of Elizabeth (N.
Horandt v. Central R. Co. of New Jersey	J. Sup.) 59
(N. J. Sup.)	Kimball v. Kimball (N. H.)
Howard County Com'rs, Baltimore & O.	King. Abrahams v. $(Md.)$
R. Co. v. (Md.)	Kingan Packing Ass'n v. Lloyd (Md.) 887
Howard v. Waters (N. J. Sup.)	Kingman v. Penobscot County Com'rs

Page	Page
Kintnel v. Olsen (N. J. Sup.) 962 Kittanning Brewing Co. v. American Nat-	McCullough v. Railway Mail Am'n (Pa.)1007. McDermott, Commonwealth v., two cases
ural Gas Co. (Pa.)	(Pa.) McEvoy v. Security Fire Ins. Co. of Balti-
Co. (Pa.)	more (Md.)
(Conn.)	McGaw v. Acker. Merrall & Condit Co.
Koogle v. Cline (Md.) 672 Kroumaier, Appeal of (Pa.) 1068 Kuehnle, McMillan v. (N. J. Ch.) 1064	(Md.)
Kuehnle, McMillan v. (N. J. Ch.)1054	McGinley v. Lehigh Coal & Navigation Co.
Kunz v. Mason (N. J.)	(Pa.). 552 McGuigan v. Pennsylvania R. Co. (Pa.). 958 McKelvey. McCarter v. (N. J. Sun.). 884
La Belle v. Rhode Island Co. (R. I.) 306	McKelvey, McCarter v. (N. J. Sup.)
Laconia Car Co. Works, Valire v. (N. H.)1117 Laing, Cuthbert v. (N. H.)	McKinnon v. Mertz (Pa.)
Lake v. Weaver (N. J. Ch.) 62 Landis v. Curtis & Jones (Pa.) 424	McLaughlin v. Summit Hill Borough (Pa.) 975 McLean v. A. Schoenhut Co. (Pa.)1058
Landon v. Hunt (Vt.)	McLean v. A. Schoenhut Co. (Pa.)1058 MacLear v. Newark (N. J.)
La Point, Abbott v. (Vt.)	McMillan v. Kuehnle (N. J. Ch.)1054 McOwen, Philadelphia Brewing Co. v.
Larsen, Ludy v. (N. J.)	(N. J.)
Lauer v. City of Baltimore (Md.) 162	Magee, Commonwealth v. (Pa.) 346
Laurel Run Turnpike Co., Scranton v. (Pa.)	Magee, Commonwealth v. (Pa.) 847 Magin v. Niner (Md.) 12 Mahanoy City, S., G. & A. St. R. Co. v. 200
Lavin v. Dodge (R. I.)	Ashiand Borough (Fa.)
Lehigh Coal & Navigation Co., McGinley v. (Pa.)	Mahoney v. Hartford Inv. Corp. (Conn.) 768 Malken v. Hemming Bros. (Conn.) 752
Lehigh Valley R. Co., Bistider v. (Pa.). 940 Lehigh Valley R. Co., Schwoerer v. (Pa.) 960	Manganese Steel Safe Co., Carroll v. (Md.) 665 Manning v. Bader (Pa.)
Lehigh Valley R. Co., Sternberg & Co. v., three cases (N. J. Sup.)	Mansfield, Fenton v. (Conn.)
Lehigh Valley R. Co., Weller v. (Pa.)1024 Lehigh & Wilkes-Barre Coal Co., Millum	Manufacturers' Land & Improvement Co.
v. (Pa.)	v. Camden (N. J. Sup.)
Electric R. Co. (Pa.)	Maroito v Andrews (R. I.)
J.) 0.10	Martin v. Johnson (Me.)
Leiby v. Lutz (Pa.)	Martin, Western Maryland R. Co. v. (Md.) 267 Maryland & P. R. Co. v. Silver (Md.) 297
Leo Co. v. Jersey City Bill Posting Co. (N. J. Sup.)	Mason, Blake v. (Conn.)
Levine v. D. Wolff & Co. (N. J. Sup.)73 Levi's Estate, In re (Pa.)334	Masonic Protective Ass'n, Sawyer v. (N. H.)
Levy, Appeal of (Pa.)	Matson v. Matson (Me.)
Libby v. Canadian Pac. R. Co. (Vt.) 593 Lincoln Council, No. 1, J. O. U. A. M. of Camden v. State Council, J. O. U. A. M. of State of New Jersey (N. J. Sup.) 245	Mayer v. Roche (N. J.)
Camden v. State Council, J. O. U. A. M. of State of New Jersey (N. J. Sup.) 245	May, Stewart v. (Md.) 460 Meagher, Sisk v. (Conn.) 785 Media, M. A. & C. Electric R. Co., Gillman
Lincoln, Hemenway v. (Vt.)	v. (Pa.)
Livelli v. Hoboken (N. J. Sup.)	Mellon v. Victor Talking Mach. Co. (N. J.) 494 Mengell's Ex'rs v. Mohnsville Water Co.
Lloyd, Bennett v. (N. J. Sup.)	(Pa.)
Locust Realty Co., Pennock v. (Pa.) 930 Loid's Adm'x v. J. S. Rogers Co. (N. J.) 488	Mertz, McKinnon v. (Pa.)
Long Dock Co. v. State Board of Assess-	Metropolitan Ins. Co. v. Clanton (N. J.
Long's Estate, In re (Pa.) 981	Ch.) Metropolitan Surety Co., Thomas Orr
Loraine v. Kelley (Pa.)	Trucking & Forwarding Co. v. (N. J.) 541 Michener's Estate. In re (Pa.)
Lowe v. State (Md.)	Miers, Moore v. (N. J. Sup.)
Lunt, Moss & Co., Battey v. (R. I.) 853 Luther, Kendall v. (Conn.)	J.) 507 Millard v. Delaware, L. & W. R. Co. (Pa.) 904
Lutz, Leiby v. (Pa.)	Miller v. Fisher (Md.)
McBride, Batura v. (N. J.)	Millum v. Lehigh & Wilkes-Barre Coal Co.
McCabe v. Watt (Pa.)	(Pa.)
McCarter v. Firemen's Ins. Co. (N. J.). 80, 414	(N. J.)
McCarter v. Hopson (N. J. Sup.)	(N. J.)
McCarthy v. Hugo (Conn.)	Mohnsville Water Co., Mengell's Ex'rs v. (Pa.) 201
McClay v. Philadelphia (Pa.)	Mondou v. New York, N. H. & H. R. Co.
McClellan, State v. (Vt.)	(Conn.) 762

Page	Pag
Monroe Nat. Bank v. Catlin (Conn.) 3	Ocean City Hotel & Development Co. v.
Montrose Realty & Improvement Co. v. Zimmerman (N. J. Ch.)	Sooy (N. J.)
Zimmerman (N. J. Ch.) 846 Moore v. Miers (N. J. Sup.) 32	O'Donnell v. Meredith (N. H.)
MICORE V. Putts (Md.)	Offutt v. Jones (Md.) 623
Moore, Tice v. (Conn.)	Ogontz Ave., In re (Pa.)
Morgan, Tiffany v. (R. I.)	Olsen, Kintzel v. (N. J. Sup.)
Morrill, State v. (Me.)1091	Olyphant Borough, Delaware & Hudson Co.
Morris & Co., Robinson v. (R. I.) 611	v. (Pa.)
Morris & Essex R. Co. v. State Board of Assessors (N. J. Sup.)	(Pa.)
Morrison v. American Surety Co. of New	O'Neill & Viscount v. Elizabeth, two cases
York (Pa.)	(N. J. Sup.)
Mt. Jessup Coal Co., Golden v. (Pa.)1103	Orben, Barrish v. (N. J. Sup.) 529
Mulholland's Estate, In re (Pa.)	Orem Fruit & Produce Co. of Baltimore
Murphey, Excelsior Refining Co. v. (Del.	City, Pennsylvania R. Co. v. (Md.) 571 Ormsby, Oliver v. (Pa.) 973
Super.)	Orr Trucking & Forwarding Co. v. Metro-
Murphy, Appeal of (Pa.)	politan Surety Co. (N. J.) 541
Murphy v. North Jersey St. R. Co. (N. J. Sup.)1119	Osborne v. Sundheim (Pa.)
	Pace, Cronin v. (Conn.)
Najarian v. Jersey City, H. & P. St. R. Co.	Pagnacco v. Faber (Pa.)
(N. J.)	Parish of Trinity Church of New Haven,
livan v. (R. I.)	New Haven County v. (Conn.) 789
National Mill Supply Co., Gerli v. (N. J.	Parsons Mfg. Co. v. Hamilton Ice Mfg. Co.
Sup.)	(N. J. Sup.)
National Shutter Bar Co. v. C. F. S. Zimmerman & Co. (Md.)	Parsons v. Utica Cement Co. (Conn.) 785 Patterson v. Taylor (N. J. Sup.) 222
National Surety Co., Alexandria Water	Paxson's Estate, In re (Pa.)
Co. v. (Pa.)	Pease House Furnishing Co., Cunningham
Pa., v. Empire State Surety Co. (N. J.	▼. (N. H.)
Sup.) 233	Peerless Casualty Co., Whalen v. (N. H.) 642 Pellio v. Bulls Head Coal Co. (Pa.) 451
Naugle v. Nescopeck Tp. (Pa.)	Pendieton, Putts v. (Md.) 900
(R. I.)	Pennington, Heinisch v. (N. J.)1118
Nautical Preparatory School, Eiswald v.	Pennock v. Locust Realty Co. (Pa.) 930 Pennsylvania R. Co., American Ice Co.
(R. I.)	▼. (Pa.)
Nelson, Kauffman v. (Pa.)	Pennsylvania R. Co., Bond v. (Pa.) 931
Nescopeck Tp., Naugle v. (Pa.)	Pennsylvania R. Co., Borough of South Amboy v. (N. J. Ch.)
Newark, De Camp v. (N. J. Sup.)	Pennsylvania R. Co. v. Cecil (Md.) 820
Newark, Walsh v. (N. J. Sup.) 523	Pennsylvania R. Co., Consolidated Ice Co. v. (Pa.)
New Castle, First Nat. Bank v. (Pa.) 331	v. (Pa.)
Newgold, Coast Realty Co. v. (N. J. Sup.) 47	Pennsylvania R. Co., Fredericks v. (Pa.) 965
New Haven County v. Parish of Trinity	Pennsylvania R. Co., Knickerbocker Ice Co. v. (Pa.)
Church of New Haven (Conn.)	Pennsylvania R. Co., McGuigan v. (Pa.) 958
New Jersey Rapid Transit Co., Burlington	Pennsylvania R. Co., Mulligan v. (Pa.). 1058
County R. Co. v. (N. J.) 504	Pennsylvania R. Co. v. Orem Fruit & Produce Co. of Baltimore City (Md.) 571
Newmarket Mfg. Co., George v. (N. H.)1117 Newton v. Emporium (Pa.)	Pennsylvania R. Co., Sanders v. (Pa.)1010
New York Bay Cemetery, Harrison v. (N.	Pennsylvania Stave Co., Appeal of (Pa.)1107
J.) 546	Pennsylvania & N. R. Co., Farraday Improvement Co. v. (N. J.)
New York Jewell Filtration Co., Karr v. (N. J. Sup.)	Pennsylvania & N. R. Co., Humbrecht v.
New York, N. H. & H. R. Co., Hoxie v.	(N. J.) 496 Penobscot County Com'rs, Kingman v.
(Conn.)	(Me.)
(Conn.)	Perkins, Fuller v. (R. I.)
Nicholson v. Ellis (Md.)	Perkiomen R. Co., John Hancock Ice Co. v. (Pa.)
Nichter, Union Safe Deposit Bank of Pottsville v. (Pa.)	Perry & Scribner, City of Barre v. (Vt.) 574
Niner, Magin v. (Md.)	Peters v. Tilghman & Purnell (Md.) 726
Noble v. Police Beneficiary Ass'n (Pa.) 336	Phelps, Roe v. (Conn.)
Nolan, Kutz v. (Pa.)	Philadelphia, McClay v. (Pa.) 188
Norridgewock, Hignett v. (Me.)1086	Philadelphia, Norbeck v. (Pa.) 179
North Jersey St. R. Co., Jersey City v.	Philadelphia, Quinn v. (Pa.)
(N. J. Sup.)	Philadelphia Brewing Co. v. McOwen (N.
North Jersey St. R. Co., Murphy v. (N. J.)1119 North Jersey St. R. Co., Van Ness v. (N.	J.) Philadelphia, B. & W. R. Co., Smith v.
J.) 509	(Mu.) Old
Nugent v. Aldrich (R. I.)	Philadelphia Rapid Transit Co., Chittick v.
(Md.)	(Pa.)
	Philadelphia v. (Pa.) 923
Oakerson v. Atlantic Coast Electric R. Co.	Philadelphia Rapid Transit Co., Guemple
(N. J.)	v. (Pa.)

Page	! Page
Philadelphia Rapid Transit Co., Quinn v.	Roland v. Philadelphia & R. R. Co. (Pa.) 958
Philadelphia David Manuelt Co. Sline a	Ross v. Chester Traction Co. (Pa.) 188
Philadelphia Rapid Transit Co., Sligo v. (Pa.) 211	Ross, Sparks v. (N. J.)
Philadelphia Rapid Transit Co., Widener	Ruh, Paonessa v. (N. J. Sup.)
v. (Pa.)	Rumsey, Appeal of (Pa.)
Philadelphia & R. R. Co., Hunt v. (Pa.) 908	Rumsey, Appeal of (Pa.)
Philadelphia & R. R. Co., Hunt v. (Pa.) 970 Philadelphia & R. R. Co., Boland v. (Pa.) 958	Rutherford Nat. Bank, Times Square Automobile Co. v. (N. J.)
Philadelphia & R. R. Co., Roland v. (Pa.) 958 Philadelphia & R. R. Co., Sloan v. (Pa.) 1069	Rutkowsky v. Bozza (N. J.)
Philadelphia & R. Terminal R. Co., Chap-	Ryan, Haskins v. (N. J.)1118
man Decorative Co. v. (Pa.)	
Philbrick v. West Gardiner (Me.)1002 Phillips v. Westminster Church (Pa.)1062	Saccone v. West End Trust Co. (Pa.) 971 St. Johnsbury, State Board of Health v.
Pifer, Heiges v. (Pa.)	(Vt.) 581
Pile v. Prizer (Pa.)	St. John the Baptist Greek Catholic Church
Pingree Co., Tuttle v. (N. H.)	v. Baron (N. J. Ch.)
Pittston Coal Min. Co., Riley v. (Pa.) 944 Plainfield, Town of Barnet v. (Vt.) 579	Samuel Hano Co. v. Hano (Pa.) 341
Police Beneficiary Ass'n, Noble v. (Pa.) 336	Samuel v. Sota & Aznar (Pa.)
Pope v. Whitridge (Md.)	Saslaff, Reed v. (N. J. Sup.)1044
Pope, Whitridge v. (Md.)	Savage, Crocheron v. (N. J.)
Postal Telegraph-Cable Co. v. State (Md.) 679 Price, Cadwalader v. (Md.)	Sawyer v. Masonic Protective Ass'n (N. H.) 168
Prizer, Pile v. (Pa.)	Sayers, Stevens & Baldwin v. (Vt.)
Probate Court of City of Pawtucket v.	Schoenfeld, Winter v. (N. J. Sup.)
Probate Court of City of Pawtucket v. Williams (R. I.)	Schoenfeld, Winter v. (N. J. Sup.) 42
Co. v. (N. J. Ch.)	Schoef v. Tompking (N. 7)
Progressive Paper Box Co., Tittlebaum v.	Schoff v. Tompkins (N. J.)
(N. J.)	SCOTE Howes V. (Pa.)
Prout v. Bernards Land & Sand Co. (N.	Scott v. Wilson (Conn.)
J.) 486 Pryor, Small v. (N. J.) 1118	L&W P Co (Pa)
Public Service Corporation of New Jersey,	L. & W. R. Co. (Pa.)
_ Anderson v. (N. J. Sup.) 840	
Public Service Corporation of New Jersey,	Sea Isle City, Twitchell v. (N. J. Sup) 75
City of Passaic v. (N. J. Ch.) 122 Public Service Corporation of New Jersey,	Security Fire Ins. Co. of Baltimore, Mc- Evoy v. (Md.)
Taylor v. (N. J. Ch.)	Seligman v. Victor Talking Mach. Co. (N.
Public Service R. Co., Rafferty v. (N. J.	J.)
Sup.) Public Service R. Co., Settlemeyer v. (N.	Seltzer v. Boyer (Pa.)
J. Sup.)	Setterstorm v. De Dietrich Import Co. (N. J. Sup.)
Public Service R. Co., Silber v. (N. J. Sup.) 232	Settlemeyer v. Public Service R. Co. (N. J.
Public Service R. Co., Williams v. (N. J.	Sup.) 50 Seybert, Worman v. (N. J. Sup.) 529 Shanley, Carpenter v. (N. J. Ch.) 64
Sup.)	Seybert, Worman v. (N. J. Sup.)
Putts v. Pendleton (Md.)	Shearman v. Shearman (Md.)1117
Pyle, Judge v. (Pa.)	Shelly, In re (Del. Super.)
Queen's Run Fire Brick Co., Good v. (Pa.) 906	Shoemaker & Co., Green v. (Md.) 688
Quinn v. Philadelphia (Pa.)	Siddall v. Philadelphia (Pa.)
Quina v. Philadelphia Rapid Transit Co.	Silver, Maryland & P. R. Co. v. (Md.) 297
(Pa.) 319	Simpson v. Anderson (N. J.)
Racco, Commonwealth v. (Pa.)1067	Singer, Duross v. (Pa.)
Rafferty v. Public Service R. Co. (N. J.	Sisk v. Meagher (Conn.)
Sup.) 41	Sisk v. Meagher (Conn.)
Railway Mail Ass'n, McCullough v. (Pa.).1007 Rainville, Messier v. (R. L.)	Sloan v. Philadelphia & R. R. Co. (Pa.). 1069
Randal v. Gould (Pa.)	Sloss-Sheffield Steel & Iron Co. v. Ætna
Randall, Commonwealth v. (Pa.)1109	Life Ins. Co. (N. J.)
Rankin v. Rankin (Pa.)	Small v. Pryor (N. J.)
Reed v. Saslaff (N. J. Sup.)1044	Smith v. Coffman (Pa.)
Reynolds, United States Circle Swing Co.	Smith v. Philadelphia, B. & W. R. Co.
v. (Pa.) 982	[(Md.)
Rhode Island Co., Green v. (R. I.) 308	Smyth, Snyder v. (Pa.)
Rhode Island Co., La Belle v. (R. I.) 306 Rice, Appeal of (Pa.)	Snyder v. Smyth (Pa.)
Richmond, Hopkins v. (R. I.) 308	Somerset Coal Co. v. Diamond State Steel
Rigley, State v. (Me.)	Co. (Pa.)
Riley v. Pittston Coal Min. Co. (Pa.) 944	Sonners, State v. (N. J. Sup.)
Roberts v. Tompkins, two cases (N. J.) 505 Robinson v. Morris & Co. (R. I.) 611	Sooy, Ocean City Hotel & Development Co.
Robinson v. Morris & Co. (R. I.)	v. (N. J.)
Roche v. Hoyt (N. J.)	Sota & Aznar, Samuel v. (Pa.) 916 Sotoloff, Lewitzky v. (Pa.) 936
Rock Creek Steamboat Co. v. Boyd (Md.) 662	Sowles of Minet (Vt)
Rockland, Abbott v. (Me.)	Sparks v. Fortescue (N. J.) 595
Rodelheim, Faust v. (N. J.)	Sparks v. Fortescue (N. J.). 593 Sparks v. Ross (N. J.). 241 Speziano, Harris v. (R. I.) 1086
Rogers v. Baily (N. J. Ch.) 243	Spirituous Liquors, State v. (N. H.) 169
Roe v. Phelps (Conn.) 138 Rogers v. Baily (N. J. Ch.) 243 Rogers Co., Loid's Adm'x v. (N. J.) 488	Spirituous Liquors, State v. (N. H.) 169 Standard Fire Ins. Co. of New Jersey, City
Rogers, Cunningham v. (Pa.)1094	of Trenton v., two cases (N. J. Sup.) 606

Page	Page
Standard Leather Co. v. Insurance Co. of North America (Pa.)	Taylor v. Public Service Corporation of New Jersey (N. J. Ch.)
Standard Leather Co. of Pittsburg v. Alle-	Taylor v. Winsor (R. I.) 388
mannia Fire Ins. Co. of Pittsburg (Pa.) 192 Staples v. Bowden (Me.)	Tennessee Oil, Gas & Mineral Development Co., Johnson v. (N. J. Ch.) 60
State v. Albertalli (N. J. Sup.)	Terppe's Estate, In re (Pa.)
State V. Anderson (Conn.)	Thillman v. Baltimore (Md.) 722
State v. Andrews (Vt.)	Thomas v. International Silver Co. (N. J. Ch.)
State v. Bertchey (N. J.)	Thomas Orr Trucking & Forwarding Co. v.
State v. Bienstock, two cases (N. J. Sup.) 530 State v. Brom (N. J. Sup.)	Metropolitan Surety Co. (N. J.) 541 Thompson v. Trenton Water Power Co.
State v. Butler (Me.)	(N. J.)
State v. Carroll (Conn.)	Tice v. Moore (Conn.) 133 Tierney-Connelly Const. Co., Vanderbeek
State v. Casasanta (R. 1.)	v. (N. J.)
State, Downs v. (Md.)	Tiffany v. Morgan (R. I.)
State v. Forbes (N. H.)	Times Square Automobile Co. v. Ruther-
State v. Intoxicating Liquor (Vt.) 586 State v. Kapicsky (Me.)	ford Nat. Bank (N. J.)
State, Lowe v. (Md.)	Tittlebaum v. Progressive Paper Box Co. (N. J.)
State v. McClellan (Vt.)	Tompkins, Roberts v., two cases (N. J.) 505 Tompkins, Schoff v. (N. J.)
State v. Morrill (Me.)	Tompsins, Schoff v. (N. J.)
State v. Rigley (Me.)	Town of Kearney v. Jersey City (N. J.
State v. Spirituous Liquors (N. H.) 169	Trainer Spinning Co., Trainer v. (Pa.) 8
State v. Warden of Baltimore City Jail (Md.)	Trainer v. Trainer Spinning Co. (Pa.) 8 Trenton, Coxon v. (N. J. Sup.)
(Md.)	Trenton Water Power Co. v. Donnelly (N.
(N. J. Sup.) 53	Trenton Water Power Co., Thompson v.
State Board of Assessors, Long Dock Co. v. (N. J. Sup.)	(N. J.)
State Board of Assessors, Morris & Essex R. Co. v. (N. J. Sup.)	J.)
State Board of Health v. St. Johnsbury	nology v. Bowes (N. J. Sup.) 38
(Vt.)	Tuttle v. D. W. Pingree Co. (N. H.) 407 Twitchell v. Sea Isle City (N. J. Sup.) 75
New Jersey, Lincoln Council, No. 1, J. O. U. A. M. of Camden v. (N. J. Sup.) 245	Tyler v. Superior Court (R. I.) 467
Sterlingworth Ry. Supply Co., Hilliard v.	Ullrich, Stieff Co. of Baltimore City v.
Sternberg & Co. v. Lehigh Valley R. Co.,	(Md.)
Sternberg & Co. v. Lehigh Valley R. Co., three cases (N. J. Sup.)	Union Safe Deposit Bank of Pottsville v.
Stevens & Baldwin v. Sayers (Vt.) 817	Nichter (Pa.)
Stewart, Commonwealth v., three cases (Pa.)	Baltimore (Md.)
(Pa.)	United States Cast Iron Pipe & Foundry Co., Bassett v. (N. J.)
(Md.) 874	(Pa.) 982
Stipp, Frey v. (Pa.)	United States Exp. Co., Eastburn v. (Pa.) 977 United States Exp. Co., Yoshimi v. (N.
Strube. Baltimore & O. R. Co. v. (Md.) 697	J. Sup.)
Suburban Electric Co., Griesemer v. (Pa.) 340 Sullivan, Junkins v. (Md.) 264	
Sullivan v. Maroney (N. J. Ch.) 842 Sullivan v. Narragansett Electric Lighting	Vajo, Vargo v. (N. J. Ch.)
Sullivan v. Narragansett Electric Lighting 306 Co. (R. I.) 308 Sulzer, Wesley v. (Pa.) 338	Valente, American Bridge Co. v. (Del.) 400 Valire v. Laconia Car Co. Works (N. H.)1117
Summerton v. Elizabeth (N. J. Sup.) 89	Vanderbeek v. Tierney-Connelly Const. Co.
Summerton v. Elizabeth (N. J.)	(N. J.)
Summit, Beechwood Park Land Co. v. (N. J. Sup.)	J.) 509 Vargo v. Vajo (N. J. Ch.) 644
Sundheim, Osborne v. (Pa.)	Veit v. Class & Nachod Brewing Co. (Pa.) 982
Superior Court, Tyler v. (R. I.) 467	Vesta Knitting Mills, Burgess v. (R. I.) 305 Victor Talking Mach. Co., Mellon v. (N. J.) 494
Supreme Lodge, New England Order of	Victor Talking Mach. Co., Seligman v.
Sutton v. West Jersey & S. R. Co. (N. J.	Vinton, Barber v. (Vt.)
Sup.)	Von Beren, Booth v. (Conn.)
Swentek, Fleishman v. (Pa.) 459	Vosler v. Delaware, L. & W. R. Co. (N.
Swire's Estate, In re (Pa.)	Vulcan Detinning Co. v. American Can Co.
T. A. Shoemaker & Co., Green v. (Md.) 688	N. J.) 603
T. A. Shoemaker & Co., Green v. (Md.) 688 Taylor, Greene v. (R. I.)	Wagner v. Burnham (Pa.)
Taylor, Patterson v. (N. J. Sup.)	Wagniere v. Dunnell (R. I.)

Page :	Page
Walker, Trenton Water Power Co. v. (N.	White, Newell v. (R. L)
J.)	Whitmer's Estate, In re (Pa.)
Wallace v. Industrial Trust Co. (R. I.) 25	Whitridge v. Pope (Md.)
Walsh v. Newark (N. J. Sup.) 523	Whitridge, Pope v. (Md.)
Wannenwetsch v. Baltimore (Md.) 701	Whittier, Jones v. (N. J.) 497
Warden of Baltimore City Jail, State v.	Widener v. Philadelphia Rapid Transit Co.
(Md.) 294	(Pa.)
Ware v. Childs (Vt.) 994	Wiebke v. Carmer (N. J. Ch.) 114
Waterbury, Kelly v. (Conn.)	Wiener v. American Ins. Co. of Boston
Waters, Ætna Indemnity Co. v. (Md.) 712 Waters, Howard v. (N. J. Sup.) 50	Willes Parry 6 W V (Presting Co. Flink
Waters, Howard v. (N. J. Sup.) 50 Watson v. McManus (Pa.)	Wilkes-Barre & W. V. Traction Co., Fink
Watt, McCabe v. (Pa.)	v. (Pa.) 936 Williams, Probate Court of City of Paw-
Watt, McCabe v. (Pa.) 455	tucket v. (R. I.)
Weaver, Lake v. (N. J. Ch.)	Williams v. Public Service R. Co. (N. J.
Wedge v. Central Vermont R. Co. (Vt.) 580	Sun)
Weeks v. Weeks (N. J. Sup.)1004	William Tinkham Co., Clavin v. (R. I.) 892
Weller v. Lehigh Valley R. Co. (Pa.)1024	Wilmington City R. Co., Elliott v. (Del.
Wesley v. Sulzer (Pa.)	Wilmington City R. Co., Elliott v. (Del. Super.)
Westcott v. Briant (N. J. Sup.) 66	Wilson v. Bryn Mawr Trust Co. (Pa.)1070
Westenberger, Gustine v. (Pa.) 913	Wilson v. Bryn Mawr Trust Co. (Pa.)1071
West End Homestead Co., Goldberg v. (N. J. Sup.)	Wilson, Scott v. (Conn.)
J. Sup.)	Wimbrow Bros., Koch v. (Md.) 896
West End Trust Co., Saccone v. (Pa.) 971	Winsor, Taylor v. (R. I.) 888
Western Maryland R. Co. v. Martin (Md.) 267	Winter v. Schoenfeld (N. J. Sup.) 42
Western Maryland R. Co., Rowe v. (Pa.) 456 West Gardiner, Philbrick v. (Me.)1002	Wolff Process Leather Co., Booth v. (Pa.) 959 Wolff & Co., Levine v. (N. J. Sup.) 78
West Jarrey & S R Co Redewitz v	Wolff & Co., Levine v. (N. J. Sup.) 78 Wolverton, Mosier v. (Pa.) 941
(N. J.)	Woodhwidge To in Middleger County Dun-
West Jersey & S. R. Co., Badewitz v. (N. J.)	Woodbridge Tp. in Middlesex County, Dunigan v. (N. J. Sup.) 477
J. Sup.)	Worman v. Seybert (N. J. Sup.) 529
West Jersey & S. R. Co., Hopkins v.	Wright v. Orange & P. V. R. Co. (N. J.) 517
[Fig.]	11 11g_1 11 01 m_g 0 m 1 1 10 1 m 00 1 (1 m 0) 0 0 0 m
West Jersey & S. R. Co., Mittelsdorfer v.	Yoshimi v. United States Exp. Co. (N. J.
(N. J.)	(Sup.)
West Jersey & S. R. Co., Mittelsdorfer v.	Young's Estate, In re (Pa.)
(N. J.) 540	Total B Mountain In to (I m) to the total to the total
(N. J.)	7-11 State - OT T)
9. Dup./	Zeller, State v. (N. J.)
Westminister Church, Phillips v. (Pa.)1062	Zelman v. Kaufherr (N. J. Ch.)1048 Zentmyer, Cornely v. (Pa.)967
West Orange, Essex County Park Commis-	Zimmerman, Montrose Realty & Improve-
sion v. (N. J.)	ment Co. v. (N. J. Ch.)
Whalen v. Peerless Casualty Co. (N. H.) 642	Zimmerman & Co., National Shutter Bar
White Rell v. (N. J. Ch.)	Co. T. (Md)

ATLANTIC REPORTER

\mathbf{VOLUME} 73.

(82 Conn. 208)

HAMILTON et al. v. CITY OF NEW HAVEN.

(Supreme Court of Errors of Connecticut. June 8, 1909.)

1. JUDGMENT (§ 906*) - ACTIONS ON JUDG-

MENTS-DEVENSES.

Where an appeal taken by defendant from a judgment after plaintiff had assigned the same was dismissed because of plaintiff's death and the fact that no administrator had been appointed, the Appellate Court being in ignorance of the assignment of the judgment, the appeal proceedings were no defense to an action by the assignee to enforce the judgment, neither did the death of the plaintiff after the assignment of the judgment prevent a recovery by the as-

[Ed. Note. -For other cases, see Judgment,

Dec. Dig. \$ 906.*]

2 ARATEMENT AND REVIVAL (\$ 68*)—DEATH OF PARTY RIGHT TO APPEAL.

The right of defendant to appeal from a judgment for plaintiff is not defeated by the death of plaintiff, but the duty devolves upon defendant to take the necessary steps to revive the serior of the spread by procuring the appeal the action or the appeal by procuring the appointment of an administrator and making him a party to the suit or the appeal, as provided by Gen. St. 1902, §§ 317, 617, 621, 622, or, in the event of an assignment of the judgment before the death of plaintiff, by procuring the assignment to be made a party plaintiff to the action or a to be made a party plaintiff to the action or a party to the appeal under Gen. St. 1902, § 617, 621, 622, 631.

[Ed. Note.—For other cases, see Abatement and Revival, Dec. Dig. § 68.*]

8. ABATEMENT AND REVIVAL (§ 68*)—DEATH OF PARTY—ASSIGNMENT OF JUDGMENT. The death of a plaintiff after the rendering of a judgment in his favor and his assignment of it does not prevent the assignee from bringing suit to enforce the judgment; a judgment being a chose in action upon which, at common law, the judgment creditor could maintain an action of debt, and Gen. St. 1902, § 631, authorizing the assignee and bona fide owner of a judgment to sue upon it in his own name.

[Ed. Note.—For other cases, see Abatement and Revival. Dec. Dig. § 68.*]

4. ESTOPPEL (§ 68*)—EQUITABLE ESTOPPEL—CLAIM IN JUDICIAL PROCEEDINGS — DISMISSAL OF APPEAL.

the assignee made the motion to dismiss the appeal and could have availed itself of such right to revive the action for the purpose of procuring its appeal as it possessed by reason of the assignment.

[Ed. Note.—For other cases, see Estoppel, Dec. Dig. § 68.*]

Appeal from Superior Court, New Haven County; Joel H. Reed, Judge.

Action by Charles S. Hamilton and others against the City of New Haven. Judgment for plaintiffs, and defendant appeals. Affirmed.

The questions presented by the demurrers are not materially different from those raised upon the trial of the issues of fact. The trial court found these facts: On the 22d of November, 1901, Richard T. Barton recovered judgment in the court of common pleas for New Haven county against the present defendant for \$500, as damages for personal injuries received by him on account of a defective sidewalk in said city. On the 22d of November, 1901, Barton assigned this judgment to his attorney, the plaintiff Mr. Hamilton, who, by agreement at the time of the assignment, is, after deducting therefrom the amount of his fees and disbursements in said suit, and the amount of certain loans, to pay the remainder of said judgment when collected to Mrs. Barton, who is a coplaintiff with him in this action. The defendant was immediately notified of this assignment. On the 4th of January, 1902, Barton died intestate, without children, owing no debts, and having given all his property to his wife before his death. No administration upon his estate has been granted or applied for. On he 23d of November, 1901, the defendant filed a notice of appeal to this court from said judgment in favor of Barton, and on December 4, 1901, filed its draft finding and request for a finding of facts, and on December 27, 1901, Judge Cable, the presiding judge at the The assignee of a judgment is not estopped from bringing suit thereon because as amicus curise he secured the dismissal of an appeal on the ground that the plaintiff had died, and no the ground that the plaintiff had died, and no administrator had been appointed; the court not being aware at the time that the judgment had been assignment of the judgment before trial of said case, filed a finding of facts. On January 8, 1902, the defendant filed a motion to correct this finding. On February 17, 1902, Judge Cable reflied said finding as mended, and on February 24, 1902, the defendant filed an appeal to the term of this court held on the second Tuesday of April, trial of said case, filed a finding of facts. On

1902, which appeal upon motion of Mr. Hamilton as amicus curiæ was erased from the docket. On June 6, 1902, the defendant filed with the clerk of the court of common pleas a suggestion of record of the death of said Barton. Judge Cable died June 9, 1903. Prior to his death the plaintiff Hamilton applied for execution upon said judgment, which was refused, and he afterwards brought an action in the city court of New Haven upon said judgment, which was subsequently dropped at the annual call of the docket. The present action was commenced in February, 1908.

Edward H. Rogers and Edward P. O'Meara, for appellant. Charles S. Hamilton, for appellees.

HALL, J. (after stating the facts as above). It is contended by the defendant that the steps which it took to appeal from the judgment in favor of Barton, the death of Barton pending such attempted appeal, and the action of the plaintiff in procuring such appeal to be dismissed from this court, operate as a supersedeas of the judgment in favor of Barton and prevent a recovery by the plaintiff in the present action. In the case of Barton v. New Haven, 74 Conn. 729, 52 Atl. 403, we only decided that there was no appeal pending in this court because the attempted appeal in the court of common pleas was not filed until after the death of Barton, and without a revival of the action by the appointment of an administrator. We suggested in that case that the appointment of an administrator was necessary to enable the defendant to perfect its appeal. There has been no application for such appointment. The plaintiff insists that, to enable the defendant to avail itself of its claimed right of appeal, it was its duty to apply for administration. The defendant claims that it has no such interest in the Barton estate as entitles it to ask for the appointment of an administrator, and further that, even though no valid appeal has been taken, yet, on account of the death of the only plaintiff in the suit of Barton v. New Haven, the judgment in his favor can only be enforced by the appointment of an administrator upon his estate. When the case of Barton v. New Haven was before us, we were not informed of the assignment to the plaintiff Mr. Hamilton of the judgment in Barton's favor, before the latter's death. It now appears that Barton's estate had no interest in defending the defendant's appeal from the judgment in Barton's favor, and that it now has no interest in enforcing that judgment. A materially different question from that decided in Barton v. New Haven is therefore presented by this case. The question here is: Does the death of Barton, or the attempted appeal, or both, operate to prevent the present plaintiff from enforcing the judgment in favor of Barton by an action upon it, in his own name as assignee?

The appeal proceedings constitute no defense to this action. We have decided, as before stated, that no appeal was taken. The failure of the appeal was not the fault of this plaintiff, nor of those interested in the Barton estate. The plaintiff as assignee was not required to aid the defendant in its attempt by its appeal to set aside the Barton judgment, and the estate of Barton had no beneficial interest either in the appeal or in the judgment. While an appeal to this court is regarded as a continuation of the original action, the appellant is virtually a plaintiff in that proceeding. The defendant's right to appeal was not defeated by the death of the plaintiff Barton (Barton v. New Haven, supra; Peer v. Cookerow, 13 N. J. Eq. 136), but to avail itself of that right it devolved upon it to take the necessary steps to revive the action or the appeal (Palmer v. Gardiner, 77 Ill. 148; Hopkins v. Hopkins, 91 Ky. 310, 15 S. W. 854). This it could have done either by procuring the appointment of an administrator, and by proper proceedings having him made a party to the suit or the appeal (sections 318, 617, 621, 622, Gen. St. 1902; Gale v. Corey, 112 Ind. 39, 13 N. E. 108, 14 N. E. 362, and authorities above cited), or by procuring the present plaintiff as the assignee of the judgment, to be made a party plaintiff to the action or a party to the appeal (sections 631, 617, 621, 622, Gen. St. 1902; Nellon v. Kansas City, etc., R. Co., 85 Mo. 599). Instead of taking either of these courses, the defendant seems to have awaited the action of those interested in the judgment, apparently believing that the judgment could only be enforced by the appointment of an administrator, and that, whenever one should be appointed, the defendant could proceed with its appeal.

The death of Barton after the assignment of the judgment does not prevent a recovery in this action. It is unnecessary to decide whether the assignee of an unsatisfied judgment, rendered in an action to which he was not a party, can procure execution to be issued in his own name. It may be observed, however, that section 4152, Gen. St. 1902, permits the assignee of a judgment to cause a judgment lien to be recorded and foreclosed in his own favor. A judgment is a chose in action upon which, at common law, the judgment creditor could maintain an action of debt (Denison v. Williams, 4 Conn. 402), and under section 631, Gen. St. 1902, the assignee and bona fide owner of a judgment may sue upon it in his own name. Such is the char-The present acter of the present action. plaintiff could have brought this action in his own name during Barton's life. Barton's death has not deprived him of that right.

The defendant further urges that Mr. Hamilton is estopped from maintaining this action as assignee, for the reason that he procured the defendant's appeal to be dismissed by this court, upon the ground of Barton's death, and by concealing the fact of the assignment of the judgment to himself. A sufficient answer to this claim is found in the fact that the defendant had notice of the assignment of the judgment before the motion to dismiss the appeal was made, and could have availed itself of such rights as it possessed by reason of the assignment to revive the action for the purpose of prosecuting its appeal.

There is no error. The other Judges conenr.

(82 Conn. 227)

MONROE NAT. BANK v. CATLIN. (Supreme Court of Errors of Connecticut. June 8, 1909.)

1. APPEAL AND ERROR (\$ 719*)—ASSIGNMENTS

OF ERROR-NECESSITY.

The Supreme Court may consider errors, though not assigned as required by Gen. St. 1902, \$ 802.

[Ed. Note.—For other cases, see Appeal and Error Cent. Dig. §§ 2968-2982; Dec. Dig. § 719.*]

2. PAYMENT (§ 87°)—RECOVERY OF PAYMENT— DURESS.

The mere threat of suit is not sufficient to make a payment compulsory.

[Ed. Note.—For other cases, see Pa Cent. Dig. §§ 283-287; Dec. Dig. § 87.*] see Payment,

8. PAYMENT (\$ 84*)—RECOVERY OF PAYMENT—MISTAKE OF LAW.

When money is paid by one under a mistake of his rights and duty, and which he was under no legal or moral obligation to pay, and which the recipient has no right in good science to retain, it may be recovered back, whether such mistake be one of fact or law.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 287-271; Dec. Dig. § 84.*]

4. PAYMENT (§ 84*)—RECOVERY OF PAYMENT MISTAKE OF LAW.

Money voluntarily paid, with full knowledge of the facts, after consideration, in response to a demand, based upon a claim of right, in recognition of a moral duty to satisfy that demand and to avoid litigation, cannot be recovered back on the ground of mistake, though the payment was made in ignorance of the payer's strict legal rights.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 267-271; Dec. Dig. § 84.*]

Appeal from Superior Court, Hartford County; Milton A. Shumway, Judge.

Action by the Monroe National Bank against Abijah Catlin, Jr. From a judgment for defendant, plaintiff appeals. Affirmed.

The defendant, a dealer in cotton in Hartford, bought of one Bandy, a cotton broker in Monroe, La., some cotton. Bandy drew two drafts on the defendant for the purchase money, attached thereto forged bills of lading, and delivered the drafts, with the bills of lading so attached, to the plaintiff, with whom he banked, for collection. No cotton was shipped. In due course these drafts and bills of lading came into the hands of a Hartford bank for presentation to the defendant for payment. They were presented to him, and he, supposing that the bills of closed by the finding, to recover back from

lading were genuine, and that the cotton had been shipped as represented therein, paid the drafts, and retained the bills of lading. At that time he had no knowledge whether the drafts had been deposited with the plaintiff for collection, or had been discounted by the plaintiff. The defendant supposed that the bills of lading were genuine, and relied in part upon the fact that the plaintiff was located in Monroe, and would satisfy itself that they were so. The Hartford bank transmitted the money paid by the defendant to the plaintiff, who placed it to the credit of Bandy, and later, but before the forgery of the bills of lading was discovered, Bandy withdrew from the plaintiff bank his whole balance, including the money so credited. The defendant, not receiving any cotton, made inquiries, and, some three months after his payment of the drafts, discovered the forgeries. He thereupon employed a lawyer of Monroe to obtain repayment of the money paid upon the drafts. The lawyer made demand upon the plaintiff for such repayment, on the ground that the bills of lading were forged and the drafts paid under a mistake of fact. He told the plaintiff that in his opinion it was legally bound to make repayment, and that, if it did not, he should bring suit to recover the money back. The officers of the plaintiff, believing that the defendant had paid the money upon the drafts under a mistake of fact; that under the circumstances it was morally bound to refund the money; that it was also legally liable to do so; and that it was its duty to do so-thereupon, in February, 1905, paid the lawyer as representing the defendant the sum represented by the two drafts, to wit, \$2,277.90. The defendant now has this money, and refuses to repay it to the plaintiff. Demand therefor was made in November, 1905. When the plaintiff received the drafts and bills of lading from Bandy, it supposed that the latter were genuine.

Benedict M. Holden and Newell Jennings, for appellant. Charles E. Perkins and Leonard Morse, for appellee.

PRENTICE, J. (after stating the facts as above). This appeal contains no assignment of error specifically made, as the statute requires. It, therefore, properly presents no matter for our determination. Gen. St. 1902, § 802. We, however, have the power to waive the defect; and, under the circumstances of the case, we have deemed it best to decide the question, which, as the defendant fully understood, the plaintiff desired to present to our consideration, and which both parties have exhaustively argued. This question is the general one of the right of the plaintiff, under the circumstances dis-

the defendant a sum of money which the former, prior to the commencement of the action, had paid to the latter. In deciding this question we have no occasion to consider the incidental one, to which much of the argument was addressed, as to whether or not the plaintiff, when it made the payment in question, was under a legal obligation to make it. If it was under such an obligation, it confessedly has no present right of action. No more has it under the circumstances presented by the other alternative, for which the plaintiff contends. The payment to the defendant was made with full knowledge on the plaintiff's part of all the facts of the situation. It was made voluntarily and deliberately. It was made in the belief on the plaintiff's part that, in view of the circumstances, it was under a moral obligation, at least, to make it. It was made in response to a demand presented by the defendant's attorney. It was made after information from the attorney that suit would be brought, if the demand were refused. We have, therefore, this situation: That it is sought to recover back money paid to another voluntarily, with full knowledge of the facts, after consideration, in response to a demand based upon a claim of right, in recognition of a moral duty to satisfy that demand and to avoid litigation. The plaintiff's change of mind and heart has come too late. It cannot now reopen the dispute once fairly settled. There is no claim of fraud, misrepresentation, or concealment on the part of the defendant or his attorney in obtaining the money. The threat of suit did not constitute duress. Morris v. New Haven, 78 Conn. 678, 675, 63 Atl. 123.

Any failure on the plaintiff's part to understand the full extent of the parties' strict legal rights under the known facts cannot help to reopen the once-closed door of controversy, for one reason because its conception of its legal obligation was only one of the moving causes of its favorable response to the appeal to recompense the defendant for what he had lost through the forged bills of lading. And there is another reason, which of itself must be conclusive. Notwithstanding that the plaintiff may have been ignorant of its strict legal rights when it paid over the money, the defendant is not thereby placed in the position of now holding that which he cannot in good conscience retain. It is true that money paid under a mistake of law can sometimes be recovered back. It is not true that it always, or generally, can. Were it so, there would be all too few money controversies ended save through the medium of litigation. The law favors the private settlement of such matters, and it does not throw around that process the hazards and uncertainties which would at- Philadelphia County.

tend the principle that no voluntary satisfaction, settlement, or compromise of a demand can be made which will have any efficacy in the face of a contention that the law was not fully known to the parties. Even the wisest lawyer might often find himself helpless to accomplish a permanent result in the way of the settlement of business differences in the presence of such conditions. The pertipent principle, which has had the approval of this court, is "that, when money is paid by one under a mistake of his rights and duty, and which he was under no legal or moral obligation to pay, and which the recipient has no right in good conscience to retain, it may be recovered back, * * * whether such mistake be one of fact or of law." Northrop v. Graves, 19 Conn. 548, 554, 50 Am. Dec. 264; Mansfield v. Lynch, 59 Conn. 320, 327, 22 Atl. 313, 12 L. R. A. 285. The appeal to which the courts listen is one to the principles of equity. It is only when one has obtained such an advantage over another, by reason of that other's mistaken view of his legal rights. that it would, under the circumstances, be unconscionable for him to retain it; that a situation created by the fair conduct of the parties will be disturbed. Park Bros. & Co. v. Blodgett & Clapp Co., 64 Conn. 28, 34, 29 Atl. 133. There is no such situation here. There is not the slightest inequity in the defendant's retaining money paid to him as this was. It was fairly got, and may be fairly kept

There is no error. All concur

(224 Pa. 13)

CHITTICK et al. v. PHILADELPHIA RAPID TRANSIT CO.

(Supreme Court of Pennsylvania. 1909.)

1. NEGLIGENCE (59*)-EXTRAORDINARY OC-CURRENCES-LIABILITY.

A street railway company is not liable for accidents of such an extraordinary character that it could not have been anticipated as the natural result of the negligent act com-

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 72; Dec. Dig. § 59.*]

2. ELECTRICITY (§ 16*)—NEGLIGENCE.
Where defendant's motorman negligently caused a trolley pole to strike a steel brace which was being raised for the construction of which was being raised for the construction of an elevated railroad, and the brace struck the trolley wire, causing an electrical explosion, whereupon plaintiff, seated at a window at a house about 300 feet distant, fell from her chair and was temporarily blinded and suffered nervous weakness, and there was no material substance set in motion by the explosion whereby plaintiff was injured, she could not recover from the street railway company.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 16.*]

Appeal from Court of Common Pleas,

Action by Annie E. Chittick and John F. Chittick against the Philadelphia Rapid Transit Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Argued before MITCHELL, C. J., and EL-KIN, FELL, POTTER, and STEWART, JJ.

Thomas Leaming and Russell Duane, for appellant. Robert B. Kelly, for appellees.

ELKIN, J. During the construction of the elevated railroad in West Philadelphia, a steel brace, a necessary part of the superstructure, was being hoisted into position by the employes of the bridge company doing the work, when the trolley pole of a street railway car struck it with such force as to cause an electrical explosion by reason of the contact of the brace with the trolley wire. The negligence relied on to sustain a recovery is the failure of the motorman to stop his car after timely notice to do so in the face of an impending danger. The negligence of appellant in the respect charged is not denied, and if the injuries complained of resulted as a natural and probable consequence of the negligent act, which ought to have been foreseen and provided against, it would be a case for the jury. What occurred after the happening of the accident is of such an extraordinary character, and the cause of the injuries of such an unusual nature, that the facts must be briefly stated in order to have an intelligent understanding of the question raised by this appeal. When the trolley wire was forcibly brought into contact with the steel brace, there was a brilliant flash of electricity, variously described by the witnesses as a "ball of fire," a "brilliant flash," a "blinding light," and a "powerful electrical flash of an explosive nature." A woman, one of the appellees here, was seated near an open window of her dwelling house 200 or 300 feet distant from the point at which the electrical manifestation occurred, and thrown, or in some manner fell, from her chair, to the floor. In the fall she received some bruises to her person, but these were of a temporary character and not serious. She was blinded temporarily by the brilliant electric flash, suffered pain in her eyes, followed by some impairment of vision and nervous weakness, and these are 'the injuries principally relied on to sustain this action for damages.

It must now be determined whether upon such a state of facts, appellant is answerable in law for injuries resulting from this unfortunate occurrence. The learned court below, after patient and careful consideration, submitted the case to the jury, and upon more mature deliberation refused to enter judgment for defendant non obstante veredicto, although in arriving at that conclusion doubt was expressed as to the liability of the defendant under the circumstances. Whatever doubt there may have been in the ed in favor of the plaintiffs, and the case is now here for final determination. At the beginning of our inquiry, it may be remarked that the relation of common carrier and passenger, or of master and servant, did not exist between the parties, all of whom were in the enjoyment of their respective properties with the right to use and operate them. in every lawful manner. The duty of each to the other was not to so wantonly or recklessly or negligently use her or its property: as to cause injury to the person or property of the other. Did the appellant meet this measure of duty, and did it do anything to make it liable for the injuries sustained? It was bound to know what the natural and probable consequences of its negligent act would be, and would be answerable in damages for all injuries which ought to have been anticipated and which could have been provided against if the duty rested upon it to foresee such consequences. This is the crux of the case, and there are numerous decisions of this court bearing upon the question involved. In Pittsburg Southern Railway Company v. Taylor, 104 Pa. 306, 49 Ama Rep. 580, it was held that the correct rule in determining proximate cause in this class of cases is that the injury must be such a natural and probable consequence of the alleged negligent act as might and ought to have been foreseen by the wrongdoer. This rule has been recognized and followed in many later cases. See West Mahanoy Township v. Watson, 112 Pa. 574, 8 Atl. 866; Fox v. Borkey, 126 Pa. 164, 17 Atl. 604; Ewing v. Railway Company, 147 Pa. 40, 23 Atl. 340, 14 L. R. A. 666, 30 Am. St. Rep. 709; Linn v. Duquesne Borough, 204 Pa. 551, 54 Atl. 341, 93 Am. St. Rep. 800; Huston v. Freemansburg Borough, 212 Pa. 548, 61 Atl. 1022; 3 L. R. A. (N. S.) 49.

In some of our cases it has been pointed out that the trend of decision both in this country and in England is against the allowance for mental suffering, or nervous shock or fright, as elements of damages, and when the injuries relied on to sustain a recovery flow from such causes the action cannot be maintained. There can be no doubt about the application of this principle in the trial of this class of cases under the authority of our decisions, and it must be considered a settled rule of law in our state. The only question to be now determined is whether, under the facts of the case at bar, this principle should be applied. If the injuries sustained resulted from mental suffering, or from a severe nervous shock, or from fright, occasioned by the unusual occurrence, the rule certainly applies, and as we read the testimony no other conclusion can be reached. It is true that the injured appellee testified that she saw a ball of fire which seemed to pass through the window at which she was sitting, and as a result of that indescribable something which passed before her mind of the learned trial judge was resolv- eyes she fell to the floor. This was an op-

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tical illusion. In point of fact there was no ball of fire, and it could not have passed through the window. It is not seriously contended that there was a real ball of fire, or that any actual physical injury was inflicted upon appellee by reason of any material force or substance coming in contact with her body. The windów at which she was sitting was not broken, nor was there any evidence of force or violence in or about the room or upon her person. The bruises she received resulted from her fall on the floor, and were not occasioned by any material or other force prior to the fall. The electrical manifestation described as a ball of fire was not a real material substance, but a flash of light reflected upon the retina of the eye, or it may have been produced by light and other rays set in motion by the flash and explosion resulting from the violent force with which the metal brace came in contact with the trolley wire. No current of electricity passed through the air, nor was any material substance set in motion, whereby injury to the person of appellee was done or could have resulted. To hold that this is anything but a case of nervous shock, or terrible fright, our eyes must be closed to the facts, and our minds to an intelligent understanding of them. If the injuries resulted from the nervous shock, and of this there can be no doubt, there can be no recovery in this action without overruling many decided cases. As we read the testimony, neither experience nor scientific research could have foreseen what happened in this case, and the consequences which followed the occurrence were of such an extraordinary character as could not have been anticipated by appellant as the natural and probable result of the negligent act. There is much in this case to indulge sympathetic inquiry and to suggest speculative theory, but a proper regard for the wholesome administration of law by the application of settled principles requires this court to hold that there can be no recovery under the facts presented at the trial in the court below.

Judgment reversed and is here entered for defendant.

(223 Pa. 654) BURD v. CITY OF PHILADELPHIA. (Supreme Court of Pennsylvania. March 8,

1909.) MUNICIPAL CORPORATIONS (\$ 807*) - NEGLI-

GENCE-DEFECTIVE STREETS Where the broken cover of a sewer inlet is unrepaired for at least two weeks, with notice to the city department, and is covered with muddy water mixed with slush and ice, a woman, without knowing of its existence, who is injured by its giving way under her, may re-cover damages for her injuries, though she could have avoided the danger by going a few steps to one side.

[Ed. Note.—For other cases, see Municipal orporations, Cent. Dig. \$\$ 1679-1681; Dec. Corporations, Dig. \$ 807.*1

Appeal from Court of Common Pleas, Philadelphia County.

Action by Margaret C. Burd against the City of Philadelphia. Verdict for plaintiff, and defendant appeals. Affirmed.

Argued before FELL, MESTREZAT, POT-TER, ELKIN, and STEWART, JJ.

Robert Brannan and Frederick Beyer, Asst. City Sols., and J. Howard Gendell, City Sol., for appellant. Maurice W. Sloan, for ap-

PER CURIAM. The top of a sewer inlet was at the curb in the line of a street crossing. The iron cover of the inlet was broken and had fallen in, or was in such a condition that it would fall if stepped on. This condition had existed for at least two weeks, and it had been reported to the proper city department. In midwinter, following a thaw. the inlet was clogged with dirt so as to obstruct the flow of water, and muddy water, mixed with slush and ice, extended from the curb two or three feet into the street, entirely covering and obscuring the top of the inlet. The plaintiff, in crossing the street, stepped into the inlet, or on the cover, which gave way.

It appeared from the plaintiff's testimony that she could have avoided the water and reached the pavement by making a few steps to one side of the crossing. From this it is argued that she took the chance of dangers that were concealed under the muddy water. She had no knowledge of the existence of the inlet, and the collection of water gave her no notice of it, since this might have been caused by the clogging of the gutter with slush and ice. The chance she took in walking on a regular street crossing partly covered by water, which she could have avoided, was danger caused by the usual irregularities of the surface, but not danger of an unusual character that she had no reason to appre-

It was not error to submit the case to the jury, and the judgment is affirmed.

> (224 Pa. 36) SNYDER v. SMYTH et al.

(Supreme Court of Pennsylvania. March 8, 1909.)

APPEAL AND ERROR (§ 1008*) - REVIEW -FINDINGS OF FACT.

A finding of fact by the court will not be

reversed, unless error appears.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \$\$ 3955-3969; Dec. Dig. \$ 1008.*]

Appeal from Court of Common Pleas, Philadelphia County.

Bill by W. Riehle Smith Snyder against Joseph J. Smyth and Wilson R. Ker. From a decree dismissing the bill, plaintiff appeals. Affirmed.

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Argued before FELL, MESTREZAT, POT- tracks of a steam railroad were also laid. TER, ELKIN, and STEWART, JJ.

Henry B. Hodge, for appellant. John G. Johnson and John McConaghy, Jr., for appellees.

PER CURIAM. The bill in this case was for an account, and was filed by the purchaser at a sheriff's sale of whatever interest the defendant in the execution had as a partner in a building operation. The court found that he was not a partner, and that he had no interest. The correctness of this finding depends on the credibility of witnesses, of which the court, who saw and heard them, had a much better opportunity to judge than we have. What has been so often said that the findings of fact by the court will not be reversed, unless error clearly appears, is especially applicable to this case.

The decree of the court dismissing the bill is affirmed, at the cost of the appellant.

(234 Pa. 52)

GAINES et al. v. CHESTER TRACTION CO. (Supreme Court of Pennsylvania. March 8, 1909.)

1. Carriers (§ 292*) — Street Railways — Collisions at Steam Railroad Crossing -ACCIDENT TO PASSENGER.

The trolley of an electric car left the wire when the car was passing over a steam rail-road crossing without negligence on the part of the street railway company, and the car was run into by a locomotive. There was nothing to show that the parting of the trolley was due to any defect in the construction or in lack of care. Held, that the passenger could not recover.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 292.*]

2 CABRIERS (§ 318*)—STREET RAILWAYS—ACCIDENT AT STEAM RAILWAY CROSSING—EVI-DENCE.

In an action for injuries to a passenger on an electric railway car by collision with an engine at a steam railroad crossing, evidence held insufficient to show any negligence on the part of the street railway.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 318.*]

Appeal from Court of Common Pleas, Delaware County.

Action by Charles E. Gaines and Ellen Gaines against the Chester Traction Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Argued before FELL, BROWN, MESTRE-ZAT, ELKIN, and STEWART, JJ.

J. B. Hannum, for appellant. O. B. Dickinson and J. E. McDonough, for appellees.

ELKIN. J. In the statement of the question involved in the paper book of appellant is contained a concise recital of the facts relied upon to sustain a recovery in this case. A trolley car of the appellant company ar-

The safety gates were down when the trolley car arrived, but were soon raised by the gate tender, who was an employe of the railroad company, thus inviting those in charge of the trolley car to pass over the crossing. Before starting his car the conductor walked ahead, as was his duty, looked up and down, saw the track was clear, and then signaled the motorman to bring the car over. passing over the crossing, the trolley came off the wire, and the car stranded across the railroad tracks. An engine of the railroad company, standing about 70 feet distant at the time the trolley car started to make the crossing, suddenly and slowly, without warning, began to move in the direction of the crossing, and its speed being accelerated as it proceeded, and no effort seemingly having been made to stop it by those in charge of the engine, a collision with the stranded trolley car resulted, and a lady passenger, one of the appellees here, was injured. The trolley car was in good repair, and the tracks and overhead construction were of the kind in general use, and there is no allegation of faulty construction or of careless or insufficient maintenance.

Under these circumstances it must now be determined whether there was any evidence of negligence to submit to the jury upon which a recovery can be sustained. The rules governing the use of the crossing were carefully observed by the conductor and the motorman. They did what their duties required them to do. The safety gates were under the control of the railroad company, and when the gate tender raised them the employes of the trolley company had a right to act on the assumption that the way was clear. They did not rely on this invitation alone, but the conductor went ahead, as was his duty, to see for himself what the situation was, and, having these two sources of information, he was fully justified in signaling the motorman to start the car. Of course, even after starting the car and being committed to the crossing, the duty still rested on the conductor to take every reasonable precaution under his control for the safety of passengers; but, as we view the testimony, everything was done within his power to do as the car passed over the crossing. The evidence does not show that anything done or left undone by the conductor or motorman was in any way responsible for the stranding of the car. It is one of those things which in the operation of a street railway sometimes occurs when no one is at fault, and this was true in the present case. The conductor of the trolley car could not control the movement of the steam engine, nor could the appellant company be made liable for what the employes of the railroad company rived at a grade crossing over which the did or failed to do. Nor can we accept as

effor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sound the contention that because the steam occasion, and had a conversation with the engine made some signs of being ready to move about the time the trolley car started, or immediately thereafter, it was the duty of the conductor to stop his car and wait to ascertain what the engine might do. He had a right to assume, after the employe of the railroad company had raised the safety gates, that the way was clear so far as the engine and trains of the railroad company might interfere with the use of the crossing. A careful examination of this record has failed to convince us that there was any evidence of negligence to submit to the jury.

Judgment reversed and is here entered for defendant.

(224 Pa. 45)

TRAINER V. TRAINER SPINNING CO. (Supreme Court of Pennsylvania. March 8, 1909.)

MASTER AND SERVANT (\$ 40°) - WEONGFUL · DISCHARGE—EVIDENCE.

Plaintiff, who had been manager of a corporation, sued to recover his salary after an alleged wrongful discharge. The corporation had passed a resolution giving plaintiff a leave of absence for a limited period. Four days later a resolution was passed discharging plaintiff on the ground of insubordination. There was evidence that before the second resolution plaintiff refused to take his vacation and to permit another to act in his place. *Held*, that a verdict for plaintiff should be sustained.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 40.*]

Appeal from Court of Common Pleas, Delaware County.

Action by William E. Trainer against the Trainer Spinning Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The court charged, in part, as follows: "It appears that some time in August, 1906, there was some difficulty in that corporation, and that difficulty in some way related to continuing Mr. Trainer, the superintendent, in his position as superintendent and manager. The real difficulty, whatever it may have been, does not very clearly appear, but on August 6, 1906, the company passed this resolution: 'Mr. James S. Austin.-Mr. Austin, one of the directors, at a meeting of the corporation, "moved that Mr. Trainer be given a vacation for three months, with his salary, from the 6th of August, 1906, and that in the interim the mill be managed by the president or such superintendent or manager as he may designate, provided that at the expiration of the three months Mr. Trainer shall not again take up the work or manage or superintend until further action by the board of directors."' That resolution was passed. On that day, or the next day, I am not very clear which, and I do not think the president testified, he called at the mill on Mr. Trainer. He went to the mill after the passage of this resolution, went alone, if I remember, on the first Mr. Dickinson:

superintendent. You remember what was said. If I got the president aright, his mission was, as he said, to coax or persuade Mr. Trainer to take a vacation. I do not remember any evidence that he demanded possession of the mill, but that he wanted him to accept the suggestion in this resolution that he take a vacation. Mr. Trainer declined to do it, and he went away. I understand there is no complaint upon the part of the defendant of this interview, but there may be. It will be for you to say whether there was anything in that interview that was contumacious upon the part of Mr. Trainer, or that evinced any effort to defy or disobey the order of the president, if any order was given.

"I do not recollect that any demand was made by the president for him to give up the mill or to go away, but my recollection is he tried to persuade him it would be better for him that he take this vacation. However, he went away. The next day he returned, if it was the next day, with a gentleman named Turner, George C. Turner, who, it is alleged by the defendant, had been selected as the manager or superintendent to take the place of Mr. Trainer, and the contention of the defendant is that Mr. Trainer refused to accept this man as the superintendent, and turn over the mill to him, and because of that refusal they had the right to discharge him. That is the contention of the defendant. That they produced to him at the mill his successor, and that he refused to obey the orders of the board of directors and of the president, and therefore they had a right to discharge him. If I remember that testimony, it was like this: That the president and Mr. Turner went to the mill. At the gate was a Mr. Pierce, a watchman employed by the superintendent, Trainer, and that he let him in, but that Mr. Trainer refused to permit Mr. Turner to enter. I do not recollect any testimony upon the part of the president or Mr. Trainer informing Mr. Trainer that this was the superintendent, and that he was there to take his place, and it does seem to the court, though you are not bound by this suggestion, that in the presence of the dubious character of this resolution of August 6th, if it was the intention of this president to present a superintendent which he had selected, for he was authorized under the resolution of August 6th to select one, that he ought to have said to Mr. Trainer: 'I have selected this gentleman to take your place, and I ask you or demand of you,' or something, 'to surrender the property to him.' I do not remember a particle of evidence whether-was there any evidence showing that Turner had been appointed? Mr. Hannum: Not at that time. The Court: I mean at that time. What Mr. Hannum's ref-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1507 to date, & Reporter Indexes

manager, but the first resolution was, if the court will remember, 'any manager or superintendent selected by the president.' The Court: Is there any evidence he had been selected by the president? Mr. Dickinson: Certainly. Mr. Blythe testified to it, and Mr. Trainer testified point blank that he told Mr. Blythe in so many words, 'I will admit you or any officer of the company, but I will not admit Mr. Turner,' who was the new manager. Mr. Hannum: Oh, he did not say that. The Court: Just as I say, it will be for you to say whether there was any evidence, first, that the president had appointed Turner at that time, and whether when he got there he informed Mr. Trainer that Turner had been appointed by him, because there is nothing on the minute to show, had been appointed by him as the manager and gave him plainly to understand that this was a demand for this property, because we would be inclined to the view that if there had been a man, a superintendent, appointed in his place, and he had appeared by the president, and Mr. Trainer had been told that he had been removed from his office, and this was his successor, that he would be bound to take notice of it and would be obliged to surrender it. But it was the duty of the defendant to make that clear. Now, was it clear? And did the superintendent and did the company believe at that time that the resolution of August 6th was intended as a dismissal, as a discharge?

"Both counsel for the plaintiff and the defendant conclude that this was not a discharge, that this was an offer or a direction to Mr. Trainer to take a three months' absence, but they informed him that his work would end at the end of three months unless the board should otherwise determine. that, first, was it clear to Mr. Trainer, who was present when this resolution was passed, that this was intended to dissolve his connection with this business or that it was optional with him whether he should take three months' vacation or not? Now, the resolution of August 9th throws some light upon this question. Evidently, after the president had returned, the board concluded that something else had to be done to get possession of the property, and they passed this resolu-'Be it resolved that the resolution adopted on August 6th, which was as follows: That William E. Trainer be given a vacation of three months with his salary, and that in the interim the mill be managed by the president or such superintendent or manager as he may designate, provided at the expiration of the three months Mr. Trainer shall not again take up the work as manager or superintendent until future orders by the boardbe revoked, rescinded, and declared null and void, and that the said William E. Trainer be and is hereby discharged as superintendent and manager of the mill; his discharge to date from this date, August 9, 1906.' Now ZAT, ELKIN, and STEWART, JJ.

erence to was his election to the position of it is quite plain from this resolution that the corporation, the company, was not intending or inclined to stand upon the resolution of August 6th as a dismissal. Whether they thought it was dubious or not no one knows, because, as Mr. Dickinson says, 'We can't give in evidence what was talked about before the resolution was passed,' but it was a fact that then they did pass a resolution not only revoking this former resolution but dismissing him. The president went down to the work, and Mr. Trainer, under this resolution of revocation, surrendered the premises.

> "Now, it will be for the jury to say whether or not this company was justified in discharging him for any reason that took place, either at the first interview by the president after the passage of the resolution of August 6th or the second. If the jury find that there was nothing in that that justified the company for discharging him, then he is entitled to recover. The president says, as I understand, that he had a conversation with the constable about what the constable would do if he sent him a letter. You remember what he said. He said he was there to keep people from taking forcible possession of the premises, and that he was employed by Mr. Trainer, and that was his duty. Now, I do not pay very much regard to what the constable said to the president at all. The constable might have said anything he pleased. True, he was there in charge, but he said that his duty—and he said it was in writing—was that he should keep people from taking forcible possession of the premises, and the conversation that he had with the president after he had gone out was not very pleasant. Still, it is the act of Mr. Trainer, and not the act of this constable, that is to justify this corporation in discharging him, if they are to be justified at all. You are not to take the view of the court that this conversation with the constable has but little bearing upon this question. It has some. It will be for you, but the court does not see that it has a very great bearing upon this controversy, because it is the act of Mr. Trainer when this president went there on these two occasions, for that is when the trouble arose. Was there anything upon his part, any act that justified this corporation in rescinding this contract? For that is what they did. And in passing upon this question, look at these minutes, pay attention to the testimony of the president and all the other witnesses and of the plaintiff, very few witnesses, and if you conclude that there was a hiring here for five years or a hiring for one year, and that the discharge was made during the term without a justifiable and a reasonable cause. then this plaintiff is entitled to recover \$1,-875 and the interest."

Verdict and judgment for plaintiff for \$1,-972.50. Defendant appealed.

Argued before FELL, BROWN, MESTRE-

pellant. Kingsley Montgomery and John B. Hannum, for appellee.

ELKIN, J. In 1902, Sloan, a promoter, being desirous of organizing a spinning company, made a proposition in writing to appellee stating the terms upon which he could become a subscriber to the capital stock of a company to be afterward incorporated for the purpose indicated, of which company Trainer was to be manager for a term of five years at a salary of \$2,500 per year. The appellee accepted the proposition, complied with all the requirements, and was selected by the board of directors as manager, and continued to perform his duties as such for a period of four years and three months, when differences arose between the manager and some officers of the board which resulted in his discharge. This suit was brought to recover the balance alleged to be due him for that portion of the last year of his term of employment in which he was not permitted to continue as manager. His right to recover is denied because of his discharge under circumstances claimed to be justifiable. testimony shows that business differences arose between the members and officers of the board in reference to the management of the company, which culminated in the resolution of August 6th being adopted, and this was followed by the resolution of August 9th.

The principal contention here is that the resolution of August 6th was not a discharge, but the grant of a leave of absence for a limited period on full pay, and that the rescinding of this resolution and the final discharge four days later on the ground of insubordination was justifiable and is sufficient to defeat a recovery in this action. These, however, were all questions for the jury, and unless there was substantial error in their submission the verdict should not be disturbed. We have concluded, after very careful consideration of the whole record, that no reversible error was committed at the trial or in the charge to the jury. While the resolution of August 6th, standing alone, might not be considered an absolute discharge, taken in connection with subsequent events and all other circumstances relating thereto, it must be considered the beginning of the end so far as his services as manager are concerned. It in substance said to the manager, "your services are no longer needed, and you must prepare to sever your relations with this company." He so understood it, and so must the other members of the board have intended it. What occurred but a few days later leaves no room to doubt that this was the intention of all parties concerned. Under these circumstances, the jury could very properly take into consideration the resolutions of August 6th and 9th and all other facts developed at the trial in order to deter- | ELKIN, and STEWART, JJ.

O. B. Dickinson and M. W. Sloan, for ap- | mine whether there was just cause for the discharge. The learned trial judge submitted all these questions to the jury in such a manner as to clearly indicate what the issue between the parties was and the grounds upon which the various contentions were based. It was a question of fact for the jury, and in our opinion nothing occurred at the trial to justify a reversal of the judgment entered on the verdict.

Judgment affirmed.

(224 Pa. 41)

MORRISON V. AMERICAN SURETY CO. OF NEW YORK.

(Supreme Court of Pennsylvania. 1909.)

1. Contracts (§ 184*)—Construction—Joint and Several Contract.

Where two or more persons enter into a contract without disclosing a different intention, the presumption is that the undertaking is a joint and not a several one; but such presumption is rebutted where the obligation contains words of severance showing that it was the intent of the parties that it should be several as well as joint.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 789; Dec. Dig. § 184.*]

Bonds (§ 53*)—Construction—Joint and Several Obligation.

SEVERAL OBLIGATION.

An obligation that one person, as principal, and another, as surety, are held to a third person in a sum stated, for the payment of which the principal binds himself and his heirs and the surety binds himself, etc., is a joint and several obligation.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. §§ 57, 69; Dec. Dig. § 53.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by William H. Morrison, to the use of the Equitable Trust Company, against the American Surety Company of New York. From a judgment for defendant on demurrer, plaintiff appeals. Reversed.

The material portion of the bond upon which suit was brought was as follows:

"Know all men by these presents, that we, of the city of Philadelphia (hereinafter called the principal), as principal, and the American Surety Company of New York (hereinafter called the surety), as surety, are held and firmly bound unto William H. Morrison, of the city of Philadelphia, Pennsylvania (hereinafter called the obligee), in the sum of - dollars, for the payment whereof the said principal binds himself, his heirs, executors, administrators and assigns, and said surety binds itself and its successors firmly by these presents."

The question raised by the demurrer was whether the bond was a joint and several one, or a purely joint one.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER,

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

F. B. Bracken, for appellant. H. Gordon: "We as principal, and the American Surety pellee.

MESTREZAT. J. In Sheppard's Touchstone it is said (page 375): "If two, three, or ed the obligee), in the sum of gation is and shall be taken to be joint only, sumption of the law is that, when two or more enter into a contract or an obligation without adding language disclosing a differ-N. W. 363, 364, 56 Am. St. Rep. 470, 474, Mr. Justice Mitchell says: "There should be question has frequently arisen in this jusome other act expressed in the singular numerance and to change a joint obligation into one that is joint and several, such as: "We bind ourselves and each of our heirs"; "our-selves, our heirs"; "and every of them"; be several as well as joint.

this controversy arises, we find the important erance. Here, in language much more diand controlling part to be the following: rect and forceful than those words, it is de-

McCouch and George S. Munson, for ap- Company of New York (hereinafter called the surety), as surety, are held and firmly bound unto William H. Morrison of the city of Philadelphia, Pennsylvania (hereinafter callmore bind themselves in an obligation thus, for the payment whereof said principal binds obligamus nos, and say no more, the obli- himself, his heirs, executors, administrators, and assigns, and said surety binds itself and and not several." In other words, the pre- its successors, firmly by these presents." The first part of this undertaking is unquestionably a joint obligation. The parties say: "We are held and firmly bound." From this ent intention, the undertaking is a joint and language the presumption arises that the not a several one. This rule has been uni- parties intended to make themselves jointly formly recognized and adhered to in all our liable on the obligation. It is however, simcases. In one jurisdiction, however, in this ply a presumption. Neither the word "joint" country, it is held that there is no presump- or "jointly," nor other language of like sigtion arising out of an obligation by two or nification, is used to show that the parties more persons that the undertaking is joint, intended a joint responsibility. Standing and not joint and several. In delivering the alone, however, the words used are sufficient opinion of the Supreme Court of Minnesota to create a joint obligation unless they are in Schultz v. Howard, 63 Minn. 196, 202, 65 modified or controlled by other language in the instrument.

Following the words just quoted, imposno presumption in favor of an obligation ing a joint liability, we find this language: being joint, instead of joint and several. "The payment whereof said principal binds Rules of law as to joint obligations are, at himself, his heirs, executors, administrabest, extremely technical and inconvenient, tors and assigns, and said surety binds itand many states have, like Illinois, enacted self and its successors, firmly by these presstatutes declaring them to be joint and sev- ents." We think these words create a severeral." While the rule is enforced in this ju- ance and are amply sufficient to overcome the risdiction, and presumption arises that the primary presumption that the obligation was obligation is a joint undertaking, yet the a joint undertaking. The obligation would presumption may be rebutted and is rebutted then be substantially in the following form: when the obligation contains words of sev- "We bind ourselves, our heirs, executors and erance showing that it was the intention of administrators; and each of us bindeth himthe parties that it should be several as well self, his heirs, executors and administra-as joint. In all contracts the parties may tors"—which the Touchstone says is the make their own bargain, and, if they do so proper form of a joint and several obligation. in language showing an intention to impose In considering the language of the bond in a several as well as a joint liability upon the the present case and its effect, it must not obligors, the courts will enforce it against be overlooked that the first part of the obeach party as well as against all the par- ligation did not declare expressly that it ties jointly. Whether therefore there is a was a joint undertaking. That it is such several as well as a joint liability in any is simply an implication or inference from case depends upon the contract or obligathe language used. The obligors primarity tion which the parties have executed. The do not declare in the bond that they are "jointly" liable, nor do they use any similar risdiction. We have held that an agreement language which shows that their undertakfor the payment of money or performance of ing is a joint one. When, however, in the subsequent part of the bond, they state the ber, but signed by two or more persons, is character of their liability, they employ lana joint and several contract. Several ex-guage which expressly declares that each is pressions have been held to be words of seviliable on the obligation. "The principal binds himself" and the "said surety binds itself" is the language of the instrument. It will be observed that these words disclose more clearly an intention on the part of the ob-"respectively"; "to be levied of our several ligors to assume a several liability than the goods." In each instance these words were words used in many of our cases, quoted held to rebut the presumption arising from above, and which we have declared do create the joint undertaking and to show that the a severance. In those cases the singular parties intended that the obligation should number, and the words "each," "every," "respectively," and "several" were the effective Turning now to the obligation out of which words in the instrument to create the sev-

clared that the "principal binds himself," and the "said surety binds itself." This is a declaration of a distinct and separate obligation by each obligor for the payment of the and of the property payment of the property of the property of the property payment of the property of the p the "said surety binds itself." This is a declaration of a distinct and separate obligasum named in the instrument. The principal assumes the obligation imposed by the contract, and the surety likewise. Each in a separate capacity, as the language clearly shows. In effect the bond declares we are held and firmly bound in the sum of . dollars, for the payment of which each obligor is responsible. By the covenant of the , parties each assumed a separate obligation to pay the sum named in the bond, and thus, under our decisions, a joint and several obligation is imposed on which an action will lie against both or either of the obligors.

We have examined all the cases cited by .. counsel, and we find none in conflict with our conclusion. The language of the obligation under consideration speaks for itself, and , points unmistakably to an intention on the , part of the obligors to assume a several as well as a joint liability.

The assignment of error is sustained, and the judgment of the court below is reversed, .. with a procedendo.

(110 Md. 299)

MAGIN et al. v. NINER et al.

(Court of Appeals of Maryland. March 23, 1909.)

1. WILLS (§ 725*)—POWER TO APPRAISE REAL ESTATE—FAILURE TO NAME DONEE. ESTATE-

Though a power of sale in a will which names no trustee to make the sale may devolve names no trustee to make the sale may devolve upon the executor, and though a power to appraise property for the purpose of offering for sale might be considered as presenting an analogous situation, yet, where the executor is one of those to whom is granted the privilege of taking part of the real estate at its appraised value, it would be inequitable to allow him to make the appraisement and then take the property at such value. erty at such value.

[Ed. Note.—For other cases, see Wills, Cent., Dig. § 1734; Dec. Dig. § 725.*]

2. WILLS (§ 725*)—POWER TO APPRAISE REAL ESTATE—FAILURE TO NAME DONEE—OR-ESTATE-PHANS' COURT.

The orphans' court is without jurisdiction to exercise a power to appraise real estate for the purpose of an option to take the property at the appraised value, where the power is given by a will without naming any donee; its jurisdiction as to the appraisement of real estate being limited to such cases as may arise under Code Pub. Gen. Laws 1904, art. 81, § 125, and article 93. §§ 158, 205.

[Ed. Note.—For other cases, a Dig. § 1734; Dec. Dig. § 725.*] see Wills, Cent.

WILLS (§ 725*)—POWER TO APPRAISE REAL ESTATE—FAILURE TO NAME DONES.

A power to appraise real estate, given by a will without naming any donee, it being provided that testator's sons should have the privi-'lege of taking the real estate at its appraised value, may be exercised by a court of equity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1734; Dec. Dig. 725.*]

erty, and with intelligence to ascertain its value after inspection and inquiry.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, p. 463.]

5. EQUITY (§ 44*)—EXCLUSIVE OR CONCURRENT JUBISDICTION—PROBATE JURISDICTION.

Where, though the orphans' court has jurisdiction of the settlement of the personal estate of a testator, and likewise, under his will, to order a sale of realty, it has no authority to carry out a provision of the will in reference to an appraisement of real estate for sale, nor to dispose of further questions not unlikely to arise over the proper construction of the will, and the equity court not only has concurrent jurisdiction over such matters with the orphans' court, but has exclusive jurisdiction in the matter of appraisement, and of any subsequent ques-tion that may arise over the will the equity court, to prevent a multiplicity of suits, or a conflict of proceedings, should be permitted to retain complete control over the settlement of the estate, and not be limited to a construction of the will and the administration of the conof the will and the administration of the estate completed in the orphans' court.

[Ed. Note.—For other cases, s Cent. Dig. § 142; Dec. Dig. § 44.*] see Equity.

Appeal from Circuit Court, Carroll County; Wm. H. Thomas, Judge.

Bill by Catherine E. Magin and others against Frank A. Niner, executor of the will of John Niner, deceased, and others. From the decree, complainants appeal. Reversed and remanded.

Argued before BOYD, C. J., and BRIS-COE, PEARCE, SCHMUCKER, BURKE, and HENRY, JJ.

Ivan L. Hoff and Guy W. Steele, for appellants. Francis Neal Parke and James A. C. Bond, for appellees.

HENRY, J. This is an appeal from a decree of the circuit court for Carroll county, sitting in equity, and involves a construction of part of the first item of the last will and testament of John Niner, late of said county, deceased, which item reads as follows: "I give and devise to my two sons Frank A. Niner and Edward Niner, all my real estate I now possess consisting of two farms. The home farm of three lots of land known as the Trumbo Wardenfelt and Houck lots containing about 27 acres more or less, also one other farm known as the Nelson farm of three lots of land known as the Nelson, William and Englar lots containing about 24 acres of land more or less after the expiration of one year from the time of my death and the said land is then to be appraised and my two sons shall have the privilege of taking said farms at the appraisement (that is Edward and Frank A. Niner), and it is my will that my son Edward Niner shall have his choice of said two farms at the appraisement if he so desires; and in

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

case neither of my sons Edward Niner or Frank A. Niner should take said farms at the appraisement then the said two farms shall be sold at public sale, and the proceeds in money of said sale of land to be equally divided among my five children; John J. Niner, Mary R. Niner, wife of William Freyman, Frank A. Niner, Catherine E. Niner, wife of Frederick Magin, and Edward Niner, their heirs or assigns, share and share alike to the five children of said testator." Letters testamentary on the estate were granted to Frank A. Niner, who is named as executor in the will. In carrying out the terms of the will the executor filed a petition in the orphans' court of Carroll county, stating that he had selected two suitable persons to make an appraisement of the real estate, whereupon the said court approved the selections made, and directed a warrant to issue to them for the appraisement of the property, after taking the oath required by law, and giving notice to the parties in interest of the time and place appointed to make the appraisement, but these proceedings were suspended, upon objections made thereto by other parties in interest, pending proceedings in the court of equity. The bill in this case was filed by Catherine Magin and others against Frank A. Niner, executor, and Frank A. Niner and Edward Niner, and sets forth, in substance, after reciting the second item of the will, that more than one year has elapsed since the death of John Niner, that the authority to appraise the real estate is void for uncertainty, and that by a true construction of the will the property should be sold, and distribution be made of the proceeds. The bill also alleges that the executor has so far administered upon the personal estate of the decedent that nothing more remains to be done by him, except to state an account and to make distribution. Further the bill says that, "by reason of the doubt arising under terms of said last will and testament of John Niner, deceased, and the conflict of views as to the proper construction thereof, it is imperative that your honorable court assume jurisdiction and control of the further administration of the estate of the said John Niner, deceased," and prays that the court may take jurisdiction in the premises, and direct and advise the executor in the further administration of the trust that the real estate be sold; that an account be taken of the personal estate of the decedent and closes with a prayer for general relief. The defendants answered, claiming that the appraisement of the real estate, as directed in the will, was the first duty now devolving upon the executor, and that the land cannot be sold until it has been appraised, and the two sons named have refused to take it at the appraised value. The answer also sets forth the proceedings for appraisement in the orphans' court, and charges that the court of equity has only a right under the circumstan-

construing the said will, and thereafter it will be the duty of the executor to proceed in the administration of the estate in the orphans' court in accord with the views of the court of equity. By agreement of counsel, the case was submitted on bill and answer, and the court below passed a decree for the sale of the real estate, and, assuming jurisdiction of the entire subject-matter, ordered the executor to proceed with and complete his administration of the estate in the court of equity. From this decree an appeal has been taken.

Practically the only question before us relates to the provision for the appraisement of the real estate. It is clear what the intention is. The power to appraise is plainly given, but there is no donee of the power, and no instructions are given as to the manner in which such appraisement shall be made. Is this provision too indefinite to be executed? If not, by whom and in what manner shall it be carried into effect? While a power of sale in a will, which names no trustee to make the sale, devolves upon the executor, if the proceeds are to be distributed by him, and he has power to arrange all details of the sale, such as the time, place, and terms thereof, and while a power to appraise for the purpose of offering for sale the property might be considered in a certain sense as presenting an analogous situation, yet in this case, where the executor is one of those who is granted the privilege of taking part of the real estate at its appraised value, it would be clearly inequitable, and against the dictates of natural justice, to allow him to do so. Nor can we find any authority for the exercise of such a power by the orphans' court, whose jurisdiction as respects the appraisement of real estate is limited to such cases as may arise under the provisions of section 125, art. 81, and sections 158 and 205, art. 93, of the Code of Public General Laws of 1904. An attempt to exercise the power by the orphans' court would be a nullity. Thom v. Thom, 101 Md. 444, 61 Atl. 193.

The proposition, therefore, narrows down to the point as to whether the power may be exercised by a court of equity. We have not found any case precisely in point, but a consideration of the nature of the duty and the broad powers of a court of equity leads us to conclude that such a court may carry out the provisions of the will. In the first place the power is one in which the two sons have a direct beneficial interest. Let us suppose that the will provided that, if the two sons did not take at the appraisement, the land should be sold for division among the other children, excluding the two sons. Such a presumption in no way affects the principle involved, but its statement better discloses the injustice that might result to these two sons if a plain direction for their benefit is held to be incapable of execution. The privilege of buying at an apces to assume jurisdiction for the purpose of praised value out of the open market might intended that the two sons named should have this advantage. While the act of appraisement itself is not a trust, yet it is a ministerial duty preliminary to the execution of an imperative provision of the testator's will, the carrying out of which is in the nature of a trust to be performed for the benefit of the two sons. In section 249, Perry on Trusts, it is said: "In all such cases where parties have an imperative power or discretion given to them, and they die in the testator's lifetime, or decline the trust or office, or disagree as to the execution of it, or do not execute it before their death, or if from any other circumstance the exercise of the power by the party intrusted with it becomes impossible, the court will imply a trust, and will put itself in the place of the trustee, and will exercise the power by the most equitable rule; and, although there may be great difficulties and impracticabilities in the way, yet the court will exercise the power and enforce the trust." And the same author says: "If the trust or power can by any possibility be exercised by the court, the nonexecution by the party intrusted should not prejudice the party beneficially interested." Unless the power or the trust is one of a personal nature, intended to be exercised or not according to the discretion of the person named, we can see no difference in principle or logic between the court acting in a case where no donee of the power is named and in a case where the donee named for any cause fails or refuses to act. In both cases the power exists in all its vigor, but in the one the testator has failed to name in the instrument the donee by whom it shall be executed, and in the other the person so named has failed to carry out the trust reposed in him. In either case, however, the court can itself assume the execution of the power, and will carry it in effect in good faith and in the usual manner of doing the business.

Now, there is nothing mysterious or uncertain about the procedure necessary to appraise property in this state. There are no insurmountable difficulties in the way of carrying out the testator's will. praisement in legal and business matters has a definite meaning, which will save the court from any vague guessing as to what the testator desired. In this state the term denotes the valuation of goods and chattels or real estate by two persons of suitable qualifications, fair, impartial, and disinterested-having knowledge of the property to be appraised, and with intelligence to ascertain its value after inspection and inquiry on the subject. This is the uniform understanding of an appraisement, and of the practice in making it, and we do not think that a court of equity would be venturing on uncertain ground by appointing two persons, upon proper application in this case, with

be a valuable one, and the testator clearly | the real estate of John Niner, and make return of such appraisement to the court appointing them. Upon notice of such return it will then be incumbent upon the two sons, Edward and Frank A. Niner, within a reasonable time, to be fixed by the court, to accept, or refuse to accept, the land at such valuation. If they accept, the court can appoint a trustee to convey the land to them, or could direct the executor to do so under the power given him to sell and convey the real estate in the last item of the will. court can see that this section of the will of John Niner, including the appraisement, is fairly carried out. It can be done at a trifling cost, and we can see no impossibilities in the way.

As stated above and, as remarked in the opinion of the learned court below, we have not been able to find any case precisely in point to the one before us, and must decide it upon general principles. In the case of Irving v. De Kay, 9 Paige (N. Y.) 521, where the will read: "All my property shall be taken in one valuation to be made by appraisers to be appointed by my executrix and executors, or a majority of them, or of the survivor of them"-the court said it would "provide for the appointment of appraisers according to the direction of the will, if the parties cannot agree upon them without the assistance of the court." In Bull v. Bull, 8 Conn. 47, 20 Am. Dec. 86, in which, the executors having died without executing a power of appointment to dispose of the residue of testator's property "among our brothers and sisters and their children, as they shall judge to be most in need of the same; this to be done according to the best of their discretion"—the court directed a reference to determine who were the most needy. Hill on Trustees, 67.

Another point raised by the pleadings in the record is that the province of the court of equity in these proceedings is limited to a construction of the will, and that the administration of the estate, under the will, must be completed in the orphans' court which first assumed jurisdiction. As a general proposition it is true that, where courts have concurrent jurisdiction, the one first assuming it is entitled to retain the same to the end of litigation. This is undoubtedly true where the matter for settlement is single, and the jurisdiction of both courts over it is unquestioned. But in the present case we have a more complicated situation. The orphans' court has jurisdiction over the settlement of the personal estate, and likewise under the will to order the sale of the realty. But it has no authority, as we have seen above, to carry out the provision in reference to the appraisement, nor has it jurisdiction to dispose of any further questions that are not unlikely to arise over the proper construction of the testator's will. court of equity, not only has concurrent ju-'e qualifications above given, to appraise risdiction over the matters mentioned with

the orphans' court, but has exclusive juris- | 6. Executors and Administrators (§ 43*) diction in the matter of appraisement, and in any subsequent question that may arise over the will. In order to prevent a multiplicity of suits, or a conflict of proceedings, we think, therefore, that the court of equity should be permitted to retain full and complete control over the settlement of the estate, so that all matters may be disposed of under the guidance of one tribunal. Story's Eq. Jurisprudence, \$ 64, etc.

It follows from what we have said that the decree of the lower court must be reversed in so far as it directs a sale of the real estate, and the cause remanded to the court of equity for further proceedings in conformity with this opinion.

Decree reversed and cause remanded; the costs to be paid out of the estate.

(110 Md. 204)

FOWLER v. BRADY et al.

(Court of Appeals of Maryland. Feb. 19, 1909.)

1. EXECUTORS AND ADMINISTRATORS (§ 70*)—
INVENTORY — CORRECTION — CONCLUSIVE-

If the orphans' court, acting within its jurisdiction, on petition of one claiming to be the owner of personal property, has ordered such property to be stricken from the inventory of a decedent's estate, the court cannot order the same issue to be sent to a jury for trial on rectition of a creditor of the estate petition of a creditor of the estate.

[Ed. Note.—For other cases, see and Administrators, Dec. Dig. § 70.*] Executors

2. Courts (§ 198*)—Courts of Probate Ju-

BISDICTION—NATURE OF JURISDICTION.

The orphans' court is a court of limited jurisdiction and can only exercise such jurisdiction as has been expressly conferred upon it by statute.

[Ed. Note.—For other cases, see Courts, Cent. Dig. 53 471, 472; Dec. Dig. 5 198.*]

3. Courts (§ 2001/2*)—Courts of Probate Jurisdiction—Nature of Jurisdiction.

The orphans' court has no jurisdiction to determine questions of title to personal property except under Code Pub. Gen. Laws 1904, art. 93, § 243, when the property is claimed by the administrator against the estate.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 479; Dec. Dig. § 2001/2.*]

4. COURTS (\$ 2001/2*)—COURTS OF PROBATE JURISDICTION—DETERMINATION OF TITLE.

While an inventory returned by an administrator may, upon his application to the orphans' court, be corrected, the court has no authority, on the petition of one claiming property included in the inventory, to determine the question of title against the claim of the administrator that it belongs to the estate.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 479; Dec. Dig. § 200½.*]

5. Courts (§ 202*)—Courts of Probate Ju-bisdiction—Procedure.

It is only in cases where the orphans' court has jurisdiction to determine the matter that it is authorized to send issues of fact to a court of law to be tried.

[Ed. Note.-For other cases, see Courts, Dec. Dig. § 202.*]

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ASSETS-PERSONAL PROPERTY.

The title to personal property of a de-ceased is vested in the administrator, and he is the only person who can assert title to it on be-half of the estate for the benefit of creditors.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 279; Dec. Dig. § 43.*]

7. EXECUTORS AND ADMINISTRATORS (§ 65*)-ASSETS-INVENTORY.

If property not included in an administraor's inventory belongs to the estate, it is his duty to make return of it as required by Code Pub. Gen. Laws 1904, art. 93, § 215, and upon his failure to do so after notice a creditor of the estate may file a petition against him in the orphans' court, under section 259, to require him to do so.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 314; Dec. Dig. § 65.*]

8. APPEAL APPEAL AND ERBOR (§ 712*)—RE MATTERS NOT APPABENT OF RECORD.

Affidavits or other papers filed in the appellate court, but not made part of the transcript filed with the clerk, as required by rule 10, will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2951; Dec. Dig. § 712.*]

Appeal from Orphans' Court, Calvert Coun-

Petition by John W. Fowler against Basil O. Brady and another. From an order dismissing the petition, the petitioner appeals. Affirmed.

Argued before BOYD, C. J., and PEARCE, SCHMUCKER, BURKE, WORTHINGTON, THOMAS, and HENRY, JJ.

Francis Gantt, for appellant.

THOMAS, J. The appellant, John W. Fowler, filed in the orphans' court of Calvert county a petition alleging: That on the 26th of September, 1906, that court, on the petitions of Basil O. Brady and Lee Brady, ordered a yoke of oxen and a horse to be stricken from the inventory of the personal estate of Basil T. Brady, deceased, returned to that court by T. M. Chaney, the administrator, to the great damage of the petitioner, who is the largest creditor of the deceased: that, "upon newly discovered evidence," the petitioner was ready to prove to that court that the said Basil O. Brady and Lee Brady did not at the death of the deceased own said property, but that the deceased obtained said yoke of oxen from Basil O. Brady in exchange for another yoke of oxen, and said horse from Lee Brady in exhange for another horse; that at the time of his death the deceased also owned another ox, which was not included in the inventory returned by the administrator, because soon after the death of the deceased it was sold by Lee Brady, who appropriated the proceeds of the sale and never accounted therefor; and that there "were other effects" of the deceased, to wit, "valuable guns and other things," wrongfully taken from the premises of the deceased which

should nave been included in the inventory. The prayer of the petition is that "these issues of fact be sent to a court of law to be tried and determined by a jury," and "that notice be given to the parties to make answer." In reply to a writ of diminution, the register of wills of Calvert county transmitted to this court certified copies of the petitions of Basil O. Brady and Lee Brady, alleging that the yoke of oxen and horse referred to belonged to them, and praying that they be stricken from the inventory returned by the administrator, and of the orders of the orphans' court striking said property from the inventory.

It therefore appears from the petition of the appellant, and from the petitions of Basil O. Brady and Lee Brady, and the orders of the court thereon, passed on the 11th of September, 1906, that the orphans' court determined that the yoke of oxen and horse referred to in said petitions and included in the inventory returned to that court, by the administrator, were not the property of the deceased, but the property of the said Basil O. Brady and Lee Brady, and accordingly ordered said property to be stricken from the inventory, and that the object of the appellant's petition is to now have a jury pass upon the identical questions that were passed upon and determined by the orphans' court on the petitions of Basil O. Brady and Lee Brady; in other words, to have a jury review the action of the court. If the orphans' court had jurisdiction to determine the question of title to the property on the petitions of Basil O. Brady and Lee Brady and to pass the orders of September 11, 1906, until these orders were revoked by that court there were no issues left to be tried by a jury. The only questions presented by the petitions were determined by the court, and its action, while subject to review and reversal on appeal taken in proper time, could not be reviewed by a jury. Miller v. Gehr, 91 Md. 716, 47 Atl. 1032.

But did the orphans' court have jurisdiction to pass the orders of September 11, 1906? Section 204, art. 93, Code Pub. Gen. Laws 1904, provides that in every case where letters testamentary or of administration are granted "an inventory or inventories shall be returned to the office granting the administration." Section 222 declares that: "With the exception of the articles enumerated in the two preceding sections (wearing apparel, and provisions laid up by the deceased for the consumption of the family) all the assets of the deceased shall be included in the inventory." Section 242 directs how the administrator shall proceed to recover property belonging to the estate which is concealed, and section 248 makes provision for cases where the administrator conceals or has in his hands property which he has omitted to return in the inventory or list of debts. The purpose of these several sections is to re-

complete inventory of all the assets of and property belonging to the estate. The title to this property is vested in the administrator, and he is required, by section 4, in stating his account, to charge himself with the assets which have come to his hands according to the inventory or inventories returned by him to the orphans' court. He may, in a court having jurisdiction, maintain an action of trespass or trover against one who takes the goods of the estate before he was actually in possession of them, or he may sue in replevin to recover them. Rockwell v. Young, 60 Md. 563; Dempsey v. McNabb, 73 Md. 433, 21 Atl. 378; Linthicum v. Polk, 93 Md. 84, 48 Atl. 842. But the orphans' court is a court of limited, and not general, jurisdiction, and can only exercise such jurisdiction as has been expressly conferred upon it by statute. Section 260 of article 93 expressly declares that: "The orphans' court shall not, under pretext of incidental power or constructive authority, exercise any jurisdiction not expressly conferred by law." it has been repeatedly held that the orphans' court has not jurisdiction to determine questions of title to personal property, except under section 243, where a person interested in the estate charges the administrator with concealing or having in his hands property belonging to the estate which he has omitted to return in the inventory. Taylor v. Bruscup, 27 Md. 219; Gibson v. Cook, 62 Md. 256; Daugherty v. Daugherty, 82 Md. 229, 33 Atl. 541; Linthicum v. Polk, supra.

There is no reason why the orphans' court should be given jurisdiction to determine the title to property claimed by a party against the administrator. The title to property belonging to the estate is in the administrator. and he, as we have said, can maintain an action to test the title in a court of law. But, when the property is claimed by the administrator against the estate, the orphans' court is authorized by section 243 to determine the title; otherwise, the title to the property of the deceased being in the administrator, there would be no way of requiring him to return a complete inventory of the assets of the estate. While there can be no doubt that an inventory returned by an administrator may, upon his application to the orphans' court, be corrected, and property which he has erroneously included in it may be omitted, the orphans' court has no authority, on the petition of one claiming title to property included in the inventory, to determine the question of title against the claim of the administrator that it belongs to the estate. If the administrator has the property in his possession, the party claiming it is not prejudiced by the fact that it is included in the inventory. He may recover it from the administrator in a proper action in a court having jurisdiction to determine the question of title. If he is in possession of the property, he may force the administrator to sue for quire the administrator to return a full and its recovery, but he cannot have the question



of title determined by the orphans' court on a pplication to have the property stricken from the inventory.

ters." If the property mentioned in the petition of the appellant as not having been infrom the inventory of the administrator

But because the orphans' court of Calvert county had no authority to pass the orders of September 11, 1906, it does not follow that there was error in its refusal on the passes.

of the appellant to send issues to a court of law to determine the question of the title to the property referred to. The object and purpose of issues from an orphans' court to a court of law is to inform the orphans' court as to certain facts, alleged on the one side and denied on the other, involved in a controversy it has jurisdiction to decide. It is only in cases where the orphans' court has jurisdiction to determine the matter that it is required to send issues to a court of law to be tried. The finding of the jury is intended as an aid to the orphans' court in the exercise of the jurisdiction conferred upon it, and, while that court is bound by the verdict of the jury, it is its final order, and not the finding of the jury, that determines the case. Therefore, as the orphans' court did not have jurisdiction to decide the questions of title raised by the petitions of Basil O. Brady and Lee Brady, it was not authorized, on the application of the appellant, to send to a court of law issues of fact involved in a case it did not have jurisdiction to determine. Yingling v. Hesson, 16 Md. 112; Gibson v. Cook, supra. Moreover, if the property mentioned in the petition of the appellant belongs to the estate of Basil T. Brady, deceased, the title to it is vested, as we have said, in the administrator, and he is the only person who can assert title to it on behalf of the estate. So, even if the orphans' court had jurisdiction, the appellant, as a creditor of the estate, would have no standing in court to test the question of title. For the reasons we have stated, there was no error in the refusal of the orphans' court to send issues to a court of law, and the order of that court, dismissing appellant's petition, must be affirmed.

But while the appellant is not entitled to the relief prayed in his petition, he, as a creditor, is interested in the proper administration of the estate. In addition to the sections of the Code we have referred to, section 215 of article 93, provides that: "Whenever personal property of any kind, or assets not mentioned in an inventory already made, shall come to the possession or knowledge of an administrator or collector, an account or inventory of the same shall be returned, appraised by two respectable disinterested sworn appraisers appointed by any justice of the peace or judge of the orphans' court, within two calendar months from the time of the discovery." By section 259 of the same article, the orphans' court is given ample power to compel an administrator to "fulfill his duty, on pain of revocation of his letters." If the property mentioned in the petition of the appellant as not having been included in the inventory of the administrator is the property of the decased, it is the duty of the administrator to make a return of it fo the orphans' court, and, upon his failure or refusal to do so after notice, the appellant may file a petition against him in the orphans' court to require him to do so, and, upon proper application to the orphans' court, that court, after due notice to Basil O. Brady and Lee Brady, ought to rescind its orders of September 11, 1906, and to require the property mentioned in said orders to be included in the inventory returned by the administrator.

As the tenth rule of this court provides, that "no paper shall be read or referred to as part of the record in the argument of any case, without consent of the counsel and leave of the court, unless such paper be copied into and made part of the transcript filed with the clerk," we have not, in disposing of the case, considered any of the affidavits or other papers filed by the appellant in this court. Order affirmed, with costs.

(110 Md. 222)

NICHOLSON v. ELLIS.

(Court of Appeals of Maryland. March 24, 1909.)

1. CONTRACTS (§ 137*)—LEGALITY OF OBJECT—IMMORALITY.

A stipulation in a contract to do an immoral act will render the entire contract void.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 705; Dec. Dig. § 137.*]

2. CONTRACTS (§ 136*)—ILLEGALITY OF OBJECT.

A contract is void the entire consideration of which is illegal, though not immoral.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 681; Dec. Dig. § 136*.]

3. Contracts (§ 137*)—Partial Invalidity— Effect.

The parties executed a contract by which appellant transferred all his interest in certain acid works, including the stock, trade, formulas, etc., in consideration of a cash payment and notes secured by mortgage, the contract providing in a separate paragraph that appellant should not conduct a similar business in the United States, or reveal any of the formulas thereby conveyed. Held that, if the covenant not to re-engage in business or reveal the formulas was illegal, as against public policy, it was not contrary to good morals and was separable, so that the whole contract was not void, and the notes and mortgage were valid.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 701-712; Dec. Dig. § 137.*]

Appeal from Circuit Court of Baltimore City; Chas. W. Henisler, Judge.

Action by Harry R. Nicholson against Luke Ellis. From a judgment for defendant, sustaining exceptions to the confirmation of a mortgage sale, plaintiff appeals. Reversed and remanded. The following is the agreement referred to in the opinion:

"This agreement, made this 30th day of April in the year one thousand nine hundred and seven, witnesseth: That Harry R. Nicholson, of the city of Baltimore, state of Maryland, in his own right and trading as the Baltimore Acid Works, does hereby grant, assign, and convey unto Luke Ellis. of said city and state, his personal representatives and assigns, all his, the said Harry R. Nicholson's right, title, and interest in and to the use of the name 'Baltimore Acid Works,' stock in trade, book accounts, good will of the business, and formulas for making No. 2 distilled sulphurous acid and benzine bleach, to the intent and purpose that the said Luke Ellis may conduct the business of the Baltimore Acid Works free and clear from any right of the said Nicholson to interfere therein or therewith. That the consideration for the above sale is six hundred dollars, of which amount one hundred dollars has been paid in cash prior to the execution hereof and the balance of five hundred dollars secured by a certain mortgage on real estate and chattels situated in the city of Baltimore. That the said Harry R. Nicholson hereby agrees not to enter into or conduct a like or similar business in the United States of America, nor to reveal to any one other than the said Luke Ellis the formulas hereby conveyed. Witness the hands and seals of the parties hereto. Harry R. Nicholson. [Seal.] Luke Ellis. [Seal.] Test: Charles E. Ecker."

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTH-INGTON, THOMAS, and HENRY, JJ.

Charles E. Ecker, for appellant. G. Ridgely Sappington and Charles G. Baldwin, for appellee.

WORTHINGTON, J. This case comes before us upon appeal from the circuit court of Baltimore city, and presents the rulings of that court upon exceptions to the ratification of a mortgagee's sale made under and by virtue of a consent decree obtained in that court on July 8, 1908. The lower court sustained the exceptions, annulled the sale, and declared the decree void on the ground that the consideration for the mortgage and mortgage notes was illegal.

The consideration in this case is held to be illegal because the agreement containing the promise to pay the money secured by the mortgage contains, in addition to a transfer of certain property rights and secret formulas to the promisor, also a covenant on the part of the promisee to refrain from doing certain things which are deemed to be illegal as in restraint of trade; and the argument is that, therefore, the whole consideration is tainted and insufficient to support a promise. It seems to be well settled

that any stipulation to perform an immora! act would taint the entire contract, and render it void in toto. Anson on Contracts, p. 251; Union Locomotive & Express Co. v. Erie Ry. Co., 35 N. J. Law, 240; Emerson v. Townsend, 73 Md. 224, 20 Atl. 984. So, also, where the entire consideration for a promise is illegal merely though not immoral, the contract is void. Wildey v. Collier, 7 Md. 273, 61 Am. Dec. 346. So, also, it has been held that, where a part of the consideration is good and part illegal merely, though not contrary to good morals, if the bad part of the consideration is not severable from the good, the whole promise fails. Bishop v. Palmer, 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 339. On the other hand, the Supreme Court of New Jersey in a wellconsidered opinion by Beasley, Chief Justice, maintained that a stipulation which was not immoral would not vitiate or avoid the entire agreement, although such stipulation was so blended with the residue of the consideration, consisting of valuable rights and interests, as not to be severable from it. Fishall v. Gray, 60 N. J. Law, 5, 37 Atl. 606. The learned judge in that case said: "There is nothing immoral or criminal in a stipulation not to engage in a certain business. A man may bind himself to such an abstention without incurring any legal penalty. only effect is that such an agreement cannot be enforced either at law or in equity." Further on in the same opinion he said: "If it be true that by reason of the promise of the plaintiff to abstain from this business being blended with the residue of the consideration that consisted of valuable interests transferred to the company will prevent a recovery of the price agreed to be paid for such property, and will enable the company to retain it without giving the equivalent agreed on, a result certainly obtains that would be both wholly unconscionable and impolitic." In a later New Jersey case (1901) the Court of Errors and Appeals of that state said: "The contract between the parties was based on sufficient reciprocal consideration, apart from the plaintiff's restrictive agreement. Both parties must be presumed to have known the law as to contracts in restraint of trade, and therefore the restrictive covenant, if invalid, ought not to be held to avoid the valid covenants. Contracts in restraint of trade are loosely spoken of as 'illegal contracts.' It would be more accurate to style them 'unenforceable contracts." These cases and others that might be cited show that there is some contrariety of opinion as to how far a partial illegality of consideration involving no moral turpitude will affect the whole contract.

ing certain things which are deemed to be illegal as in restraint of trade; and the argument is that, therefore, the whole consideration is tainted and insufficient to support a promise. It seems to be well settled

nant is so far distinct from the residue of the consideration for which the promise to pay the money secured by the mortgage was made, as to be easily severable from it. The agreement above mentioned which we will ask the reporter to set out in full in his report of this case is in effect the sale and transfer of all the right, title, and interest of Harry R. Nicholson, the appellant, in and to the use of the name "Baltimore Acid Works," also of the stock in trade, book accounts, good will of the business and formulas for making No. 2 distilled sulphurous acid and benzine bleach, in consideration of the payment to him, by Luke Ellis, the purchaser, of the sum of \$600, \$100 of which was paid in cash and promissory notes, secured by mortgage, given for the residue. In a separate paragraph at the end of the contract is the covenant on the part of Nicholson not to enter into or conduct a like or similar business in the United States, nor to reveal to any one other than the said Luke Ellis, the formulas thereby conveyed to him. No part of the purchase price is expressed to be paid for this covenant, and so far as appears from the language and form of the agreement, the covenant was an afterthought, voluntarily entered into by Nicholson as a better protection to his grantee. At any rate, the covenant is clearly separable from the other part of the consideration, and, even if it be illegal as against public policy, it contains nothing contrary to good morals, and nothing for which a legal penalty is incurred, and therefore it does not taint the whole agreement so as to render it void in toto. As was said by Chief Baron Pollock in Green v. Price, 13 Mees. & W. 695: "It is not like a contract to do an illegal act. It is merely a covenant which the law will not enforce, but the party may perform if it chooses." There is no intimation that the defendant in this case has not faithfully observed the covenant, but we are asked to declare void a mortgage given by the purchaser to secure the balance due of the purchase money agreed to be paid for a certain business, stock in trade, good will, and secret formulas merely because the seller, for the better protection of the purchaser, at the end of the agreement added the restrictive covenant above mentioned. As this covenant is not so interwoven with the residue of the consideration as to be inseverable from it, we think the promissory notes secured by mortgage given for the residue of the purchase money are valid and enforceable contracts, and that there was error in the ruling of the lower court holding the contrary. It follows that the decree of the lower court must be reversed, and the cause remanded for further proceedings.

Decree reversed, with costs, and cause remanded.

(110 Md. 818) NATIONAL SHUTTER BAR CO. v. C. F. S. ZIMMERMAN & CO.

(Court of Appeals of Maryland. March 23, 1909.)

1. Corporations (§ 35*) — Creation — Pay-MENT OF BONUS TAX.

Code Pub. Gen. Laws 1904, art. 81, \$ 98, requiring every corporation, other than the excepted classes, incorporated under any general or special law, to pay the bonus tax prescribed to the State Treasurer, and providing that no corporation shall have or exercise any corporate power until such bonus tax has been paid, makes payment thereof a condition precedent to corporate existence.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 35.*]

2. LIBEL AND SLANDER (§ 21°)-Person Li-BELED.

To maintain an action for libel, it must appear that the defamatory words refer to some ascertained or ascertainable person, and that person must be plaintiff.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 103; Dec. Dig. § 21.*]

8. LIBEL AND SLANDER (§ 21*)-INJURY TO PROFESSION OR BUSINESS.

Where words are actionable only because of their effect on plaintiff in his profession, trade, or business, it must appear that plaintiff was at the time in such profession, trade, or business.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 103; Dec. Dig. § 21.*]

4. CORPORATIONS (§ 29*)—LIBEL—DEFENSES.

It is a good defense to an action for libel brought by a corporation that at the time of the publication plaintiff had not paid the bonus tax required by Code Pub. Gen. Laws 1904, art. 81, 198, since the payment of that tax is a condition precedent to corporate existence, and such defense is not precluded by Acts 1908, p. 27, c. 240, 8 6, providing that no certificate of incorporation shall be declared void for formal defects merely, and that where an effort has been made, in good faith, to form a corporation, neither party to any transaction with it shall deny the legality of its incorporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 77-79; Dec. Dig. § 29.*]

5. COBPOBATIONS (§ 25°)—PROCEEDINGS TO INCORPOBATE—DEFECTS—CURATIVE ACTS.

Acts 1908, p. 27, c. 240, § 6, providing that no certificate of incorporation shall be declared void for formal defects merely, and that where an effort has been made, in good faith, to form a corporation, neither party to any transaction with it shall deny the legality of its incorporation, is intended to save the incorporation of persons who have, in good faith, made an effort to comply with the requirements expressly made conditions precedent to the possession or use of corporate franchises, and does not apply where through indifference or neglect there has been no such attempt at all.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 25.*]

6. CORPORATIONS (\$ 34*)—CORPORATE EXIST-ENCE—ESTOPPEL TO DENY.

In an action for libel by a corporation,

defendants are not estopped to make the de-fense that at the time of its publication plaintiff was without corporate existence because it had not paid the required bonus tax, by the fact that defendants directed letters to it as a corporation, referred other persons to it as such,

action against it as such.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 81-96; Dec. Dig. § 34.*]

7. ESTOPPEL (§ 110*)—PLEADING.

An estoppel in pais cannot be pleaded, though it may be given in evidence, and thus made operative under the direction of the court. [Ed. Note.—For other cases, see I Cent. Dig. § 300; Dec. Dig. § 110.*] Estoppel,

8. Associations (§ 20°)-Libel-Right of MEMBER TO SUE.

Members of an unincorporated association may sue for libel as individuals having a common interest in the business injuriously affected thereby.

[Ed. Note.—For other cases, see Associations, Dec. Dig. § 20.*]

Appeal from Circuit Court, Carroll County.

Action by the National Shutter Bar Company against C. F. S. Zimmerman & Co. Judgment of non pros., and plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRIS-COE, PEARCE, SCHMUCKER, BURKE, and HENRY, JJ.

Leo Weinberg and Guy W. Steele, for appellant. Francis Neal Parke and Hammond Urner, for appellee.

SCHMUCKER, J. The vital question presented by this appeal is whether a corporation; which did not pay its bonus tax until after the publication of an alleged libelous circular letter, can recover damages in an action, on the case against the publisher of the letter, for libel. The further question whether the defendants were estopped, by certain conduct on their part, from relying on the nonpayment of the bonus tax as a defense to the action, is also presented by the record. We will consider both questions.

The suit was instituted on August 29, 1906, in the circuit court for Frederick county, by the National Shutter Bar Company, as a body corporate, against the appellees, as copartners trading as C. F. S. Zimmerman & Co., and after two removals it reached the circuit court for Carroll county, where the judgment of non pros., from which the appeal was taken, was entered on the 8th of December, 1908. The alleged cause of action was the issue by the defendants on the 2d day of July, 1906, of a circular letter to various persons and firms doing business with them and also with the plaintiff company, stating that certain shutter bars, which were then being manufactured and sold by that company, were direct infringements of patent rights owned by the defendants, and giving notice that all sellers and users of the bars would be prosecuted for the infringement. We will assume, for the purposes of this opinion, without, however, so deciding, that this circular letter was libelous in character. The pleadings in the case were protracted and voluminous, and the to comply with the rule the court entered the

and procured one of their number to bring an | record bristles with demurrers and excep-There were four successive declarations, one original and three amended ones, whose claims for damages grew from \$20,-000, in the first one, to \$50,000, in the last. They were separately demurred to. Then, in response to demands from the defendants, the plaintiff filed in succession four bills of particulars, to each of which exceptions were filed. To discuss in detail the technical questions of pleading thus raised would be academic and useless, as the defense of the nonexistence of the plaintiff corporation at the date of the publication of the alleged libelous letter, which was presented in the manner hereinafter mentioned, constituted a fatal obstacle to a recovery by the plaintiff.

The defendants' demurrer to the third amended declaration having been overruled, they filed seven pleas, the last one of which interposed the defense to which we have referred, by averring that the corporation bonus tax had not been paid by the plaintiff when the alleged libelous letter was issued. The plaintiff demurred to that plea, but the court overruled the demurrer. Thereupon the plaintiff filed a replication to the plea, admitting that the bonus tax had not been paid at the time therein alleged, but averring that it had been paid on the 6th of August, 1906, before the institution of the suit, and further averring that the defendants were estopped from denying the corporate existence of the plaintiff at the time of the publication of the letter complained of, because they had recognized its existence by directing letters to it as a corporation and by referring other persons to it as such for information, and by procuring one of their number to sue it, as such, in the Circuit Court of the United States for the District of Maryland. The defendants demurred to this replication, and the court sustained their demurrer. The plaintiff then tendered, for filing, a second replication, asserting its incorporation under the general laws of the state on the 11th of December, 1905, by the filing of its duly approved certificate of incorporation in the office of the clerk of the circuit court for Frederick county, and that thereupon the persons named in the certificate to serve as directors for the first year proceeded to a: I did duly organize and carry on the business of making and selling of shutters bars, and that on the 6th of August, 1906, it paid its bonus tax. It then alleged the issue by the defendants of the circular letter, and averred that in consequence thereof it had suffered great loss and damage on and after the 6th of August, 1906. To this replication the defendants interposed a motion of ne recipiatur, which the court sustained. A rule to plead further was then laid upon the plaintiff, and upon its refusal

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date. & Reporter Indexes

the appeal was taken.

Without pausing to inquire whether the first of these two replications was open to objection for duplicity, we will consider whether either of them constituted a sufficient reply to the seventh plea. In this connection it may be premised that the nonpayment of the bonus tax was properly pleaded by way of traverse, and not in abatement, for the plea did not interpose an objection to the further progress of the suit, but it denied the existence of the cause of action it-The theory of the plea is that the self. plaintiff corporation had not been created at the time of the commission of the wrong in the declaration alleged, and therefore could not have been injured by it. The effect upon corporate existence of the nonpayment of the bonus tax, required by section 98, art. 81, Code Pub. Gen. Laws 1904, to be made as an essential step in the formation of corporations of the class to which the present plaintiff belongs, has received repeated consideration at the hands of this court, and is no longer an open question. Maryland Tube Works v. West End Improvement Co., 87 Md. 207, 39 Atl. 620, 39 L. R. A. 810; Cleaveland v. Mullin, 96 Md. 598, 54 Atl. 665; Murphy v. Wheatley, 102 Md. 501, 63 Atl. 62; State v. Consol. Gas Co., 104 Md. 364, 65 Atl. 40. The tenor and effect of these decisions was well expressed by the late Chief Justice McSherry, speaking for the court in Cleaveland v. Mullin, supra, where he said: "Section 88f (now section 98, art. 81, Code Pub. Gen. Laws) prescribes the payment of the bonus tax as a condition precedent to the possession or exercise by any corporation, other than the excepted classes, of any corporate powers. No company 'shall have,' that is, possess, 'or exercise,' that is, use, any corporate powers until said bonus tax has been paid.' It would be difficult to frame a more emphatic or sweeping condition precedent. * * * That section 88f imposes a condition precedent is no longer an open question in this state. Md. Tube Works v. West End. Imp. Co., 87 Md. 215, 89 Atl. 620, 39 L. R. A. 810. 'There is certainly no doubt that, where a corporation is created by statute, or under a general statute, * * * which requires certain acts to be done before it can be considered in esse, there those acts must appear to have been done in order to establish the corporate existence.' Lord v. Essex Bldg. Ass'n, 37 Md. 325. No less emphatic is the case of Franklin Fire Ins. Co. v. Hart, 31 Md. 59."

The cases to which we have referred were cases in contract, but on principle the same rule should be applied to cases in tort. In Maryland Tube Works v. West End Imp. Co., supra, this court cited with approval and relied on, in support of the proposition that statutory conditions precedent must have been complied with to give existence to cor-

judgment of non pros, against it, from which, case of Jones v. Aspen Hardware Co., 21 Colo. 263, 40 Pac. 457, 29 L. R. A. 143, 52 Am. St. Rep. 220, which was an action of replevin The Colorado statute required the payment, by persons forming a corporation under its provisions, of a fee to the Secretary of State "for incorporation and certain other privileges," and further provided that no such corporation "shall have or exercise any corporate powers or be permitted to do any business in this state until the said fee shall have been paid." It was there held that the corporation had no title to the property it sought to replevin, which had been conveyed before it had paid the fee required by the statute, and thereby come into existence as a corporation. See, to same effect, as to necessity of compliance with statutory conditions precedent to give existence to corporations: 10 Cyc. p. 227; 7 A. & E. Encycl. p. 655. The authorities agree that, in order to maintain an action for libel or slander, it must appear that the defamatory words refer to some ascertained or ascertainable person, and that person must be the plaintiff. Odgers on Libel & Slander, 126, 137; Frazer on Libel & Slander, 5; A. & E. Encycl. of Law (2d Ed.) vol. 18, p. 994, and cases there cited; Avirett v. State, 76 Md. 510, 25 Atl. 676, 987. "And where words are actionable only because of their effect on the plaintiff in his profession, trade, or business, there must be a distinct allegation that the plaintiff was, at the time of such scandal, in such profession or exercising such calling." Dicken v. Shepherd, 22 Md. 416. How can it possibly be said in the present case that the alleged defamatory circular referred to the plaintiff corporation, when that corporation was not in existence at the time the circular was published? Or how could it be truthfully alleged that the plaintiff, which did not then exist, was at the time engaged in the business for the injury to which the damages mentioned in the declaration are claimed?

The appellant's counsel, on their brief and at the hearing of the appeal, invoked in its behalf the provisions of section 6 of chapter 240, p. 27, of the Acts of 1908, and contended that it was intended as an enabling or curative act to counteract the effect of the decisions of this court to which we have referred construing the ninety-eighth section of article 81 of the Code, and that since its passage the defense set up in the seventh plea could no longer be relied on. We do not regard this contention as sound. Section 6 provides that: "No certificate of incorporation shall be declared void for formal defects merely: and where an effort has been made in good faith to form under the laws of this state a corporation formable thereunder, neither party to any transaction with it shall deny the legality of its incorporation or organization in any suit or proceeding growing out of such transaction; and 'transaction' shall include any wrong to person or property porations formed under general laws, the giving rise to a cause of action or equitable relief against such corporation." We do not ! think that the defense under consideration to the present suit comes within either the letter or the spirit of that section. In the first place, the plea does not deny the legality of the plaintiff's incorporation or its right to sue or be sued. It merely says that the plaintiff had not yet become incorporated or come into existence when the letter complained of was issued, and was therefore not injured by the publication. There is no republication alleged in any of the declarations filed in the case. In the second place, the obvious purpose and spirit of section 6 is to save the incorporation of persons who have in good faith made an effort to comply with the requisites of the corporation laws of the state, but whose compliance turns out to have been in some respects irregular or informal. It was not intended to cover cases where, through indifference or neglect, there has been no attempt at all to comply with important requirements of the law, which by its express terms are made conditions precedent to the possession or use of any corporate franchises. Section 98, art. 81, of the Code, which imposes the payment of the bonus tax on corporations, provides that the tax "shall be due and payable upon the incorporation of said company." In the present case the plaintiff asserts that it was duly incorporated on the 11th day of December, 1905, and that the persons named in its certificate to act as directors for the first year forthwith met and organized and proceeded to carry on the business of making and selling shutter bars, but it is nowhere averred by it that it made any effort or attempt, bona fide or otherwise, to pay its bonus tax until the 6th of August, 1906.

Nor do we think that the alleged estoppel relied on in the first replication to the seventh plea was a valid one. It is essential to the validity of an estoppel that the party setting it up must have acted or relied to his prejudice on the conduct or representations constituting it, which the replication does not allege that the plaintiff has done. Furthermore, the estoppel, if it was one, was an estoppel in pais, which cannot be pleaded, although it may be given in evidence, and thus made operative under the direction of the Court. Poe's Pleading, vol. 1, § 696; Alexander v. Walter, 8 Gill, 247, 50 Am. Dec. 688; Babylon v. Duttera, 89 Md. 444, 43 Atl. 938; Albert v. Freas, 103 Md. 591, 64 Atl. 282. The subject to which the alleged estoppel related was the corporate existence of the plaintiff on July 2, 1906, when the circular letter was published. We have already said that it had at that time no legal corporate existence. It has been held by our predecessors that a corporation cannot be actually or virtually created by estoppel in Maryland. In Boyce v. Trustees of M. E. Church, 46 Md. | new trial.

374, it is said: "The statute law of the state expressly requiring certain prescribed acts to be done to constitute a corporation, to permit parties, indirectly or upon the principle of estoppel, virtually to create a corporation for any purpose, or to have acts so construed, would be in manifest opposition to the statute law, and clearly against its policy, and justified upon no sound principle in the administration of justice." In Md. Tube Works v. West End Imp. Co., 87 Md. 218, 39 Atl. 620, 39 L. R. A. 810, this court cited with approval the above quotation from Boyce's Case, as it also did the statement from the opinion in Jones v. Aspen Hardware Co., supra, that: "The doctrine of estoppel cannot be successfully invoked unless the corporation has at least a de facto existence. A de facto corporation can never be recognized in violation of a positive law. There is a broad distinction between those acts made necessary by the statute as a prerequisite to the exercise of corporate powers, and those acts required of individuals seeking incorporation but not made prerequisites to the exercise of such powers."

When the circular letter complained of was issued, the persons engaged in the business of manufacturing and selling shutter bars, mentioned in the declaration in this case, were not without remedy, although they had at that time no corporate existence, because of failure to pay the bonus tax. They, being then members of an unincorporated association, might have brought suit for the libel, if such it were, as individuals having a common interest in the business alleged to have been injuriously affected by the issue of the circular letter complained of. That right was distinctly recognized in Mears v. Moulton, 30 Md. 142, and in Littleton v. Wells & Mc-Comas Council, 98 Md. 455, 56 Atl. 798, it was held that the right of the members to maintain such suits existed at common law as well as under section 301, art. 23, of the Code of Public General Laws as it then stood, although it may be doubted if a statutory right in the members to so sue could be successfully asserted since the passage of chapter 240 of the Acts of 1908, which made material changes in article 23 of the Code.

For the reasons mentioned by us, neither of the plaintiff's replications to the defendant's seventh plea to the third amended declaration constituted a sufficient reply thereto. There was consequently no error in sustaining the demurrer to the first replication, or the motion ne recipiatur to the second one, or in entering the judgment of non pros., which must be affirmed. As the plaintiff is in our view of the case not entitled to recover, no new trial will be granted.

Judgment affirmed, with costs, without a new trial.

(82 Vt. 252)

ANGELL V. BASHAW.

(Supreme Court of Vermont. Brattleboro. May 31, 1909.)

1. Sales (§ 121*)—RIGHT TO RESCIND CONTRACT—ESTOPPEL.

Under a contract by which one party sold another certain premises in the latter's possession, the vendor agreed to build a barn thereon, and the purchaser sold him the lumber therefor. The purchaser claimed that the vendor's conduct regarding the measurement of the lumber was a breach of the contract, which entitled him to an allowance therefor at its full value, regardless of the price agreed on. Held that, if the purchaser had the right to rescind the contract, wholly or in part, on this account, and he failed to exercise it by any notice or act of rescission, but proceeded to measure a part of the lumber taken, and stood by in silence while the vendor used the remainder in performance of the contract, by attaching it to the premises which he was required to convey by a provision of the contract which the purchaser always and still treated as in force, then his silence in these circumstances was inconsistent with any claim of rescission, and that, if he was entitled to any allowance, it was by way of damages.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 121.*]

2. VENDOR AND PURCHASER (§ 198*)—TAXES ON PREMISES—LIABILITY AND DUTY TO PAY.

Where a contract for the sale of land in

Where a contract for the sale of land in possession of the purchaser contained nothing on the subject of taxes on the premises assessed after the purchase, and which were properly set to the vendor in the grand list, the latter is liable therefor; but, as between him and the purchaser, the duty of payment rests on the latter.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 408-412; Dec. Dig.

§ 198.*]

8. VENDOR AND PURCHASER (§ 818*)—SUIT BETWEEN PARTIES—DEOREE AS TO PAYMENT OF TAXES.

In a suit by a vendor against a purchaser, wherein the purchaser was properly held chargeable with taxes assessed after the purchase, and for which the vendor was liable because the premises were set to him in the grand list, provisions of decretal orders which permitted payment of the taxes in the first instance by either party, without regulating the exercise of the option, make the orders neither void for uncertainty nor erroneous in substance.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 318.*]

Appeal in Chancery, Caledonia County; Alfred H. Hall, Chancellor.

Suit by T. E. Angell against P. A. Bashaw. From a decree in favor of the orator, defendant appeals. Affirmed.

The writing mentioned in the opinion was duly witnessed and acknowledged, but was not recorded. The decree provided that "If the orator pays the taxes assessed against the premises for the years 1906, 1907, and 1908, as found in the report, and presents to the clerk of that court receipts for the same, the defendant, in order to redeem his equity, shall pay the amount of those taxes in addition to the sum hereinafter found to be due."

Argued before ROWELL, C. J., and MUN-SON, WATSON, HASELTON, and POW-ERS, JJ.

B. E. Bullard, for appellant. W. A. Dutton, for appellee.

MUNSON, J. This controversy grows out of matters evidenced by a contract dated October 13, 1905, by which the orator sold the defendant certain premises at Woodbury, then in defendant's possession as lessee, and agreed to build a barn thereon as soon as it could conveniently be done, and by which the defendant sold the orator four stacks of lumber in Wolcott, to be taken by the orator in the stack, and from which the barn was to be built if the defendant so elected, and by which it was further provided that, as soon as the barn was built and the quantity of lumber determined, the orator should convey the title to the defendant and receive notes for the balance due him, secured by a mortgage of the premises. This agreement also provided that the quantity of the lumber should be ascertained "by counting the same in the stacks or when drawn," at the option of the orator.

The master finds that some of the lumber was drawn before the orator informed the defendant when it would be measured, and without the defendant's knowledge; that the orator afterwards notified the defendant that he would count the lumber as he drew it, and that the defendant then requested the orator to notify him by telephone at his expense when he was ready to draw, as he wished to be present at the drawing; that the orator drew more of the lumber without notifying the defendant as requested, or giving him any notice that enabled him to be present; that the orator afterwards informed the defendant that he could not tell when the balance would be drawn, owing to the uncertainty of the roads and the inability to secure teams; and that after the drawing was completed the orator so informed the defendant by letter. All the lumber, except that used in the construction of defendant's barn, was afterwards measured in the orator's yard by the official surveyor on the defendant's procurement. Before any of the lumber was drawn, the defendant understood that some of it was to be taken to Woodbury, to be used in building his barn. This was measured by the orator when it arrived at Woodbury, but was not measured by the defendant until it had gone into the barn and the barn was completed. The defendant was present when it was unloaded, saw the orator measure it, and could have measured it himself if he had desired.

The defendant claims that the orator's conduct regarding the measurement was a breach of the contract which entitles him to an allowance for the lumber at its full value, regardless of the price agreed upon. It is not necessary to determine the controverted point regarding the construction of the provision for measurement, nor to inquire

whether the default complained of was one which entitled the defendant to rescind the contract wholly or in part. If the defendant had the right to rescind, he failed to exercise it by any notice or act of rescission, but proceeded to measure a part of the lumber taken, and stood by in silence while the orator used the remainder in performance of the contract by attaching it to premises which the defendant occupied, and which the orator was required to convey to him by a provision of the contract which the defendant has always treated and still treats as in force. The defendant's silence in these circumstances was inconsistent with any claim of rescission. If the defendant is entitled to any allowance, it is by way of damages. But no damage appears; for the quantity is ascertained by measurements made on defendant's procurement, or made in his presence without question, and the findings bring all the lumber within these measurements.

The decree is correct as regards the tax-The contract contains nothing on the subject. The premises were set to the orator in the grand list, and the parties are agreed in saying that this was properly done. So the orator is holden for the taxes; but, as between the orator and defendant, the duty of payment rests on the latter. A vendee in possession is chargeable with the taxes assessed after the purchase. Bradford v. Union Bank, 13 How. 57, 14 L. Ed. 49. The provisions of the decretal orders which permit the payment of the taxes in the first instance by either party, without regulating the exercise of the option, do not make the order void for uncertainty or erroneous in substance. The burden upon the defendant is the same under either alternative. Nothing but its form is left to be determined by the party taking action. It can hardly be necessary to provide for the contingency of a simultaneous payment or offer of payment by both parties; but, if any difficulty is feared, the chancellor can properly amplify the provisions in question.

Decree affirmed, and cause remanded. Let a new time of performance and redemption be fixed below.

(82 Vt. 243)

MORGAN v. MORGAN.

(Supreme Court of Vermont. Bennington. May 31, 1909.)

APPEAL AND ERROR (§ 1009*)-REVIEW-FINDINGS.

Findings of a chancellor, like those of a ecial master, cannot be set aside on appeal, if there is evidence to support them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

been recorded, even at the grantor's direction, does not constitute delivery.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \$ 625-632, 634; Dec. Dig. \$ 208.*]

3. DEEDS (§ 59*)-DELIVERY-RECORD.

Where a town clerk received a deed from the grantor, with instructions to file it, but to delay recording, the clerk's subsequent recording of the deed and delivery thereof to the grantee at her direction was ineffective to constitute delivery.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 136-139; Dec. Dig. § 59.*]

Appeal in Chancery, Bennington County; Willard W. Miles, Chancellor.

Action by William R. Morgan against Merritt B. Morgan to set aside a deed. From a decree for orator, defendant appeals. Affirmed and remanded.

Argued before ROWELL, C. J., and TY-LER, MUNSON, and WATSON, JJ.

C. H. Mason and W. B. Sheldon, for appellant. O. M. Barber and Batchilder & Bates, for appellee.

MUNSON, J. On the 19th day of October, 1900, the orator executed to his sister Harriet a deed of real estate in Bennington, and three days later he handed it to the town clerk, with instructions to file it, but delay the recording. This was the only instruction given the town clerk by the orator. Some time after this the grantee directed the town clerk to record the deed, and he thereupon recorded it and delivered it to the grantee. The orator afterwards called for the deed, and then learned what had been done regarding it. The chancellor does not say in terms that Harriet acted without the orator's authority; but his language fairly implies that she did, and we think it should be so construed.

The defendant moved to have the findings set aside as not warranted or supported by the evidence. The findings of a chancellor stand the same as those of a special master, as regards their effect; and they cannot be set aside if there was evidence tending to support them. The only question that can possibly be made under this motion regarding the findings above stated is with reference to the instructions. The town clerk was called by the defendant, and testified on direct examination that the orator's instructions were that the deed be filed for record, but that the actual work of recording be delayed; and on cross-examination he testified that he had a place where he put papers that were not to be recorded until further directions were given, which he called the "slow record" file; that he might just minute the filing of these papers in lead 2. Deeds (\$ 208*)—Record—Delivery—Primary—Primary—Primary—Primary—Record is primary—Pr

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

them; and that he put the orator's deed in this file. This was clearly evidence tending to support the finding regarding the instruc-

The fact that a deed is on record is primafacie evidence of delivery. Walsh v. Vt. Mutual Ins. Co., 54 Vt. 851. But the mere fact that the deed has been recorded, even if done by the grantor's direction, does not of itself constitute a delivery. Fair Haven Marble Co. v. Owens, 69 Vt. 246, 87 Atl, 749. There was no delivery here, unless a delivery was effected by means of the recording and the delivery of the recorded deed to the grantee by the town clerk. But the delivery of the deed by the town clerk could have no effect, unless he was authorized to record it. The town clerk received the deed from the grantor, with instructions to file it, but delay the recording. This must be construed as a direction to postpone the recording until further instructions from the grantor. It cannot have meant that the town clerk was to delay the recording for an indefinite period, that was to be ended, if at all, on some impulse of his own. So the deed was held by the town clerk to be filed, but not recorded, and the placing it upon record without further instructions from the grantor was of no effect. Blair v. Ritchie, 72 Vt. 811, 47 Atl. 1074. It follows that the grantee's possession of the deed was unauthorized.

It is not necessary to inquire whether the filing of exceptions to the chancellor's findings was necessary to entitle the defendant to stand on his objections to the evidence, nor whether Mr. O'Brien was a competent witness to what the orator and his sister said in Mr. Baker's office in connection with the preparation and execution of the deed; for it is clear that Mr. O'Brien's testimony had no bearing upon the transaction between the orator and the town clerk, but only upon issues made immaterial by our holding that that transaction did not constitute a delivery.

Decree affirmed, and cause remanded.

(29 R. L. 550)

WALLACE v. INDUSTRIAL TRUST CO. et al.

(Supreme Court of Rhode Island. June 19, 1909.)

1. TRUSTS (§ 47*)—TERMINATION—EVIDENCE.

In a suit by the voluntary creator of a spendthrift trust containing no power of revocation, evidence held to require a finding that complainant created the trust voluntarily after obtaining independent legal advice with knowledge, and intending that the same should be irrevocable during her life, and that she therefore was not entitled to maintain a suit to revoke the same.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 70; Dec. Dig. § 47.*]

2. TRUSTS (§ 47*)-TRUST DEED-POWER OF REVOCATION.

Absence of a revocation clause in a volun-

of a mistake, where the purpose of the trust was inconsistent with such power of revocation, and such power at the time the trust was executed was neither intended nor desired by the grantor. [Ed. Note.—For other cases, see Trusts, Cent. Dig. § 70; Dec. Dig. § 47.*]

Case certified from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Presiding Justice.

Suit by Fredrika King Wallace against the Industrial Trust Company and others. Case certified to the appellate division for final decree. Remanded, with instructions to enter decree of dismissal.

Comstock & Canning (Patrick P. Ourran, of counsel), for complainant. C. M. Van Slyck and Fred'k A. Jones, for respondent Industrial Trust Company. Everitte S. Chaffee, pro se, guardian ad litem.

PARKHURST, J. This suit was commenced in the superior court in Providence county on the equity side of the court, and was assigned for hearing on bill, answer, and proofs. At the hearing it appeared that the cause was ready for final decree, and it was certified to this court, under Court and Practice Act 1905, § 338. The pleadings are in substance as follows:

The bill in this suit sets forth: (1) That the respondents, Fredrika Montgomery Macleod and Kathleen King Macleod, are the only children of the complainant, and are of the age of 17 years and 18 years, respectively. (2) That William J. King died August 8, 1885, leaving a will. (3) That said will created a trust of the residue of the testator's estate, which was to continue until the youngest grandchild of the testator, living at the testator's death, should attain the age of 21, when the said residue was to be distributed. (4) That the youngest grandchild, living at the testator's death, attained the age of 21 on June 26, 1904. (5) That the complainant's father was Edward G. King. who was a son of, and who predeceased, the said testator, and at the time of any distribution of the said trust estate the complainant would be entitled to a large share of the property. (6) That prior to June 26, 1904, the complainant was married to George R. Macleod, and on September 11, 1902, proceedings were begun in the Supreme Court of Rhode Island for a divorce, which was granted by said court on December 19, 1903; that while the complainant was covert, as aforesaid, she undertook the liquidation of many obligations not primarily her own, several of which were falling due at about said time of distribution; that the complainant's brother, William J. King, 2d, was desirous that the complainant, prior to said period of distribution, execute a deed of trust of her share of the said trust estate. and cause such a deed to be drafted, in tary deed of trust is not prima facie evidence which he was named as trustee, and which

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the complainant executed on December 14, 1903, a copy being annexed to the bill and marked "Complainant's Exhibit A." That said trust deed was executed on the solicitation and advice of said William J. King, 2d, without consideration, and for the sole purpose of placing him in a position to deal with the creditors and alleged creditors of the complainant. (8) That the complainant did not read the said deed, nor know that the express power of revocation was omitted therefrom, and that William J. King, 2d, thought the instrument to be revocable, and so advised the complainant. (9) That William J. King, 2d, received as trustee under said deed in partial distribution of said trust estate many thousands of dollars. (10) That on or about October 4, 1906, William J. King, 2d, resigned as trustee under said deed, and the respondent Industrial Trust Company was appointed in his place, and now holds said office; that the complainant has informed the Industrial Trust Company of the above facts, and requested an accounting and a transfer of all the trust property which it holds under the said deed, first deducting a reasonable charge for its services; that the Industrial Trust Company has made said accounting, but has informed the complainant that it cannot safely terminate said trust. (11) That the omission of the power of revocation was by mistake; that the complainant did not intend to make an absolute settlement, and would not have signed the instrument if she had been aware that it made such a disposition of her property. (12) That the purpose of said deed has now been accomplished, the obligations of the complainant contracted as aforesaid having been paid and adjusted, and no reason exists for the further continuance of said trust. In consideration whereof the complainant prays that the court order the Industrial Trust Company to convey to her all its right, title, and interest in and to the property in said deed of trust described, and order the other respondents by their guardian ad litem, to execute to the complainant a deed of release and quitclaim of all their right, title, and interest in and to said trust estate. In its answer the respondent Industrial Trust Company admits the allegations contained in the first, second, third, fourth, fifth, and tenth paragraphs of the bill of complaint, and that the complainant executed the trust deed, but states that it is not informed as to the circumstances under which said deed was executed, and therefore neither admits nor denies the allegations contained in the sixth, seventh, eighth, ninth, eleventh, and twelfth paragraphs of the bill. The answer of the respondents Fredrika Montgomery Macleod and Kathleen King Macleod is the same as that of Industrial Trust Company, except that they neither admit nor deny the allegations contained in the second, third, fourth, tifth, and tenth paragraphs of the bill.

It appears from the testimony in this case that on December 14, 1903, the complainant executed a voluntary trust deed, a copy whereof has been made "Exhibit A" in this suit, by which she conveyed to her brother, William J. King, 2d, all her property coming and to come to her from the estate of her grandfather, Wuliam J. King. trusts created by the deed were as follows: (1) That the trustee be the complainant's attorney irrevocable to collect and receive the said property. (2) That the trustee manage said property and invest and reinvest the same according to his best judgment so long as the complainant live, and until the respondents Kathleen King Macleod and Fredrika Montgomery Macleod, the daughters of the complainant, shall both have arrived at the age of 21 years. (3) That the trustee pay, compromise, or contest the claims against the complainant according to his best judgment. (4) That the trustee, in his discretion, provide from said trust estate for the suitable and comfortable support of the said two daughters so long as the complainant live and until both of said daughters arrive at the age of 21 years. (5) That the trustee have power to pay from said trust fund such sums as he think fit to the complainant or for her behefit. (6) That upon the death of the complainant and arrival of both daughters at the age of 21 the trustee pay over the trust estate to the said daughters, or to the survivor of them, their issue, etc. (7) That 'the appellate division of the Supreme Court have power to appoint a successor to the said trustee subject to the approval of said complainant. It also appears that the said Fredrika Montgomery Macleod will be 21 years of age on February 5, 1912, and the said Kathleen King Macleod will be 21 years of age on November 4, 1910; that the said property was received and managed by the said William J. King, 2d, in accordance with the provisions of the deed, until on or about the 4th day of October, 1906, when he resigned as trustee, and the respondent Industrial Trust Company, the present trustee under said deed, was duly appointed his successor in the trust.

The complainant, in support of her prayer for a reconveyance from the respondent Industrial Trust Company, relies upon a claim that she did not read the deed when she executed it, that she executed it in the belief that it was revocable, and that the purposes for which said deed was executed have been accomplished, and no reason exists for the further continuance of the trust; and it is further claimed on her behalf by her counsel in this cause that she was induced to execute the deed by her brother, William J. King, 2d, who was named in the deed as trustee, and who had been up to that time her only adviser and man of affairs; that she had no legal advice from any attorney, except his attorney, and from him only at the very moment of execution of the deed; that

she had no independent legal advice whatever; that she did not intend to create an irrevocable trust, but only such as would always be subject to her own control. The claim set up in the bill that the sole purpose of this trust was to enable her trustee to liquidate her financial affairs, and settle with her creditors, or contest their claims, and that such purpose has been accomplished, while it is supported in a general way by her own testimony, is contradicted by the terms of the deed itself, and is overwhelmingly disproved by the testimony of her two daughters and her two brothers, who were examined after she testified, and whose testimony she does not attempt to rebut. They all showed that she was a woman of weak will, easily persuaded and influenced to give away money or to enter into obligations in large amounts; that not only was she, as she admits, under heavy liabilities, assumed or claimed to have been assumed, during coverture with her former husband prior to her divorce, as to which special powers of payment, compromise, or contest were given to her trustee; but she had, even pending her divorce proceedings and before a final decree was entered, such close and friendly relations with one or more persons that she was influenced to give away or promise sums of money in such amounts that her brothers feared she would squander all of her estate and leave nothing for her daughters or herself; that they were alarmed about this state of affairs, and frequently remonstrated with her, and she promised amendment; that for a period of five or six months prior to the execution of the trust deed the matter of protecting herself and her daughters from the consequences of her own imprudence and recklessness by means of a trust (which she at first refused) was under consideration; that meanwhile she did not improve in the matter of prudence in her conduct of affairs, and that finally she realized the danger and consented at the earnest solicitation of all her brothers (not William J. King, 2d alone) to execute a trust deed, not only to provide for the liquidation of claims then preferred against her, but also to protect her daughters and herself from future squandering of her estate. Under these circumstances, the claim that she did not intend to create an irrevocable trust, but only one that would always be subject to her own control, so that the primary and underlying purpose of the trust could be nullified by her at her mere whim, or by reason of external and harmful influences, cannot be supported, particularly in view of the testimony of her brothers and her children that she intended the protection afforded by the trust to be permanent for the benefit of herself and her daughters; and again it is to be noted, with emphasis, that she does not attempt to rebut any one of these particular and circumstantial statements of her two brothers and her two chil-

the very general statements of her intention contained in her own direct testimony.

The further claims that she did not read the deed, and executed it in the belief that it was revocable at her pleasure, that she was induced to execute the deed by her brother William J. King, 2d, named as trustee, her sole adviser, and man of affairs, and that she had no independent legal advice, and no advice except from his attorney, are not supported by the testimony. It appears, with no attempt at rebuttal by her, that not only William J. King, 2d, but also two other brothers, Edward G. King and Gilbert M. King, took part in the conferences which ended in her execution of the deed, the said Edward G. King coming specially to Providence on two or more occasions to take part with his brothers in this conference with her, in the endeavor to induce her to consent to this measure of protection for her benefit and the benefit of her daughters; and it is to be noted in this connection that neither of her brothers takes any benefit, even remotely, under the trust, which is solely for the benefit of the complainant and her daughters. Equally untenable is the claim that she had no independent legal adviser. On the contrary, it appears by the records of this court, and was admitted in argument, that the firm of Barney & Lee, in whose office the trust deed was prepared, had been her own personal attorneys in her divorce proceedings from September 11, 1902, to December 19, 1903, a period of upwards of 15 months, prior to and including the date of the execution of the deed (December 14, 1903). They must have been fully conversant with all her affairs and obligations during all that time; and it seems to us that they were the very attorneys who should have been consulted, and who were most competent to advise her at this juncture and there is not a word of evidence to show that they were ever the attorneys of William J. King, 2d, or ever advised him except in this matter. It is further shown by the testimony of complainant's two brothers that she read the deed herself and that it was read to her in full before she signed it, and that she was fully advised as to its meaning and contents, which were explained to her by William J. King, 2d, and that she fully understood that the arrangement was a permanent one, for the protection of herself and her daughters from the consequences of her own weakness in financial affairs.

could be nullified by her at her mere whim, or by reason of external and harmful influences, cannot be supported, particularly in view of the testimony of her brothers and her children that she intended the protection afforded by the trust to be permanent for the benefit of herself and her daughters; and again it is to be noted, with emphasis, that she does not attempt to rebut any one of these particular and circumstantial statements of her two brothers and her two children that she intended the protection afforded by the trust to be permanent for the benefit of herself and her daughters; and again it is to be noted, with emphasis, that she does not attempt to rebut any one of the told me that Mrs. Macleod was ready to execute the paper. I then took it to her, and asked her if she understood what it was. She stated she understood she was putting

all her property into her brother's hands as out independent advice, will be set aside by trustee, and that it was all right, as she had every confidence in him. I don't know whether she then signed it before asking me another question or not. My impression is she started in to write, and then she said: 'Mr. Barney, what would happen if anything happened to Will? I said: 'It is provided here that a trustee will be appointed by the appellate division of the Supreme Court, subject to your approval.' I told her that the court could, of course, appoint some one whom she did not approve of, if she was not reasonable about the matter of approval, but would probably listen to any reasonable suggestion from her; that, no matter who was trustee, she always had the protection of the court against any unreasonable action. She then asked me what would happen after all her debts were paid, and I told her that the trust would continue on for the benefit of herself and her children. I think she said something like this: 'By and by, when those children grow up. I may want to terminate this trust. Can I do so?' I told her my impression was that, on application to the Supreme Court, and showing that it was proper for her to manage her property, she could terminate the trust, and that at all events, after the children became of age, they could together terminate it at any time. If she had not previously signed the paper, she then signed it, and at all events the acknowledgment, if not the signature, was after this conversation."

In view of the fact that she had had the matter of a trust for the settlement of her financial affairs and for the protection of herself and her daughters under consideration for at least five or six months prior to December 14, 1903, and that she had been advised fully as to what should be done to those ends, we deem that the advice and explanation from her counsel were sufficient and proper, and that she had no reason to believe, and as a matter of fact did not then believe, that she was creating a trust revocable at her pleasure. On the contrary, we are o strained to believe from the whole testimony that she then knew that she was making an irrevocable trust, and that she then intended so to do, for reasons which she then fully understood, and which have been fully set forth herein, and that her present idea that the trust was then intended to be revocable and ought now to be revoked has grown up out of her changed conditions of life, the partial estrangement of her children, owing to their disapproval of her subsequent conduct, and the circumstances attendant upon her recent marriage. For reasons fully set forth above, we do not find the deed to have been improvident, but quite the contrary, under all the circumstances surrounding the parties in in-

The complainant cites numerous cases to her adviser, on his solicitation, and with-ing a number of cases in this state and

a court of equity. Prideaux v. Lonsdale, 4 Giff. 159, confirmed in 1 De Gex, J. & S. 483; Garnsey v. Mundy, 24 N. J. Eq. 243; Rhodes v. Bates, L. R. 1 Ch. 252, 257. Many other cases might be cited to the same effect, and we have examined all the cases cited by the complainant and many others. We do not for an instant dispute the principles of those cases. But they do not apply here. In all those cases there was evidence of such misrepresentation or concealment, or of benefits conferred upon the grantee, trustee, or beneficiaries, without the knowledge or full understanding of the settlor, so that they all come within the general class of deeds obtained through fraud. Here no such case is shown. The complainant was advised by her own attorney, and she was fully aware of what she was doing and of the necessity therefor, and no benefit was conferred by her deed except upon herself and her daughters.

Again, the complainant cites cases to the effect that the absence from a voluntary deed of a power of revocation is prima facie evidence of mistake, where a deliberate intent to make it irrevocable does not appear, and refers to Aylsworth v. Whitcomb, 12 R. I. 298, Neisler v. Pearsall, 22 R. I. 367, 48 Atl. 8, 52 L. R. A. 874, Toker v. Toker, 8 De Ger, J. & S. 487, Coutts v. Acworth, L. R. 8 Eq. 558, Hall v. Hall, L. R. 8 Ch. App. 430, and many others. We see nothing in these cases to disturb our conclusions stated They are all in accord with the principle first enunciated in this state in Aylsworth v. Whitcomb, 12 R. I. 298, at page 299, as follows: "This settlement was a voluntary one, without any consideration. It is true the instrument contains no power of revocation; but, according to the weight of modern authority, this is only a circumstance to be taken into account, and is not decisive, and, where a deliberate intent to make it irrevocable does not appear, the absence of the power will be prima facie evidence of mistake.' Furthermore, it was freely conceded in the above case by the trustee, as well as by the settlor, that they both supposed that the trust was a temporary provision, and that the settlor could revoke it; and so it was admitted that in fact there was a mistake in omitting the power of revocation. In Neisler v. Pearsall, 22 R. I. 367, 48 Atl. 8, 52 L. R. A. 874, the above principle was approved, but not applied, because the deed was irrevocable by its very terms, and there was no evidence of contrary intention. The court quotes with approval the rule adopted by Lord Justice Turner in Toker v. Toker, 3 De Gex, J. & S. 487, 491, viz.: "The absence of a power of revocation is, I think, a circumstance to be taken into account in determining such cases as these, and it is a circumstance of more or less weight according to the facts of each parthe general effect that a deed executed by one | ticular case"—and, after citing and discusselsewhere, sums up the effect of the decisions as follows (22 R. I. 878, 48 Atl. 10 [52 L. R. A. 874]): "In all these cases it is admitted that the deliberate intention of the grantor to settle his property beyond his own control makes his deed irrevocable. In suits brought to set aside or cancel such a deed, the courts may differ as to the weight to be given to the circumstance of the mere omission of a power of revocation, as they may as to the weight of any other piece of evidence in the case; but, if convinced that the grantor intelligently intended to make his act irrevocable, they will hold it to be so against his subsequent attempt to cancel it."

settlement, which was to protect her from the threats, or importunities, or influence of the rhusband. * * * It is not, therefore, a case like some of those cited by the plainment to be revocable, and the power to revoke was omitted by mistake. See Aylsworth v. Whitcomb, 12 R. I. 298, Garnsey v. Mundy, 24 N. J. Eq. 243, and cases cited." Thurston, Petitioner, 154 Mass. 596, 29 N. E. 53, 26 Am. St. Rep. 278, is a similar case the above. Here a married woman, in orthogolic high property beyond her bushand. * * * It is not, therefore, a case like some of those cited by the plainment to be revocable, and the power to revoke was omitted by mistake. See Aylsworth v. Whitcomb, 12 R. I. 298, Garnsey v. Mundy, 24 N. J. Eq. 243, and cases cited." Thurston, Petitioner, 154 Mass. 596, 29 N. E. 53, 26 Am. St. Rep. 278, is a similar case the above. Here a married woman, in orthogolic high property beyond her bushand.

We do not find it necessary to discuss the cases cited by the complainant further, because we stand by the doctrines laid down in our own cases cited above, and regard the absence of a clause of revocation in a voluntary deed intended to be made revocable as "prima facie evidence of mistake," or as "a circumstance to be taken into account"; and in this case we do not find the omission of the power of revocation to be prima facle evidence of a mistake, because we have found that the primary underlying purpose of the trust was entirely inconsistent with such power of revocation, and the evidence convinces us that such power was at the time of execution of the deed neither intended nor desired by the grantor.

This case falls clearly within the principles of a number of cases cited by the respondents, where the settlor, seeking protection for herself and children against the importunities or persuasions of an improvident husband, or against the probable consequences of the settlor's own weakness or infirmity, had made voluntary settlements in trust without power of revocation, and subsequently sought to revoke them by means of suit in equity. The courts refused the relief sought. In Keyes v. Carleton, 141 Mass. 45, 6 N. E. 524, 55 Am. Rep. 446, a woman, for the purpose of preventing her husband from influencing her to dispose of her real estate, conveyed it by deed containing no revocation clause to her brother, in trust for her benefit during life, then to her children. She petitioned the court to set aside the deed, as it appeared that, at the time of execution, she did not think of, nor provide for, the contingency of surviving her husband. It was held that, on her husband's death, she was not entitled to have the trust set aside, and, at page 50 of 141 Mass., page 528 of 6 N. E. (55 Am. Rep. 446), the court says: "The deed contains no power of revocation, and it is clear that the power of revocation was intentionally omitted. * * * If she had retained a power of revocation, it would have defeated one of the principal objects of the cordance herewith.

the threats, or importunities, or influence of her husband. * * * It is not, therefore, a case like some of those cited by the plaintiff, where both parties supposed the settlement to be revocable, and the power to revoke was omitted by mistake. See Aylsworth v. Whitcomb, 12 R. I. 298, Garnsey v. Mundy, 24 N. J. Eq. 243, and cases cited." Thurston, Petitioner, 154 Mass. 596, 29 N. E. 53, 26 Am. St. Rep. 278, is a similar case to the above. Here a married woman, in order to place her property beyond her husband's interference or control, voluntarily conveyed it, without reserving any power of revocation, to a trustee for her benefit, for life, then to her issue, or, in default of issue, to her heirs at law. Later she was divorced from her husband, and, the purposes for which the trust was created no longer existing, petitioned to have it set aside. It was held that the children of the petitioner had an interest, and the trust could not be terminated without their assent. The court says, on page 597 of 154 Mass., on page 54 of 29 N. E. (26 Am. St. Rep. 278): "The petitioner contends that, where no motive exists for not inserting a power of revocation, the absence of such power is prima facie evidence of a mistake; but, if she had retained such a power, it would have defeated the object of the settlement, which was, as she alleges, to place the property beyond the interference or control of her then husband." To the same effect, see Reidy v. Small, 154 Pa. 505, 26 Atl. 602, 20 L. R. A. 362; Stockett v. Ryan, 176 Pa. 71, 84 Atl. 978; Riddle v. Cutter, 49 Iowa, 547: Middleton v. Shelby County Trust Co. (Ky.) 51 S. W. 156; Brown v. Mercantile Trust Co., 87 Md. 877, 40 Atl. 256; Rogers v. Rogers, 97 Md. 573, 55 Atl. 450, and Dayton v. Stewart, 99 Md. 643, 59 Atl. 281.

The clear principle of decision in all these cases is quoted with approval in the last cited case from Rogers v. Rogers, supra, where the court, after a careful review of most of the cases cited herein and many others, says: "There is a class of voluntary settlements to which powers of revocation are appropriate, and another class to which they are not, and it is fairly well settled that each case depends in this regard upon its own facts." Dayton v. Stewart, 99 Md. 643, at page 650, 59 Atl. 281, at page 284. Our conclusion, therefore, is that the bill of complaint should be dismissed, and that the respondents are entitled to have their costs and expenses of suit reimbursed to them out of the trust funds in the hands of the respondent trustee.

The case is remanded to the superior court, with instruction to enter its decree in accordance herewith.

In re APPLEBY et al.

(Supreme Court of Rhode Island. June 18, 1909.)

WILLS (\$ 566*)—CONSTRUCTION—"BANK DE-POSITS.

In the first clause of his will, a testator provided for the payment of his debts, funeral expenses, and expenses of settling his estate, expenses, and expenses of settling his estate, and for the erection of suitable gravestones. In the second to the tenth clauses, inclusive, he bequeathed certain legacies. The eleventh clause provided for the specific gift of capital stock of a bank. The twelfth provided that, should there remain in the hands of his executor any money from the proceeds of his bank deposits after payment of all sums above required to be paid, he should pay over and divide it in equal shares to certain children. The thirteenth gave the remainder of his estate, both real and personal, to children of a brother in equal shares. Held, that he intended that the bank deposits should be the primary fund from which all debts, legacies, funeral charges, and expenses of settling be the primary fund from which all debts, lega-cies, funeral charges, and expenses of settling his estate should be paid, and that cash found in his residence after his death, collections made thereafter, and dividends on the bank stock re-ferred to, were not included in the term "bank deposits," but passed under the thirteenth clause of the will as did also the household furniture. of the will, as did also the household furniture and that the bequest contained in the twelfth clause was of so much of the bank deposits as, thus construed, should remain after such payments were made.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1238½; Dec. Dig. § 566.*

For other definitions, see Words and Phrases, vol. 1, p. 691.]

Petition by Sidney Appleby and others for an opinion construing the will of John Appleby, deceased. Will construed pursuant thereto.

The following are the provisions of the will in question: In the first clause the testator provided for the payment of all his "just debts, funeral charges, the expense of settling my estate, and the erection of suitable gravestones at my grave." In the next nine clauses he bequeathed legacies aggregating \$8,400. The eleventh clause is a specific gift to Nellie Angell of 50 shares of the capital stock of the National Exchange Bank of Greeneville, R. I. The twelfth clause of the will is as follows: "In the event there shall be remaining in the hands of my executor any money from the proceeds of my bank deposits after the payment of all sums above required to be paid, I hereby direct my said executor to pay over and divide any such money in equal shares to the following named children of Tnomas H. Angell, namely: Lillian Inman, Clara Sweet, and Walter Angell." The thirteenth clause of the will is as follows: "All the rest, residue and remainder of my estate and property, both real and personal, including all horses, cattle, farming machinery and tools on my farm of every name, nature and description, wherever or however the same may be situated, of which I may die seised and possessed, or be in any way entitled, I give, devise and bequeath to Sidney Appleby and

Clara Appleby, children of my brother Silas Appleby, in equal shares, to share and share alike, to them, their heirs and assigns, for-By the fourteenth and last clause, he nominated and appointed Nicholas S. Winsor, of Smithfield, as executor, and requested that he be not required to file an inventory of his household furniture or ef-

James Harris, Irving Champlin, and Louis L. Angell, for various parties.

PER CURIAM. Upon a careful consideration of all the provisions of the will in question, the court is of the opinion that it was the intent of the testator that the bank deposits should be the primary fund from which all debts, legacies, funeral charges, and expenses of settling the estate should be paid, if sufficient for these purposes, and that the \$1,000 cash found in the testator's residence after his decease, the \$500 of collections made thereafter, and the \$250 dividends on National Exchange Bank stock are not to be included in the term "bank deposits," but pass under the thirteenth clause of the will, as also does the household furniture mentioned in the fourteenth clause, and that the bequest contained in the twelfth clause is of so much only of said bank deposits, as thus construed, as shall remain after the payments aforesaid have been made.

(75 N. H. 270)

EASTER v. EASTER.

(Supreme Court of New Hampshire. Belknap. May 4, 1909.)

1. DISMISSAL AND NONSUIT (§ 75*)—DISMISSAL WITHOUT PREJUDICE—EFFECT.

A judgment dismissing a cause without prejudice, rendered without a hearing, reserves to the parties the right to litigate all questions which might have been tried and determined in the suit. the suit.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 169; Dec. Dig. § 75.*]

2. DIVORCE (§ 147*)—ABANDONMENT—QUESTION FOR JURY.

Whether a wife without sufficient cause, and without the consent of the husband, abandoned and refused for three years together to habit with the husband so as to authorize him to obtain a divorce under Pub. St. 1901, c. 175, § 5, is a question of fact.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 147.*]

3. DIVORCE (§ 109*)—PENDENCY OF SUIT FOR DIVORCE—EFFECT.

The pendency of an application for divorce may, under some circumstances, compel the in-ference that the separation during the pendency was consented to, or was with sufficient cause.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 109.*]

4. DIVORCE (§ 133*) - ABANDONMENT - EVI-DENCE.

Where, in libel for divorce for abandonment for three years, without sufficient cause, and without consent, it appeared that libelant had instituted a prior suit for divorce on the

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

same ground, and that it was dismissed without dency was consented to, or was with suffi-prejudice, without a hearing, but there was nothing to show that the separation was caused by the former suit, or justified by libelant's conduct, but it resulted from defendant's wrongful 82 Am. Dec. 251; Hurning v. Hurning, 80 act prior to the commencement of the former suit, the pendency of the former suit was but an evidentiary fact bearing on the question whether the absence complained of was such an abandonment as Pub. St. 1901, c. 175, § 5, makes a cause for divorce.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. \$ 133.*]

Exceptions from Superior Court, Belknap County; Stone, Judge.

Libel for divorce by J. Frank Easter against Carrie A. Easter. The court ruled in favor of libelant, and libelee excepts. Exception overruled.

February 19, 1905, the libelee without sufficient cause abandoned and refused to live with the libelant, and since that date the parties have not lived together or cohabited as husband and wife. September 11, 1906, the libelant brought a libel for divorce on the ground of abandonment, which was entered at the September term. The libelee appeared. There was no hearing, but at the March term, 1907 (March 27th), the libel was dismissed without prejudice. The libelee moved to dismiss the pending libel, upon the ground that three years' abandonment had not been proved, because the time during which the first libel was pending could not be reckoned as part of the three years. The court ruled otherwise, and the libelee excented.

Bertram Blaisdell, for plaintiff. Harrison Dunham & Son, for defendant.

PARSONS, C. J. "A divorce from the bonds of matrimony shall be decreed in favor of the innocent party * * * when either party, without sufficient cause, and without the consent of the other, has abandoned and refused for three years together to cohabit with the other." Pub. St. 1901, c. 175, § 5. As there was no hearing, the facts involved in the first libel were not litigated, and the form of the judgment of dismissal ("without prejudice") specially reserved to the parties the right to litigate ail questions which might have been therein tried and determined. Brown v. Brown, 37 N. H. 530, 75 Am. Dec. 154.

Whether the defendant, without sufficient cause, and without the consent of the plaintiff, abandoned and refused for three years together to cohabit with the plaintiff were questions of fact, determinative of the present proceeding. Kimball v. Kimball, 13 N. H. 222, 224; Robinson v. Robinson, 66 N. H. 600, 23 Atl. 362, 15 L. R. A. 121, 49 Am. St. Rep. 632. The pendency of an application for divorce by either against the other might, under some circumstances, compel the in-

Minn. 373, 83 N. W. 342; Palmer v. Palmer, 36 Fla. 385, 18 South. 720; Haltenhof v. Haltenbof, 44 Ill. App. 135; Porritt v. Porritt, 18 Mich. 420; Doyle v. Doyle, 26 Mo. 545; Salorgne v. Salorgne, 6 Mo. App. 603. It may, however, appear that both elements were present during all the prior litigation. Weigel v. Weigel, 63 N. J. Eq. 677, 52 Atl. 1123; Wagner v. Wagner, 39 Minn. 394, 40 N. W. 360; Hitchcock v. Hitchcock, 15 App. D. C. 81; Neddo v. Neddo, 56 Kan. 507, 44 Pac. 1.

It is said: "The parties should live separate during a suit for divorce. While the suit is pending cohabitation would be highly improper, and therefore the time of such separation can form no part of the statutory period." 1 Nels. Div. & Sep. \$ 93. Doubtless absence of cohabitation after the filing of the libel is essential to the successful maintenance of a suit for divorce; but the policy of the law promotes the continuance of the marriage relation-not its destruction by divorce. Hence it is not probable this ianguage was intended to be understood as a statement that the law requires the parties to remain separate until the legal adjudication of pending proceedings for divorce, or forbids their reconciliation before judgment, or considers impossible the existence of a purpose or conduct which may in time constitute a cause for divorce, merely because proceedings have been begun. If such were the law, the mere filing of a libel for divorce would be equivalent to a decree of separation, beyond the control of the parties, irreversible except by a formal dismissal of the libel.

The pendency of a libel for divorce is an evidentiary fact, bearing upon the question whether the absence complained of is such an abandonment as the statute makes a cause for divorce, but it is not necessarily decisive of the question. One honestly prosecuting a supposedly sound suit for divorce cannot be found guilty of desertion while so engaged, and one charged with offenses which imply the consent of the other to a separation cannot be charged with desertion within the meaning of the statute for refraining from the matrimonial relation, both because the absence is justifiable and consented to. One who has caused a separation by a groundless suit cannot charge the other with desertion. But in this case the separation was not caused by the plaintiff's former suit, nor justified by the plaintiff's conduct, but resulted from the defendant's wrongful act prior to the commencement of that suit. The former application for divorce upon the ground of abandonment did not conclusively ference that the separation during such pen-establish that the libelant consented to the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

separation, nor the pendency of the application necessarily destroy the libelee's abandoning intent-the essence of the charge of desertion in the party offending. 1 Nels. Div. & Sep. # 98; 2 Bish. Mar. & Div. # 506. Nothing appears from which it can be inferred that the trial court drew an unwarranted inference from the facts in evidence before it. The ruling that a single item of evidence was not conclusive on the material issues presented was not erroneous.

Exceptions overruled. All concur.

(75 N. H. 272)

O'DONNELL v. TOWN OF MEREDITH. (Supreme Court of New Hampshire. Belknap. May 4, 1909.)

L_TAXATION (§ 701*)-TAX SALES-NOTICE TO

Pub. St. 1901, c. 61, § 8, declares that the purchaser of any real estate sold for taxes within 30 days from the time of the sale shall notify all persons holding mortgages on such real estate of the date of the sale, the amount for which the land was sold, and the amount of his costs of notifying mortgagees, and that the sale shall be void as against any mortgages to whom such notice shall not be given, as provided in the succeeding section. Held that, vided in the succeeding section. Held that, where a mortgagee paid the taxes before the time to notify him of the sale of the mortgaged property had expired, he could not complain that the sale was void because of want of no-

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 701.*]

2. Taxation (§ 669*)—Tax Sales—Lien—Authority to Sell.

Under Pub. St. 1901, c. 60, \$ 13, imposing a lien on real estate for taxes, and providing for a sale thereof, the tax collector has a prior lien on the real estate of a mortgagor for all taxes assessed against him, which may be foreclosed by sale if the mortgagor does not pay the taxes, or expose personal property within 14 days after notice.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 669.*]

8. Taxation (§ 631*)—"REAL ESTATE."
Under Pub. St. 1901, c. 61, § 21, providing that any separate interest in land and in buildings standing on the land, or owned by an-other person, shall be taken to be real estate, an icehouse erected on leased land is taxable as "real estate" within chapter 60. § 13, providing for the foreclosure of the collector's tax lien on real estate by sale.

[Ed. Note.-For other cases, see Taxation, Dec. Dig. \$ 631.*

For other definitions, see Words and Phrases, vol. 7, pp. 5939-5951; vol. 8, pp. 7778, 7779.]

Transferred from Superior Court, Belknap County; Stone, Judge.

Bill by Louis P. O'Donnell against the Town of Meredith to set aside a tax sale under Laws 1895, p. 425, c. 64, § 1, and to recover certain taxes, amounting to \$36.94, which plaintiff paid as mortgagee. transferred to the Supreme Court without a ruling on an agreed statement of facts. Judgment for defendant, and case discharged.

In 1906 the plaintiff took a mortgage of an icehouse erected on leased land in Meredith. In 1907, the town taxed the mortgagor for the house and other personal property. He did not pay his taxes when due, and on December 2, 1907, the collector advertised the house for sale, and on January 16, 1908, sold it to the town for all the taxes assessed against the mortgagor. The plaintiff redeemed before February 2, 1908. He now insists that the sale is invalid because: (1) He was not legally notified of it; (2) the proceedings were begun prematurely; and (8) the collector had no lien on the house.

Walter S. Peaslee, for plaintiff. Charles B. Hibbard, for defendant.

YOUNG, J. 1. The plaintiff paid the town before the time to notify him of the sale had expired, and therefore he is in no position to complain of want of notice. Pub. St. 1901, c. 61', # 8.

2. It was the mortgagor's duty to either pay his taxes, or to expose personal property within 14 days after he was notified of the tax; and. as he failed to do either, the collector was authorized to sell the house when and as he did. provided it is "real estate" within the meaning of section 13, c. 60, Pub. St. 1901, which is held to give the collector a lien on the mortgagor's real estate for all the taxes assessed against him Drew v. Morrill, 62 N. H. 28, 26.

3. Section 21, c. 61, Pub. St. 1901, makes such a building as the icehouse in question "real estate" within the meaning of section 13, c. 60, Pub. St. 1901. Consequently the collector had a lien upon it for all the mortgagor's taxes.

Case discharged. All concurred.

(78 N. J. L. 201)

MOORE v. MIERS.

(Supreme Court of New Jersey. June 8, 1909.) LIBEL AND SLANDER (§ 85*) - PLEADING . DECLARATION.

The declaration sets up that the defendant, who was the secretary of the state council of a fraternal order, into which council plaintiff a fraternal order, into which council plaintiff was entitled to admission, published the following oral statement concerning the plaintiff: "If they [meaning plaintiff] have the pass, they got it in some other way; they did not get it through me. There is a man by the name of S. who gets a copy of everything I send through the mails, but I don't know how they [meaning plaintiff and said S.] get it"—meaning and insinuating that plaintiff had taken said password from the mails. Held that the statement in suggistion was not also decrease a cither in diquestion was not slanderous per se, either in direct language or by innuendo.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 85.*]

(Syllabus by the Court.)

Action by Joseph L. Moore against William H. Miers. Judgment for defendant on demurrer.

Argued February term, 1909, before GUM-

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

MERE, C. J., and SWAYZE and PARKER.

Spencer Simpson and George A. Enright, for plaintiff. Allan H. Strong and Theodore Strong, for defendant.

PARKER, J. This is a suit for slander. The declaration alleges that the plaintiff was duly elected and qualified representative of Lincoln Council No. 1, Junior Order of United American Mechanics at the State Council of the Junior Order of United American Mechanics, and, being desirous of attending the said State Council, obtained the current passwords from the secretary of the State Council, and applied for admission at the meeting, and that the defendant, being then and there the secretary of the State Council, stated at the meeting, and at other places made the following statement concerning the plaintiff: "If they [meaning this plaintiff] have the pass, they got it in some other way; they did not get it through me. There is a man by the name of Smythe who gets a copy of everything I send through the mails, but I don't know how they [meaning the plaintiff and said Smythe] get it"-meaning and insinuating that said plaintiff had taken said passwords from the mails. The second count is substantially the same, using the same words with the same innuendo. Without reference to the question whether these words would be libelous if written, we have no hesitation in saying that they are not slanderous when spoken, nor does the innuendo place any meaning in them which can be regarded as slanderous so that they are actionable. The words themselves import no more than that the information was procured in some other way than from the secretary, and that Smythe obtained a copy of what the secretary sent through the mails. There is nothing slanderous in this, for there is no charge of criminality or moral turpitude, and it is not pretended that the words are slanderous per se on any other of the recognized grounds. The innuendo does not help the matter, for all it charges is that the plaintiff took the passwords from the mails, which he might have done without any breach of the law. The case is controlled in our judgment by Ludlum v. McCuen, 17 N. J. Law, 12, in which the plaintiff was postmaster, and was charged with having broken open the defendant's letters in the postoffice, and in which it was held by Chief Justice Hornblower that: "The mere opening of letters, whether for the gratification of idle curiosity or as an act of wantonness, does not involve the idea of moral turpitude, or render a man infamous, in such a sense as the law imputes to those terms when it is settling the doctrine of slander at the common law."

There will be judgment for the defendant on the demurrer.

(75 N. J. E. 589)

CROCHERON et al. v. SAVAGE et al.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

ATTORNEY AND CLIENT (§ 123*)—PURCHASE FROM CLIENT.

An attorney in hac re cannot maintain a purchase from a client of the subject-matter of the retainer unless he demonstrates that he made a full communication to his client not on-ly of all that he knew, but as well of all that he believed, respecting the property.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. \$ 240-244; Dec. Dig. \$

2. ATTORNEY AND CLIENT (§ 123°)—PURCHASE FROM ATTORNEY—VALIDITY.

If, in the course of his employment, the attorney forms an opinion that the property is more valuable than had theretofore been assumed, and if he fails to disclose that opinion, and thus give his client all that reasonable advice against himself that he would give against a third person, the transaction, if questioned, cannot be sustained.

[Ed. Note.—For other cases, see Attorney and lient, Cent. Dig. \$\$ 240-244; Dec. Dig. \$ Client, 123.*1

(Syllabus by the Court.)

Appeal from Court of Chancery.

Bill by Valina R. Crocheron and others against Edward S. Savage and others. Decree (70 Atl. 853) for defendants, and complainants appeal. Reversed.

McDermott & Enright, for appellants. Robert H. McCarter and William H. Osborne, for respondents.

DILL, J. The complainant Mrs. Crocheron seeks to set aside a deed of certain real property made by her to her attorney, Mr. Savage, the defendant herein, in the course of his professional employment in hac re. The conveyance is attacked on the grounds: That it was obtained by the defendant from his client in violation of the rule which requires that an attorney who bargains with his client in a matter of advantage to himself must conduct the transaction in all respects fairly and equitably; that he must fully and faithfully discharge all his duties to his client, not only by refraining from any misrepresentation or concealment of any material fact, but by active diligence to see that his client is fully informed of the nature and effect of the transaction proposed and of his own rights and interests in the subject-matter involved, and by seeing to it that his client either has independent advice in the matter, or else receives from the attorney such advice as the latter would have been expected to give, had the transaction been one between his client and a stranger. The learned vice chancellor who heard the case below sustained the transaction and held the deed valid.

We are obliged to differ with the conclusion of the court below, applying the amplification of Lord Eldon's rule (Gibson v. Jeyes, 6 Ves. 266) as laid down by Justice Kay estate expert in local values, and the owner in Luddy's Trustee v. Peard, 55 L. J. R. N. of similar adjacent property, to represent 8. Ch. Div. 884 (1886), to the effect: That an attorney cannot maintain a purchase from a client unless he can demonstrate that he made a full communication to his client not only of all that he knew, but also, what is pertinent to this case, of all that he believed, respecting the property, its character and value; that where the attorney, in the course of his employment, forms an opinion that the property is more valuable than had theretofore been assumed, if he fails to disclose that opinion, and thus give his client all that reasonable advice against himself that he would give against a third person, the transaction cannot be sustained. Inasmuch as the relation of attorney and client is involved, we discuss the facts somewhat in de-

The complainant was the owner of an undivided half interest in a certain tract of three acres of salt meadow land on Staten Island Sound and Thorp's creek in Middlesex county, N. J. The property in question had prior to this controversy been treated, so far as the record of title shows, as a mere adjunct to property on Staten Island, and the history of the title was therefore found in deeds to Staten Island property recorded in Richmond county, in New York state. About 1890 the Port Reading Railroad Company acquired title to the other undivided half of the property by a deed from one Louis N. Meyer. In the deed to the railroad company, the scrivener attempted to convey this undivided one-half interest in three acres by a description conveying 11/2 acres, although the property had never been partitioned or divided. The railroad, however, took possession of the whole three acres. The plot in question was so substantially inclosed by other lands belonging to the railroad that the only access to it was by boat, either from Staten Island Sound or inland by Thorp's creek. The railroad erected on the immediately adjacent property coal docks, bulkheads, and particularly a wharf, which practically closed Thorp's creek to navigation, and thus tended to cut off the only available access to the locus in quo from the land side. The use made of the land by the complainant and her predecessors in title was to cut salt grass upon the meadow. Because of the situation and character of the property, it had little market value and as little available value except from its contiguity to the railroad property and from its considerable water front, nearly 300 feet on Staten Island Sound and approximately 750 feet on Thorp's creek. It therefore occupied a strategic situation and was of primary importance to the railroad.

In 1903 the complainant, who was a widow some 75 years of age, without apparent influence or means, employed the defendant, a lawyer of special experience in dealing with properties in this neighborhood, a real

of similar adjacent property, to represent her as attorney and counsel, and either to sell the property to, or force some settlement with, the railroad. The defendant, under his professional retainer, entered into negotiations, but the railroad, sustained as it was by a record title which its attorney had advised was sufficient, seemed to rely upon possession as nine points of the law. From 1903 to November 1, 1905, the defendant had various communications with the railroad, asserting his client's ownership of the property, threatening suit, and demanding \$7,500 for her interest; but he evidently desired to avoid a lawsuit, hoping to convince the railroad that the claimant had title, and thus settle the matter. In October, 1905, he again threatened suit, stating (October 18, 1905): That he had promised his client that he would file the papers within a week unless the matter was arranged, but would hold the papers until the 23d of October, 1905; that if not settled by that time he would go to Philadelphia and make a demand on the railroad preliminary to commencing the action. But the railroad constantly refused to recognize the complainant's title, although it offered the nominal sum of \$100 as peace money for her interest, which she declined. Finally, in November, 1905, Mr. Savage had an interview with Mr. Cutter, the local counsel for the railroad. in which the latter told Mr. Savage: That he had spent two or three days in the Richmond county clerk's office, Staten Island, examining the title; that he had personally inspected the property, and, although the descriptions were somewhat indefinite and differed in the Oakley deed and in the Meyer deed, he thought the property mentioned in both deeds was the same. He then said that the Oakley deed, under which the complainant claimed, called only for an undivided half of the land, and that if partition proceedings were brought the company would have set apart to it the land upon which the docks were constructed.

In reference to this interview the railroad counsel testified that he had never admitted before that he thought the property described in the two deeds was the same property. Mr. Savage testified that Mr. Cutter told him that he had made his report, and that the impression made upon his (Mr. Savage's) mind at that interview was that Mr. Cutter had reported that the complainant had some title. The facts thus communicated to the defendant, that the railroad had through its counsel examined the records in' Staten Island, and that the counsel had personally inspected the property and was satisfied that the complainant had title to an undivided one-half interest in the property, are important because, as appears from the evidence on both sides, Mr. Savage became convinced at this time that the railroad now had before it such facts that it must

recognize the complainant's claim, and from | so agreed to pay the fees of a former lawver this he must have formed the professional opinion that the result of negotiations or of a legal contest must eventually be an award to his client, and hence that the value of the client's interest was greater than either he or she had theretofore believed. After this interview nothing more seems to have been done, and no communications passed between any of the parties until the 3d of January, 1906, when the defendant, without previous notice to the complainant, went to her residence at Rossville, on Staten Island, with the admittedly preconceived intention of buying her interest in the property. He took with him a deed, containing a description of the property and ready for execution except as to the names of the parties, and, what is quite as significant, he provided himself with \$200 in currency with which to pay for the property.

Taking the defendant's version of the interview with the plaintiff and her son, he first mentioned the subject of the proposed purchase to the son, and told him: That he had spent all the time and all the money he was going to spend on the matter, unless he commenced litigation. That he had been referred from one official to another and was no better off than he was three years before. The only offer they had ever made was an offer of \$100. And that, if his mother wanted to go on with the suit, an action in partition would have to be brought that might result in a division of the property and the recovery of her half interest. To this the son replied, "The other half is not worth anything," and then defendant, without advising him, said, "That is something for you to determine." The defendant told the complainant that the best offer that he could get for her was \$100, and that he would rather give her \$200 for her interest and fight the railroad himself, than give up the fight. He told her plainly that he could not do anything more for her without a lawsuit, and that he offered her \$200, with the understanding that he was going to fight the railroad through and find out whether they had a half interest in the property or not. Again, in the presence of the mother, he repeated to the son that \$100 was the only offer that he had ever been able to get them to make, and the question was whether the complainant should give up the right or bring an action to maintain her title, and in his opinion the railroad would not pay anything until they were beat-The son thereupon said to his mother that she could do as she pleased. Complainant said that she would rather have the money, and the defendant again reiterated his statement that he would give her \$200 just for the privilege of fighting the railroad, as he thought they had tried to make a fool of him. She asked for delay to consider the matter, but he urged immediate action on her part. He then filled out the deed, she executed it, and he paid her the \$200. He al- railroad. In fact, the evidence abundantly

(\$50), and agreed to send a letter explaining the deed which might be sent to the Virginia heirs.

It is admitted that, whether intentionally or otherwise, the defendant failed to make any mention to the complainant of his interview with the counsel for the railroad, or that he had since that time formed any further or other opinion as to the value of the complainant's interest or her chances of succeeding in bringing the railroad to terms. On the contrary, he at once wrote a letter to the complainant to be sent to the Virginia heirs, saying, in part: "The best price that I could offer to you for your undivided interest in the three-acre tract is \$200. This is \$100 more than the railroad company offered and in my opinion is its full value at the present time. It has really no value outside of the fact that it may be of some value to me eventually, and therefore I have offered \$200." The defendant's negotiations with his client were based upon the position of affairs prior to his interview with the railroad's counsel, and not upon the situation as changed by that interview. He made to her no statement of fact and expressed no opinion as to the changed attitude of the railroad. He failed to disclose the impression made upon his mind by the admissions of Mr. Cutter, the railroad's attorney, but refrained from advising her as to the probabilities of success of the suit, without which he declared nothing could be obtained. On the other hand, immediately after he became the purchaser, in his further dealings and negotiations with the railroad, he boldly stood upon his interview with Mr. Cutter as establishing the recognition of his client's title. A side light is thrown upon the conduct of the attorney in not affording the complainant time for reflection and independent advice, but that when she requested delay he urged an immediate execution of the deed. Four days after acquiring the title, the defendant wrote to the railroad, not disclosing his purchase, but assuming to still represent the complainant, and stated that Mr. Cutter had finally concluded that the meadow property purchased by the railroad from Meyer was only a half interest and not the whole property, and that the undivided one-half belonged to his client. He suggested an actual partition, and stated that he had had the property surveyed, and expressed the hope that they could agree upon a fair and equitable division.

After the ownership of the defendant became known, negotiations continued between him and the railroad on various lines, for a division of land by conveyances each to the other, by adopting a line of division or drawing by lot, for an exchange of contiguous properties owned by the parties, in which the three-acre tract was included, for the purchase or sale at a figure to be fixed by the

shows that the defendant made every effort he also formed the opinion that the estate in his power to realize upon the property without resorting to a lawsuit, to obtain an actual partition by agreement, to effect an exchange of properties, to realize cash upon his half interest by an actual sale at a figure, or to purchase the interest of the railroad at the same figure. Throughout the entire negotiations, the value placed upon the property by the defendant was \$7,500, or in that immediate neighborhood. The negotiations having failed, the defendant brought a suit in equity against the railroad, claiming title to the land in question, asking for an accounting and a mandatory injunction against the railroad, enjoining and directing the removal of all the piers, docks, stores, buildings, and obstructions, and directing the restoration of Thorp's creek to its natural and navigable condition. The present suit was commenced nearly two years after the execution of the deed in question and shortly after the suit was brought by the defendant against the railroad.

As to the law applicable to this case, it is well settled. Mr. Justice (subsequently Chancellor) Magie in this court stated the rule as follows: "When two parties stand toward each other in any relation which necessarily induces one to put confidence in the other, and gives to the latter the influence which naturally grows out of such confidence, and a sale is made by the former to the latter, equity raises a presumption against the validity of the transaction. To sustain it the buyer must show affirmatively that the transaction was conducted in perfectly good faith, without pressure of influence on his part, with complete knowledge of the situation and circumstances, and of entire freedom of action on the part of the sel-When the confidential relation is that of attorney and client, the attorney, who buys, must also show that he gave to his client, who sells, full information and disinterested advice." Dunn v. Dunn, 42 N. J. Eq. 431, at page 443, 7 Atl. 842, at page 844. The same principle is found in the English reports, following the leading case of Gibson v. Jeyes, 6 Ves. 266 (1801). See: Holman v. Loynes, 4 De G., M. & G. 270 (1854); Savery v. King, 5 H. L. Cas. 627 (1856); McPherson v. Watt, L. R. 3 App. Cas. 254 (1877). Luddy's Trustee v. Peard, 35 L. J. R. N. S., Ch. Div., 884 (1886), is closely analogous to the present case. There a solicitor, who had acted for a bankrupt, purchased the interest of the latter in a trust estate. The solicitor had apparently in good faith, and without intention to mislead, represented to the trustee in bankruptcy and to his solicitor and to the bankrupt himself that the interest was a life interest only, having no salable value; but before the purchase the solicitor's professional skill had led him to believe that this construction of the will was doubtful. and that it was possible that the bankrupt's interest was, after all, an absolute one, and part of the railroad to defeat the injunction

was much more valuable than appeared from the rental, which he admitted was nothing like its true value. The solicitor purchased from the trustee in bankruptcy for £77 an estate which was worth £2,000. The opinion contains the following: "From a time anterior to the death of the testatrix until after his purchase from Sperring (the bankrupt's trustee), J. D. Peard acted as solicitor for Luddy in respect of this property. In the course of that employment he was called upon to consider carefully the extent of Luddy's interest under the will. He evidently formed an opinion that it was probably an absolute interest, and not merely * * * a life interest, as described in his letter of the 11th of December, 1876, * * * and his subsequent communications with Luddy and his trustee. In the course of the same employment he also formed an opinion that the property was more valuable than the actual rental showed. He did not disclose his opinion on these points either to Luddy or his trustee or the trustee's solicitor. * * Putting aside the circumstance of secrecy, and supposing Luddy not to be bankrupt, the case would be one in which Peard could not have maintained such a purchase from Luddy himself unless he could show that he had made a full communication to his client of all he knew or believed respecting the property, and, as Lord Eldon said in Gibson v. Jeyes, 6 Ves. 266, had given his client all that reasonable advice against himself that he would have given against a third person." As to the distinction made in the English cases between an attorney in hac re and one otherwise situated, see: Montesquieu v. Sandys, 18 Ves. 302, at page 313; Holman v. Loynes, supra; McPherson v. Watt, supra. There is no force in the contention here that Mr. Savage was not the attorney in hac re.

It is not necessary to find that the attorney was guilty of intentional wrongdoing. The reason why he did not disclose the material facts upon which we have commented is not important. The fact that he did not disclose them is sufficient. The law looks on transactions of this kind between an attorney and his client with suspicion, and will not permit a conveyance to the attorney to stand unless the attorney demonstrates the entire good faith of the transaction. It requires him to be absolutely frank and open with his client, to disclose every fact of which he has knowledge, and as well any professional opinion he may have formed, which could in any way affect the client in determining whether or not to make the conveyance. The conduct of Mr. Savage does not measure up to this standard of frankness.

The contention of the defendant's counsel that the Port Reading Railroad Company instigated the present action, and that it is intended to be and is a counter move on the suit brought by Mr. Savage against the railroad-or, as counsel graphically puts it, that "the hand of the railroad sticks up like a sore thumb throughout the entire suit from its commencement down to date"-is interesting, but is no defense. The defendant is answered by the language of Vice Chancellor (now Mr. Justice) Reed in Ocean City Railroad Co. v. Bray, 57 N. J. Eq. 164, at page 167, 87 Atl. 604, 605, where he says: "In respect to those actions at law wherein malice is not an essential element in the plaintiff's case, or in those suits in equity where intent does not lie at the bottom of the right to relief, the courts will take no notice of the purpose in the mind of the parties in asserting or defending such legal or equitable rights. The right of a party to redress in such instances is ex debito justitize, and a court has no discretionary power to determine whether it will or will not award to a party his legal or equitable remedy, according to whether the party may or may not be actuated by a malicious or impolitic motive." In another case Vice Chancellor Reed aptly said: "In such case as this, bad motive in the complainant will not defeat the relief. At best it will arouse a suspicious scrutiny of the proofs as to the existence of the conditions upon which the remedy is given." Fort Wayne Electric Corporation v. Franklin Electric Light Co., 57 N. J. Eq. 16, at page 21, 41 Atl. 666, 668. The United States Supreme Court has also held: "If the law concerned itself with the motives of parties, new complications would be introduced into suits which might seriously obscure their real merits. If the debt secured by a mortgage be justly due, it is no defense to a foreclosure that the mortgagee was animated by hostility or other bad motive." Dickerman v. Northern Trust Co., 176 U.S. 181, at page 191, 20 Sup. Ct. 811, 314, 44 L. Ed. 423. See, also: McFadden v. Mays Landing & Egg Harbor City R. R. Co., 49 N. J. Eq. 176, at page 183, 22 Atl. 932; Davis v. Flagg, 35 N. J. Eq. 491, Court of Appeals, 1882 (opinion by Beasley, C. J.); Roberts v. Tompkins (decided at this term of this court) 73 Atl. 505 (opinion by Parker, J.); McDonald v. Smalley et al., 1 Pet. 620, 7 L. Ed. 287; Morris v. Tuthill 72 N. Y. 575, at page 577; Raughley v. West Jersey & S. R. Co., 202 Pa. 43, 51 Atl. 597.

The decree below is therefore reversed.

(78 N. J. L. 186)

HOLCOMBE et al. v. GRIGGS.

(Supreme Court of New Jersey. June 8, 1909.) WILLS (§ 68°) - CONTRACT TO MAKE - AC-TION FOR BREACH.

defendant's testator, then living, thereupon promised to leave them her estate if they would refrain from filing a caveat and permit the will to be probated, to which they agreed, and which agreement they carried out by permitting the probate of the will. Afterwards the defendant's good cause of action for damages against the estate of the party who made the promise.

[Ed. Note.—For other cases, see Wills, Dec. Dig. \$ 68.*]

(Syllabus by the Court.)

Action by Tunis Q. Holcombe and others against James L. Griggs, executor of Mary E. Holcombe, deceased. Demurrer to dec laration overruled.

Argued February term, 1909, before GUM-MERE, C. J., and SWAYZE and PARK-ER, JJ.

McDermott & Enright, for plaintiffs. Hugh K. Gaston, for defendant,

PARKER, J. The plaintiffs are children, of Oscar V. Holcombe, who was a son of Lucilla A. Holcombe, deceased, and as such represented their father as heirs at law of said Lucilla. The defendant is executor of Mary E. Holcombe, who was a sister of Oscar V. Holcombe, and who survived her moth: er, Lucilla. Oscar, however, predeceased his mother. The declaration sets forth that after the death of Lucilla A. Holcombe, who died seised of an estate of several thousand dollars, a document purporting to be her last will and testament gave by its terms to Mary E. Holcombe all her silverware, horses, cattle, phaëton, carriage, and harness, and all household and kitchen utensils and the books contained in her library, and to her son John W. Holcombe and to said Mary E. Holcombe the farm in Franklin township, on which she resided, share and share alike; these two provisions carrying the bulk of her estate. The declaration goes on to say "that subsequent to the death of said Lucilla A. Holcombe, and prior to the probate of said document as her will, the plaintiffs herein, well' believing that the aforesaid alleged will had been procured by undue influence, and that the testatrix at the time of the execution thereof was of unsound mind and without testamentary capacity, and that the alleged will was void and not in fact the last will and testament of the deceased, did evidence their intention to oppose the probate thereof and to file caveats against the same. That thereupon a family settlement was agreed upon, and the said Mary E. Holcombe and the said plaintiffs did mutually agree, by way of family settlement of the estate of said deceased. that if the said plaintiffs would refrain from contesting said will and would permit the The declaration alleged, in substance, that plaintiffs, who were heirs at law and next of kin of a decedent, were cut off by her will, and before it was offered for probate "evidenced their intention" of contesting it, and that the

of her property, real and personal, of which a promise in writing to pay \$4,000, if comshe should die seised and possessed, over and above the amount necessary to pay her debts, unto the plaintiffs herein, share and share It goes on to say: That the plainalike." tiffs, relying on said promise, and in consideration thereof, refrained from contesting the probate of said will, and dld permit the same to go to probate and abandoned their claims as heirs at law and next of kin, and that the will was afterwards probated and letters testamentary issued thereon, and that Mary E. Holcombe received and enjoyed the property left to her thereby. That afterwards Mary E. Holcombe died at Somerville leaving personal property of the value of \$5,000, and upwards above her debts, and that she failed to carry out her promise to devise and bequeath all her property to the plaintiffs, but, on the contrary, disposed of it in other ways, leaving to the plaintiffs only a few personal articles. The grounds of demurrer are (1) that the declaration discloses no valid consideration for the supposed contract; (2) that plaintiff has failed to set forth such a contract as would charge defendant to the performance thereof; (3) that the facts do not justify recovery in a court of law.

So far as concerns the contract itself, we think it is definite and sufficient, and that there was a breach. That an agreement to leave property by will, if made on sufficient consideration, is valid and will be enforced is well settled. Johnson v. Hubbell, 10 N. J. Eq. 332, 66 Am. Dec. 773; Van Duyne v. Vreeland, 12 N. J. Eq. 142; Winfield v. Bowen, 65 N. J. Eq. 636, 56 Atl. 728. Recovery may be had by a suit for damages in a court of law. Stone v. Todd, 49 N. J. Law, 274, 8 Atl. 300. The contract is set out with sufficient definiteness in the declaration, which avers in substance that Mary E. Holcombe proposed to the plaintiffs that, if they would refrain from a contest of the will in her favor, she in her turn would leave them her property, and that the plaintiffs agreed to this and performed their part of the agreement. In Grandin v. Grandin, 49 N. J. Law, 508, 9 Atl. 756, 60 Am. Rep. 642, plaintiff had filed a caveat and was induced to withdraw it and to assign an interest in the estate in consideration of defendant's promise. It was held that, while the withdrawal of the caveat might not have been a sufficient consideration because its filing had commenced a litigation which must then go on in the orphans' court, the further action by way of assignment disabled plaintiff from claiming any share in the estate except under the will, even barring an action of ejectment. Rue v. Meirs, 43 N. J. Eq. 377, 378, 12 Atl. 369, is more like the present case. No caveat had been filed, and the father of infant heirs "ex-

said Mary E. Holcombe would by her last sions of the will and protested against its will and testament devise and bequeath all admission to probate." The defendants made plainant would abstain from contesting the probate and present the will to be proved. This he did. It was claimed that the promise to pay \$4,000 was without consideration; but the court held otherwise (Van Fleet, V. C.). See foot of page 379 of 43 N. J. Eq., page 370 of 12 Atl.

I think the declaration somewhat loosely but still sufficiently sets up that plaintiffs believed they had a valid ground of contest, and threatened to make such contest, and that in view of such threat Mary made the agreement with them which is now sued on. If such a consideration would support a promise to pay \$4,000 at once in cash, it may well be held adequate to support a promise to leave one's property at death, retaining the benefit of it during life. Our only difficulty in the case has been the question whether the intention "evidenced" by the plaintiffs of contesting the probate of the will was brought home sufficiently to Mary E. Holcombe to indicate that this was a moving consideration for her promise; but we conclude that this is sufficiently apparent on the face of the declaration, for it says "that thereupon a family settlement was agreed upon," and this can mean nothing else than that the promise of Mary was part of the family settlement, and that the family settlement was in view of the indication by the plaintiffs of their intention to contest the will.

Judgment will be entered for the plaintiffs on demurrer.

(78 N. J. L. 205)

TRUSTEES OF STEVENS' INSTITUTE OF TECHNOLOGY v. BOWES, Collector of Taxes, et al.

(Supreme Court of New Jersey. June 8, 1909.) TAXATION (§ 242*)—EXEMPTIONS—PROPERTY OF COLLEGE.

Land acquired by Stevens' Institute in Ho-Land acquired by Stevens' Institute in Ho-boken subsequent to the erection of its academic buildings, separated therefrom by a street, and used mainly, if not entirely, for athletic pur-poses, is not land whereon the buildings are sit-uated, necessary to the fair use and enjoyment thereof, so as to be entitled to exemption under section 3, pl. 4, Tax Act 1903 (P. L. p. 394).

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 394-403; Dec. Dig. § 242.*] (Syllabus by the Court.)

Certiorari by the Trustees of the Stevens' Institute of Technology against Richard Bowes, Collector of Taxes in the City of Hoboken, and others. Modified and affirmed.

Argued February term, 1909, before GUM-MERE, C. J., and SWAYZE and PARKER,

J. W. Rufus Besson and Gilbert Collins, for prosecutor. John J. Fallon, for defendpressed his dissatisfaction with the provi- ants.

PARKER, J. The prosecutor was assessed for taxes of 1908 on about 7% acres of land in the city of Hoboken, and claims exemption under placitum 4 of section 8 of the general tax act of 1903 (P. L. p. 394). The pertinent provisions of the act are fully quoted in the opinion of this court in a former suit between the same parties, which opinion is reported in 74 N. J. Law, 80, 70 Atl. 730. As in that case the controversy involves the land adjoining, and perhaps that underlying, the building known as the "Morton Laboratory," but the outlying lands now sought to be declared exempt are not the same, and it is to these last that the principal dispute relates. It is not denied that the prosecutor is a college or academy not conducted for profit, and as such entitled to the exemptions conferred by the section cited. The question now to be determined is whether the lands included in the writ are, within the meaning of the statute, lands whereon the buildings of the prosecutor "are situated, necessary to the fair use and enjoyment thereof, not exceeding five acres in extent for each." Until very recently Stevens' Institute was a compact group of buildings, all situated on the block, bounded west by Hudson, east by River, south by Fifth, and north by Sixth street in Hoboken. North of Sixth street is the Stevens' family property, known as "Castle Point," bounded on the west by Hudson street, on the north in part by Eighth street, and on the south, east of River street, by Sixth street. At the time of the former litigation the Institute owned, besides the block containing its general plant, a tract of 4.562 acres, trapezoidal in form, situate on the northeast corner of Sixth and River streets, and running to the The Morton Laboratory, a Shore road. building used for the purposes of the prosecutor, and which is about 120 feet long, and 45 feet deep, stands at the intersection of Sixth and River streets in the southwest corner of this tract. By the former decision the whole piece was declared exempt, on the grounds that it did not exceed five acres in area; that the laboratory was situated on it: that other buildings were to be erected on it; and that the uncontradicted testimony indicated that is was necessary for the fair use of the laboratory.

The present situation is very different. The Institute has parted with the easterly portion of the 4.562-aere tract, retaining of it a rectangle of 1.690 acres, 175 by 425 feet, less one small corner, the southerly end being occupied by the laboratory, and in lieu of the land disposed of has acquired land as far as Eighth street on the north and Hudson street on the west, making a continuous tract, besides the land immediately feet in length by 450 feet in width, or about for defendant affirmed.

seven acres. Counsel for prosecutors call this a "campus," but the map they submit shows that it is an athletic field, with grand stand, fieldhouse, "bleachers," 220 yards straight away and half mile oval, besides room for base ball, football, and lawn tennis. The president testifies that an athletic field is a distinct necessity in connection with the obtaining of a higher degree of efficiency in instruction. Conceding this for the sake of argument, we are unable to see that it brings the athletic field within the exemption of the statute. The exemption conferred is of land both necessary to the fair use and enjoyment of the buildings, and "whereon the same are situated." It cannot be said that the buildings on the main block are "situated" on land in another block, which was acquired long after they were erected; nor do we think that the general athletic needs of students at an institution of learning make a neighboring athletic field necessary to the fair use and enjoyment of the buildings. The Morton Laboratory, and the land on which it actually stands, are of course exempt. So also is a curtilage around it of such area as is reasonable, in view of the purposes to which it is devoted, including light, air, and access, and incidental outside uses. This under the circumstances would mean a tract bounded by River and Sixth streets and the present easterly line of the property, and on the north by a line not necessarily straight or at right angles, separating the laboratory tract from land devoted to other purposes. Counsel can no doubt agree on the location of this line.

So far as relates to this laboratory tract. the assessment of taxes brought up will be set aside; in other respects it will be affirmed.

(78 N. J. L. 277)

STERNBERG & CO. v. LEHIGH VALLEY R. CO. (three cases).

(Supreme Court of New Jersey. June 7, 1909.)

ASSIGNMENTS (§ 121*)—ACTIONS BY ASSIGN-EE—PARTIAL ASSIGNMENT.

The nineteenth section of the practice act of April 14, 1903 (P. L. p. 540), does not extend to a case where a part of a chose in action is attempted to be assigned.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 200; Dec. Dig. § 121.*]

(Syllabus by the Court.)

Appeals from District Court of Newark, Three separate actions by Sternberg & Co. against the Lehigh Valley Railroad Company. In two of the actions judgment was rendered for plaintiff and in the third for defendant, and the parties appeal from the respective judgments against them. Judgadjoining the laboratory, of approximately 650 | ments for plaintiff reversed, and judgment

•For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

These three cases bring to test the valid-| \$17.48. It differs from the assignment in ity of certain assignments made by employes of the defendant company, whereby the plaintiff claims to be entitled to recover at law the wages of such employes. They are appeals from the judgment of the Second district court of the city of Newark, and for convenience they will be referred to as suits Nos. 1, 2, and 3, respectively. They were argued together in this court. None of the assignments were accepted by the defendant, but payment was promptly refused, and the plaintiff was so notified.

Suit No. 1 concerns the assignment of Thomas F. Lynapp, and presents the following facts: The assignor has been a trainman in the employ of the railroad company since July 20, 1900. He receives \$3 per day wages payable at the expiration of each month, and is subject to discharge at the pleasure of the company at the expiration of any month, and to immediate discharge for cause. An assignment was executed by him on January 20, 1907, and delivered to the plaintiff, which in consideration of \$21 assigns to the plaintiff "all claims and demands which I now have and all of which at any time between the date hereof and until the above amount shall have been paid shall accrue, for all sums of money due or to become due to me for services, or for any claim whatsoever, and I hereby direct that my wages be paid to said Sternberg & Co. by my employer." There are no particular wages under any particular contract assigned. This assignment was not presented to the defendant till April 6th, before which date defendant had no knowledge of it. On April 10th, defendant refused payment, and so notified plaintiff. The assignor had received his wages to March 81st preceding, and at the date of the commencement of the suit was still in defendant's employ, and has received his regular wages since the date of the assignment, viz., on April 30th, the wages earned during April. Lynapp owes the plaintiff \$21 for merchandise purchased as security for the payment of which the assignment was executed and delivered. At the close of the case, plaintiff moved for judgment in its favor for \$21, and defendant moved for judgment in its favor. Both motions were denied, whereupon the court rendered judgment in favor of the plaintiff and against the defendant for \$18. Cross-appeals were then taken to this court.

Suit No. 2 involves the assignment of George W. Doyle, and presents the following facts: The assignor has been a deck hand on defendant's boat in defendant's employ since August 18, 1906. He was employed by the month. His wages are \$55 per month and paid monthly. He is subject to discharge at the pleasure of the company at the expiration of any given month and also subject to immediate discharge for cause. The assignment was executed by him

case No. 1, in that it directs that his wages be paid to the plaintiff by his employer, the defendant, "covering the months of January, February, and March, 1907," and is directed in that respect to his employers. The notice of it was served on the defendant on the 1st day of February, 1907, which was the defendant's first knowledge of it. Payment was refused February 7th, and Doyle was discharged on that day by the defendants for executing and delivering the assignment. The last payment of wages to Doyle by the defendants was January 31st which was in full to that date. No moneys have been paid to the plaintiff by the defendant under the assignment. The assignor owes to the plaintiff \$17.48 for merchandise purchased as security for the payment of which the assignment was executed and delivered. The court rendered judgment in favor of the defendant. The plaintiff thereupon appealed to this court.

Suit No. 3 involves the assignment of John Quigley, and presents the following facts: The assignor has been in the employ of the defendant since July 23, 1904, as a trainman. His employment was by the day at \$2.60, but received his wages monthly. He was subject to discharge at the pleasure of the company at the expiration of any month and to discharge for cause at any intermediate time. On October 19, 1906, he executed and delivered to the plaintiff an assignment as security for the payment of \$20.50, the price of goods purchased by him from the plaintiff. The assignment was in form like that in case No. 1-first, a general assignment, and then a specific direction that his wages be paid to Sternberg by his employer, the defendant, "covering the months of October, November, and December, 1906." The notice of the assignment was served November 7. 1906, which was defendant's first knowledge of it, was refused on the 8th of November, and Quigley was dismissed on December 15, 1906, for reasons aside from any connection with the execution of the assignments. He received from the defendant his regular wages up to the time of his dismissal, and was paid December 1st his regular wages for the month of November. No moneys have been paid by the defendant to plaintiffs under the assignment. At the close of the case defendant moved for judgment in its favor, and plaintiff moved for judgment in its favor for \$20.50. Both motions were denied, and the court gave judgment in favor of the plaintiff for \$18.20. Cross-appeals were then taken to this court.

Argued February term, 1909, before GAR-RISON, BERGEN, and VOORHEES, JJ.

Otto A. Stiefel, for plaintiff. McCarter & English, for defendant.

VOORHEES, J. (after stating the facts as above). Assuming, but not deciding, that on December 10, 1906, in consideration of the choses in action involved in this case have a potential existence, that the wages sought to be assigned were under existing contracts, and were therefore assignable at law, and were not mere possibilities not coupled with an interest all of which may well be doubted, there is one insuperable obstacle presented in each case to the upholding of the assignments. The authority of the plaintiff, the assignee, to sue in its own name at law, must arise under the nineteenth section of the practice act of April 14, 1903 (P. L. p. 540). We are concerned, therefore, with a strictly legal assignment, not an assignment of contingent interests and expectancies which equity will enforce by construing such assignment to operate by way of agreement or contract, a distinction clearly pointed out in Mitchell v. Winslow, 2 Story, 630, Fed. Cas. No. 9,673. See Sullivan v. Visconti, 68 N. J. Law, 543, 53 Atl. 598.

In each of the cases the assignment sets out a definite consideration, and assigns all claims "which I have now and all (of) which at any time between the date hereof and until the above amount shall have been paid shall accrue" for service or any claim whatever. There was no acceptance by the defendant of the assignments; on the contrary, each was refused. The assignment in each case became inoperative as soon as the sum of money designated as its consideration had been paid. No particular sum of money corresponding in amount with payments to be made by the defendant to its employé was assigned. In each case compliance with the assignment would result in the splitting up of the wages by the payment to the plaintiff of the part assigned to it, and the payment of the remainder to the assignor. The statute in question has been construed by this court in Otis v. Adams, 56 N. J. Law, 88, 27 Atl. 1092, as not extending to a case where a part of a chose in action is attempted to be assigned.

This view leads to the following results: In case No. 1 the judgment will be reversed, with costs. In case No. 2 the judgment will be affirmed, with costs. In case No. 3 the judgment will be reversed, with costs.

(78 N. J. L. 203)

RAFFERTY v. PUBLIC SERVICE RY. CO. (Supreme Court of New Jersey. June 8, 1909.)
NEW TRIAL (§ 89*)—GROUNDS—UNFAIR AD-

VANTAGE.

The plaintiff sustained personal injuries by being thrown from the defendant's trolley car, and it was claimed that as a result of the accident she was suffering from a disease known as "pachymeningitis," which manifested itself in impaired mentality and other allied symptoms. All the medical witnesses on the plaintiff's main case and all the medical witnesses for the defendant agreed that the plaintiff, who was a young child, was suffering from adenoids, and the claim of the defendant was that the impairment of mental force and other symptoms testified to could be accounted for by this fact. On

the plaintiff's rebuttal the court permitted another medical witness to be sworn for the first time, and to testify that he had examined specially for adenoids, and they did not exist. Held that, while the admission of this testimony was not legal error, it injected a new issue into the case at a stage when the defendant was not fairly in a position to meet it, and that a new trial must be ordered.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 177; Dec. Dig. § 89.*]

(Syllabus by the Court.)

Action by Ellen Rafferty, by James S. Rafferty her next friend, against the Public Service Railway Company. Verdict for plaintiff, and defendant obtained a rule to show cause why a new trial should not be granted. Rule made absolute.

Argued February term, 1909, before GUM-MERE, C. J., and SWAYZE and PARK-ER, JJ.

Craig A. Marsh, for plaintiff. Alvah A. Clark, for defendant.

PARKER, J. This was a suit for personal injuries sustained by the plaintiff, a child of about seven years old, while endeavoring to board a trolley car operated by the defendant company.

It is urged as a ground for a new trial that the verdict was against the weight of evidence. We have examined the evidence in the case, and do not find that the defendant's evidence so greatly preponderated that it is our duty to set the verdict aside. On the contrary, we find testimony from which the jury were fairly entitled to infer that after the car stopped and while a passenger was getting off the conductor was inside the car with a memorandum book in his hand making some entries from the fare register and that he started the car without paying any attention to what was going on outside or looking to see whether any passengers desired to board the car. The question of contributory negligence would be peculiarly for the jury in the case of so young a child.

It is further urged that the damages are excessive. On this branch of the case we conclude that there must be a new trial, substantially from the way in which the testimony was introduced.

The claim made on the part of the plaintiff was that the accident resulted in a diseased condition known as "pachymeningitis," os hardening of the dura mater of the brain, which is a disease of slow development and produces a mental sluggishness or inactivity which all the medical witnesses agreed was present, and up to the time that the defendant rested its case all the medical witnesses were likewise agreed that the child was a sufferer from the disease of childhood known as "adenoids," and all were in substantial agreement that adenoids tend to impair the mental processes because of the impoverished

condition of the blood due to faulty respiration, and the dispute in the case was whether the impaired mental condition of the plaintiff was attributable to pachymeningitis or could be accounted for by the existence of these adenoids. This was a well-defined issue, and evidently understood as such by both parties throughout the trial; but the plaintiff in rebuttal called another medical witness, Dr. Ard, who testified that he was a specialist in adenoids, with special appliances for diagnosis of that disease, and that he had made an examination with all the scientific appliances to discover whether the plaintiff in fact had adenoids, and swore positively, as a result of that examination, that she had not. This testimony was objected to as not proper rebuttal, but the court admitted it. We cannot say that the admission of this testimony was legal error: the matter being entirely within the discretion of the court; but it is very evident from an examination of the whole case that, not only was the defendant in no position to meet this new evidence, but inasmuch as the medical witnesses for the plaintiff had freely conceded the existence of adenoids, and the entire trial had proceeded on that basis, the introduction of this evidence in rebuttal brought an entirely new issue into the case, which the defendant was not prepared to meet, and which it could not be expected under the circumstances to have anticipated. In all probability the previous medical witnesses, being active practitioners, had been dismissed and had gone about their ordinary business. The plaintiff recovered a verdict for \$4,000, and such a verdict cannot possibly be supported on any theory except that the claim made for the plaintiff was correct, and that she was suffering from pachymeningitis as a result of the accident.

The evidence of Dr. Ard must necessarily have been an important factor in this result, and we think that its introduction at that stage of the case gave the plaintiff an unfair advantage that deprived the verdict of the force which it would otherwise have.

For this reason the rule to show cause will be made absolute.

(78 N. J. L. 92)

WINTER . SCHOENFELD.

(Supreme Court of New Jersey. June 7, 1909.) SET-OFF AND COUNTERCLAIM (§ 14*)—ACTION FOR DEBT—RECOUPMENT.

In an action of indebitatus assumpsit where the plaintiff relies only upon the common counts, the defendant cannot by plea or notice of recoupment claim damages sustained by reason of any cause of action arising out of the contract upon which the indebitatus assumpsit is rested. Bozarth v. Dudley, 44 N. J. Law, 304, 43 Am. Rep. 373, followed.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 16; Dec. Dig. § 14.*]

(Syllabus by the Court.)

Action by Michael Winter against Abram L. Schoenfeld. Demurrers to pleas sustained. Argued February term, 1909, before the CHIEF JUSTICE and SWAYZE and PARK-ER, JJ.

William A. Lord, for plaintiff. William Hamilton Osborne, for defendant.

SWAYZE, J. The declaration is in the ordinary form of the common counts in assumpsit. Annexed is a bill of particulars stating that the action is brought to recover the amount due on a book account. The detailed statement of the items follows, showing a charge of \$975 for rent from December 1, 1907, to December 1, 1908, inclusive, upon which \$400 is credited, leaving a balance due on what is called the rent account of \$575; a charge of \$200 for the amount paid for license, with credits of \$150, leaving \$50 balance on the license account; a charge of \$24 for beer from November 27 to December 4, 1908, with a credit of \$6, leaving a balance due of \$18. Three pleas are interposed. The first is the ordinary plea of nonassump-The second plea avers that the defendant in August, 1907, bought a hotel and café business of the plaintiff, for which \$2,-000 was paid; that the plaintiff before the purchase represented that he held a 10-year lease of the hotel premises which had 8 years to run; that the representation was made for the purpose of inducing the defendant to purchase the business, and that the defendant made the purchase on the faith of the representations; that the representation was untrue, the fact being that the plaintiff's lease expired in the spring of 1909; that the defendant has only recently discovered the falsity of the representations, and that he thereupon rescinded the contract and tendered to the plaintiff a bill of sale of the goods and chattels, good will, and business of the hotel: that the items set forth in and annexed to the declaration are for moneys claimed by the plaintiff under and pursuant to the agreement and transaction of purchase; that the consideration has completely failed. The third plea sets up in the form of a plea a right to recover damages by way of recoupment by reason of the deceit which is set forth substantially in the terms of the second plea. A separate demurrer is interposed to each plea. One of the causes of demurrer to the second plea is that the alleged misrepresentations could not defeat the plaintiff's right to maintain this action, and one of the causes of demurrer to the third plea is that the plea does not show a defect in or partial failure of the consideration of the contract sued on. The second and third pleas are directed apparently to the cause of action disclosed in the bill of particulars. This, however, is no part of the declaration. Harrison v. Vreeland, 38 N. J. Law, 366; Brown v. Warden,

44 N. J. Law, 177. The declaration counts | upon an implied contract. It alleges an indebtedness from the defendant to the plaintiff and a promise in consideration thereof to pay the plaintiff the sums demanded. The case, therefore, does not raise the question which counsel have supposed to be involved, and to which their arguments have been directed-whether section 105 of the practice act (Act April 14, 1903; P L. p. 568) authorizes the defendant to recoup damages for deceit upon a contract for sale. That section authorizes only the recoupment of damages which the defendant may have sustained by reason of any cause of action arising out of the contract or transaction which is the subject of the action. The contract which is the subject of the action in this case is not the contract of sale, but an implied contract to pay an existing debt. The distinction has already been pointed out by this court in Bozarth v. Dudley, 44 N. J. Law, 304, 313, 43 Am. Rep. 373. The demurrers therefore are well taken, and the plaintiff is entitled to judgment upon the two pleas demurred to. The issue raised by the plea of nonassumpsit remains to be tried.

For the satisfaction of the defendant it may be well to add that, as near as we can guess from the statements of the bill of particulars, the amounts claimed are for rent accrued while the defendant was in the actuall occupation of the premises, for a balance of cash paid for a liquor license by the plaintiff for the defendant, and for a balance due for beer actually delivered. These items seem to constitute a debt which would be a sufficient consideration for the promise set forth in the declaration. On the defendant's own showing of a rescission of the contract he was bound to restore the consideration which he had received, and a part of this consideration was the occupancy of the premises for the 13 months in question and perhaps the amount of the license fee which the defendant would be bound to repay. The sale and delivery of the beer seems to have been an ordinary case of the purchase and sale of goods and chattels and occurred long after the original transaction. This sale itself would constitute a sufficient consideration to support the declaration.

(78 N. J. L. 236)

HARRISON v. CLARKE.

(Supreme Court of New Jersey. June 7, 1909.)

1. DAMAGES (§ 163*)—BREACH OF CONTRACT.

The general rule is that for a breach of a contract nominal damages only can be recovered, unless there is proof of substantial damages, which cannot be inferred from the breach alone. [Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 454-459; Dec. Dig. § 163.*]

Damages (§ 124*)—Breach of Contract Prevention of Performance.

ure of damages generally is: For the work performed, such a proportion of the entire price as the fair cost of that work bears to the fair cost of the whole work; and, for the work not performed, such profit as would have been realized by its performance.

[Ed. Note.—For other cases, see Dam Cent. Dig. §§ 326-338; Dec. Dig. § 124.*]

3. Damages (§ 124*) — Breach — Damages —Prevention of Performance.

In such a suit the amount of recovery must be regulated by the contract price, although cir-cumstances may exist which make it impractica-ble to ascertain what sum would be due at the contract price, as in case the work done was in such an unfinished state as to be incapable of measurement, in which event the recovery may be without reference to the contract rate, as upon a quantum meruit.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 326-338; Dec. Dig. § 124.*]

4. Damages (§ 124*)—Breach of Contract.

A plaintiff should not be awarded a recovery of the whole contract price under a contract not performed or only partially performed without proof to show his actual loss.

[Ed. Note.-For other cases, see Damages, Cent. Dig. §§ 326-338; Dec. Dig. § 124.*]

(Syllabus by the Court.)

Appeal from District Court of Newark.

Action by Henry Harrison against Frederick H. Clarke. Judgment for plaintiff, and defendant appeals. Reversed, and a new trial granted.

Argued February term, 1909, before GAR-RISON, BERGEN, and VOORHEES, JJ.

Woodruff & Stevens, for appellant. Edwin G. Adams, for appellee.

VOORHEES, J. This is an appeal from the first district court of Newark, in which judgment was rendered after trial before the court without a jury in favor of the plaintiff for \$300. The action was brought to recover upon a contract contained in certain correspondence, whereby the plaintiff offered in a letter to paint two portraits of the defendant's parents to the entire satisfaction of the defendant as to likeness and quality; pictures to be delivered within a reasonable time. This was confirmed by letter written to the plaintiff by the defendant on the same day. to wit, May 28, 1908, and the plaintiff was directed to proceed. The proof was that the defendant after sitting by his parents and the taking of photographs, during which the sister of the defendant was present, received a letter from the defendant reading, "Your proposition to cancel your contract to produce in oil portraits of my father and mother is accepted without recourse," to which the plaintiff replied that he was not aware of any proposed cancellation of the contract. and that if the defendant desired to cancel it the plaintiff supposed that he would at least offer to settle for the work already Thereafter there was some corredone. spondence between the parties, in which the plaintiff was informed that there would be Where a defendant has prevented the per plaintiff was informed that there would be formance of a contract by his fault, the meas- no more sittings at present, as there was dis-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plaintiff was conducting the matter. The court found as a matter of fact: That the contract had never been rescinded, and that the portraits had progressed to some extent. The plaintiff stated that the expense was "inestimable," no cash expense to speak of; the cost of the actual paint and canvas being very little. The most was in skill and labor. and that, if the plaintiff had been permitted to fulfill his contract, there would have been profit. The court rendered a judgment for the entire contract price, \$300.

The insistment of the defendant is that the measure of damages in cases of this type is: (1) Actual reasonable expense in preparing to perform the contract; (2) if the work is partly performed before the breach, the actual reasonable value of the work done; and (3) the actual pecuniary loss of profit, if any. And further argues that the plaintiff must prove these or fail in recovering actual damages and be confined to nominal damages alone. The general rule is that for the breach of a contract nominal damages only can be recovered, unless there is proof of substantial damages, which cannot be inferred from the breach alone. There was no evidence that there was any expense in the preparation to perform the contract, nor what was the reasonable value of the work done before the contract was broken, nor was there any evidence of what profit, if any, would have been made if the contract had been completed. Consequently no loss of profit was proved. The general rule of damages, where there is a prevention of performance of a contract by the fault of the defendant, was enunciated in Kehoe v. Rutherford, 56 N. J. Law, 23, 27 Atl. 912. It was, for the work performed, such a proportion of the entire price, as the fair cost of that work bears to the fair cost of the whole work, and, for the work not performed, such profit as would have been realized by its performance.

In a suit brought upon such a contract for refusal to perform the damages for what has been done under it, as well as the profits to be earned, must be regulated by the contract price, although circumstances may exist which make it impracticable to ascertain what sum would be due at the stipulated prices, because when the work was stopped it was left in such an unfinished state as to be incapable of measurement, in which case the recovery might be as upon a quantum meruit, without reference to the contract rate. Derby v. Johnson, 21 Vt. 17. See full discussion of this subject in Sedgwick Damages (6th Ed.) pp. 264, 265. It may be and probably is true that these circumstances are present in this case, and that the latter rule must be applied as to work performed; but that the plaintiff, without proof to show his

satisfaction with the manner in which the | contract not performed, or only partially performed, of the same amount as he would be entitled to upon full performance, would be to permit what in Kehoe v. Rutherford, supra, was rejected because "the absurdity of the result condemns the application of such a rule." This leads to a reversal of the judgment. Whether the general rule or its modification must be applied in this case depends upon the facts. What they are do not appear.

> The judgment is reversed, and a new trial granted.

> > (78 N. J. L. 213)

BENNETT, Overseer of The Poor v. LLOYD. (Supreme Court of New Jersey. June 7, 1909.) CRIMINAL LAW (§ 1023*) - APPEAL - QUES-TIONS DETERMINABLE—REMEDY BY CERTIO-BARÍ.

In proceedings to compel a defendant to support his family under the act concerning disorderly persons, the justice of the peace permitted the complainant to amend a defective complaint, after which the same was tried and judgment entered against defendant, who there-upon appealed to the court of quarter sessions, in which court the proceedings were dismissed upon the ground that the original complaint was defective. *Held*, that the sessions had no power to review the legal error, if any, of the justice in allowing the amendment, as that was only subject to review by certiforari; that the defendant having chosen one of two remedies. defendant having chosen one of two remedies, namely, certiorari, for a review of the legal error, or appeal on the merits of his cause, he must stand by his choice, and the sessions should have proceeded to try the cause on the record as amended.

[Ed. Note.-For other cases, see Criminal Law, Dec. Dig. \$ 1023.*]

(Syllabus by the Court.)

Certiorari to Court of Quarter Sessions, Cumberland County.

Certiorari by Charles E. Bennett, overseer of the poor of the city of Millville, against John Lloyd. Judgment set aside.

Argued February term, 1909, before GAR-RISON, BERGEN, and VOORHEES, JJ.

Louis H. Miller, for prosecutor. J. Roy Oliver, for defendant.

BERGEN, J. A writ of certiorari was allowed for the purpose of reviewing the action of the court of quarter sessions of the county of Cumberland in dismissing proceedings instituted to compel defendant to support his family under the act concerning disorderly persons. P. L. 1898, p. 942. Section 17 of the act makes it the duty of the overseer of the poor of any township or city to make a complaint under oath before a magistrate of such township or city against any husband or father who "deserts or willfully refuses or neglects to provide for his wife or other family," where he has reason to believe that the family may become loss, should be awarded a recovery under a chargeable to such township or city. In this

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1967 to date, & Reporter Indexes

case complaint was made before a justice | of the peace having jurisdiction that the defendant, as complainant "is credibly informed, and verily believes, neglects and refuses to support and take care of his family, and that by reason thereof such family is likely to become a charge upon the city of Millville." On this complaint a warrant was issued, the defendant arrested, brought before the justice, and entered into a recognizance to appear for a hearing, which was had April 23, 1908, at which both parties appeared, when counsel for defendant moved that the complaint be dismissed because it did not contain the words "deserts and willfully." This motion was overruled, after which, according to the record, the plaintiff moved to amend the complaint in the particular complained of "and, no objection being made, the same was allowed and filed." The trial then proceeded, resulting in the conviction of the defendant and an order for maintenance, from which the defendant appealed to the court of quarter sessions of the county of Cumberland, in which court appellant moved to dismiss the complaint on the ground that the court had no jurisdiction, because the complaint as originally made before the justice, failed to show that the appellant "deserts and willfully neglects" to support his family, and that the amendment of the complaint made by the justice could not be made against the objection of the appellant. The court of quarter sessions dis missed the proceedings upon the ground that the complaint was defective without proceeding to hear and determine the appeal upon its merits.

A review of this determination is the object of this writ, and the principal reasons urged in its support are that the justice had jurisdiction; that the appeal cured any want of jurisdiction in the justice court, if it existed: and that the court of quarter sessions could not act as a court of review. There can be no doubt under the settled law of this state that, in order to give the justice jurisdiction to act in a case of this character there must be a complaint under oath setting forth the jurisdictional facts, and also that one of the jurisdictional facts is that the defendant willfully refuses or neglects to support his family, and for want of this necessary and material statement in the complaint the justice lacked jurisdiction, and should have dismissed the proceedings on the application of the defendant. The record shows that the amendment was made before the justice without objection. and thereafter the merits of the controversy tried before the justice. Whether the justice had the power to allow such an amendment it is not necessary to determine, because the record, as amended and returned to the court of quarter sessions, disclosed a sufficient complaint, and it was the paid by check.

duty of that court to retry the cause, and not to pass upon the legality of the procedure in the court pelow. Barclay v. Brabston, 49 N. J. Law, 630, 9 Atl. 769. If the amendment was erroneously allowed by the justice, and his jurisdiction to hear the cause improperly obtained by reason thereof, it was a legal error subject to review by certiorari. The defendant, as was said in Barclay v. Brabston, supra, had a choice of remedies by certiorari for a legal review, or by appeal for a new trial. He chose to appeal from the judgment based upon the record as amended, and is bound to stand by his choice. The court of quarter sessions had no power to review on the appeal the legal error, if any, of the justice.

This result renders it unnecessary to consider the other reasons urged by the prosecutor on the argument.

The judgment challenged by this writ is set aside with costs, and a new trial ordered.

(78 N. J. L. 281)

YOSHIMI et al. v. UNITED STATES EX-PRESS CO.

(Supreme Court of New Jersey. June 7, 1909.)

1. Principal and Agent (§ 22*)-Evidence

OF AGENCY.

The mere declaration of a person that he is agent for a party to a suit is not eviden-tial against such party.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 40; Dec. Dig. § 22.*]

2. EVIDENCE (\$ 241*) - DECLARATIONS OF AGENT.

The admissions of an agent bind a principal only when within the scope of the agency, when they are authorized by the principal.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 887-892; Dec. Dig. § 241.*]

(Syllabus by the Court.)

Appeal from District Court of Atlantic City.

Action by Kyozo Yoshimi and Sybil Yoshimi, trading as Yoshimi & Co., against the United States Express Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Argued February term, 1909, before GAR-RISON, BERGEN, and VOORHEES, JJ.

Perry & Stokes, for appellant. Thompson & Cole, for appellees.

VOORHEES, J. This is an appeal from the district court of Atlantic City. plaintiffs brought suit for the value of four pieces of ivory goods, alleged to have been delivered packed in a box by the plaintiffs to the defendant for transportation to one Insull, at Chicago. It was in proof that these ivories were sold at auction by the plaintiffs to Insuli, and \$5 paid on account, and thereafter the balance due for them was The shipment was to be

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

made by the plaintiffs. That the plaintiff | personally packed them in separate boxes, and took them down to the packer, laid them on his wrapping table, and stood there until he had secured a large box to pack them in, and saw him pack two of the smaller boxes containing the ivories in the larger box, and then came upstairs. The packer was Duke Albertson, and he died about three weeks before the trial. The plaintiff testified on cross-examination that, when she left Albertson, he had two figures in the box, and two figures outside of the box, and that she knew nothing of them after she saw them downstairs. The box was delivered to one of the drivers of the express company, who called at the plaintiffs' place for it, and gave a receipt dated February 22, 1907, for one box said to contain glass, valued at \$176. marked "S. Insull, 23 Lake Shore Drive, Chicago." It was alleged in the state of demand that the plaintiff delivered to the defendant the box in question, and that, through the negligence and carelessness of the defendant, the goods were mislaid, lost, or stolen, and were never delivered to the consignee. There was testimony also, that the servant of the defendant who called for the box had roped the box, and tied it and sealed the ends, so that no one could open it. It appeared that the box had been returned to Atlantic City by the defendant after complaint had been made that it was not delivered. The lid was then off, the cords had been cut, and there was nothing in it but hay and straw. When it was shipped from Atlantic City, it weighed 15 pounds, and when it came back it weighed 14% pounds. ivory goods weighed about 3 pounds.

The nondelivery of the parcel was attempted to be proved by a conversation which the plaintiff had with Mr. Edelman, who was the local agent at Atlantic City of the express company. The plaintiff, after testifying that Edelman told her that he was the manager of the defendant at Atlantic City, and that the clerk in the office had told her so also, stated that this manager had admitted to her that the box was empty, with the exception of the straw, when it reached its destination, and that, with the exception of the cords being cut, it had not been tampered with at all so far as he knew. On cross-examination the plaintiff testified: "Do you know whether the package was ever delivered to the consignee? A. I wasn't there, and don't know that it was. Q. Do you know? A. I had letters from her that she had received the box, and that it was empty, with the exception of the straw. Q. She had received it? A. Yes. Q. You had letters from her? A. Yes." She also stated that Edelman told her that there could not versed.

have been anything in the box when it left Atlantic City, and that all he knew about the delivery of the box was what he had heard. At the close of the plaintiff's testimony a motion was made to nonsuit on four grounds:

(a) Because there was no delivery of the goods to the defendant; (b) because there was no proof showing nondelivery of the goods; (c) because the plaintiff had no right of property in the goods, and hence was not the proper party to sue; and (d) because the sale at auction passed the title absolutely from the plaintiff.

Assuming that there was proof of sufficient facts and circumstances to justify the conclusion that the goods were packed in the box when delivered to the common carrier, and assuming that there was proof of facts from which the jury might conclude that the contract of sale included the shipment of the goods by express to the purchaser, and that the plaintiff had a standing to sue for the loss of the goods, there still was no legal proof that the goods were not delivered to the consignee. The mere fact that the person in charge of the express office of the defendant company at Atlantic City was called the agent or manager could not make him the agent of the company for all purposes. Nor was his declaration that he was such agent evidential against the defendant. It was not proved that the scope of his agency extended to anything that occurred at the Chicago office. Hence his declaration or admissions concerning the transaction in Chicago could not be admitted as against the defendant. The admissions of an agent bind a principal only when within the scope of the agency, or when they are authorized by the principal. Runk v. Ten Eyck, 24 N. J. Law, 756. See, also, Hill v. Adams Express Co.. 74 N. J. Law, 338, 68 Atl. 94; Huebner v. Erie R. R., 69 N. J. Law, 327, 55 Atl. 273. Furthermore, the plaintiff admitted that the package had been delivered to the consignee, and that upon opening it it was found by the consignee to contain nothing but straw. The contention that because these matters were brought out on cross-examination they, as well as the agent's admissions, have become legal evidence against the company, is without force. That the box was delivered to the consignee by the defendant is an admission of the plaintiff against her interest, and as such is binding upon her; but her testimony that the consignee had informed plaintiff that the box when delivered to the consignee was empty is mere hearsay. To admit it would put the mere statement of the consignee on a par with testimony given under oath.

For these reasons the judgment will be reversed.

(78 N. J. L. 293)

CARVER v. CITY OF CAMDEN et al. (Supreme Court of New Jersey. June 7, 1909.) ESTOPPEL (§ 93*) — EQUITABLE ESTOPPEL -

PERMITTING EXPENDITURES.

The law requires diligence in the prosecution of a right involved in a public work, and therefore one who for seven months ignores the giving out of a contract for public work, during which time the contractor has incurred expense and obligated himself in pursuance of his contract with the city, is estopped from complain-

[Ed. Note.—For other cases, see Estoppel, Dec. Dig. § 93.*]

(Syllabus by the Court.)

Certiorari by John J. Carver against the City of Camden and others to review resolution of the city council. Resolution affirmed. Argued February term, 1909, before REED, TRENCHARD, and MINTURN, JJ.

Carrow & Kraft, for prosecutor. E. G. C. Bleakly, for defendants.

MINTURN, J. In March, 1907, the city council of Camden passed an ordinance providing for the paving of Federal street between Cooper's Creek Bridge and Twenty-Seventh street with sheet asphaltum. Estimates were received on June 25, 1907, after due advertisement, for the pavement of the street with asphaltum and Belgian blocks, and these estimates were laid over. In February 1908, the ordinance of March, 1907, was repealed, and a new ordinance was then passed, providing for the paving of Federal street between Cooper's Bridge and Marlton avenue with Belgian blocks, and between Marlton avenue and Twenty-Seventh street with sheet asphaltum. Without further advertisement, and in April following, a contract was awarded to the defendants B. F. Sweeten & Son for the pavement of Federal street between Mariton avenue and Cooper's creek with Belgian blocks under their estimate of June 1, 1907. The contract for the Belgian block pavement from the bridge to Twenty-Seventh street was awarded to the Filbert Paving Company, and that contract in the case of Filbert Paving Company against Camden and Sweeten was sustained by the judgment of this court at the June term, 1908. The contract awarded to Sweeten & Son was evidenced by the report of the committee of council accepting the Sweeten bid, which report was presented and accepted by council at the meeting on April 30, 1908.

The written contract between the city and Sweeten & Son in pursuance of this report was dated and executed on May 8, 1908. are not referred to any provision of the charter of Camden which provides for a power of veto in the mayor either of the report of the committee awarding the contract to Sweeten & Son, or of the contract itself; and it seemed to be conceded on the argument that such veto power was not expressly con-

ferred. The contract to Sweeten & Son therefore became effectual on the 8th of May, 1908, and in pursuance of its provisions the contractor entered upon the prosecution of the work. On the 7th of May of that year they contracted with a dealer in writing, which is in evidence, for a supply of granite paving blocks to be used upon the work, and the testimony taken shows that they have in this manner incurred an obligation in pursuance of this contract to the amount of \$17,500. and that this paving material, in part at least, was deposited on the line of the proposed improvement. The prosecutor testified that he knew this contract had been awarded to Sweeten & Son, and ignored the fact until this writ was applied for in January, 1909. Disregarding entirely the element of mala fides, to which some testimony has been directed, and which stands out quite prominently in this case, and not unmindful of Eggers v. Montclair (N. J. Sup.) 71 Atl. 665, we find it necessary only to say, for the purposes of the case, that we are convinced that the prosecutor is upon this record guilty of laches, and is estopped from complaining. The rule is as stated by this court in Mc-Kevitt v. Hoboken, 45 N. J. Law, 484: "The law requires diligence, and the party who stands by and sees a work of this character in the course of construction (sewer improvement), attended by the incurrence of indebtedness, or the expenditure of money, waives his right to take those objections, which, if promptly interposed, would have stopped the work and saved the expense." Ware v. Rutherford, 55 N. J. Law, 450, 26 Atl. 933; State v. City of Hudson, 34 N. J. Law, 25; Cunningham v. Merchantville, 61 N. J. Law, 466, 39 Atl. 639; Carling v. Hoboken, 64 N. J. Law, 223, 44 Atl. 950.

For this reason the resolution in question is affirmed.

(78 N. J. L. 215)

COAST REALTY CO. v. NEWGOLD (Supreme Court of New Jersey. June 7, 1909.) AND TENANT (§ 202*) - LEASE LANDLORD

LANDLORD AND
—RENT—ACCRUAL.

By the terms of a lease the premises were let from June 15, 1908, to April 1, 1913. The rent reserved for the whole period was \$14.250, payable in definite installments. The last payment to be made in 1908, was \$650 (August 10, 1908), "same being rent in full for the first year," and the remaining payments were provided for as follows: "For the remaining four years the rent shall be paid as follows: Seven hundred dollars on the first day of January of each year," etc. Held, that the next payment after August 10, 1908, matured January 1, 1909.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 202.*]

(Syllabus by the Court.)

Certiorari to Justice Court. Action by the Coast Realty Company against Gabriel A. Newgold. Judgment for Affirmed.

Argued February term, 1909, before GAR-RISON, BERGEN, and VOORHEES, JJ.

Frank Transue, for plaintiff. Durand, Ivins & Carton, for defendant.

BERGEN, J. The parties to this controversy entered into a written agreement bearing date April 13, 1908, by the terms of which the Coast Realty Company, as owner, let to Gabriel A. Newgold, as tenant, a hotel property located in North Asbury Park in this state. The landlord instituted proceedings to dispossess his tenant for nonpayment of rent, which resulted in a judgment for the landlord, and thereupon a warrant for possession was issued, duly executed, and the landlord is now in possession. The tenant challenges the correctness of these proceedings, the record of which has been brought into this court by a writ of certiorari.

The only question requiring consideration is whether an installment of rent matured January 1, 1909. If it did, as the court below determined, then the judgment should stand. That part of the lease pertinent to the question presented runs as follows: "Term: The period covered by this lease is from June 15, 1908, to April 1, 1913. Rent: The total amount of rent for said premises, as hereby mutually agreed upon, is fourteen thousand two hundred and fifty (\$14,250) dollars, payable as follows: By said tenant, at the office of Ferguson & Son, Asbury Park, N. J. The first payment made upon the signing of this lease, the receipt of which is hereby acknowledged, is one thousand (\$1-000) dollars, and the further sum of six hundred (\$600) dollars, July 10, 1908, and the further sum of six hundred (\$600) dollars August 1, 1908, and the balance of six hundred and fifty (\$650) dollars August 10, 1908. Same being rent in full for the first year. For the remaining four years the rent shall be paid as follows: Seven hundred (\$700) dollars on the first day of January of each year; seven hundred (\$700) dollars on the first day of May of each year; seven hundred (\$700) dollars on the tenth day of July of each year, and seven hundred and fifty (\$750) dollars on the fifth day of August of each year."

According to the contract the term granted is from June 15, 1908, to April 1, 1913; the rent to be paid for the whole term \$14,-250 and the payments for each year of the term are to be concluded in the month of August. For the first year the payments were made as stipulated, and the present dispute is whether the first installment of the remaining four years became payable January 1, 1909. The tenant makes two claims. First, that when he paid the last installment of rent due August 10, 1908, the rent was paid to

plaintiff, and defendant brings certiorari. I installment of rent for the remaining four years was not payable until May 1, 1909; and, second, that the expression "same being rent in full for the first year" referring to the payment in August, 1908, concludes the landlord from demanding rent until after the expiration of one year from the date when the lease went into effect, which would be June 15, 1909, and therefore the next installment, after August, 1908, would not mature until July 10, 1909, whereas the landlord contends that the payments for the remaining years began January 1, 1909. It will be observed that the payment of the whole rent reserved of \$14,250 is so apportioned that the amount of \$2.850 is paid by August 5th of each year, and the intention that it should be is indicated by the clause in the lease which declares that, when \$650 was paid in August, 1908, it was in full for the first year, and according to the theory of the landlord the payments for the next year, if the first installment matured January 1, would be concluded on the 5th day of August, and so for each succeeding year, the last payment being in August, 1912. The tenant cannot stand on his first proposition, because April 1, 1909, was not the expiration of one year from June 15, 1908, and the words "the same being rent in full for the first year" must apply either to the year 1908, or to a year ending June 15, 1909. As to the second point we are of opinion that the lease provides for the payment of all the rent on or before August 5, 1912, which would not be accomplished if payments for the remaining four years did not commence on January 1, 1909, and this would not be open to argument, except for the statement in the lease, after providing for payments to be made in 1908, "same being rent in full for the first year," but this has reference to the effect of payments made, and does not relate to the time agreed upon for future payments. Certain payments were to be made in 1908, and when made were in satisfaction of a part of the term, and other payments were promised for the rest of the term, beginning, if we regard the order in which they are named, on the 1st day of January next following. Even if we concede that the payments in 1908 were for a term extending beyond January 1, 1909, there is no reason why the parties might not contract to pay in advance of the beginning of the following year. They did contract that after the payment in August, 1908, a payment should be made on the 1st day of January in each year until, by necessary implication, the whole debt was extinguished. The term granted does not cover five years, for it goes into effect June 15, 1908, and expires April 1, 1913, which indicates that the "remaining four years" in which payments were to be made were calendar years, otherwise there would not be April 1, 1909, and that therefore the first remaining four years, because if the install-



ments for the first of the remaining four | road was at the time lighted sufficiently to years were to commence after the expiration of one year from the letting, the first payment would not be due until July 10, 1909, and the last not until May 10, 1913, or more than a month after the expiration of the term. The lease expressly states that after the payment in August, 1908, the payments of the rent for the remaining four years shall be made "\$700 on the first day of January of each year," and the other installments on definite days following, concluding on the 5th day of August of each year; and to hold that the first payment of the remaining four years was not due until the 10th day of July, 1909, would, in our opinion, violate the expresscontract made by the parties. We think that the intention of the parties was that after the year 1908 payments of the installments of rent were to begin on the 1st day of January, and end the 5th day of August. of each year, and that that intention is clearly expressed by their agreement.

It. therefore, follows that the court below correctly construed the agreement, and the judgment should be affirmed.

DECOU v. DEXHEIMER.

(Supreme Court of New Jersey. June 7, 1909.)

1. APPEAL AND ERROR (§ 1185*)-REFUSAL TO GRANT NONSUIT-QUESTIONS REVIEWABLE.

Where the only exception was to the re-fusal to nonsuit, and the evidence presented a question for the jury, the judgment rendered on the verdict on a question of fact must be affirmed.

[Ed. Note.—For other cases, see Appeal and Error. Dec. Dig. § 1135.*]

2. HIGHWAYS (§ 176*)—COLLISIONS—LIABIL-

A driver of an automobile on a road sufficiently lighted to enable him to see for 150 feet is not justified in running down a wagon driving in the same direction merely because the wagon failed to carry lights, though it was compelled to do so.

[Ed. Note,—For other cases, see Highways, Dec. Dig. § 176.*]

Error to Court of Common Pleas, Monmouth County.

Action by George Decou against John P. Dexheimer. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Argued February term, 1909, before the CH!EF JUSTICE and SWAYZE and PAR-KER, JJ.

Riker & Riker, for plaintiff in error. Charles E. Cook, for defendant in error.

PER CURIAM. There was evidence justifying the inference that the plaintiff was driving in his wagon on the right-hand side of the road from Belmar to Ocean Grove, and was struck by the defendant's automo-

enable the defendant to see for 150 feet. These facts presented a question for the jury, and, as the only exception is the refusal to nonsuit, the judgment must be affirmed. The fact that the wagon carried no lights is immaterial. Even if it had been compelled to carry lights, and had failed to do so, the defendant would not have been justifled in running it down.

The judgment is affirmed, with costs.

STATE V. SOMMERS.

(Supreme Court of New Jersey. June 7, 1909.) HOMICIDE (\$ 300*) - TRIAL - INSTRUCTIONS-SELF-DEFENSE.

A charge upon the right to kill in self-defense, such force as is reasonably necessary to repel an assault not involving peril of life or limb, is not prejudicial when the facts present an as-sault with a weapon, instead of a mere assault and battery.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

Error to Court of Oyer and Terminer, Hudson County.

John Sommers was convicted of assault and battery, and he brings error. Affirmed.

Argued February term, 1909, before the CHIEF JUSTICE and SWAYZE and PAR-KER. JJ.

Alexander Simpson, for plaintiff in error. Pierre P. Garven, for the State.

SWAYZE, J. The defendant was indicted for murder, and convicted of assault and battery. His defense was self-defense. His own-account of the occurrence is that his companion, Schmeiss, had quite a talk with Dobbins, the deceased; that the woman in whose company Dobbins was had gone away. and that when he, the defendant, pushed his head in to see what was the trouble, Dobbins punched him in the jaw, and as he was starting back Schmeiss said, "Look out, Jack; he has got a knife;" that he saw the knife in the hand of the deceased, and backed off a step or two; that the deceased came toward him, and he struck the deceased somewhere in the face. There was no other testimony in the case of any justification. The defendant said that he was afraid the deceased would get after him and his companion, and stick one of them with the knife. The court was requested to charge that the right of self-defense may arise from circumstances that justify a reasonable apprehension of great bodily harm, and that the defendant may have been in no actual peril, yet he would have the right, if he had a reasonable apprehension of great bodily harm, to strike the blow he did in defense of himself. The trial judge charged that if bile approaching from the rear; that the the deceased had struck the defendant, and

then advanced upon him again with the uplifted hand with the knife in it ready to strike again, the defendant was clearly within his rights in defending himself with such force as was necessary to protect him from great bodily injury, or what he apprehended reasonably to be a dangerous situation; that the burden was upon the defendant to satisfy the jury that the circumstances were such at the time he struck the blow that he was in reasonable apprehension of danger. He then added: "The circumstances must be such as to satisfy you that the defendant had reasonable grounds to believe he was in danger of life or limb." This was an inadequate statement of the law of self-defense. It omits the situation which arises when the force offered is not so great as to involve peril of life or limb, where the defendant may use such force as is reasonably necessary to repel the actual attack. But, while it is inadequate as an abstract statement of the law of self-defense, we think that it was not prejudicial to the plaintiff in error. The facts did not present the case of a mere assault and battery not involving peril of life or limb, but an assault with a weapon, and the requests to charge on the part of the defendant naturally called attention to these facts of the case if the jury believed his evidence. The judge was not called upon to charge the jury as to the law under a state of facts which neither the state nor the defendant had shown to exist.

We find no prejudicial error in the case, and the judgment is affirmed.

SETTLEMEYER v. PUBLIC SERVICE RY. CO.

(Supreme Court of New Jersey. June 7, 1909.) 1. STREET RAILBOADS (§ 117*)—CROSSING ACCIDENTS—COLLISIONS WITH VEHICLES—SUB-

MISSION TO JURY.

In an action against a street railroad for death of decedent in a collision between defend-ant's car and the wagon decedent was driving, evidence held to make out a case for the jury.

[Ed. Note.-For other cases, see Street Railroads, Dec. Dig. \$ 117:*]

2. DEATH (\$ 99*)—EXCESSIVE DAMAGES.
Where, in an action for wrongful death, it appeared: That decedent was 50 years old; that he was earning \$10 a week; that, though at one time when running a farm with the aid of his family he earned a much larger income. he had quit farming and was working as a farm laborer; that in three months' time he had contributed only \$40 to the support of his family; that all but four of his children were married; and that the unmarried children ried; and that the unmarried children were aged 14, 20, 22, and 24 years of age, respectively—a verdict for \$6,000 was excessive.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125-130; Dec. Dig. § 99.*]

Action by Sidney L. Settlemeyer, administrator, etc., against the Public Service Railway Company. Verdict for plaintiff. Heard on rule to show cause. Rule made absolute.

Argued February term, 1909, before the CHIEF JUSTICE and SWAYZE and PAR-KER, JJ.

Randolph Perkins, for plaintiff. Edwards & Smith, for defendant.

PER CURIAM. The decedent was killed as the result of a collision between a street car of the defendant company and a wagon driven by him. He was at the time coming out of a cross-street. The motorman testified that he saw the wagon coming out of the cross-street on a lively walk when he was 20 or 25 feet away. The car struck the wagon at a point between the horses and the body of the wagon. These facts made a case for the jury. The man was driving only at a lively walk, and there is nothing to indicate that that was not a reasonable rate of speed. He reached the point of crossing going at that rate of speed in advance of the car, and the car was at such a distance that the jury had the right to infer that it might have been stopped in time to avoid the collision if it had itself been going at a reasonable rate of speed. The jury awarded the plaintiff \$6,000.

The decedent was earning \$10 a week, but in three months' time had contributed only \$40 to the support of his family. He was 50 years of age. There was some testimony that at one time, when he had been running a farm with the aid of his family, he had earned a much larger income, but the proof was that he had quit farming, and had sold his tools, and was working as a farm laborer for another man. His family were pretty well grown up. All but four of his children were married and had homes of their own. Of those who were unmarried, one was 24 years of age, another 22, another 20, and another 14. Under these circumstances a verdict of \$6,000 as compensation for the pecuniary loss which the family had sustained by reason of the father's death is absurd. We think, also, that the trial judge ought to have charged, as requested by the defendant, that there was not sufficient data as to the profits made by the decedent in his farming operations to afford any basis to estimate damages.

The rule must therefore be made absolute.

HOWARD v. WATERS et al.

(Supreme Court of New Jersey. June 7, 1909.) MUNICIPAL CORPOBATIONS (\$ 753*)-TORTS OF

OFFICER-LIABILITY.

Where there was nothing to show that de-Where there was nothing to show that defendant city directed a seizure or sale of plaintiff's goods under a tax warrant, or received the proceeds of the sale with knowledge that the goods belonged to plaintiff, the officer having merely seized goods of plaintiff when directed to seize another's goods, defendant was not liable for the wrongful seizure and sale.

[Ed. Note.—For other cases, Corporations, Dec. Dig. § 753.*] see Municipal



"Not to be officially reported."

Action by Mary Howard against Robert Waters and the Mayor and Common Council of the City of Rahway. Rule to show cause why a verdict rendered against the city should not be set aside and a new trial granted. Rule made absolute.

Argued February term, 1909, before the CHIEF JUSTICE, and SWAYZE and PAR-

Samuel Koestler, for plaintiff. Francis V. Dobbins and Horace Coddington, for defendanta

PER CURIAM. The plaintiff sued to recover damages because of the alleged seizure and sale of her personal property by a man named McGuirk, a deputy tax collector, by virtue of a tax warrant directing him to coliect taxes assessed against Howard & Co. The action is in tort. There is nothing to show that the city directed or authorized McGuirk to seize the plaintiff's goods, nor is there anything to show that they received the proceeds of the sale with knowledge that the goods sold belonged to the plaintiff. So far as appears, the case is an ordinary one of an officer directed by his writ to seize the goods of one person, and in disobedience of the writ seizing the goods of another. Under these circumstances it is clear that there was no liability on the part of the city. The question seems to have been presented to the trial judge in the reasons for nonsuit, and we think the motion should have been granted. The rule to show cause recites that the verdict was rendered against the city of Rahway. There is nothing before us to indicate what verdict, if any, was rendered against Waters.

The consequence is that the rule obtained by the city of Rahway for a new trial must be made absolute.

(78 N. J. L. 296)

DIXON et al. v. RUSSELL et al.

(Supreme Court of New Jersey. May 21, 1909.)

1. STATUTES (§ 109*)—TITLES—PARTICULARI-

TY REQUIRED.

The degrees of particularity which must be observed in the title of a statute rest in legislative discretion, not being defined by the Constitution, and the generality of a title will not be fatal to the act if by fair intendment it can be connected with it.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 136; Dec. Dig. § 109.*]

2. STATUTES (§ 121*)—TITLES—CONSTITUTION-AL REQUIREMENTS—SINGLE OBJECT IN TI-TLE.

P. L. 1906, p. 432, c. 228, being "An act to amend an act entitled 'An act to tax intestates' estates, gifts, legacies, devises and collateral inheritance in certain cases,'" is not violative of Const. art. 4, \$ 7, par. 4, requiring every law to embrace but one object, which shall be express in its title.

[Ed. Note. For other cases, see Statutes, Dec. Dig. 121.*]

3. Taxation (§ 867°) — Inhebitance Tax — Property Subject—"Legacies."

Shares of stock in a New Jersey corporation belonging to a testatrix, resident of Rhode tion belonging to a testatrix, resident of knowled Island, and passing under a bequest in her will, are subject to the inheritance tax imposed by P. L. 1906, p. 432, c. 228, entitled "An act to amend an act entitled "An act to tax intestates" estates, legacies, "etc., which by section 1, subd. 2, imposes a tax when the transfer is by will of property within the state and decedent was property within the state, and decedent was a nonresident of the state at death; the stock be-ing embraced by the term "legacies" as used in the title.

[Ed. Note.—For other cases, see Cent. Dig. § 1682; Dec. Dig. § 867.* see Taxation.

For other definitions, see Words and Phrases, vol. 5, pp. 4054-4057; vol. 8, p. 7703.]

4. Constitutional Law (§ 48*) — Persumptions—Legislative Intent to Enact Valid Law.

In construing a statute it will be presum-ed that the Legislature intended to pass a valid enactment, and hence a construction which will support the validity of the act, rather than one which will invalidate it, will be adopted, unless the vice or illegality is clearly discernible.

[Ed. Note.-For other cases, see Constitutional Law, Cent. Dig. \$ 46; Dec. Dig. \$ 48.*]

al Law, Cent. Dig. § 48; Dec. Dig. § 48."]

5. STATUTES (§ 121*) — TITLE — VALIDITY —
"TRANSFER"—"PASSING"—"CHANGE OF TITLE"—"CHANGE OF POSSESSION."

The title of P. L. 1906, p. 432, c. 228, entitled "An act to amend an act entitled 'An act to tax intestates' estates, gifts, legacies, devises and collateral inheritance in certain cases," is sufficiently comprehensive to include the subject-matter of section 1, subd. 2, thereof, providing that a tax may be imposed when the transfer is by will of property within the state and decedent was a nonresident at death; the word "transfer" being used as synonymous with "passing," "change of title," or "change of possession."

[Ed. Note.—For other cases, see Statutes, Dec. Dig. 121.

For other definitions, see Words and Phrases, ol. 2, pp. 1056-1059; vol. 8, pp. 7064-7070, 7819.]

6. Courts (\$ 24*) — Jurisdiction—Jurisdiction By Consent.

The principle that consent can confer juris-diction applies only where the tribunal whose judiction applies only where the tribunal whose jurisdiction is in question has general power to hear the controversy, and not where the jurisdiction or power is not authorized by law or conferred upon it by the Constitution, and hence the jurisdiction of a surrogate to assess an inheritance tax imposed by P. L. 1906, p. 432, c. 228, must be established by more than a mere estoppel in pais alleged to arise from the pro forma request by an executor to a surrogate that he assess the tax gate that he assess the tax.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 76-78; Dec. Dig. § 24.*]

7. COURTS (§ 2*)—JURISDICTION—GROUNDS.

The jurisdiction of a court can never depend upon the merits of a case brought before it, but depends upon its right to hear and decide it at all.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1; Dec. Dig. § 2.*]

8. Taxation († 892*) — Inheritance Tax — Jurisdiction of Surrogate to Levy As-SESSMENT.

Act May 15, 1894 (P. L. p. 318), § 13, imposing an inheritance tax, provides that the surrogate or register of the Prerogative Court, on the application of any interested party or upon his own motion, shall appoint an appraiser

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

whenever occasion may require. Section 15 provides that the ordinary or orphans' court in the county in which the real property of a decedent, not a resident of the state, is situated, shall have jurisdiction to determine all questions in relation to the tax imposed by the act. *Held*, that the surrogate has jurisdiction to levy the assessment of an inheritance tax imposed by the act as amended by P. L. 1906, p. 432, c. 228, upon the application of decedent's executor with the right to appeal to either the ordinary or orphans' court.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 892.*]

Certiorari by William F. Dixon and others, executors of Martha T. Fiske, against George E. Russell and another, to review an order levying an inheritance tax. Order and levy affirmed.

McCarter & English, for prosecutor. Theodore Backes and Edmund Wilson, Atty. Gen., for defendants.

MINTURN, J. Martha T. Fiske died testate, at Cairo, Egypt, on the 23d day of January, 1908, being a resident of the state of Rhode Island at the time of her death. Letters testamentary were issued upon her estate as a nonresident testatrix by the surrogate of New York county to the prosecutors. She was not the owner of real estate within this state, but was possessed at the time of her decease of 1,150 shares of the capital stock of the Standard Oil Company, a corporation of New Jersey, the certificates of which stock were not within this state at the time of the decedent's death. The said stock passed pursuant to the bequests contained in the will to persons and corporations not within the exemption clause of the inheritance act of this state. The executors of the deceased applied to the Standard Oil Company, at its office in this state, to transfer the said shares of stock, but the officials declined to do so upon the ground that the stock might be liable to an inheritance tax. Application was then made by the executors to the surrogate of Essex county to levy a tax on the shares for the purpose of forming a basis for an application to this court to determine the legality of the tax so fixed. The surrogate, in performance of this duty, appointed appraisers, and, upon their report levied a tax on the said shares and forwarded the same to the State Comptroller, who has since made demand upon the executors for the payment of the tax so levied. The prosecutors refused payment of the tax upon the ground of the surrogate's want of jurisdiction to assess it. and upon the ground that the act under which it was assessed is unconstitutional.

Were it not for the existence of the act of 1906 (P. L. p. 432, c. 228), the case of Neilson and Russell, 71 Atl. 286, recently determined by the Court of Errors, would be dispositive of the case at bar, as the facts in the Neilson Case were mutatis mutandis substantially

enunciated that the tax in question was not a property tax but a succession, or transfer tax or legacy duty upon shares of stock of a New Jersey corporation, which, notwithstanding the foreign domicile of the holder, had their situs in this state; but that, notwithstanding that status, they were not subject to the inheritance tax imposed by the act of May 15, 1894 (P. L. p. 318). The act of 1906 provides the differentiating factor in the case at bar and supplies the basis for the tax in question. It is entitled "An act to amend an act entitled 'An act to tax intestates' estates, gifts, legacies, devises and collateral inheritance in certain cases," and by the second subdivision to the first section thereof it provides that a tax may be imposed "when the transfer is by will or intestate law of property within the state, and the decedent was a nonresident of the state at the time of his death." The prosecutors reasons synthetically considered involve two propositions, the first of which attacks the constitutionality of this act, as in contravention of article 4, \$ 7, par. 4. of the state Constitution, which requires every law to embrace but one object, which shall be expressed in its title, and the other that the acts of the surrogate in assessing the tax and the Comptroller in attempting to collect it are coram non judici and void for want of jurisdiction. The title of this act fairly includes the subject-matter of this litigation in specifying "legacies" as the legal term indicative of the matters with which it purports to deal. The shares of stock in question, according to the stipulation in the case, passed under a bequest contained in decedent's will, and therefore are within the meaning of the term "legacies." And as the object of the act sub judici is to impose a tax inter alia upon "legacies" not within the exemption clause of the statute, it seems manifest that the subject-matter of this controversy is plainly comprehended in the title of the act. That the title of this act is not subject to the criticism of the prosecutor in this regard is indicated by the following language of Mr. Justice Van Syckel in Walter v. Town of Union, 33 N. J. Law, 350: "The degrees of particularity which must be used in the title of the act rest in legislative discretion, and is not defined by the Constitution. There are many cases where the object might with great propriety be more specifically stated, yet generality of the title will not be fatal to the act if by fair intendment it can be connected with it." To the same effect are Kirkpatrick & New Brunswick, 40 N. J. Eq. 51, and Bumsted v. Govern, 47 N. J. Law, 373, 1 Atl. 835.

Nor is the act within the constitutional inhibition because, as the prosecutor alleges, its provisions are more comprehensive than the title of the act. This criticism is directed to paragraph 2 of section 1 of the act, and similar to the case sub judici. It was there if the criticism were warranted, it may well



be that the subdivision referred to might be | who was not a resident of this state is situatexscinded without affecting the remaining provisions of the act, as the paragraph in question forms an independent substantive clause. State v. Corrigan, 72 N. J. Law, 64, 60 Atl. 515; State v. Davis, 73 N. J. Law, 680, 64 Atl. 1134. It must be assumed, however, upon well-settled principles of statutory construction, that the Legislature intended to pass a valid enactment; and therefore a construction which will support the validity of the act, rather than one which will invalidate it, will be adopted, unless the vice of illegality is clearly discernible. Road Commission v. Haring Township, 55 N. J. Law, 327, 26 Atl. 915; In re Drainage App., 35 N. J. Law. 497.

Adopting this canon of construction, it may be said with reason that the word "transfer," in section 1 of the act, was used by the Legislature as synonymous with "passing" or "change of title" or "change of possession." This legislative intent is confirmed by the fact that the words "transfer" and "pass" are used throughout the act interchangeably, to indicate a change of title or a change of beneficial ownership, in which event the tax under certain conditions is to be assessed. The jurisdiction of the surrogate, however, to assess the tax, must be established by more than a mere estoppel in pais arising, as is claimed by the learned Attorney General, from the fact that the prosecutor pro forma requested that the assessment be levied as the basis for invoking this writ, because manifestly this statutory proceeding does not establish a tribunal of which it can be said that consent can confer jurisdiction. principle can be invoked only where the tribunal whose jurisdiction is in question has general power to hear the controversy, and is not applicable where the jurisdiction or power is not authorized by law, or conferred upon it by the Constitution. 11 Cyc. 673, and cases; Cooley's Const. Lim. 398.

As was stated in Re Watkins, 7 Pet. 568, 8 L Ed. 786: "The jurisdiction of a court can never depend upon the merits of a case brought before it, but upon its right to hear and decide it at all." The necessity, however, for invoking the principle of estoppel, is not at all apparent. For it is quite manifest that the jurisdiction of the surrogate and the State Comptroller is established by the language of the legislation under consideration. Section 13 in Act March 23, 1892 (P. L. p. 211); Act March 16, 1893 (P. L. p. 371), and Act May 15, 1894 (P L. p. 323), provides: "The surrogate or register of the Prerogative Court, on the application of any interested party or upon his own motion shall appoint some competent person as appraiser as often as, and whenever occasion may require." Section 15 provides that: "The

ed, or in the county of which the decedent was a resident at the time of his death shall have jurisdiction to hear and determine all questions in relation to the tax arising under the provisions of this act." The effect of this legislation is to confer jurisdiction upon either the surrogate or the register of the Prerogative Court to levy the assessment with the right of appeal as the facts may require to either the ordinary or to the orphans' court. In re Vineland Historical Society, 68 N. J. Eq. 294, 56 Atl. 1039.

On the case at bar the surrogate, "upon the application of an interested party," as provided for in section 13 of the act, appointed an appraiser, who assessed the tax in controversy; and this action was manifestly the exercise of a power conferred upon him by the legislation which imposed the tax.

The order of the surrogate and the levy of the tax thereunder are affirmed.

(78 N. J. L. 44)

LONG DOCK CO. v. STATE BOARD OF AS-SESSORS et al. MORRIS & ESSEX R. CO. v. SAME. CENTRAL R. OF NEW JERSEY V. SAME.

(Supreme Court of New Jersey. May 21, 1909.) TAXATION (§ 890°) - SECOND-CLASS RAIL-BOAD PROPERTY—ASSESSMENT.
In the ascertainment of the value of sec-

ond-class railroad property under subdivision 2 of section 3 of the revised act of March 27, 1888 (P. L. p. 271), for the taxation of railroad and canal property, the State Board of Assessors is required to value such property at the value it has in exchange for money as shown by the testimony, i. e., at its market value. Additional value imparted to such property by its use under a railroad franchise should not be included in such ascertainment.

[Ed. Note.-For other cases. Cent. Dig. \$\$ 652-658; Dec. Dig. \$ 390.*]

2. TAXATION (§ 890*) — SECOND-CLASS RAIL-BOAD PROPERTY—ASSESSMENT.

The duty of the State Board of Assessors under the supplemental act of March 4, 1908 (P. L. p. 15), is the same and none other than that required of them by section 3 of the revised act of March 27, 1888 (P. L. p. 270), recited in such supplement. such supplement.

[Ed. Note.—For Dec. Dig. § 390.*] -For other cases, see Taxation,

(Syllabus by the Court.)

8. Taxation (§ 890*)—"Property Used for Railroad and Canal Purposes."

The expression "property used for railroad and canal purposes" is, upon the question of its valuation under subdivision 2, § 3, Act March 27, 1888 (P. L. p. 271), for the taxation of railroad and canal property, the precise equivalent of "property to which a value is imparted by its use under a railroad or canal franchise."

[Ed. Note.—For other cases, see Taxation. Dec. Dig. \$ 390.*]

Certiorari by the Long Dock Company against the State Board of Assessors and others, and by Morris & Essex Railroad Comordinary or orphans' court in the county pany against the same defendants, and by in which the real property of a decedent the Central Railroad of New Jersey against the same defendants, to review certain assessments. Assessments set aside.

See, also, 65 Atl. 244; 75 N. J. Law, 120, 67 Atl. 672.

These writs of certiorari bring up for review the action of the State Board of Assessors in placing a valuation upon the terminal lands of the prosecutors in Jersey City and Hoboken under the supplement to the act for the taxation of railroad and canal property approved March 4, 1908 (P. L. p.

There is one question that is raised by the reasons filed in each case the precise nature of which will be made to appear by a brief recital of antecedent legislation and adjudi-

In 1884 the original statute for the taxation of railroad and canal property was enacted, by the provisions of which all the property of these corporations was to be assessed for taxation; property not used for railroad purposes being made assessable by local assessors, and all property that was so used being made assessable by a State Board of Assessors, who were required in ascertaining the true value of such property to ascertain the value (1) of the main stem, (2) of other real estate used for railroad purposes, called "second-class railroad property," (3) of tangible personal property, and (4) of the franchise. The revision of this act in 1888 (P. L. p. 269) did not vary these requirements.

The duty thus imposed was performed by the State Board of Assessors uninterruptedly from 1884 to 1905, when, by the provisions of the so-called "Perkins act" (Act May 18, 1906 [P. L. p. 571]), such duty as to second-class railroad property was transferred to the local municipal assessors, who made such assessments for the years 1906 and 1907.

On March 3, 1908, the Perkins act was declared to be unconstitutional (United N. J. R. R. Co. v. Parker, 75 N. J. Law, 771, 69 Atl. 239), and on the following day the Legislature passed the remedial act under which the valuations and assessments now before us were made by the State Board of This supplement, after reciting Assessors. the foregoing facts and the further fact that the time within which the State Board of Assessors might make a proper assessment had by reason of the premises expired, enacted that the time for the performance by the State Board of Assessors of their duty under the revised act of 1888 with respect to the valuation and assessment of secondclass railroad property for the years 1906 and 1907 be extended, and that within such extended time such duty should be performed.

In their performance of this duty which, saving as to time, was precisely the original and normal duty imposed on such board by the revised act of 1888, the State Board of Assessors placed upon the terminal lands of the respective prosecutors the valuations would have performed in due course if the

shown by the returns to these several writs of certiorari. These valuations are now attacked by each of the prosecutors upon the ground that as part of the taxing scheme in question they are in excess of the true value of said lands. The returns to these writs bring up the preliminary assessments and the objections thereto filed with the State Board of Assessors, together with the exceptions to the final determination of the board. Upon the questions of fact a voluminous mass of testimony taken before the State Board is returned, upon the weight of which, as well as upon the legal questions involved, counsel representing the prosecutors and the two taxing districts affected have presented comprehensive arguments both orally and by briefs prepared both before and after the oral argument.

Argued February term, 1909, before GAR-RISON, BERGEN, and VOORHEES, JJ.

William H. Corbin, for Long Dock Company. William D. Edwards, for Morris & E. R. Co. George Holmes and R. V. Lindabury, for Central R. Co. Warren Dixon, for Jersey City. Horace W. Allen, for city of Hoboken.

GARRISON, J. (after stating the facts as above). From the testimony brought up by these writs, we find two facts touching the valuation placed by the State Board of Assessors upon the terminal lands of the respective prosecutors to review which these suits have been brought: First, that as to the lands of each of the prosecutors such valuation is in excess of the value such lands have in exchange for money, i. e., their market value. Second, that the valuation of such lands by the State Board of Assessors in so far as it is in excess of their market value is based upon and represents the value imparted to such lands by their actual use for railroad purposes under the franchises of the respective corporations so using them.

In view of these findings of fact, the pertinent legal questions are: First, what is the nature of the duty imposed upon the State Board of Assessors by the supplemental act of March 4, 1908? And, second, in the performance of the duty imposed by that supplement is the State Board of Assessors to value second-class railroad property at its market, i. e., its money exchange value, or are they to include in such valuation the additional value that is imparted to such property by reason of its use under the franchise of the company so using it?

The first of these questions is answered by the act itself, viz., that the duty it requires of the State Board of Assessors is that required by the provisions of subdivision 2 of section 3 of the revised act of 1888. There is no suggestion in the supplemental act that the State Board is to perform any other or different duties under the recited section of the revised act than such board Perkins act had never been passed. The sole question therefore is whether or not, in the valuation of second-class railroad property under subdivision 2 of section 3 of the act of 1888, the State Board of Assessors is to include in and enhance such valuation by an additional value that is imparted to such property by the circumstance that it is used under a railroad franchise.

We think that the increase of value over and above its market value that is imparted to second-class railroad property by reason of its use under a railroad franchise should not be included in the valuation of such property by the State Board of Assessors under section 3, subd. 2, of the act of 1888, and that the opposite course would be directly contrary to the scheme of such act; in other words, that it is absolutely essential to the integrity of the taxing scheme of this act that the valuation placed upon tangible real property under subdivision 2 of section 3 of the act shall not include any element of value that is imparted to it by the intangible property, i. e., the franchise, that is to be valued under subdivision 4 of the same section. The reason for this is we think clear.

It is matter of political history that the paramount object sought to be attained by the act of 1884 for the taxation of railroad and canal property was the taxation of the franchises of these corporations, and it is apparent from an examination of the provisions of the act that its predominating purpose in such taxation was that the money derived from that particular source, i. e., the taxation of railroad and canal franchises, should go to the state for state purposes whatever disposition might be made of the money derived under the act from the taxation of the tangible real property of these corporations situated in the various taxing districts.

To meet these requirements the act of 1884 imposed upon property used for railroad and canal purposes a single tax in the distribution or apportionment of which, as between the state and the taxing districts, so much of the entire tax as represented the value of the franchise (and certain of the tangible property) was to go to the state by which such franchise had been granted, and so much as was based upon the real property situate in the taxing districts was to go to those districts by which but for this act such property would have been taxed. This scheme taxed the value of the franchise for the sole benefit of the state.

Such being the scheme and the equity of the act, it was imperatively requisite not only that the franchise should be assessed and taxed at its true value, but also that the tax yielded by it should go to the state and not to the taxing districts.

These being the paramount purposes of the very thing upon the impracticabilithe act, the problem was how to assess and doing which the entire act itself was tax this intangible property so as to secure these results, and at the same time to tangible railroad and canal property.

comply with the constitutional requirement that property shall be assessed for taxes by uniform rules according to its true value.

The elements that entered into this problem were deemed by the Legislature, and subsequently by the court of last resort, to be sufficiently marked and characteristic to form the basis of a general law for the assessment and taxation of the property of railroads and canals, chief among which was the circumstance that the franchise value, which it was the paramount object of the act to reach, was in the nature of things distributed over the entire property, real and personal, that was used under it, imparting some modicum of such value to every item thereof wherever situated and however used in furtherance of the object for which such franchise was granted. The practical impossibility of the apportionment by any uniform rule of this unique value among the hundreds of thousands of items of property of these companies by the assignment by the local assessors to each item of the increment in value specially imparted to it was the effective characteristic laid hold of by the Legislature upon which to rest a comprehensive and constitutional scheme for the assessment and taxation of all of the property of these corporations including their franchises. In general terms the basis of the classification adopted was "property used for railroad and canal purposes," but a moment's reflection will suffice to show that the only feature of such use that was strictly germane to the legislative object in question, viz., the valuation of such property for the purpose of its taxation, was the value imparted to such property by such use, and, inasmuch as such use was solely by virtue of a franchise so to use, the expression "property used for railroad and canal purposes" is upon the question of its valuation under the act the precise equivalent of "property to which a value is imparted by its use under a railroad or canal franchise." This equivalence, though not expressly pointed out when the only matter sub judice was the constitutionality of the act as a whole, should be recognized whenever in the practical administration of the act we are required to determine the internal relations of the several parts of the act to each other and to the entire working scheme of the act itself. Upon the question now before us touching the inclusion of franchise value in the valuation of second-class railroad property (which has not hitherto been susceptible of presentation in this isolated form), the recognition of this essential element of the classification upon which the act itself is based is of vital importance, for otherwise it might be deemed that the State Board of Assessors in the administration of the act were required to do the very thing upon the impracticability of doing which the entire act itself was based, viz., to assess a franchise value directly upon

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act, however, contains no such self-stultification, for by section 3 the State Board is definitely required to ascertain the value of the franchise in a subdivision by itself. Under subdivisions 1, 2, and 3 of section 3, the board is to ascertain the value of the tangible property and under subdivision 4 the value of the franchise. The revision of 1888, while not varying this requirement, altered the language of subdivision 4 in a respect that must challenge attention, occurring as it does in a revision that was so extremely chary of making changes. In the original act subdivision 4 read. "the value of the franchise." This was changed in the revision of 1888 to "the value of the remaining property including the franchise." The significance of this change is not so much in its intimation that there may be intangible property of a corporation other than its franchise, as in its suggestion that such intangible property is "remaining property," i. e., property that is left after something has been taken or subtracted from something else. This remainder being the value of the intangible property of a corporation which, together with the value of its tangible property makes up the total value of its corporate wealth, it is obvious that the subtrahend, or sum to be substracted is the value of such tangible property (ascertained under subdivisions 1, 2, and 3), and that the minuend, or sum from which such substraction is to be made, is the total value of such corporate property determined in accordance with the detailed provisions of sections 16, 17, and 18 of the act. Unless this is the purpose of these sections, it is impossible to see what they are doing in a statute so scientifically drawn as this one is.

If such be the purpose of these sections, the remainder obtained by the deduction of the value of the tangible property from the total value of all the corporate property gives the commercial value of the franchise expressed in the terms of money in strict compliance with the carefully revised phraseology of subdivision 4, viz., as the "remaining property," and thus also an intangible value is translated into the terms of the commercial standard, just as in the physical sciences the specific gravity of a ponderable substance is translated into the terms of the common physical standard.

The matter is not, however, for present purposes, of controlling import, since, by whatever method the total value of the enfranchised property be determined, the result is the same upon the only consideration with which we are concerned, viz., that the value of the franchise must be truly and separately ascertained, and that, once having been ascertained, no remnant of such value inheres in the tangible property of the company to enhance its valuation by reference to its use under such franchise.

the circumstance that the tax imposed by it is a single tax (United N. J. R. R. & C. Co. v. Parker, 75 N. J. Law, 771, 69 Atl. 239) into which it was intended that the element of franchise value should enter but once. The scheme of the act is that, upon the total valuation of a company's property into which necessarily the full value of its franchise enters, a tax rate shall be laid for the sole benefit of the state, and that upon secondclass property another rate shall be laid for the sole benefit of the taxing districts, and that these two combined rates shall constitute the single tax levied under the act. Inasmuch, however, as into this single tax the element of franchise value is to enter but once, and then solely for the benefit of the state, it is perfectly obvious that, if any element of such franchise value is included in the valuation of second-class property, the scheme of the act is frustrated, and a double taxation imposed that is without the slightest justification in the act. Hence we are forced to the conclusion that in the ascertainment of the value of second-class railroad property, under subdivision 2 of section 8 of the act of 1888, which is the sole matter sub judice, no element of value imparted to such property by its franchise use should be included.

The same conclusion is forced upon us in a different way when we consider the specific duty required of the State Board of Assessors by section 3 of the act. Under this section a valuation is to be placed upon all tangible property, and then the value of "the remaining property," to wit, the intangible, is to be ascertained. Inasmuch therefore as the value of such intangible property is required to be assembled and ascertained as a totality under the last-mentioned head, it is clear that no element of such value was intended to be computed under any other head. All franchise value, i. e., all value imparted to corporate property by its franchise use, is to be gathered up under one head as the value of "the remaining property," i. e., the property remaining after all tangible values have been deducted. The plain purpose was, to use a homely metaphor, that the franchise value should be "skimmed off" for the use of the state, and this of necessity implies that no element of such value shall be confused with the value of second-class property, and thus go to the uses of the taxing districts. If this be not the proper construction of section 3, i. e., if the value of the tangible property mentioned in the first three subdivisions of that section was intended to be ascertained at the enhanced value imparted to it by its franchise use, then we have the absurd result that, upon the deduction of the aggregate valuation of the tangible property thus ascertained from the total value of the company's property in order to ascertain the value of "the re-That these considerations are vital in the maining property," the value of such readministration of the act is manifest from maining property, including the franchise,

would, in view of the axiom that the whole valued the terminal lands of each of the is equal to the sum of its parts, be always found to be exactly and precisely nothing at all. Thus we are again forced to the conclusion already expressed, viz., that, in the ascertainment of the value of second-class railroad property under subdivision 2 of section 3 of the act of 1888, the State Board of Assessors should value such property at the value it has in exchange for money without regard to any enhanced value such property may have imparted to it by its use under the franchise of the company so using it. To the argument that such valuation is not the true value of such property, the complete answer is that the assessment upon which the entire tax is based complies in all respects with the constitutional requirement, and that the subsidiary ascertainment of value incidental to the apportionment of such single tax does not come within the purview of the organic law.

We are not intending to suggest that the availability of land for railroad purposes generally may not be shown and taken into account in the ascertainment of its market value. The reasoning of the opinion in Currie v. Waverly Railroad Co., 52 N. J. Law, 381, 20 Atl. 56, 19 Am. St. Rep. 452, although there applied to the condemnation of land, is equally pertinent to the question of its market value. The difference, however, between the market value of land by reason of its availability for railroad purposes generally, and the value imparted to such land by its specific use under a railroad franchise, is so great as to be fundamental. The latter value is special and peculiar to the individual user of the land proceeding as it were from within; whereas, the former is general, and is based upon external conditions susceptible of universal application as a legal measure. A single foot of submarine cable, owing to its peculiar use under the franchise of its operating company, has thereby imparted to it a value many thousand times greater than such foot of cable possesses when estimated at its market value. The same is true of the tracks of a railroad company, and is also true of its terminal Our general tax act (Act April 8, 1903 [P. L. p. 398]) practically defines the "market value of land" as "the price it would sell for at a fair and bona fide sale by private contractor." In the valuation of the terminal lands of the prosecutors it was the duty of the State Board under the act of 1888 to appraise them at their market value from the testimony.

This being the duty of the state assessors under the section of the revised act recited in the supplemental act of 1908, such and prosecutors in excess of the money exchange value possessed by such lands as shown by the testimony. This is conclusive of the case without regard to the second of our findings of fact, which serves only to point out the erroneous principle that entered into and produced such overvaluation. In view of this result, certain subsidiary questions affecting some only of the prosecutors have not been considered.

In order that the State Board of Assessors may perform the duty imposed upon them by the supplement of 1908 in conformity with the views herein expressed, the valuations, assessments, and taxes brought up by these writs of certiorari are set aside. A rule to that effect may be entered by each of the prosecutors.

(78 N. J. L. 182)

BEECHWOOD PARK LAND CO. et al. v. CITY OF SUMMIT et al.

(Supreme Court of New Jersey. May 18, 1909.)

1. MUNICIPAL CORPORATIONS (§ 303*) - PUB-LIC IMPROVEMENTS—INCLUSION OF SEVERAL IMPROVEMENTS IN ONE OBDINANCE.

The opening of a new street and its grading, paving, etc., are all parts of a single scheme of improvement, and municipal proceedings that include these several matters in one ordinance are not invalid on that account.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 303.*]

2. MUNICIPAL CORPORATIONS (§ 304*)—PUBLIC IMPROVEMENTS — ORDINANCE — SUFFICIENCY.

An ordinance for the grading, paving, and otherwise improving a street is not invalid because it omits to specify the methods of work and character of materials in minute particulara

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 811-816; Dec. Dig. § 304.*]

3. MUNICIPAL CORPORATIONS (§ 112*)-NANCES—EXPRESSION OF SUBJECT IN TITLE

-"OPEN."

An ordinance, entitled "An ordinance to open, grade, macadamize and otherwise improve" a new street designated in such title, contained provisions for the taking of the lands required for such street, by condemnation, and the payment of proper damages for such taking.

Held, that the word "open" implies the acquisition by condemnation, if such acquisition be necessary, of the lands required for such opening, and that the title sufficiently indicates an intent to condemn.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 258-261; Dec. Dig. § 112.*

For other definitions, see Words and Phrases, vol. 6, pp. 4983, 4984.]

4. Eminent Domain (§ 170*)—Proceedings to Take — Inability to Agree with OWNER.

When negotiations for the purchase of land are a jurisdictional prerequisite to the exercise of none other was their duty under such supplemental act. This duty we have by the first of our findings of fact decided that the State Board did not perform, in that they the land in question had been dedicated for the

use to which the proceeding is intended to subject it.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 462-467; Dec. Dig. § 170.*] (Syllabus by the Court.)

Certiorari by the Beechwood Park Land Company and others to review the proceedings of the City of Summit and its officers for the opening of an improvement of a street. Proceedings set aside so far as affecting the lands of prosecutors.

Argued February term, 1909, before GAR-RISON, VOORHEES, and PARKER, JJ.

Atwood L. De Coster and Herbert Boggs, for prosecutors. Corra N. Williams, for defendants.

PARKER, J. This writ of certiorari brings up for review certain proceedings of the municipal authorities of the city of Summit, for the opening and general improvement of a new street called "Hawthorne Place," especially as they bear on the taking of certain lands of the prosecutors lying within the lines of such street. The proceedings are regulated by section 48 et seq. of "An act relating to and providing for the government of cities of this state containing a population of less than twelve thousand in-Act March 21, 1899 (P. L. pp. 96, 118). The procedure is for the common council to give notice by advertisement of their intention to make the improvement contemplated, with an opportunity for objection by persons interested, after which the council may pass an ordinance providing for such improvement, and thereafter may act When land is to be taken, by resolution. and the council cannot agree with the owner as to price, the council, by section 52, is to make written application to the board of city assessors to estimate and assess the damages of the owner by reason of the taking of his land, "which application shall specify the improvement and the land or other real estate with the appurtenances intended to be taken for such purpose." In the present case the city engineer was directed to prepare plans and specifications for the "opening, grading, macadamizing, guttering, and laying of a four-foot cement sidewalk and otherwise improving a new street," etc. Notice of intention was duly published and followed by the introduction of the ordinance, whose title specified that it was "to open, grade, macadamize, and otherwise improve" the new street. The application to the board of city assessors was couched in the form of a resolution reciting that the council had determined to take the lands and real estate necessary to be taken, and could not agree with the owners, and calling on the assessors to make an estimate and assessment of the damages sustained by the owners of the lands and real estate necessary to be taken,

The first three reasons urged by prosecutors challenge the inclusion in one notice and ordinance of the opening and one or more forms of improvement. The accepted rule seems to be that the inclusion in one proceeding of two or more improvements is illegal, but we are not prepared to say that the opening and working of a new street constitute more than one improvement. We think the rule refers to improvements in more than one street, as in Church v. People, 179 Ill. 205, 53 N. E. 554, and People v. Latham, 203 Ill. 9, 67 N. E. 403, and not, as in the present case, to a single scheme of improvement embracing the opening and adapting for public use of a new street. We are not disposed to set aside either the notice or the ordinance on this ground.

It is next objected that the ordinance is vague and uncertain in falling to specify the particulars of material and work. The ordinance specified that the work is to be done in accordance with a survey and map filed in the city engineer's office. It calls for grading, macadamizing, and eight-foot sidewalks paved with cement four feet wide, and gutters paved with cobblestone. This sufficiently indicates the nature of the improvements, and the details are properly left to specifications that may be afterwards adopted by resolution.

The next objection, that the second reading of the ordinance was by title, is without force, if the title sufficiently discloses its object. Anderson v. Camden, 58 N. J. Law, 515, 33 Atl. 846. We think the title fairly discloses the object of the ordinance. It is said that neither the taking of land nor the intent to assess is indicated by this title; but the opening of a street necessarily implies the taking of land for the purpose, if necessary, and from this, as well as from the working of the street, an assessment naturally is to be expected.

The sixth reason is that the common council has not treated with the owner or owners of the land to be taken, and has not attempted in any way to agree with said owner or owners as to the price thereof. Under this the prosecutors attack the resolution of May 5th calling on the assessors for a valuation of the lands necessary to be taken for the opening of the street in question, in which are included the lands of prosecutors. We think the point is well taken. It is conceded that no negotiation was had or attempted, and the evidence shows that prosecutors were both accessible and ready and willing to negotiate. If therefore their land was intended to be taken, there is no excuse for not endeavoring to agree on the price. The proceeding is a condemnation and should be strictly pursued. The answer of the city is that it is not obliged, nor does it intend, to pay for the prosecutors' land, because it has already been dedicated for the purpose

of the street in question; but this does not dation were not qualified, but I am not help the matter. The city says by its request to the board of assessors that it intends to take the lands necessary to be taken for the opening of the street, and asks them to appraise their value. This being in form a determination to condemn lands of prosecutors, they are entitled to resist it as not founded on any attempt to agree as to price, and the city cannot be heard to say in the same breath that it proposes to take their lands and pay for them, and is excused from negotiating because they are dedicated. If dedicated, condemnation is needless. If not dedicated, proceedings to condemn must be prefaced by an attempt to agree.

The resolution of May 5, 1908, embodying a request to the board of assessors to appraise the damages for taking of land so far as it affects the prosecutors, will be set aside, with costs.

(78 N. J. L. 218)

KIDD et al. v. BOARD OF EXCISE OF CITY OF ELIZABETH et al.

(Supreme Court of New Jersey. May 20, 1909.) INTOXICATING LIQUORS (\$ 102*)-LICENSES-RENEWAL.

The right to a renewal of a license to sell intoxicating liquors in cities of the second class upon the petition of an applicant, without the recommendation of freeholders, is confined to the person to whom the license was originally granted and a transferee of such license for an unexpired term is not entitled to such renewal. In his case it is an application for a new license, and he must furnish the certificate of the required number of freeholders.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 102.*]

(Syllabus by the Court.)

Certiorari by John H. Kidd and others against the Board of Excise of the City of Elizabeth and others. Proceedings set aside. Argued February term, 1909, before BER-GEN. J.

Charles Wagner and S. W. Eldridge, for prosecutors. James C. Connolly, for defendant Board of Excise. John J. Stamler, for defendant Joseph Brazaikas.

BERGEN, J. The writ of certiorari was allowed in this case for the purpose of reviewing the proceedings of the board of excise of the city of Elizabeth in transferring a saloon license, and was heard before a single judge by consent of counsel. case presented is this: On May 2, 1907, Joseph Peatokas applied to the board of excise of the city of Elizabeth for a license to sell malt liquors and wines at No. 208 First street. The application purports to be signed by the requisite number of freeholders, and the license applied for was granted to expire in one year from June 5, 1907. The prosecutor claims to have shown that some

disposed to consider these objections at this late date, and for the purposes of this case will assume that the license was regularly issued according to legal requirements. This license was, on October 31, 1907, transferred by the licensee to one August Grablin, and, although his application appears to bear the signatures of freeholders as recommending the applicant, it is admitted that the list of names attached to the application is only a copy of the names of those who had signed the original application, which every applicant for a transfer is required, by the rules of the board, to file with the city clerk, and was merely an application for a transfer of an old, and not the granting of a new, license. Nor was it a renewal of a license about to expire, because the minutes of the excise board show that the only action taken by it was the transfer of the license which would expire on June 5, 1908. Some time previous to the latter date, Grablin presented his application for a renewal of the license granted to Peatokas, without the recommendation of freeholders, and on June 4, 1908, the excise board granted the application, and the next day a certificate of the license was issued to him to be effective until June 5, 1909. The next step was a sale of the business by Grablin to Joseph Brazaikas, who applied to the board of excise, not only to transfer the license from Grablin to him, but the place of business, from the building where it was then carried on, to another place in the same city, which application was granted and it is this transfer which the prosecutor challenges upon several grounds, but the only one I think it necessary to consider is that Grablin had no license to be transferred, because as transferee from the original licensee, he was not entitled to have the license renewed unger the statute which permits renewals without the recommendation of freeholders.

The latest act relating to such renewals in cities of the second class, in which the city of Elizabeth belongs, to which my attention has been called, is that of February 10, 1891 (P. L. p. 12), which provides that in all cities of the second class, after a license has once been granted to any person or persons at any place in such license designated, it shall not be requisite, in order to give jurisdiction to grant renewals of such licenses, that a new application recommended by freeholders shall be first signed and presented to such board; but that the filing with the body or board authorized to grant and renew licenses in any such city, of a petition for renewal, signed by the applicant, accompanied by a new bond of the same tenor as accompanied the first application, shall conof the persons who signed the recommen- fer the power upon such a board to renew

such license for the term of one year; but ! the freeholders who may have recommended the former application shall not be eligible signers for any new application for the term of one year from the granting of such renewal.

I have reached the conclusion that such right of renewal is not vested in a transferee of the original license, and can only be availed of by one who has already supplied the body empowered to grant licenses with the recommendation, as required by law, that he is a sober and honest man. This recommendation is a jurisdictional requirement in the first instance, and the Legislature, while intending to extend the benefit of that recommendation as a basis for one renewal, cannot be supposed to have intended to waive it in the case of another person, without clearly displaying such intention in the law. Nothing of that kind appears in the act. On the contrary, it says that, after a license has once been granted to any person or persons, it may be renewed without the recommendation of freeholders upon a petition signed by the applicant, upon condition that a new bond be given of the same tenor as that which accompanied the first application. In order to confer jurisdiction upon any such body to grant a license to sell liquors, it is necessary that an application be presented by the person desiring the license with a certificate, signed by a required number of freeholders, that the applicant has the qualifications which the law requires, and to hold that a transferee may, without any such certificate, renew in his name the original license, is not warranted either by the letter or spirit of the law which has regard to the character for sobriety and honesty of the applicant. Nor have I overlooked the fact that the Legislature has permitted a transfer of the unexpired term of a license without in terms requiring any such certificate from the transferee. The right of the Legislature to regulate the sale of intoxicating liquors is absolute, and it may have intended-but this is not free from doubt-that a transferee might use a license .for an unexpired term without any recommendation, in cities of the second class, but the transfer of an existing license is not the granting of a new one. It merely confers upon the licensee the power to exercise the right under the license granted to another, until its expiration. When that period expires, all that has been transferred is at an end, and the rights of the transferee thereunder are terminated. He is not the person to whom a license has once been granted as contemplated and intended by the law, and he has nothing to renew.

Under the views which I have expressed,

cise exceeded their power in undertaking to renew it, and therefore he had nothing to transfer to the person now claiming the right to sell by virtue of a transfer of a license from Grablin to him, and the proceedings approving such transfer should be set aside. with costs.

(75 N. J. E. 214)

JOHNSON v. TENNESSEE OIL, GAS & MINERAL DEVELOPMENT CO. et al.

(Court of Chancery of New Jersey. May 10, 1909.)

1. COEPORATIONS (§ 308*)—LIABILITY OF OF-FICERS FOR DEBTS—CONTRIBUTION. Under a resolution by directors of a corpo-ration holding nonassessable stock, assessing each director a specified amount to be placed in the company's treasury to meet current expenses and cost of further development, the obligation of the directors is several and not joint, in the sense that each director is liable joint, in the sense that each director is instead to the extent of his own assessment under the resolution, and not liable beyond that sum for the assessment made against any other defendant under the resolution, but after a decree in a proceeding by a judgment creditor to enforce this resolution has been entered assessing a specific amount against each director for the payment of the judgment, which amount was less than the total amount assessed under the process. than the total amount assessed under the resoluthan the total amount assessed under the resolu-tion, and one director, a nonresident without property in the state, fails to pay his assess-ment under the decree, the judgment creditor under leave given in the decree may have the amount which such director failed to pay as-sessed against the other directors within the amount of each director's assessment under the resolution, and this additional assessment may be made without first exhausting the remedy against the nonpaying director.

[Ed. Note.-For other cases, see Corporations, Cent. Dig. § 1509; Dec. Dig. § 368.*]

2. CONTRIBUTION (§ 7*)-MEASURE OF CON-TRIBUTION.

In an action at law for contribution, re-covery against any defendant is limited to the proportionate share of such defendant, whether or not any of the other contributors were in-solvent or without the state; but in equity a contributor is liable to contribute to the pay-ment of the proportionate share of any other contributor who is insolvent or beyond the reach of process.

[Ed. Note.—For other cases, see Contribution, Cent. Dig. § 13; Dec. Dig. § 7.*]

3. Corporations (\$ 304*)—Officers—Liabil-ity for Debts — Right to Subrogation — DECREE.

A resolution was adopted by the directors of a corporation assessing each director a spe-cific amount for the payment of claims against the corporation. A judgment creditor of the corporation obtained a decree against the directors poration obtained a decree against the directors assessing each a specific amount under the resolution in payment of his judgment, and all of the directors paid the amount assessed except one, and the judgment creditor obtained a decree against the paying directors assessing the amount upon them that the other director failamount upon them that the decree should contain a provision that, on payment by any of the directors under the decree, of his proportion of the amount assessed against the nonpaying di-Grablin was not entitled to a renewal of his license in June, 1908, and the board of ex-

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1997 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 364.*]

Action by Joseph B. Johnson against the Tennessee Oil, Gas & Mineral Development Company and others. From a former decision in this case (69 Atl. 788), the following statement of facts is taken: A resolution was adopted by the directors of the Tennessee Oil, Gas & Mineral Development Company assessing each director a specific amount to be placed in the company's treasury to meet current expenses and cost of further development. The stock held by the directors was nonassessable. In an action against the corporation by a judgment creditor, a decree was entered against the directors fixing the amount payable by each under the resolution in order to pay the amount of plaintiff's judgment. One of the directors did not pay the amount assessed against him, and application is made under leave reserved in the decree to fix the liability of the other directors for the amount assessed against such nonpaying director. Application granted.

W. J. Knight, for complainant. Mr. Bradner. Mr. Stein, and Abner Kalisch, for defendants.

EMFRY. V. C. The decree in this case settled the amount of the debts or obligations incurred by the company under the resolution for assessment, and. after declaring "that each defendant is individually responsible for his pro rata portion of the debt and interest." fixed the amount each defendant should pay as such proportion. The amount fixed was the pro rata portion for each defendant and was less than the amount assessed against each defendant by the resolution. Leave was reserved in the decree to apply for further directions as to the liability of any defendant for the portion of the decree unpaid by any other defendant; the question as to whether the liability of the defendants for the said debt and interest is collective, as well as individual, being expressly reserved for further hearing.

Five of the six defendants have paid their pro rata portion as fixed by the decree. The other defendant, Reitlinger, has not paid his portion. He is a nonresident, and, although he appeared and answered in the suit, he has no property in the state which can be reached for satisfaction of the decree, and the execution issued on the decree has been returned unsatisfied. Application is now made by complainant under the leave reserved for further direction or decree as to the liability of the other defendants to pay or contribute toward the satisfaction of the debt. up to the limit of their assessment under the resolution. The obligation of the de-

quired, must assign the benefit of the decree to not joint, in the sense that each defendant the director making such payment. is liable to the extent of his own assessment under the resolution, and not liable beyond this sum for the assessment made against any other defendant under the resolution; but the real question is whether, in working out by a decree the full liability of each of the defendants to the complainant under the resolution, any defendant should be liable at all for the proportion of the debt which any other defendant may, in the first instance, be directed by the decree to pay. At law each defendant liable to the company under this resolution would have been separately liable for the whole amount of his subscription, so far as necessary to pay the debts or obligations covered by the resolution, and any defendant who, by reason of such recovery in the suit at law, paid more than his proportion of the debt, would then have himself been put to an action for contribution against his co-directors or co-obligors. In an action at law for contribution, recovery against any defendant would have been limited to the proportionate share of each, independent of the question whether any of the other contributors were insolvent or without the state. In equity the contributor or co-surety would be liable to contribute to the payment of his proportionate share of any co-surety insolvent or beyond the reach of process. This is the essential difference between the legal and equitable basis of contribution in an action for contribution by one contributor or co-obligor who has overpaid; but this question of the right or limit of contribution between themselves, which arises only after full payment to the creditor by one or more of the debtors liable, does not affect or impair the right of the complainant, as creditor under the resolution, to recover from each of the defendants liable, up to the amount of his separate assessment, if necessary for the payment of his debt. By filing a bill in equity for the recovery of the debt against all of the defendants, the complainant subjects himself to the equity of submitting to such decree in the case as may be equitably made for contribution among the defendants themselves; but the enforcement or working out in the creditors' suit of the equities between the defendants themselves does not require, and should not permit, any limitation by decree, condition, or otherwise, of complainant's right against each defendant, up to the full amount of his assessment, if necessary for paying the debt. By the decree already made. the proportionate liabilities of the defendants were fixed as between the defendants liable, who appeared in the suit, and who were not claimed to be insolvent, on the basis of each paying his pro rata share; but it now appears by the return of execution unsatisfied that the complainant's right to have fendants under the resolution is several, and from the nonresident defendant his propor-

out because he has no property subject to execution within the state. Complainant's whole debt or claim, under the resolution, being therefore established by the decree, he is entitled under the leave reserved to a further decree declaring and directing that the remaining defendants, up to the amount of their several assessments fixed by the resolution, are each further liable for the payment of so much of the amount directed to be paid by Reitlinger as has not been paid by

It was claimed by the defendant that no such decree should be made, until the remedy against Reitlinger had been exhausted by suit upon the decree in the state of his residence; but this I think would be an unjustiflable limitation of the complainant's right to recover in this suit or at law against each defendant severally the whole amount of his assessment so far as necessary to pay his debt. The appearance, answer, and trial on the merits make the decree final against the nonresident, both as against complainant and between the parties themselves. failure to find property within this state to satisfy the decree puts the complainant, so far as the courts of this state are concerned, in the same condition as if Reitlinger were insolvent, or not within reach of process, and, as this situation has developed in the attempt to work out the decree for complainant's rights which was based on Reitlinger's appearance and answer and the absence of any suggestion of his insolvency, the remedy is to be found in a further decree. This is the course pointed out as the one proper and equitable to be taken, where, after assessments upon stockholders to pay debts of the company, some of the stockholders assessed do not pay and have no property within the jurisdiction subject to execution. Godfrey v. Terry (1877) 97 U.S. 171, 177, 24 L. Ed. 944, Miller, J. The course directed here was a new assessment against the other stockholders to pay the share of the stockholders as to whom nulla bona was returned, and to continue until all should be paid, or the sum of the several liabilities exhausted. The expression of Vice Chancellor Pitney in See, Receiver, v. Heppenheimer, 69 N. J. Eq. 36, 63, 61 Atl. 843, that in an action of this character the stockholders who are solvent and within the reach of process of the court must bear the whole burden, if it be taken to refer only to process for appearance, must not be taken as any adjudication upon the point now raised, as the point was not involved or. argued.

As the resolution in this case expressly fixed the amount of each assessment, my present view is that complainant cannot be further required to take another decree for the proportionate assessment of Reitlinger's de-

tion of the debt or decree cannot be worked of the remaining defendants for Reitlinger's assessment; the recovery against any defendant, however, not to exceed the amount of his assessment as fixed by the resolution, less the amount already paid. The decree may contain a clause providing that if any of the defendants other than Reitlinger should pay the decree against him, or any portion of it, then they shall be subrogated as against the other defendants to the rights of the complainant against Reitlinger, and complainant must, if required, assign the benefit of the decree. Such right to enforce contribution was recognized in Masters v. Rossie, etc., Co., 2 Sandf. Ch. (N. Y.) 301 (1845), and the method of subrogation is the practice indicated in Boice v. Conover, 63 N. J. Eq. 273, 275, 53 Atl. 910 (Err. & App. 1901). The decree will be settled on notice.

LAKE et al. v. WEAVER.

(Court of Chancery of New Jersey. April 22, 1909.)

1. TRUSTS (§ 17*)—STATUTE OF FRAUDS—ORAL PROOF.

A conveyance upon an expressed considera-tion with the uses declared in favor of the gran-tee is protected under the statute of frauds from attack by oral proof on the part of the grantor.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 17.*]

2. Trusts (§ 17*)—Oral Trusts—Defective EXECUTION.

A trustee under an oral trust, unprovable under the statute of frauds, is not prevented from executing the trust, and, if executed, the courts will not interfere.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 24; Dec. Dig. § 17.*]

8. TRUSTS (§ 44*)—DBT TRUSTS—EXECUTION—SUFFICIENCY OF EVIDENCE.

—SUFFICIENCY OF EVIDENCE.

On an issue whether an absolute deed was given to the grantee in trust for the children of the granter, evidence held to show that, though the grantee had an option to claim title under the deed, she considered herself merely a dry trustee, and by her conduct executed the trust, and made a gift of the property mentioned in the deed to the children, and vested title in them them.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 44.*]

On rehearing.

For former opinion, see 70 Atl. 81.

John J. Crandall, for complainants. Louis G. Morten and Gilbert Collins, for defendant.

GARRISON, V. C. (brally). In an opinion filed on the 15th day of May, 1908, I formulated the issues and announced my conclusions in this cause.

This cause has been before the court for a long time, the first testimony therein having been taken at Trenton on the 11th of December, 1906. Among the matters offered in evidence at a hearing held January 28, 1908, was the deposition of one George A. Bourcree, but is entitled to a decree against all geois taken on the 11th of January, 1908.

This deposition was taken at the instance of the complainants. Among the objections made on behalf of the defendant to the admission of this deposition was that it appeared that Mr. Bourgeois was at the time of the communications and transactions alluded to in his testimony the solicitor and counsel of Mrs. Josephine T. Weaver, and that, by the familiar rule which protects the communications of clients, her communications to him were privileged and protected. The court thereupon considered all of the evidence which had been taken at that hearing upon the matter, and, not finding any in which Mrs. Weaver had waived her privilege, ruled that the deposition was not admissible. Therefore at the time the court decided the case there was no testimony, excepting that given by Mrs. Weaver upon the witness stand, as to the transactions between her and Theodore at the time that she received the deed in question, which deed having been lost the defendants took the proceedings to have it established under the statute which are sought to be enjoined in this suit by this bill.

The complainant, after the filing of my opinion of May 15, 1908, petitioned the court for a rehearing, which was granted and has now been held. At that rehearing it developed that the testimony taken at Trenton on December 11, 1906 (overlooked by all of the parties and by the court at the time that the admissibility of the Bourgeois deposition was being discussed), contained many references by Josephine T: Weaver to the matter in hand. It is shown in that testimony that Mrs. Weaver, upon being interrogated by her counsel as to why she had admitted in the specific performance suit brought against her by the Whites that one-third of the property was owned by the children, answered that it was because of advice given to her by Mr. Bourgeois, and she assumed to recite the language that he used to her in giving her that advice, saying that he told her that if the deed was lost, as she said it was, her rights were all lost, that she had no rights, that they were lost; and that, acting under that advice, she admitted that the children had a third interest. The Bourgeois deposition, dealing with this matter of the failure to set up the rights of Mrs. Weaver under the deed of her son to her in the specific performance case, states that the reason was that she told him, Bourgeois, that this deed, which she exhibited to him, was given to her by her son for no consideration whatever; that she had given nothing for it; that she held it for the children of Theodore, and had no other interest in it; and that, under the circumstances, he advised her that there was no necessity for her to set it up in the specinc performance case. Since the entire case, as dealt with by me heretofore, rested upon the testimony of Mrs. Weaver, and since the testimony of Mr. Bourgeois, an impartial and credible witness, shows that her testimony is

I now find that Mrs. Weaver received this deed under circumstances which made it optional with her as I heretofore held in the partition suit (Smith v. White [N. J. Ch.] 65 Atl. 1017), whether she would take it or not, and I find that she did elect, as shown by the Bourgeois testimony, not to take it, and that by her actions and conduct she did in every way that was possible, except by actually drawing a deed from herself to the children and putting that on record, vest the title in the children. In other words, the title descended to the children on the record. she withheld the deed from record, the record would vest the title in them. She did withhold the deed from record. She stated that. She practically shows that, whatever her rights were, she was making a gift to the children, or, at least, not claiming any rights herself, which resulted in a gift to the children, or resulted in the children getting the title; and I now find the very state of mind exhibited by her own conduct which, without the Bourgeois testimony, I failed to find in the suit. I will advise a decree that the defendant Josephine T. Weaver is enjoined from proceeding to have this deed established of record under the statute, and that Josephine T. Weaver has no interest in the one-third of the proceeds realized in the partition suit, which therein nominally go to the complainants in this suit, and that the complainants in this suit may apply therein for their rights upon notice to the defendants. The foregoing was the oral statement of the court in deciding the case at the conclusion of the rehearing.

Having been notified of the taking of an appeal, I think it proper to add a brief statement for the purpose of making the grounds of my decision more easily understood. I do not think it necessary to restate the facts in view of the two previous statements reported in Smith v. White, supra, and Lake v. Weaver (N. J. Ch.) 70 Atl. 81. I desire to add. however, the impression which I think is apparent in my previous dealings with this evidence, which I obtained from Mrs. Weaver's manner, and, to some extent, from her own testimony, and that was that she was not willingly asserting any claim under the deed from her son to herself, but was, so to speak, permitting herself to be used to establish a legal position outside of and unconnected with her own volition. Her conduct with respect to the deed itself was in accordance with this attitude. She did not record it, and no longer had it in her possession, and my impression always was that she had voluntarily destroyed it. Even before the admission of the Bourgeois deposition, I could not escape the conviction that Mrs. Weaver from the date of the deed in 1889 to 1905. when the application to establish the lost deed was made, a period of 16 years, did not intend to take any personal advantage false, I propose to reverse my finding of fact. of the deed. But, in the absence of any clear

legal proof that this conduct was the result | the fact that the same was not enforceable of an executed purpose to thereby make a gift to the children of her son (the grantor in the deed), I decided that her legal rights prevailed. And I do not now decide that such legal rights fail because she must be considered a trustee. I am aware of and give full weight to the decisions in our state to the contrary. I do not intend by this decision to abate at all from the rule established in this state that a conveyance upon an expressed consideration with the uses declared in favor of the grantee is protected under the statute of frauds from attack by oral proof on the part of the grantor. This rule I consider to be too well settled to require citation. If, however, the alleged trust in this case is to receive any consideration, and the decision be not put upon the ground upon which I put it, the complainants could prevail without infringing upon the rule just stated. There is nothing to prevent one who is a trustee under an oral trust unprovable under the statute of frauds from voluntarily executing such a trust; and, after such execution, the court will not interfere. 15 Am. & Eng. Ency. of Law (2d Ed.) p. 1169, note 5. Giving to the Bourgeois deposition the controlling weight to which, by reason of the character of the witness and his absolute impartiality, it is entitled, it establishes that Mrs. Weaver informed him she had no interest in this property, was a dry trustee, and was thereupon advised by him that, under the circumstances, the deed which she exhibited to him was of no consequence or moment. In the very suit then in hand she asserted the ownership by the children of her son, the grantor in the deed, of the very lands described in the deed, and at or about that time the deed finally disappears—destroyed, as I have before stated I believe, by her.

The proper finding upon this state of facts would be that she had executed the trust. If she recorded the deed and the legal title was vested in her, she was a dry trustee. If she desired then to execute the trust-which was not enforceable against her because of the absence of a writing—she would have to execute a deed or declaration of trust to the children aforesaid. But her purpose to execute the trust and vest the title in the children would be just as effectually accomplished without any expense or trouble, by merely destroying the paper evidencing the legal title in herself. It was an immaterial detail. therefore, excepting only the matter of expense, whether she recorded this deed and made one back to the children, or whether she destroyed the deed, and thereby just as effectually caused the title to be in the children. The children by the operation of law held the title to this property unless the deed from their father to Mrs. Weaver was effective. Her conduct therefore at that time was an effective execution of the trust, and

against her is now negligible. But, as before stated. I think exactly the same finding will result by considering her in the position of a donor whose gift was completely executed, and will not now be undone.

While only her own testimony was usable to discover the facts, I was constrained, unwilling, as appears by my statement at the time, to find that she might hold this otherwise voluntary deed as a mortgage. I could not even then escape the conviction that from the time she obtained the deed as aforesaid, and for the 16 years which followed. Her intention had always been to take no advantage under the deed, and to give the benefit of the property to the children of her son. But I had not, up to the time of the admission of the testimony of Bourgeois, any sufficient proof upon which to rest my conviction of what the situation really was. That evidence in my view clears up the whole case. It shows that Mrs. Weaver never intended to claim anything under the deed given her by her son; that, therefore, she refrained from recording it; that, when every legal and moral necessity called upon her to honestly state the facts and her intention or claim (namely, in the specific performance case of the Whites against her), she not only negatived her own claim by not setting it up, but affirmatively set up that the right, title, and interest were in the children of her son. At that time, with full knowledge of the facts, with the necessity for her to declare her intention, with the deed in her possession, and able counsel at her elbow, she disclosed in my view her intention and determination, which was to refrain from claiming anything personally beneficial to herself by reason of the deed, and to thereby give to the children of her son the property in question. Immediately thereafter the deed disappeared. I think it entirely clear that she must be held to have effectually given (in consonance, as I believe, of her original intention never to take) the property in question.

The decree will be along the lines above indicated.

(75 N. J. E. 369)

CARPENTER v. SHANLEY.

(Court of Chancery of New Jersey. April 22, 1909.) (§ 50*)—INCUMBRANCES-

JUDICIAL SALES LIABILITY OF PURCHASER FOR IMPROVEMENT asekssment.

Under the conditions of a master's sale that the property is sold free of incumbrance, the purchaser did not take the property free from an improvement assessment, confirmed after the confirmation of the sale, but before deligners of the deed and appears have the confirmation. livery of the deed, and cannot have the amount of an assessment which became a lien before delivery of the deed paid out of the purchase price, and so get a title free of incumbrance.

Note.-For other cases, see [Ed. Sales, Cent. Dig. \$ 93; Dec. Dig. \$ 50.*1

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Suit by Sarah E. Carpenter against Sara R. Shanley. On the petition of L. Theodore Everett, the purchaser at a master's sale, for a direction to the master to pay out of the purchase money the amount of an improvement assessment against the property sold. Petition dismissed.

Merritt Lane, for petitioner. Melosh & Morten, for complainant.

GARRISON, V. C. This is a petition, on behalf of the purchaser at a master's sale, praying that the master be directed to pay out of the purchase money the sum of \$350, which is the amount of an assessment for an improvement to the property, which assessment was confirmed against the property on the 9th day of February, 1909.

The property was sold by the master on the 30th day of December, 1908, and the conditions of sale provide that it was sold free and clear of incumbrance. Both parties admit, without argument, that, whatever the law might otherwise be, the conditions of sale control the question involved in this case.

The order confirming the sale was filed on the 7th of January, 1909. The time fixed by the conditions of sale for the delivery of the deed was February 1, 1909; but because the master did not, for some reason, receive the order confirming sale, it was adjourned to the 19th day of February, 1909.

As before stated, the assessment was confirmed on the 9th of February, 1909. Both parties concede that the assessment became a lien and incumbrance from the date of its confirmation. Cadmus v. Fagan, 47 N. J. Law, 549, 4 Atl. 323 (Ct. of Er., 1885).

The petitioner's contention is that, since this assessment became a lien before the deed was delivered to him, he is entitled, under the conditions of sale, to have the amount of the assessment paid out of the purchase price, so that he will, at the time of the delivery of the deed, get a title free and clear of incumbrance. I think that the authorities in this state settle the point against the contention of the petitioner. It has been held by the Court of Errors and Appeals that "the date of the delivery of the sheriff's deed is a circumstance of no importance. A purchaser at a sheriff's sale acquires by the act of purchase a right to a conveyance of the premises in pursuance of the sale. The delivery by the sheriff of a deed is a mere ministerial act, which the officer is required to perform to consummate the sale and vest in the purchaser a title in compliance with the law under which the sale was made. Walker v. Hill's Ex'rs, 22 N. J. Eq. 513, 530. The sheriff's deed, when delivered, has relation back to the time of the sale of which it is the consummation. Jacobus v. Mutual Benefit Life Ins. Co., 27 N. J. Eq. 604, 608." Morse v.

281, 20 Atl. 961, 12 L. R. A. 62 (Ct. of Er., 1890). See, also, Wimpfheimer v. Prudential Ins. Co. of America, 56 N. J. Eq. 585, 591, 39 Atl. 916 (Emery, V. C., 1898).

If a confirmation by the court is to be considered as a necessary step in completing the sale, that act took place in the suit at har before the assessment became a lien upon the premises. It seems entirely clear, therefore, that the sale was completed, and was free of incumbrance at the time of its completion, and that the incumbrance in question arose thereafter.

The petition must be dismissed, with costs.

(78 N. J. L. 163)

SETTERSTORM v. DE DIETRICH IM-PORT CO.

(Supreme Court of New Jersey. June 7, 1909.) 1. New Teial (§ 71*)—Questions of Fact-Conflicting Evidence.

A verdict, the result of conflicting evidence, will not be set aside unless clearly against the weight of the evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 144, 145; Dec. Dig. § 71.*]

2. New Trial (§ 76*)—Grounds—Excessive VERDIOT.

A court will not set aside a verdict as excessive unless it is perfectly plain that it is so. [Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 153-156; Dec. Dig. § 76.*] (Syllabus by the Court.)

Action by Andrew Setterstorm against the De Dietrich Import Company. Verdict for plaintiff. Rule to show cause discnarged.

Argued February term, 1909, before REED, TRENCHARD, and MINTURN, JJ.

George S. Silzer, for plaintiff. McDermott & Enright, for defendant.

TRENCHARD, J. Andrew Setterstorm, the plaintiff, a farmer living near Metuchen, was driving home at about 5:30 o'clock on the afternoon of December 22, 1906, when he was run into from behind by an automobile which overtook him. The collision threw the plaintiff out of his farm wagon violently to the ground, and injured him severely. This action was brought in the Supreme Court to recover for such injuries, and the trial at the Middlesex circuit resulted in a verdict for the plaintiff of \$2,000. The defendant obtained this rule to show cause why the verdict should not be set aside. The evidence was most persuasive that the automobile was being driven at a high rate of speed without lights, and that the plaintiff, when overtaken, was where he had a right to be on the public highway, and was without fault. So it seems to be here conceded that the driver of the automobile was negligent, and that there was no contributory negligence upon the part of the plaintiff. The only reasons for setting aside the verdict urged by the defendant are Hackensack Savings Bank, 47 N. J. Eq. 279, (1) that the defendant is not responsible for

the acts of the driver, and (2) that the dam-, the weight of evidence as to justify us in ages are excessive. We think that the question of this defendant's responsibility was properly submitted to the jury.

The car was being taken from the warerooms of the defendant, the De Dietrich Import Company, in New York (the seller) to Rowan & Co., in Philadelphia (the purchasers), and the collision took place on the way, at Metuchen. The car bore the defendant's New Jersey license number "M 223." James Hillyard was driving the car, and Mr. Blair, a member of the firm of Rowan & Co., was riding with him. Besides these two there was another man in the car, whom the evidence seems to show was the mechanic or demonstrator of the defendant.

The contention of the defendant company is that Hillyard, the driver of the car, was not in its employ, nor under its control, and that, therefore, the company is not responsible for his negligence. Mr. Blair, a witness called by the plaintiff, testified, in effect, that the automobile was to be delivered by the defendant to Rowan & Co., in Philadelphia, and, since there had been no demonstration of the car, a representative of Rowan & Co. -had the privilege of riding in it to Philadelphia with the demonstrator; that it was to avail him of that privilege that he went to defendant's warerooms in New York; that the defendant company hired the driver and paid him, and instructed him to deliver the car for the company to Rowan & Co. in Philadelphia; that he (Blair) had never seen Hillyard, the driver, before that day, and did not hire nor pay him, and exercised no control over him or the machine. He is corroborated by the written contract between the parties, by the telegram sent by the defendant company to Rowan & Co., by the statement first made by Hillyard, and by the fact that, after the car was wrecked at the accident, it was towed back to the defendant's place in New York for repairs by the head demonstrator of the defendant company, who went to Metuchen for that purpose. The defendant attempted to overcome the force of this proof upon the part of the plaintiff by the testimony of its manager, of its bookkeeper, and by that of Hillyard the driver. By their testimony the defendant sought to show that Hillyard was not, and never had been, in their employ, and that the car was delivered by them in New York to Mr. Blair, the agent of Rowan & Co., and that Hillyard was employed by Blair to drive the car on the trip in question, and was therefore the servant of Rowan & Co. But in view of the testimony of Blair, corroborated as it is in its important features by the defendant's telegram, Hillyard's first statement, and the entries in the books of the defendant company, we think the question at issue was properly submitted to the jury, and we cannot say that the verdict is so clearly against relator from serving as chosen freeholder,

disturbing it upon that ground.

But the defendant insists that the verdict is excessive. It appeared that the plaintiff, who was 37 years old, was considerably bruised, causing him to be confined to the house for some time, and that, in addition thereto, he was ruptured. The testimony is that the rupture is permanent and severe, and gives, and is likely to continue to give,. him pain, and that as a result of his injuries he is not able to do much of his ordinary work upon the farm. Besides that, his horse, wagon, and harness were injured. this state of proof, we cannot say that the verdict of \$2,000 is so plainly excessive as to justify this court in disturbing it.

The rule to show cause will be discharged.

(78 N. J. L. 226)

WESTCOTT v. BRIANT.

(Supreme Court of New Jersey. June 7, 1909.) Officers (§ 30*)—Disqualification—Ap-pointment to Other Office.

The offices of undersheriff and chosen free-holders are, under "An act concerning sheriffs" (Gen. St. 1895, p. 3110), incompatible, and the appointment and qualification to the office of undersheriff of a person holding the office of chosen freeholder annuls his commission for the latter office.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 37-39; Dec. Dig. § 30.*]

(Syllabus by the Court.)

2. Officers (§ 30*)—Disqualification—Ap-POINTMENT TO OTHER OFFICE—"HOLDS AND EXERCISES OFFICE OF SHERIFF."

An undersheriff is a person who "holds and exercises the office of a sheriff." within the meaning of Gen. St. 1895, p. 3118, § 36, which provides that no person shall exercise any other civil office during the time that he holds and exercises the office of a sheriff.

[Ed. Note.—For other cases, see Officers, Dec. Dig. § 30.*]

Quo warranto by Benjamin B. Westcott against Jackson W. Briant. Demurrer to plea of respondent overruled.

Argued February term, 1909, before GAR-RISON, BERGEN, and VOORHEES, JJ.

French & Richards and Lewis Starr, for relator. John W. Westcott, for respondent.

BERGEN, J. The relator was, in November, 1907, elected a chosen freeholder of the county of Salem, from one of the wards of the city of Salem, for a term of three years commencing January 1, 1908. He accepted the office, and on November 10, 1908, while acting as such chosen freeholder, was appointed undersheriff of the county of Salem by the sheriff of that county, and, having qualified, assumed the performance of the duties of the office to which he had been appointed. The common council of the city of Salem, having determined that the acceptance of the latter office disqualified the

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and that a vacancy in the office was thereby appear that our statute in regulating the created, elected the respondent to fill such vacant office until the general election, to be held in 1909. The board of chosen freeholders of the county, having recognized such election as lawful, admitted the respondent to its membership, and he is now in possession of the office and performing the duties of chosen freeholder of the county. The relator instituted quo warranto proceedings to test the validity of the appointment of the respondent, who interposed a plea to the information in the quo warranto proceedings, in which, after stating the facts, he averred that the two offices were incompatible, and that, under the statute prohibiting a sheriff from holding any other civil office, the office of a chosen freeholder became vacant upon the acceptance by relator of the office of undersheriff. To this plea the relator demurred, and the question presented here is the legal sufficiency of that plea.

Section 36 of the statute concerning sheriffs (Gen. St. 1895, p. 3118) declares: "That no person shall exercise any other civil office during the time that he holds and exercises the office of a sheriff; and that by acceptance of the latter office, his commission for any other civil office shall be null and void." The claim of the relator is that this statute is limited to the sheriff, and does not apply to a person holding and exercising the office of undersheriff. The relator also urges that the offices of chosen freeholder and undersheriff are not incompatible, and that the same person may legally hold and exercise the functions of both We have no statute providing for the appointment of an undersheriff, but the ancient and well-established right of a sheriff to make such appointments is recognized in section 41 of the act relating to sheriffs (Gen. St. 1895. p. 3119), which requires the appointment, when made, to be in writing under the hand and seal of the sheriff, and the filing of an oath by the appointee before he intermeddles with the office. The power of the sheriff to appoint an undersheriff, although not expressly granted by law, has been so long exercised that it has become one of the accepted prerogatives of his office. In Bac. Ab., under the title "sheriff," it is said: "Although the King by his letters patent granteth to the sheriff custodiam comitatus, without any express words to make a deputy, yet hath the sheriff power to make a deputy or undersheriff who may execute all the ministerial parts of the office; for experience, says my Lord Hobart, proves that many sheriffs cannot execute it themselves. From the antiquity therefore and the necessity of this office, the law takes notice of him, and on his being appointed the law implicitly gives him power to execute all the ordinary offices of the sheriff himself, that can be transferred by law." It would thus

method of appointing an undersheriff recognizes the office, and the right as well as the duty of its incumbent to execute all the ordinary offices of the sheriff. An undersheriff is a public officer who, by virtue of his appointment in the manner provided by our statute, is empowered to perform the ordinary duties of the office. Meyer v. Bishop, 27 N. J. Eq. 141, 142.

We are of opinion that an "undersheriff" is "a person who holds and exercises the office of a sheriff" within the meaning of section 36 of the act above mentioned. The evil which the act is aimed at would never be reached if the sheriff can delegate the exercise of the ordinary offices of a sheriff to one not subject to the restrictions imposed upon a person who holds and exercises the office of a sheriff. The Legislature has specifically provided that the office of sheriff and any other civil office are incompatible, and the sheriff cannot remove the inconsistency by appointing a person to do the very thing which the law prohibits him from doing. If this be not so, then the person holding the office of sheriff could, through his official alter ego, exercise the office of sheriff in contravention to the legislative policy concerning it.

The demurrer to the plea of the respondent is overruled.

(78 N. J. L. 85)

LISSBERGER v. KELLOGG et al.

(Supreme Court of New Jersey. June 7, 1909.)

1. PRINCIPAL AND AGENT (§ 60°)—AGENT TO BUY GOODS—DUTY.

An agent to buy goods abroad is under a duty, if he cannot procure the goods desired, to so inform his principal; and, if he buys an inferior grade of goods and ships them as a compliance with the order, he is liable to his principal for damages. cipal for damages.

[Ed. Note.-For other cases, see Principal and Agent, Cent. Dig. \$ 95; Dec. Dig. \$ 60.*]

2. SALES (§ 271*)—SALE BY DESCRIPTION.

The rule contained in section 14 of the sale of goods act (P. L. 1907, p. 316), that if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods correspond with the cample if the goods rot place. respond with the sample if the goods do not also correspond with the description, is merely an enactment of the common-law rule as it existed before the statute.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 769-771; Dec. Dig. § 271.*]

3. SALES (§ 442*)-BREACH OF WARRANTY-DAMAGES.

Where goods are sold by description for the purpose of resale and do not answer the description, the vendee may recover, in addition to his anticipated profits, the damages which he is un-der obligation to pay to his subvendee, when those damages are such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as the probable result of its breach.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1284-1301; Dec. Dig. § 442.*]

(Syllabus by the Court.)

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Action by Edmund Lissberger against Da- | not mean to be understood, however, as exvid M. Kellogg and others. Verdict for plaintiff, and defendants obtained a rule to show cause why a new trial should not be granted. Rule discharged.

Argued February term, 1909, before the CHIEF JUSTICE, and SWAYZE and PARKER, JJ.

Tennant & Haight, for plaintiff. Edward S. Savage (Frederick H. Kellogg, on the brief), for defendants.

SWAYZE, J. The action is for damages caused by the failure of the defendants to deliver wool in accordance with the contract between them and the plaintiff. The plaintiff is a wool merchant in New York. The defendants are wool brokers and dealers at Buenos Ayres in the Argentine. In the summer of 1905 the plaintiff ordered some 30 bales of wool, of which 10 bales were to be Lincoln, 10 bales 1/4 blood, and 10 bales %. The order was accepted, but 35 bales were shipped instead of 30. The invoice described the wool as composed of Lincoln 1/4 blood, 1/8, 1/2, and 1/4, and the specifications described them as 10 bales Lincoln, 11 bales 1/4 blood, 10 bales % Lincoln, 4 bales 1/2 Lincoln. This wool arrived in New York December 26, 1905. Prior to its arrival, and on December 5th, the plaintiff ordered defendants to buy 200 bales, one-half of which was to be % and half of which was to be 1/4; and on December 18th ordered them to buy 100 bales, half of which was to be % and half 4. These orders were duly accepted, and the wool shipped in January, arriving in New York in February. The two lots of 200 and 100 bales were sold in advance of their arrival, by the plaintiff, to the Cleveland Worsted Mills of Cleveland, Ohio, and shipped through to them directly from the steamer, in bond. The wool proved to be inferior in quality to the description. The case was tried upon the theory that the plaintiff could only recover in case he was dealing with the defendants as principals. It was apparently supposed by counsel that there could be no recovery if the defendants were the brokers or agents of the plaintiff. and the trial judge charged the jury that if they were acting as brokers the defendants were entitled to the verdict. It is now insisted that there was no evidence which would justify the finding that the defendants were principals, or, if that is not so, that the weight of the evidence is so decidedly in favor of the view that they were brokers that the verdict should be set aside. We find in the sworn statements made by the defendants to accompany the invoices evidence which would justify the conclusion that they were contracting as principals and as vendors. There is persuasive evidence to the contrary, but we cannot say that the weight preponderates on that side to such an extent

pressing approval of the view adopted at the trial that the defendants were not to be held liable in damages if they were acting as brokers. Their contract in that case would indeed be different from the contract between a vendor and purchaser, but it has been held that, where agents are to buy goods abroad, they are under the duty not only of buying as cheaply as possible and of shipping the goods when bought, but must also inform their principal if they are unable to procure the goods required and to take reasonable care to send correct information. They may, if they are acting as brokers and are unable to procure the goods desired, so report to their principals; but they cannot buy an inferior grade of goods and ship them as a compliance with the order without being liable to their principal for damages. The difference between the case of vendor and purchaser and of a foreign broker and his own principal is not that in one case there is a liability for damages and in the other no liability. The difference is in the measure of damages in the two cases. Cassaboglou v. Gibb (1883) 11 Q. B. D. 797, 52 L. J. Q. B. 538.

The defendant next contends: That the sale in this case was a sale by sample, and, so far as the 300 bales is concerned, that they were equal to the sample of 35 bales; that, so far as the 35 bales was concerned. they were a mere sample shipment, and the quality was immaterial. We think the defendant is wrong in both contentions. The letter ordering the first shipment distinctly said that the wool was to be one-third Lincoln, one-third 1/4 blood, and one-third 1/8, and this order was accepted. It was clearly a sale by description. So, too, the cables did not order the wool similar to the sample lot. In fact, it would have been impossible, for at the time the cables were sent the first shipment had not arrived in New York. Both the cables ordered wool half % and half 1/4. This also was clearly a sale by description, and the trial judge should so have charged. Instead of doing so, he charged that it was for the jury to say whether the plaintiff was to get the grades generally known to the trade by the description, or whether he was to get the same kind or similar kinds that he had been receiving in prior years. This error, however, was injurious to the plaintiff, and not to the defendants. He further charged that "the rule as to selling by sample is this: That what is sent thereafter must substantially comply with the sample, and, if it does not, the purchaser is under no obligation to keep it." As applied to the present case, this charge also was inaccurate. The true rule prior to our codification of the law relating to sales is thus stated in the last English edition of Benjamin on Sales (page 616): "The imthat we ought to disturb the verdict. We do | plied condition that goods bought under specified commercial description should conform therewith is not excluded by the fact that the sale is by sample, or even after an inspection of the bulk. A sample is looked on in such case as a mere expression of the quality of the article, and not of its essential character, and notwithstanding the bulk be fairly shown, or agree with the sample, yet, if the bulk does not reasonably answer to the description, the seller is liable"-citing Mody v. Gregson [1868] L. R. 4 Ex. 49, 38 L. J. Ex. 12. Among the cases cited in Benjamin, Azemar v. Cassella, L. R. 2 C. P. 431, 677, 36 L. J. C. P. 124, 263, is similar to the present case. The same rule of law is stated in Sales Act 1907 (P. L. p. 316) § 14. This act did not take effect until after the transactions now in question, but it was a mere codification of the then existing law in this respect. The charge of the court, while erroneous, was injurious only to the plaintiff, and the defendant is not injured thereby.

The next complaint is that the plaintiff could not accept the goods and sue for breach of the warranty. It is enough to say as to this that the law is settled to the contrary, Benjamin on Sales (5th Eng. Ed.) p. 1001; Sales Act 1907 (P. L. p. 837) \$ 69b.

The plaintiff was allowed to recover the following items: (1) The difference between the purchase price paid by him and the amount received on the sale; (2) the loss of profits on the sale to the Cleveland Worsted Company; (3) damages paid that company to settle its claim against him; (4) freight on wool shipped from Cleveland to Boston for resale. It was proper to include all of these items in the plaintiff's claim for damages, if the case was one between vendor and vendee, except perhaps the freight from Cleveland to Boston. The subject was dealt with by the writer of this opinion in Lodge & Shipley Co. v. Binnse, 24 N. J. Law J. 430. That they were entitled to recover profits on the resale is hardly open to question. It was held in that case, on the authority of Borries v. Hutchinson, 18 C. B. N. S. 445, Die Elbinger Actien Gesellschaft v. Armstrong, L. R. 9 Q. B. 473, and Grabert-Borgnies v. Nugent, 15 Q. B. D. 85, that damages which the vendee was under obligation to pay to a subvendee were also recoverable when they are such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as the probable result of its breach. The freight paid on the shipment of the wool from Cleveland to Boston could only be recoverable if that expense was reasonably incurred in the effort to market the goods which had proved inferior to the description. No objection was made at the trial to this portion of the judge's charge, and it is therefore not open to the defendant on this rule.

The rule is discharged, with costs.

(78 N. J. L. CE) , BULLOCK v. BIGGS.

(Supreme Court of New Jersey. June 7, 1909.)

1. MUNICIPAL CORPORATIONS (§ 183*)—AP-POINTMENT OF CITY MARSHAL—OATH OF OF-FICE

The charter of Millville required that all officers elected under the act should take an official oath before the common council of the city, and provided for a city marshall to be elected. Subsequently the charter was so amended that the city marshal was thereafter appointed by the mayor and common council. that he was still required to take the oath as required by the original charter.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 183.*]

2. Municipal Corporations (# 144*)--Offi-CERS-OFFICIAL OATH.

Where a city officer is required to take his official oath before the common council, it is not enough for him to take it before the mayor

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \$\frac{4}{3} 316-318; Dec. Dig. 144.*]

8. Quo Warbanto (§ 61*)—Title to Office— JÜDGMENT.

In a quo warranto brought by one claiming title in himself under section 4 of the quo warranto act (Act April 8, 1903 [P. L. 1903, p. 877]), the court must determine the title of the relator as well as of the respondent when the former's title is questioned by proper pleadings, and, if neither relator nor respondent is entitled to the office, judgment must be entered to that effect. effect.

[Ed. Note.—For other cases, see Quo Warranto, Dec. Dig. § 61.*]

(Syllabus by the Court.)

Quo warranto on the relation of Frank Bullock against Charles Biggs. Judgment that neither party was entitled to office in anestion.

Argued February term, 1909, before the CHIEF JUSTICE, and SWAYZE and PAR-KER, JJ.

Hampton & Fithian, for relator. Joseph-F. Smith and Carrow & Kraft, for defendant. :

SWAYZE, J. The pleadings in this case. are informal, and consist of an information. setting forth the title of the relator to the office of city marshal of Millville and a plea challenging the title of the relator and claiming title in the defendant. There is no demurrer or replication and no issue joined upon this plea. The parties, instead of joining issue and having it disposed of by the court if it was an issue of law, or tried by a jury if it was an issue of fact, have taken depositions as if the proceeding were in the nature of a rule to show cause why an information should not be filed. The conclusion to which we have come is such that we . think we may fairly dispose of the case upon the merits as if it came before us on a rule to show cause or upon a demurrer to the plea. Since the act of 1895, which now appears as section 12 of the quo warranto act

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

which was passed to meet the situation created by the decision in Davis v. Davis, 57 N. J. Law, 203, 31 Atl. 218, the court is required to determine not only the title of the respondent to the office or franchise in question, but also the title of the relator to the same office or franchise. Hawkins v. Cook, 62 N. J. Law, 84, 40 Atl. 781; Manahan v. Watts, 64 N. J. Law, 465, 45 Atl. 813; Lane v. Otis, 68 N. J. Law, 64, 656, 52 Atl. 805, 54 Atl. 442. It is, however, essential that the question should be raised by proper pleadings. Magner v. Yore, 75 N. J. Law, 198, 66 Atl. 948.

The plea challenges the title of the relator to his office upon the ground that he failed to take the official oath required by the charter of Millville (Act Feb. 26, 1866 [P. L. p. 119] \$ 9). This requires that all officers elected under the act shall take an official oath before the common council of the city. It is conceded that the relator failed so to do, but it is said that the section of the charter cited applies only to elective officers, and that the marshal is no longer an elective officer since the act of March 15, 1871 (P. L. p. 540), which provides that he shall be appointed by the mayor and common council. We think, however, that the ninth section of the charter of 1866 applies to all the officers enumerated in section 5, and thereby required to be elected. The object of the act was to secure from each officer an oath of fidelity, and the reference to them in section 9 as officers elected under the act was intended to be a short description of the officers of whom the oath was required. It is as if the officers had been once more enumerated in section 9. The result is that the change in the method of their selection did not do away with the requirement of an official oath. In fact the relator seems to have supposed that he was still required to take an official oath, and took the same before the mayor. This, however, is not a compliance with the statute. No doubt the Legislature might well have authorized the oath to be taken before the mayor. It is sufficient, however, to say that they chose to require that it be taken before the common council. As Chief Justice Beasley said, in Douglass v. Freeholders of Essex, 38 N. J. Law, 214, at page 216: "Where that which is directed to be done is within the sphere of legislation, and the terms used clearly express the intent, all reasoning derived from the supposed inconvenience or even absurdity of the result is out of place. It is no province of the courts to supervise legislation and keep it within the bounds of propriety and common sense." In that case oath as chosen freeholders within 20 days ordered in Hawkins v. Cook, 62 N. J. Law, after their election and appointment, as re- 84, 40 Atl. 784.

(Act April 8, 1903 [P. L. 1903, p. 379]), [quired by the charter of Belleville, and it was urged that such an oath ought not to be required of the freeholders of the city of Belleville when it was not required of freeholders from other municipalities; but the court held that the statutory requirement was plain. So in Hayter v. Benner, 67 N. J. Law, 359, 52 Atl. 351, the officer in that case was required to take an oath faithfully and impartially to discharge the duties of his office. The oath taken was to perform the duties of the office required by the Constitution and by-laws of the borough to the best of his ability. The court held, however, that these words were not the equivalent of those used in the statute, and that the relator never obtained the title to the office of councilman. None of the acts relating to the taking of official oaths help the relator, for none of them do away with the specific requirement of the Millville charter. The act of February 19, 1906 (P. L. p. 13), requires that the officers shall file the oath with the clerk of the municipality. No oath taken by the relator was produced. The mayor testifled that the oaths had been taken before him, and that it was the practice to leave the papers with him, and that the relator's oaths had probably been burned with other papers when he left the office.

We have, however, decided in Magner v. Yore, 75 N. J. Law, 198, 66 Atl. 948, that the tenure of office act of 1899 (P. L. p. 26) applies to police officers who are such de facto. and it may be said that the effect of the act of 1899 was to retain the relator in the office of which he then actually was in possession. In Magner v. Yore, however, we were dealing only with the question of the title of the respondent, and that depended upon whether at the time he was appointed there was an existing vacancy, and we held that the operation of the act of 1899 was to prevent the vacancy. We distinctly said that the pleadings were not in such shape as to present the question of the title of the relator himself. The question raised in that case, however, was very different from the question now presented. Here the title of the relator is put in issue by the pleadings, and he must rely not merely upon the fact that he was a de facto officer and continued as such by the tenure of office act: but he must show that he is an officer de jure, and this he has failed to do. Magner v. Yore, however, is authority for the position that the respondent is not rightfully in possession of the office of marshal, for at the time he was appointed the office was not vacant. The result is that neither relator nor respondent is legally entitled to the office, and the judgthe relators had failed to take an official ment to be entered should be that which was (78 N. J. L. 222)

STATE v. BROM et al.

(Supreme Court of New Jersey. June 7, 1909.) 1. MUNICIPAL CORPORATIONS (§ 174*)—Com-MON COUNCIL—APPROPRIATION OF MONEY—

CRIMINAL RESPONSIBILITY.

An indictment for the violation of section 31 of the Crimes Act of June 14, 1898 (P. L. p. 803), must set forth the particular acts which it is alleged constitute a disregard of the statnte, and an averment that the defendants, as members of the common council of a borough, voted to pay one G. B. the sum of \$553.13, "for which no appropriation had been made," is not sufficient to charge the defendants with the statutory offense of voting for the "disbursement of public moneys in excess of the appropriation respectively to any such board."

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 174.*]

2. MUNICIPAL CORPORATIONS (§ 174*)—Common Council—Appropriation of Money—Criminal Responsibility.

In an indictment for incurring "obligations in excess of the appropriation and the limit of expenditure provided by law for the purposes respectively of any such board" a crime is not sufficiently stated by the averment that defendants voted to purchase land, nothing appearing to have been done to consummate a purchase.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 174.*]

3. MUNICIPAL CORPORATIONS (§ 174*)—Common Council—Appropriation of Money-CRIMINAL RESPONSIBILITY

A charge that the defendants, as members of the common council of a borough, incurred an obligation "in excess of the appropriation" an obligation "in excess of the appropriation by giving a note in consideration of the conveyance of land, does not charge a violation of the statute. It should appear what appropriation or limit of expenditure has been exceeded.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 174.*]

(Syllabus by the Court.)

Certiorari to Circuit Court, Bergen County. Separate writs of certiorari by David Brom and others to test the sufficiency of indictments found in the Bergen county over and terminer. Indictments quashed.

Argued February term, 1909, before GAR-RISON, BERGEN, and VOORHEES, JJ.

Roe & Runyon and Gilbert Collins, for prosecutors. Ernest Koester, for the State.

BERGEN, J. Eight writs of certiorari were allowed for the purpose of testing the sufficiency of a like number of indictments found in the Bergen county over and terminer against the members of the common council of the borough of Park Ridge. Seven of them are substantially alike and are governed by the same legal rules, so that the disposition of one will control the result in all. The remaining indictment contains counts not embraced in the others which require separate consideration, and will be dealt with after I have disposed of the others. One of the seven is an indictment against David Brom and five other defendants, and it charges that the defendants, as members of the common council of the

borough of Park Ridge, "did willfully and unlawfully vote for the disbursement of public moneys in excess of the appropriation of Park Ridge, in that the said defendants did vote to disburse the sum of five hundred and fifty-three dollars and thirteen cents to George Bennett, for which no appropriation had been made, which the said defendants then and there knew." This indictment is based upon section 31 of the Crimes Act of June 14, 1898 (P. L. 1898, p. 803), which, inter alia, makes it a misdemeanor for the common council of any borough in this state to "disburse, order or vote for the disbursement of public moneys, in excess of the appropriation respectively to any such board," or to "incur obligations in excess of the appropriation and limit of expenditure provided by law" for the purpose of any such board.

The statute relied on was first adopted in this state February 7, 1876 (P. L. p. 16), in substantially the form in which it now appears in section 31 of the crimes act. In construing the act of 1876, Mr. Justice Van Syckle, in State v. Halsted, 39 N. J. Law, 402, 411, said that it would not suffice to allege in the general words of the statute that the defendants did incur an obligation in excess of the appropriation. The particular act which constitutes such disregard of this statutory provision must be disclosed. The present indictment, after charging that the defendants voted to disburse public moneys "in excess of the appropriation of said borough of Park Ridge," proceeds to disclose what it is alleged constituted the violation of the statute, and the question presented is whether it is sufficient. We think it is not, for it simply alleges that the defendants, as members of the common council. voted to disburse the sum of \$553.13 to-George C. Bennett for which no appropriation had been made. It does not charge that there should be a particular appropriation: for this payment, or that the payment voted was in excess of moneys appropriated to the common council for the general purposes of the municipal government, out of which, for all that appears, the claim of Bennett might be properly paid. The charge is that no appropriation had been made to pay Bennett, but that does not imply that in paying Bennett it was required to exceed the money appropriated to the common council. manifest intent of the statute is to forbid voting for the disbursing of public moneys in excess of the amount appropriated for disbursement, and not the prohibition of voting money to one for whom no particular appropriation has been made, so long as. the money appropriated for the use of the borough is not exceeded. It may well be, in fact the presumption is, that payments to individuals by a municipal body are from

a general appropriation raised by taxation; for the different branches of local government, which is the appropriation meant by the law, and not that there shall be a special appropriation to each person likely to become its creditor. Under the Borough Act of April 24, 1897 (P. L. p. 285), the common council have power to raise and appropriate money for many different purposes, and the indictment should set out some facts showing which appropriation was exceeded, or that the payment could not properly be made because not within any of the purposes provided for. In the present case, if the indictment be held sufficient, proof that the money had been voted to Bennett, and that no appropriation had been made to pay him. for it is not charged that no appropriation had been made to the common council, would be sufficient to convict the defendants, although the general appropriation to the common council had not been exceeded. The facts set out disclose, not that no appropriation had been made to the common council, and therefore any disbursement would be in excess of appropriations, but that no appropriations had been made for this particular payment.

The remaining indictment contains two counts, the first charging Robert A. Sibbald, as mayor, and the other defendants, as members of the common council of said borough, with unlawfully disbursing public moneys in voting to purchase certain land for which no appropriation had been made. This charges no crime, for voting to purchase is not an appropriation of the purchase price, and there is no averment that the purchase was ever carried out in any such way as to be binding on the borough. The second count charges that the defendants incurred "an obligation upon the said borough of Park Ridge in excess of the appropriation, by giving then and there to one Andrew Perry a note for six hundred and sixty dollars in consideration of the conveyance of certain lands," which obligated the borough to pay that sum. This count is also defective, for it does not state any fact which constitutes a violation of the statute. Incurring an obligation "in excess of the appropriation" is not enough. It must be "in excess of the appropriation and limit of expenditure provided by law for the purposes respectively of any such board." Under the act relating to boroughs, and its supplements, the common council may incur obligations for certain purposes without any appropriation being made, and, in order to bring the defendants within the terms of the law, the indictment should show that the obligation required an expenditure in excess of that provided by law. This indictment has not even the merit of following the words of the statute, and

particular fact or facts from which a violation of the law can be inferred. If the borough council had no power to make the note, and therefore it had no binding force, then, under Marley v. State, 58 N. J. Law, 207, 33 Atl. 208, no crime was committed.

All of these indictments are defective and should be quashed, and an order will be entered in each case quashing the indictment.

(78 N. J. L. 239)

HITE v. DELL.

(Supreme Court of New Jersey. June 7, 1909.)

1. Costs (\$ 154*)—Items—Depositions.

The fifty-third section of the Evidence Act of March 23, 1900 (P. L. p. 378), and the act of April 11, 1908, amendatory thereof (P. L. p. 277), apply as well to testimony taken by consent under the fifty-seventh section of the evidence act as to depositions taken under order of the court. of the court.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 154.*]

Costs (§ 154*)—Taxation—Discretion or COURT.

The power to order that the expense of depositions taken under the act concerning evidence be made a part of the taxed bill of costs of the prevailing party under amendment of April 11, 1908 (P. L. p. 277), is a discretionary power.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 154.*]

APPEAL AND ERROR (§ 947*) - REVIEW -DISCRETION OF COURT.

Where an order discretionary in its character has been made by a single justice at cham-bers, and it appears from the terms of such order that such justice did not treat the matter as discretionary, and therefore did not exercise his discretion, such order for that reason will be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3813; Dec. Dig. § 947.*] (Syllabus by the Court.)

Action by Louis Hite against William A. Motion to review order made by Dell. judge at chambers. Order reversed.

Argued February term, 1909, before GAR-RISON, BERGEN, and VOORHEES, JJ.

Vreeland, King, Wilson & Lindabury, for plaintiff. Lindabury, Depue & Faulks, for defendant.

VOORHEES, J. This is an application to review an order made by a justice of this court. Application was made to him for an order directing that the expense of the examination of certain witnesses taken de bene esse by commission and under a stipulation should be made a part of the defendant's taxed costs, the defendant being the prevailing party in the suit. Some of the witnesses were examined by stipulation dated March 7, and April 22, 1908, by consent under the fifty-seventh section of the Evidence Act of March 23, 1900 (P. L. p. 378), is entirely devoid of a statement of any which expense amounted to \$141.18.

examination of two other witnesses was made on notice and order of the court, under the provisions of said act by commissions issued in September, 1908. The order refused to allow the costs of the examinations taken by consent to be included in the bill of costs, but did allow those taken by commission to be included, and refused the allowance of the former.

Section 53 of the evidence act originally provided that "the party requiring such examination or deposition shall be at the sole expense thereof, and shall not have any allowance for the same in the taxation of costs." This section was amended in 1908 by a supplement approved April 11, 1908, to read as follows: "The party requiring such examination or deposition shall in the first instance be at the sole expense thereof and said expense may be made a part of the taxed bill of costs of the prevailing party if so ordered by the court." P. L. p. 277.

It is insisted on the one hand that this section as originally enacted and as amended can apply only to those examinations which are taken upon commission issued under an order of the court, and do not apply to testimony taken by consent pursuant to the fifty-seventh section of the evidence act. To say that the words "the party requiring such examinations" shall apply only to those making application to the court for a commission, but not to those who seek out their adversaries and obtain their consent, would be a distinction not well taken. The party asking for the consent may be said to require the examination quite as much as he who manifests the requirement by an application to the court. We therefore think that the fifty-third section as it originally stood and as amended applies as well to testimony taken by consent as a deposition taken under order of the court.

But it is further claimed, on the one hand. that the power to order that the expense of the depositions be made a part of the taxed bill of costs of the prevailing party under the amendment of 1908 is not discretionary, while the other party insists that it is discretionary. That it is a discretionary power cannot be doubted, and hence, under Key v. Paul, 61 N. J. Law, 133, 38 Atl. 823, cannot be reviewed here. If the justice making the order had treated it as a discretionary matter, and had exercised his discretion, his order would have been a finality. pears, however, from the order made that he did not treat it as discretionary, and therefore did not exercise his discretion, for the order recites that "the justice being of opinion that the expense of the examinations or depositions taken by virtue of said stipulation of March 7, 1908, and April 22, 1908, could not be included in the taxed bill of costs of the defendant, for the reason that

For that reason the order under review must be reversed.

Whether the amendatory act, approved April 11, 1908, would be retroactive so as to apply to the examinations taken under the stipulation of March 7, 1908, may well be doubted, but that objection could not apply to the examination taken pursuant to the stipulation of April 22, 1908.

(78 N. J. L. 206)

LEVINE v. D. WOLFF & CO.

(Supreme Court of New Jersey. June 7, 1909.) 1. WAREHOUSEMEN (§ 34*) — NEGLIGENCE — ACTIONS—QUESTIONS OF FACT.

Where the defendant, as a warehouseman,

took plaintiff's goods to store, and kept them for two days and nights in its stable upon a wagon, where fire consumed them, held to be a question of fact whether defendant bestowed upon the goods thus stored the care required by

[Ed. Note.—For other cases, see Warehousemen, Dec. Dig. § 34.*]

(Syllabus by the Court.)

2. WORDS AND PHRASES-"PULLED GOODS." Pulled goods are chattels sold upon condition and retaken by the vendor for noncompliance with the conditions of sale.

Appeal from District Court of City of New-

Action by Julius J. Levine against D. Wolff & Co. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued February term, 1909, before REED, TRENCHARD, and MINTURN, JJ.

Riker & Riker, for appellant. Philip J. Schotland, for appellee.

MINTURN, J. The result of the trial of this action before the district court was that the court found as facts that the plaintiff contracted with defendant company "to store' his household goods for a monthly consideration, to be paid to the defendant; and that in pursuance of this contract the defendant company carried the goods upon their truck to the defendant's stable, where the wagon was taken in and allowed to stand with the goods loaded thereon for two days and nights; and while thus situated a fire occurred in the stable upon the second night, and the goods were thereby destroyed. The building was used not only as a stable, and a place for keeping defendant's wagons, but also as a place to keep what is called "pulled goods," viz., chattels sold by defendant upon conditional sales, and retaken by the vendor for noncompliance with the conditions of sale. These "pulled goods" were stored in wooden compartments in the stable: some were injured by the fire, and some damaged by water, but none was destroyed, and all were subsequently sold as secondhand goods. court found the value of plaintiff's goods to no provision of law exists in that behalf." be \$300, and rendered judgment in his favor

for that amount. The case presents a question resolvable under the law of bailment; and the liability of the defendant thereon is to be determined by the conclusion reached upon the facts, as to whether, as bailee, he performed the duty imposed upon him by law as a warehouseman. At common law, since Coggs v. Bernard, this duty was defined to be to take reasonable care of the goods intrusted to his charge. Story on Bailments, 444; Insurance Co. v. Kiger, 103 U. S. 352, 26 L. Ed. 433. Section 21 of chapter 133 of the Laws of 1907, entitled "An Act Concerning Warehouse Receipts and to Make Uniform the Law Relating Thereto," makes no change in this respect in the common-law doctrines, and is merely declaratory thereof. 'Act May 7, 1907 (P. L. p. 347). It has been held that within the purview of this duty is the requirement to use reasonable care; to provide a building reasonably fit and safe for storage. Moulton v. Phillips, 10 R. I. 218, 14 Am. Rep. 663; Hickey v. Morrell, 102 N. Y. 454, 7 N. E. 321, 55 Am. Rep. 824; Walden v. Finch, 70 Pa. 460.

It is to be noted also that the reasonable care contracted for was that ordinarily exercised by a warehouseman "to store" the plaintiff's goods; and it has been held that this duty imposed upon the warehouseman such care and diligence as good and capable warehousemen are accustomed to show under similar circumstances. Lancaster Mills v. Merchants' Cotton Press Co., 89 Tenn. 1, 14 S. W. 317, 24 Am. St. Rep. 586. The defendant insists that, because its own goods were stored in another portion of this stable, the reasonable care required of it by law was furnished, by storing the plaintiff's goods in the same place. Without referring to the implication that may fairly arise upon the facts of the case, that the plaintiff when he contracted with a warehouseman "to store" his goods had reason to assume that a stable would not be their destination, the adjudicated cases are to the contrary of defendant's contention. Lord Holt, in Coggs v. Bernhard, 2 L. R. 909, by way of obiter afforded a basis for such a construction of the law, regarding reasonable care, but this notion has been exploded; and the true rule is now declared to be that, if the bailee used the same care in regard to the property bailed that he bestows upon his own, it is but evidence tending to show that he is not guilty of gross negligence, or, as was stated in one case, it is merely "an argument for his honesty." Gilpin v. McMullen, L. R. 2 P. C. 318. Apropos of this contention, Tindal, C. J., once observed that to fix a standard of liability coextensive with the individual judgment would make it as variable as the foot of each individual. Vaughn v. Menlore, 3 Bing. N. S. 468 (38 E. C. L. 208); Doorman v. Jenkins, 2 Ad. & E. C. 256 (20 E. C. L. 80). When, therefore, the plaintiff proved the delivery of the chattels in good condition

to defendant, and their destruction thereafter by fire upon defendant's premises, the law presumes the negligence of the bailee to be the cause of the loss: and this presumption could be rebutted only by affirmative proof of reasonable care upon defendant's part. Jackson v. McDonald, 70 N. J. Law, 594, 57 Atl. 126; Manson v. Palace Car Co. (N. J. Sup.) 60 Atl. 1120. Therefore it was a question entirely of fact whether the storing of these goods in defendant's stable, upon a wagon for two days and nights, under a contract with defendant as a warehouseman, to use such reasonable care in storing them as men in that line of business usually take of goods committed to their care, was a compliance with the duty thus imposed upon this defendant by law; and, the court having found as a fact that it was not, we cannot disturb that finding.

The judgment is affirmed.

(78 N. J. L. 284)

DELAMARRE v. BOTT.

(Supreme Court of New Jersey. June 7, 1909.)

DRAINS (§ 63*)—OBSTEUCTION—DAMAGES.

Where defendant wrongfully stopped a drain leading from the premises of the plaintiff past those of the defendant, the measure of damage is not the cost of a new drain, but the damage sustained by the plaintiff in the enjoyment of his use of his property while the consequence of the wrongful act continues.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 63.*]

(Syllabus by the Court.)

Appeal from District Court of City of Hoboken,

Action by Louis Delamarre against Charles Bott. Judgment for plaintiff, and defendant appeals. Reversed.

Argued February term, 1909, before GAR-RISON, BERGEN, and VOORHEES, JJ.

Isidor H. Brand, for appellant. James C. Agnew, for appellee.

VOORHEES, J. This is an appeal from the district court of Hoboken. Judgment for the plaintiff for \$225 damages and costs was rendered. The plaintiff is the owner of property on New York avenue. The defendant owned property on Kamp Place. Plaintiff constructed a drain for waste water and sewerage from his premises through New York avenue about 100 feet thence turning by a right angle into Kamp Place, a distance of 190 feet, and, terminating near Palisade avenue, when it came to the surface. The contents of the drain for the remainder of the distance in Kamp Place ran upon the surface of the ground in front of defendant's premises, and emptied into the gutter in Palisade avenue. The defendant stopped up the drain. It was constructed of two flagstones placed on their edges for

the sides, with a flagstone for the top or cov- | class to construct, purchase, or otherwise ac-

The sole ground for reversal is the admission in evidence of the following testimony on the part of the plaintiff over the objection of the defendant: "Now, Mr. Smith, will you please state in your opinion what would be the cost of constructing an eight-inch pipe drain from the place where the water ran off plaintiff's land to Palisade avenue, which makes a distance of 290 feet?" The witness answered \$1 per foot. This was error. The measure of damage in this case is not the cost of a new drain, but the damage sustained by the plaintiff in the enjoyment of his use of the property, and then only during the period while the consequence of the wrongful act continues. If the stoppage by the defendant was a wrongful act, and it must be so to entitle the plaintiff to recover, it will not be assumed that the stoppage will continue and be a permanent condition and so allow a recovery once for all and necessitate the building of a new sewer. The damages are such as accrue to the owner in his enjoyment of the property down to the commencement of the suit, or until the wrongful act ceases. Miller v. Rambo, 66 N. J. Law, 195, 49 Atl. 453; Lewis v. P. R. R. (N. J.) 68 Atl. 1077. This rule excludes evidence of the cost of a new drain.

The judgment will be reversed, and a venire de novo awarded.

(78 N. J. L. 165)

TWITCHELL V. SEA ISLE CITY. (Supreme Court of New Jersey. June 7, 1909.) WATERS AND WATER COURSES (§ 183*)—PUB-LIC WATER SUPPLY—SUBMISSION TO VOTERS.

Under the provision of Act June 8, 1906 P. L. p. 664), enabling cities other than cities of the first class to construct, purchase, or otherwise acquire waterworks, the city council of a city cannot adopt the provisions of the act by submitting the question of its adoption to the voters coupled with a proposition that city council shall cause to be issued bonds to an amount not to exceed \$50,000, and so coupled that the voters could not yote for or except the or proposition. voters could not vote for or against one proposition without voting for or against the other.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 183.*]

(Syllabus by the Court.)

Certiorari by Seldon Twitcheli against Sea Isle City to review certain resolutions. Resolutions set aside.

Argued February term, 1909, before REED, TRENCHARD, and MINTURN, JJ.

Carrow & Kraft, for prosecutor. James M. E. Hildreth, for defendant.

TRENCHARD, J. This writ of certiorari is sued out to test the legality of certain proceedings of Sea Isle City, whereby it attempted to adopt the provisions of an act of the act of June 8, 1907 (P. L. p. 565) provides that

quire waterworks. Section 15 of that act (P. L. p. 671) provides that its provisions shall remain inoperative in any city until assented to by a majority of those of the legal voters of such city who shall vote either for or against the adoption of its provisions, at an election to be held in such city at any time to be fixed by city council. On August 13, 1908, the city council of Sea Isle City adopted a resolution providing that an election be held on November 3, 1908, to vote for or against the construction, purchase, or otherwise acquiring waterworks, etc., as provided for by an act of 1906, and the issuance of bonds not exceeding \$50,000. The ballots provided by the proper officers and used at the election held in pursuance of the resolution contained printed words "For-Against," preceding the words "The construction, purchasing or otherwise acquiring waterworks [reciting the language of the resolution including its concluding words], and that common council shall cause to be issued bonds to an amount not to exceed the sum of \$50,000." The election resulted in 95 votes being cast in favor of the proposition and 90 votes against it.

Among other reasons for setting aside the proceedings, assigned by the prosecutor, a taxpayer and landowner of the city, is this: That the proceedings are invalid because the proposition submitted to the voters was not the proposition directed to be submitted to them by the act. We think the proceedings invalid for the reasons we will now state: As we have pointed out, section 15 of the act of June 8, 1906 (P. L. p. 671), provides that the act shall remain inoperative in any city until assented to by a majority of the voters of such city, who shall vote either for or against the adoption of its provisions. The section further provides that, upon the ballots provided at the election, there shall be printed the following words: "For a water plant" and immediately thereunder the proposition "Against a water plant," and the voter may vote to adopt the act by obliterating the second proposition, or may vote to reject the act by obliterating the first proposition. The question therefore to be presented to the voter was the adoption of the provisions of the act. Assuming, but not deciding, that there was printed upon the ballots in question matter which, if assented to by a majority of the voters, would result in the adoption of the provisions of the act, yet there was coupled with the proposition thereon printed the question of a bond issue of \$50,000. An examination of the entire act discloses no authority for submitting the question of a bond issue to the voters. On the contrary, section 10 as amended by the Legislature (Act June 8, 1906 [P. L. p. 664]) it shall be lawful for common council to enabling cities other than cities of the first cause to be issued bonds for the purposes of

the act to an amount to be determined by a certain placard which contained the words common council. The natural effect of coupling with the question of the adoption of the act a proposition for a bond issue to be limited to \$50.000 was to mislead the voters, because it tended to delude them into believing that, by their voting to issue not more than \$50,000 of bonds, common council would be precluded from exceeding that sum; whereas, in fact, under the act, council was not so limited. Moreover, the proposition for the adoption of the act and the question of bond issue were so coupled together as to be, for voting purposes, inseparable, and the voter could not vote for or against one without voting for or against the other. Whether the resolution and ballots were faulty in other respects, and whether the notice of the election was sufficient, we have not considered, and with respect thereto express no opinion.

But for the reasons indicated, we think the resolution and all proceedings under it were invalid, and they will be set aside with costs.

,(78 N. J. L. 818)

STATE v. ALLGOR. '

(Supreme Court of New Jersey. June 7, 1909.) INDICTMENT AND INFORMATION (§ 96*)—Req-UISITES AND SUFFICIENCY—MATTERS BY WAY OF INDUCEMENT.

An allegation in an indictment setting forth an act not malum in se or malum prohibitum, but criminal only from the aspect given to the act by extrinsic facts, such facts should be alleged by way of inducement or innuendo, or the indictment will be defective.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 268; Dec. Dig. . \$ 96.*]

(Syllabus by the Court.)

James M. Allgor was indicted by the Grand Jury of Monmouth County for maintaining a common nuisance, and sues out a writ of certiorari to review the indictment. Indictment

Argued February term, 1909, before REED, TRENCHARD, and MINTURN, JJ.

Richard Doherty and Thomas F. Griffin, for prosecutor. John S. Applegate, Jr., for the State.

MINTURN, J. Upon a prominent thoroughfare in the borough of Seabright, the prosecutor in this writ, according to the allegations of the indictment presented by the grand jury of Monmouth county, caused to be suspended and exhibited upon a rope from his building, to a pole near the edge of the highway, "a pair of blue overalls, one pair of dirty white overalls, one old piece of bed ticking, one pair of ladies' white drawers, two pair of men's red flannel drawers"; but the gravamen of the allegation consisted in the fact that the flaming red raiment of this segregation of human utilities bore the words "The M. Packor," "The M. McMahoney," and | Corbert, 12 R. I. 288; State v. Haddonfield

"They do say who stole the firemen's relief money," "They do say who stole the church money," which combination in the language of the indictment was "offensive to the senses, and a common nuisance to all the citizens of the state, there residing, inhabiting, and passing."

It is not perceived how the mere allegation of this act, without colloquium, innuendo, or inducement, to show the relation of Messrs. Packor and McMahoney to the firemen's fund or to the church fund, or to show that either fund had an existence, so as to make it the subject of larceny, can be construed into an allegation of criminality. In a common-law declaration seeking only damages for an alleged libel, such an allegation would be demurrable. 1 Chitty, Pl. 400; Joralemon v. Pomeroy, 22 N. J. Law, 271. And a fortiori, where the liberty of the citizen is at stake, is the objection valid and fatal. Non constat as the owner of the fee in the highway, upon which is imposed only a public easement, which may be in no wise interfered with by such an act, this defendant, so far as the indictment alleges, might insist upon the perfect legality of his act. Adams v. Rivers (N. Y.) 11 Barb. 890; Montclair Military Academy v. North Jersey St. Ry., 65 N. J. Law, 328, 47 Atl. 890.

Want of certainty in the statement of the offense is therefore the vice of this indictment, and at common law the rule is fundamental that an indictment must be certain in its allegations, so that it can be seen upon inspection, not merely what nature of crime, but what particular crime, is intended to be charged. 2 Hale, P. C. 193; Rex v. Juddis, 1 East, 314; State v. Middlesex & S. Traction Co., 67 N. J. Law, 14, 50 Atl. 354; U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; Morris & E. R. R. v. State, 36 N. J. Law, 555. This rule is supplemented by our organic law, state and federal, as well as by the Bill of Rights (article 12), which requires "that the accused shall enjoy the right to be informed of the nature and cause of the accusation" against him. "A salutary rule of the common law," says the Massachusetts Supreme Court, is "that no subject shall be held to answer for any crime or offense, until the same is fully and plainly, and substantially, and formally described to him." Commonwealth v. Phillips, 16 Pick. (Mass.) 211. If it be intended to charge a crime by the commission of an act not malum in se or malum prohibitum, but criminal only from the color given to it by extrinsic facts, which explain its criminal aspect, such facts should be set out by way of inducement, colloquium, or innuendo in the indictment, or their absence will invalidate it. 3 Chitty's Am. Law, 875; State v. Mott, 45 N. J. Law, 494; State v.

Turnpike Co., 65 N. J. Law, 97, 46 Atl. 700. As was said by the Court of Errors in Morris & E. R. R. Co. v. State, 86 N. J. Law, 555: "A mere allegation in the indictment that certain facts charged are to the common nuisance of all the citizens of the state will not make it a good indictment, unless the facts charged be of such a nature as may justify the conclusion as one of law, as weil as of fact."

For these reasons this indictment must be quashed.

(78 N. J. L. 245)

LIVELLI V. MAYOR, ETC., OF CITY OF HOBOKEN.

(Supreme Court of New Jersey. June 7, 1909.) 1. STATUTES (§ 93*)—GENERAL OR SPECIAL—REGULATION OF MUNICIPAL INTERNAL AF-FAIRS.

An act concerning the appointment of com-missioners of assessment of taxes in certain cities, passed April 3, 1889 (P. L. p. 152), being an act dealing with the structure, machinery, or powers of municipal government, is consti-Queen (N. J. Sup.) 69 Atl. 30, affirmed by Court of Errors and Appeals, 72 Atl. 1119.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 102; Dec. Dig. § 93.*]

2. MUNICIPAL CORPOBATIONS (§ 958*)—Assessment Commissioners—Statutory Provisions—Validity.

The provision in said act that "no more than a bare majority of such board of assessors or officers shall at any time be members of one political party" does not render the act invalid. [Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 958.*]

& CERTIORARI (§ 41*)-LACHES.

The failure of a taxpayer to apply for a writ of certiorari to set aside an ordinance defining the duty and fixing the salary of commissioners of assessment of taxes, for a period of over 11 years, during which such taxpayer was a resident of the municipality wherein the ordinance was in force, is gross laches and disentitles him to the writ.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 59; Dec. Dig. § 41.*]

(Syllabus by the Court.)

Rule by Domenick Livelli to show cause why a writ of certiorari should not issue to review an ordinance passed by the Council of Hoboken. Rule discharged, and writ refused.

Argued February term, 1909, before GAR-RISON, BERGEN, and VOORHEES, JJ.

Samuel A. Besson, for prosecutor. John J. Fallon, for defendant.

VOORHEES, J. This is a rule to show cause why a writ of certiorari should not issue to remove an ordinance passed by the council of Hoboken entitled "An ordinance defining the duty and fixing the salary of commissioners of assessment of taxes," passed June 3, 1897, and thereafter partially included in a revision and recompilation of ordinances in 1900.

The ground of attack is that the act of the Legislature entitled "An act concerning the appointment of commissioners of assessment of taxes in certain cities," passed April 3, 1889 (P. L. p. 152), is unconstitutional. It is asserted that it is special legislation regulating the internal affairs of towns, etc. The question must be resolved against the prosecutor under McCarthy v. Queen (N. J. Sup.) 69 Atl. 30, affirmed by the Court of Errors and Appeals, 72 Atl. 1119, where it is asserted that an act dealing merely with the structure, machinery, or powers of municipal government is general, although it embraces only a class of cities formed on the basis of their population according to the discretion of the Legislature unless the class formed be illusory. The provision in the act that no more than a bare majority of such board of assessors or officers shall at any time be members of one political party does not render the act invalid. It was so held by this court regarding chapters 45, 46, and 62 of the Laws of 1907 (Acts April 12, 13, 1907 [P. L. pp. 89, 95, 114]), in Me-Carter, Attorney General, v. McKelvey (June Term, 1908) 73 Atl. 884.

The gross laches of the prosecutor will prevent the allowance of the writ by the court in the exercise of its discretion. The ordinance attacked was passed in 1897. This application is made more than 11 years thereafter, during which time the prosecutor, who invokes the power of this court as a taxpayer merely, has lived in the city of Hoboken.

The change in the machinery of the city government in respect to the department of taxes has been made and continued under the act and ordinance to the knowledge of the prosecutor without objection for over a decade, and will not now be disturbed. Allen v. Freeholders, 72 N. J. Law, 116, 60 Atl. 36, and cases cited.

The rule should be discharged, and the allowance of the writ refused, with costs.

(78 N. J. L. 247)

MANUFACTURERS' LAND & IMPROVE-MENT CO. v. CITY OF CAMDEN et al.

(Supreme Court of New Jersey. June 7, 1909.)

1. CERTIORARI (§ 37°)—PARTIES—OFFICERS OR BODIES WITHOUT COMMON DUTTES.

A writ of certiorari directed to several officers or bodies having no joint or common duties, and who act independently of each other, should not be allowed, but there should be separate writs running to each to bring up the particular matters with which each respectively is concerned. concerned.

[Ed. Note.—For other cases, see Certiorari, Dec. Dig. § 87.*]

2. CUSTOMS AND USAGES (§ 8*)—LEGALITY.
No binding custom can be said to exist which is grounded upon an unconstitutional foundation.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 8-10; Dec. Dig. § 8.*]

3. MUNICIPAL COBPORATIONS (§ 316*)—PUBLIC no joint or common duties, and who act inIMPROVEMENTS—PRELIMINARY PROCEEDINGS
—ORDINANCE—NOTICE.

Under an ordinance judicial in its character, and objectionable because passed without notice to those to be affected thereby, work was commenced and completed without objection on the part of the prosecutors, although they knew of such work and of the publication of the ordinance, and thereby, by its recitals, were informed that the proceeding was under a law authorizing an assessment for benefits against their property. The prosecutors waited until the public had entered into a contract pursuant to such ordinance and until the completion of the work under such contract. Held, that it must be deemed that the prosecutors had legal information that an assessment would be levied upon their property, and it was then too late to object to the ordinance on the ground of lack of notice after the completion of the work.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 316.*]

(Syllabus by the Court.)

Certiorari by the Manufacturers' Land & Improvement Company against the City of Camden and others. Writ dismissed.

Argued February term, 1909, before GAR-RISON, BERGEN, and VOORHEES, JJ.

Herbert A. Drake and James E. Hays, for prosecutor. Edwin G. C. Bleakly, for defendants.

VOORHEES, J. This writ of certiorari is directed to the city of Camden, to the clerk of that city, and to the clerk of the court of common pleas of Camden county. The prosecutors are the Manufacturers' Land & Improvement Company. The writ removes, first, five certain assessments aggregating \$4,108.20 against their lands on Broadway in the city of Camden. Secondly, it removes the report of said assessment made by commissioners appointed by the court of common pleas of said county on the 17th day of January, 1908, to estimate and assess the benefits of repaving said street. Thirdly, it removes the application for the appointment of the commissioners and the order appointing them and the previous reports made by commissioners filed March 2, and April 3, 1908. Fourthly, it removes an ordinance directing the improvement of Broadway by paving with sheet asphaltum and Belgian blocks on a concrete foundation, approved March 28, 1907. And, fifthly, it removes another ordinance amending an ordinance to improve Broadway by paving with sheet asphaltum and Belgian blocks, approved March 28, 1907, which last-mentioned ordinance was passed July 25, 1907.

It is insisted that the writ should be dismissed because it was directed to the country clerk having the custody of the assessment proceedings, and to the city clerk, who has the record of the ordinances, and because it takes up two totally different records. The better opinion is that a writ of certiorari directed to several officers or bodies having

no joint or common duties, and who act independently of each other, should not be allowed, but that separate writs must run to each to bring up the particular matters with which each respectively is concerned. Starr v. Trustees of Rochester, 6 Wend. (N. Y.) 564; People v. Hill, 65 Barb. (N. Y.) 170; Corwin v. Walters, 68 N. Y. 403; Quinchard v. Trustees, 113 Cal. 664, 45 Pac. 856; 6 Cyc. 797. Strict practice, therefore, would lead to a dismissal of the writ, but as the merits of the case have been gone into at length, and much testimony has been taken, the court has considered the whole case.

We pass, then, to a consideration of the case on its merits. It is in proof on the part of the prosecutor that the street in question under the provisions of the charter of the city of Camden of 1871 (P. L. 1871, p. 210) and 1872 (P. L. 1872, p. 593) was paved with macadam pavement about the year 1879, and the entire cost was assessed upon the abutting property owners; that under those provisions a custom was established by which the whole cost of street improvements, without reference to benefits, was in the beginning imposed upon the abutting owners, and thereafter the city assumed the charge and care and repair of the street pavement, and thereafter the abutting owners on the street became immune; that the prosecutors in 1879 entered into a contract with the city by which it paved with macadam pavement the entire roadway on both sides of Broadway, and the prosecutors paid the entire expense, amounting to \$15,180.20, aside from the cost of paving the intersections of the streets, and those parts lying in front of the properties of other owners; that this street was accepted by the city, and the repairing and repaving were assumed by the city of Camden shortly after 1879. In 1906 an ordinance was passed providing for the appointment of a board of commissioners of assessment. In March 2, 1898 (P. L. p. 43, c. 24), an act providing for repaving at the expense of the city was passed, and numerous streets were repayed in the city of Camden. Jelliff v. Newark, 48 N. J. Law, 101, 2 Atl. 627, holds that where a street has been paved, and the abutting owners assessed for the benefits, it may be repaved and another assessment levied for such further improvement. The power to improve is a continuing one. Dillon, Municipal Corporations (4th Ed.) par. 959. The assessment of the entire cost upon abutting property owners would be in violation of the Constitution. Agens v. Newark, 37 N. J. Law, 415. Hence no binding custom can be said to exist which is grounded upon such unconstitutional foundation; nor will the voluntary payment by abutting owners of the whole cost of paving secure them by that means protection from a further assessment. There being no con-

upon the abutting property owners in the abutting property owners, then the prosfirst instance, a payment therefore would be voluntary, hence immunity from future assessments for further improvements subsequently done could not by such payment be constitutionally purchased. Malus usus abolendus est.

The history of legal municipal paving in Camden is quite fully set forth by Mr. Justice Collins in Borton v. Camden, 65 N. J. Law, 511, 47 Atl. 436. It was there held that the charter of Camden, wherein it imposed the entire cost of street paving upon abutting property, was unconstitutional; that no statutory constitutional method was in force in that city until 1876 (1 Gen. St. 1895, p. 681, \$ 1), but even that statute remained inoperative until 1886, for there was in Camden no legal authority to make assessments for street and sewer improvements until the defect was supplied, and a board of commissioners of assessments was authorized by an act approved April 12, 1886 (1 Gen. St. 1895, p. 574, § 1).

In 1898 two acts were passed, one entitled "An act providing for the repavement of paved streets in cities and for the issuance of bonds." Act March 8, 1898 (P. L. p. 43). It enacts that the proceeds of bonds to be issued thereunder shall be used in the payment of the costs and expenses incurred in the repavement of any paved streets, which the city shall thereafter decide to so repave, out of said fund. The other act is entitled, "An act to authorize the improvement of streets and highways in cities, etc., and to provide for the payment of the expense of the same." Act June 13, 1898 (P. L. p. 466).

It is insisted by the prosecutor that the assessment under review being for repaving should be set aside, because the work should have been done under the former of these acts, and also for the further reason that other streets in the city had been repayed under that act. Nothing is said in the latter of the two acts that it shall be confined to the improvement of an unpaved street, nor does it appear that the whole cost and expense incurred in repaying under the former act should be paid out of the bond issue, or that it would exclude the assessment of benefits upon the abutting property owners. The improvements of the streets to be paid for by the bonds may well be construed to apply to the proportion of the cost thereof falling upon the city at large. If the two acts stand together, they would seem equally available to the city, and the determination by the council under which act it would proceed would seem to be final. Be that as it may, however, the contention of the prosecutor that, because certain streets are being repaved under the former act wholly at the expense of the city, the assessment under review levied under the later act must be wrong. If there be authority in law for the

ecutor cannot allege that the proceeding is invalid merely because other streets are paved under other authority, be that other authority legal or illegal.

The prosecutor also contends that the cost of the old pavement borne entirely by it should be set off against the benefits assessed against it for the new pavement, under the authority of Bayonne v. Morris, 61 N. J. Law. 127, 38 Atl. 819. That case does not seem applicable to the present facts. Here, the old pavement had been voluntarily paid for, and in such case no claim for return of money so paid could be enforced.

The further point is made that the act of June 18, 1898 (P. L. p. 466), is unconstitutional because it provides a special local tribunal in the appointment of commissioners to assess the expense. The act is a general act, and provides a general scheme complete in itself, and is not private, local, or special, and therefore does not appoint local officers or commissioners to regulate municipal affairs in violation of the Constitution. act is not objectionable in this particular.

But it is said that no notice of the passage of the ordinances was given, and, being judicial in their nature, are void without such notice as against persons to be assessed thereunder. This is undoubtedly so, as a general principle. These ordinances were passed in March and July, 1907. The work was commenced and completed without any objection on the part of the prosecutors, although they knew of such work. The prosecutors admit that they saw the publication of these ordinances. The ordinances refer to the act of June 13, 1898 (P. L. p. 466), and recite that the paving is to be done under it. In Durrell v. Woodbury, 74 N. J. Law, 206, 65 Atl. 198, this court held that the act made it mandatory upon the city council to proceed to have benefits assessed, the authority for which resided in the acts itself and not in the ordinances. It must be deemed therefore that they had legal information that an assessment would be levied upon their property. It is too late now to object to the ordinances on this ground. As was said in Read v. Atlantic City, 49 N. J. Law, 562, 9 Atl. 759, it is settled that when proceedings of a municipal corporation have resulted in the expenditure of public money, objection even when founded on lack of authority must be made promptly. This principle was enforced in Borton v. Camden, supra, and in Durrell v. Woodbury, supra, where the cases are cited. The contract for the work was duly awarded, and the work has been done. This objection, therefore, comes too late.

There was testimony adduced that no benefit resulted from the assessment, and that the assessments were excessive. These objections were made to the court of common repayement of the street in question, and pleas. The report of the commissioners refor an assessment of the benefits upon the cited that the assessments made were for benefits equal in amount to the amount of benefits actually acquired by the lands, and in no case had any property been assessed beyond the amount of benefit actually derived from the paving. This report was referred back to the commissioners twice for revision, and should not now be disturbed. The report was confirmed December 18, 1908. after notice to appear and make objection had been given, according to law. This finding should not be now disturbed upon the conflicting evidence, or where the same is not glear and convincing. Kirtland v. Parker (N. J. Sup.) 68 Atl. 913.

The merits of the case showing no reasons to disturb the assessment, the writ should be dismissed because embracing two objects not necessarily connected, and for laches.

(74 N. J. E. 872)

McCARTER. Atty. Gen., v. FIREMEN'S INS. CO. et al.

(New Jersey Court of Errors and Appeals. June 14, 1909.)

1. CORPORATIONS (§ 385*)—PUBLIC INTEREST
—CONTRACTS IN VIOLATION OF.

CONTRACTS IN VIOLATION OF.

If a corporation, engaged in a business that is affected with a public interest, contracts to enter upon a line of conduct in respect to such business that tends to affect such public interest injuriously, and is contrary to public policy, such contract is ultra vires, and such corporation may be restrained in equity at the suit of the Attorney General, without regard to whether or not actual injury has resulted to the public. the public.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1545-1547; Dec. Dig. § 385.*]

2. INSURANCE (§ 36*)—INSURANCE COMPANT— PUBLIC INTEREST — CONTRACTS IN VIOLA-TION OF.

The business of fire insurance, as it is carried on in this state by corporations created, licensed, and regulated by the state, is a business affected with a public interest within the meaning of this rule.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. \$ 36.*]

8. Corporations (§ 3*)—Quasi Public—De-FINED.

Quasi public corporations—i. e., those "affected with a public interest"—defined.
[Ed. Note.—For other cases, see Corporations,

Dec. Dig. § 3.*

For other definitions, see Words and Phrases, vol. 7, p. 5896; vol. 8, p. 7777.]

4. FORMER DECISION APPLIED.

The case of Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, applied.

5. Injunction (§ 61*) — Contracts in Re-straint of Trade—Suit by Attorney Gen-EBAL.

A contract in restraint of trade, entered into by fire insurance companies, the necessary effect and the actual result of which is to control such business within a certain area, and within such area to fix and regulate prices, and to limit or eliminate competition to the injury of the public, is contrary to public policy, and altra vires such corporations, and may be re-

strained in equity at the suit of the Attorney General.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 120-123; Dec. Dig. § 61.*]

6. EQUITY (§ 25*)—CONTRACTS IN RESTRAINT OF TRADE—REMEDIES.

The rule in equity that contracts in re-

straint of trade are merely unenforceable does not require that the parties so contracting be deemed to be immune from ordinary equitable remedies, when their violation of public policy is directed at, and actually works, a public in-

[Ed. Note—For other cases, see Equity, Cent. Dig. §§ 77-85; Dec. Dig. § 25.*]

Swayze, J., dissenting.

(Syllabus by the Court.)

On rehearing. Decree of Court of Chancery (70 N. J. Eq. 291, 61 Atl. 705) reversed, and cause remitted.

For former opinion in Court of Errors and Appeals, see 66 Atl. 398.

The decree of the Court of Chancery dismissed an information filed by the Attorney General against 8 domestic fire insurance companies and 113 foreign fire insurance companies, praying for a decree adjudging a certain agreement in writing, entered into by the defendants, to be void as an ultra vires act injurious to the public, and that the said companies be enjoined from continulng to act under such agreement.

The contract in question, which was annexed to the bill, and occupies 22 closely printed pages, constitutes the subscribing companies members of "The Newark Fire Insurance Exchange," and covers apparently every detail necessary to vest in such Exchange the fixing of the premium rates to be charged for insurance by the constituent companies, and to render it, as far as possible, impracticable to obtain fire insurance within the area covered by the Exchange otherwise than from its constituent companies, and upon the rates fixed by it. The area thus covered includes the city of Newark, and certain outlying and adjacent districts in Essex and Hudson counties. The salient features of this contract pertinent to this appeal are (1) that the premium rates to be charged by the constituent companies shall be fixed by a central association, through an executive committee of five of its members, such central association being composed of a single representative of each constituent company, and such executive committee including uniformly one member representing all of the domestic companies; (2) that no member of the Exchange shall write policies at any other rate than that fixed by the Exchange; (3) that the only brokers to whom members of the Exchange shall pay brokerage for business obtained through them shall be those holding a broker's certificate from the Exchange in order to obtain which such broker must pledge himself not to place any insurance with any insurance company that is not a member of

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the Exchange unless, after giving preference to the members of the Exchange, sufficient insurance cannot be obtained. Upon receipt of a broker's certificate the broker must agree in writing to observe the rules of the Exchange that forbid rebating, and "to act only as the agent of the assured in placing contracts for insurance."

The information charged that this contract rendered it practically impossible to obtain fire insurance within the covered territory save from the companies that had subscribed to such contract, and at the premium rates fixed in accordance with its terms, and that the rates so fixed are 60 per cent. higher than the rates that prevailed in the same territory prior to the making of this contract, and that now prevail in the immediately adjacent territory not covered by the contract. The relief prayed by the information was that the defendants be enjoined from continuing or doing any act under said contract that tended to fix the rates to be charged for tire insurance, or to prescribe the persons through whom insurance may be placed, or the mode of payment therefor.

A mass of testimony substantiating on the one hand the averments of the information, and justifying on the other hand the propriety of the rates fixed and the methods employed by the Exchange, was taken, and the case thus made brought to final hearing before the Vice Chancellor, who advised that the information be dismissed, not because its charges and averments had not been proven, but because, assuming that they had been proved, the contract in question, while one that a court of equity would not aid a party to such contract in enforcing against another party to it, was not one that a court of equity, at the instance of the state, would restrain the defendants from entering into or continuing to the public injury. Precisely what was decided is thus abstracted in the headnotes to the Vice Chancellor's opinion: (1) "The common law does not treat agreements in restraint of trade as being illegal in the ordinary sease of the word, but merely as being unenforceable. (2) In the absence of a statute authorizing it the Attorney General may not maintain a suit to enjoin insurers against carrying out an agreement regulating rates, though against public policy, as in restraint of trade, and the fact that the insurers are corporations makes no difference."

Upon the ground thus stated the information of the Attorney General was dismissed, and from the decree to that effect this appeal was taken, and argued, after which a reargument was ordered and had covering certain further matters upon which the court desired to hear the views of counsel.

Robert H. McCarter. Atty. Gen., and Malcolm MacLear. for appellant. Bennet Van Syckel and Richard V. Lindabury, for respondents. GARRISON, J. (after stating the facts as above). The learned Vice Chancellor, who advised that the information filed by the Attorney General be dismissed on the ground that the Court of Chancery could not give relief in such a suit, said at the conclusion of his opinion: "If these corporations were public or quasi public bodies, and if the Attorney General were here asking to enjoin them from doing ultra vires acts to the public injury, as in Attorney General v. Central Railroad Company, 50 N. J. Eq. 52, 24 Atl. 964, 17 L. R. A. 97, the case would be different."

We agree with the learned Vice Chancellor as to the class of corporations and of corporate acts to which the rule of Attorney General v. Central Railroad Company, applies but we do not agree with him that the defendants are not within such class. The pertinent language of Chancellor Mc-Gill in Attorney General v. Central Railroad Company is: "Where a corporate excess of power tends to the public injury, or to defeat public policy, it may be restrained in equity at the suit of the Attorney General." The case of Attorney General v. Central Railroad Company, which did not itself come to this court, has since its decision by Chancellor McGill in 1892 been followed in the Court of Chancery, and has been approved and acted upon by this court notably in the recent case of Attorney General v. Vineland Light & Power Co. (N. J.) 70 Atl. 177, where the decree that was affirmed had been advised by Vice Chancellor Leaming (65 Atl. 1041), as to this point, upon the express authority of Attorney General v. Central Railroad Co.

In the case of Attorney General v. American Tobacco Company, 55 N. J. Eq. 352, 36 Atl. 971, Vice Chancellor Reed said: "It may be conceded that if this corporation had entered into an agreement with other manufacturers of these goods, whether those manufacturers were individuals or corporations, by which agreement prices were to be fixed and competition paralyzed, such an agreement would be a subject of equitable cognizance. Such was the case of Stockton, Attorney General, v. Central Railroad Company, 50 N. J. Eq. 52, 24 Atl. 964, 17 L. R. A. 97." This opinion was adopted by this court.

In Attorney General v. Del. & B. B. R. R. Co., 27 N. J. Eq. 631, Mr. Justice Dixon, speaking for this court, said: "In equity as in the law court the Attorney General has the right, in cases where the property of the sovereign or the interests of the public are directly concerned, to institute suit by what may be called civil information for their protection."

Prof. Pomeroy (section 1093) states the rule thus: "When the managing body are doing, or about to do, an ultra vires act of such a nature as to produce public mischief, the Attorney General as the representative of

the people and of the government may maintain an equitable suit for preventive relief."

In England the same rule prevails. torney General v. Cockermouth Local Board, L. R., 18 Eq. Cas. 172; Attorney General v. Shrewsbury Bridge Co., L. R. 21 Ch. Div. 752; Attorney General v. London & N. W. Ry. Co., 1 Q. B. Div. 78.

The rule of the American courts to the same effect as that laid down by Chancellor McGill is epitomized in 20 Am. & Eng. Ency. 850, under the title "Monopolies and Trusts," where numerous cases are cited in the notes. A complete collection of such cases will also be found in the two volumes of Lewson's Monopoly and Trade Restraint Cases, which work is, in effect, a collection of the syllabi of the opinions delivered by American courts upon this topic.

The rule illustrated by all of these cases, and the one that we should adopt, if we have not already done so, is that if a corporation, engaged in a business that is affected with a public interest, contracts to enter upon a line of conduct in respect to such business that tends to affect such public interest injuriously, and is contrary to public policy, such contract is ultra vires such corporation, and may be restrained in equity at the suit of the Attorney General, without regard to whether or not actual injury has resulted to the public. The expression "corporation affected with a public interest" is to be preferred to the term "quasi public corporation" as tending, in some measure at least, to characterize the class of corporations indicated, whereas the term "quasi public" is characterized only by its unmeaning vagueness. In the discussion, and still more in the application of this rule it will of course be necessary to amplify the expression "affected with a public interest" to the extent of stating just what is meant by that term, and also to discriminate between acts that are ultra vires a corporation and those that are merely illegal, and also to make clear what "tends" to public injury, for it is upon the concurrence of these three factors that the applicability of the rule in question depends.

Upon this branch of the present inquiry, therefore, the pertinent questions are:

- (1) Are the defendants engaged in a business affected with a public interest?
- (2) Is the contract into which they have entered one that is ultra vires such corporations? and
- (3) Does such contract tend to affect such public interest injuriously?

The first question, and that upon the answer to which this branch of the case virtually turns, is whether or not the business of fire insurance as carried on in this state is a business affected with a public interest within the meaning of the rule enunciated Company. The answer to this question does not depend, as counsel for the respondents argue, upon whether the defendants were expressly created as public agents, or whether the state has expressly charged them with the performance of a public duty, or has to that end clothed them with monopolistic privileges, or granted to them its right of eminent domain, or required that they insure the property of all citizens alike. These are indicia by which the existence of "a public interest" may be readily discerned, but, so far from "the public interest" arising out of these incidents, the fundamental fact is that they arise out of such public interest. In natural course the public interest first arose, and afterwards, and because of such interest, all of these incidents were added unto it. In their inception all public callings were private ones, whose history has consisted in the evolution of a public character and of the incidents that they now possess. "First the blade, then the ear, after that the full corn in the ear."

Such at the common law was the course by which common carriers, and all of the callings now recognized as affected with a public interest, ceased to be juris privati only, and became matters of public concern. More than two centuries ago Lord Chief Justice Hale, in his treatise De Portibus Maris, said that when private property is "affected with a public interest, it ceases to be juris privati only" (1 Harg. L. Tr. 78), illustrating this by the case of a man who sets up on his land a crane that in due course ceases to be juris privati, and becomes subject to public regulation. statement of Lord Hale was cited with approval, and applied by Lord Kenyon a century later in Bolt v. Stennett (8 T. R. 606), "and has," said Chief Justice Waite, speaking for the Supreme Court of the United States still a hundred years later, "been accepted without objection as the law of property ever since." Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77.

"Property," Chief Justice Waite continues, "does become clothed with a public interest, when used in a manner to make it of public consequence and affect the community at When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created."

One significance of this statement of the law of property is that it speaks in the present tense, viz., "property does become clothed with a public interest," not did become so clothed once upon a time. Another is its recognition of the fundamental law that public interest arises essentially from the uses to which a man puts his property, and in Attorney General v. Central Railroad | not from a force ab extra; and yet another engage in certain callings, knowing that the business they so embark in will, if success attend it, become affected with a public in-"They entered upon their business and provided the means to carry it on subject to this condition," he says; and, speaking to the point that it was of no moment that a direct precedent could not be found, Chief Justice Waite says, "It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance," and, reaching the conclusion that the public interest was affected, he adds, "It presents, therefore, a case for the application of a longknown and well-established principle in social science. * * * There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations if they use it in this particular manner."

The force and significance of these statements of the highest court in our land is enhanced by the fact that the property owners with respect to which they were made were private individuals, and the business concerned that of storing grain in private warehouses. The fact that the question in Munn v. Illinois was the right of the public through its Legislature to deal with a use of private property as affected with a public interest, rather than with the right of the public so to deal with it in the courts, is of no significance upon the point for which the language of the decision is now cited. Upon the underlying proposition that a business, private at its inception, may become affected with a public interest it is immaterial that the question of its public character arose in a case where its restraint had been legislatively rather than judicially determined. Upon this point Munn v. Illinois, as was said by Chief Justice Waite, introduced no novel What it did was to call attention to the fundamental relation that exists between the use of private property and the creation of a public interest in such use, and its chief value as a contribution to jurisprudence was that it pointed out clearly that in the determination of such a relation the underlying question was not what the state had done to impress a public interest upon a business, but what the owners and operators of such business had done to draw to, and thus clothe themselves with, a public interest; for in Munn v. Illinois the state had done absolutely nothing. The vast importance of the maintenance of this point of view by the courts of this country must be conceded when we consider that to an unprecedented extent business enterprises are launched the success of which depends upon the extent to which the public can be attracted to them and constrained to lean upon them. Public support of this character is essential to the success of these enterprises,

is that, knowing this to be the law, men atum of their promoters. When, therefore, success along these lines has been attained, it brings with it duties to the public, whose interests are involved, of precisely the same nature as if such duties had been imposed by public law upon such enterprises at their inception. This is the principle that was recognized and applied in Munn v. Illinois, and if it be sound as applied to individuals, it must a fortiori be sound as regards corporations. To the eye of the law and in the interest of the public it is one and the same thing whether a corporation be created to subserve a public interest, or whether such corporation achieve success of such a nature that the duty of regarding the interests of the public is thrust upon it. Aptly the words of the great dramatist may be paraphrased, viz., that some corporations are born to serve the public, some achieve that end, and some have it thrust upon them; and (as in the state of man) the last two conditions are so correlated that, when the interest of the public has been woven into a business as a sine qua non of its success, the success thus achieved thrusts upon such business a coordinate duty that clothes it, to that extent, with a public interest. It is in accordance with this principle that the entire class of callings we are considering has come into existence. Railways, ferries, inns, warehouses, or what not have in their day had this same origin and history. When the first waterman held out to his neighbors a means of ferriage other than in their separate boats. and when the first teamster undertook to carry families and their produce to the market town, the foundation of the modern law of common carriage was laid, and, as success attended these undertakings by their successful appeal to the public, a public interest in them arose which in time was recognized and acted upon by Legislatures and by courts alike, the power of eminent domain and other privileges being granted in order that such public interest might be the better served; the duty of serving all alike, and of refraining from excessive charges by combination or otherwise, being imposed that such public interest might be the better safeguarded. To confuse therefore these incidents and indicia with the fundamental relation out of which they arose, or to say that such fundamental relation between the use of private property and the public interest therein is a thing of the past, and that such relation is not just as sound and fruitful now as then, is to take a totally illogical position, the acceptance of which would disarm the courts of to-day of defensive weapons of which the public stands in more need now than it did then. It is therefore a shallow argument to say that a court cannot restrain corporations from ultra vires acts injurious to the public because such corporations have not been given the right of eminent domain, or because they have not been and hence is from their inception the desider- compelled to insure all of the property of all

of the people. When the public interest will be | en that did not covenant for such insurance furthered by such power or by such duty, they will come into existence, but not other-What, for instance, would a fire insurance company do with the power of eminent domain, or how would law abiding insurers be benefited by requiring these companies to insure the property of incendiaries? The same law, both as to the attainment of a public interest and as to the incidents that shall attach to it, is operative now as in the past, and the same history still repeats itself whenever a business or calling that was either unknown to the common law, or of no public import then, insinuates itself into modern business methods, so that it becomes a matter in which the public is vitally concerned. Of this there can be no more apt an example than the business of fire insurance as carried on by these defendants under modern conditions and under the laws of this state. If such business were still in the hands of individual underwriters, unaffected by state regulation; and confined to the writing of policies on the dwellings of prudent householders and on the stores of careful merchants, a great deal might be said in favor of the view that no public interest had attached to the making of these private contracts. We cannot, however, close our eyes to the fact that, by the enormous extension of this business, by its concentration in the hands of immense corporations, by state regulations that amount to privileges, and by its practically universal employment as a collateral security for debts, the business has become one in which the interest of the public is directly involved, certainly as much so as it is in the warehousing of grain. The collateral security of mortgage debts would alone suffice to attach a public interest to the business in question, since it vitally concerns credit as a factor in modern business.

Whatever concerns business credit ex necessitate touches a matter in which the public is directly interested. The impairment or embarrassment of business credit affects immediately, not only the demand for money and the volume of business transacted, but also the inauguration of new enterprises, the employment of people, and the payment of the wages they would otherwise receive and spend, and thus ramifies in its effects from the greatest banking houses, through the homes of the unemployed, or the badly paid, to the smallest retail shops. By the introduction and perfection of title insurance a practically new commercial utility has been imparted to real property, which, under such new conditions, performs a recognized service in the immediate obtaining of credit for commercial needs or in business emergencies. The collateral indemnification of credit thus obtained has become one of the chief, if not the chief, business of modern fire insurance, and I doubt whether within 20 years past a mortgage on improved property has been giv- court," i. e., the Supreme Court of the United

and for its maintenance under the penalty of immediate foreclosure. The public, greatly to the benefit of the insurance business, has become educated to this system, and to lean upon it and to shape their business ventures in reliance upon it. Such education and such reliance, which were of course beneficial, and properly so, to the insurance companies, have so entered into the woof and warp of general public business that nothing that can be conceived of would produce greater disturbance or profounder catastrophe than the cancellation of such policies or the withholding of such insurance. It seems to me that it is impossible to say that by its very growth and success the business of fire insurance has not become affected with a public interest within the principle of Munn v. Illinois. That it is deemed for legislative purposes to be so affected is evident from the voluminous Code enacted in this state for its regulation in the interest of the public. P. L. 1902, pp. 407-447. It is pertinent, at this point, to ask why the state should enact a regulative Code for the protection of a public interest that does not exist. Moreover, some of the provisions of this Code while in form regulations imposed upon insurance companies, amount practically to privileges accorded to them. Indeed it is by reason of the privileges thus enjoyed by foreign companies that the present combination is rendered feasible. such case-i. e., where foreign corporations that have been accorded the privilege of transacting their legitimate business in this state use such privilege to engage with our domestic companies in a compact inimical to the interests of the people—it would be a salutary, and I am inclined to think a sound rule of law that would estop such foreign corporations to deny that they were enjoying such a privilege from the state as made them amenable in the premises to its court of equity. A state that had granted such a privilege should, it seems to me, be entitled, with a reasonable expectation of being heard, to apply to its own courts for preventive relief based upon the abuse of the privilege it had granted. Be this as it may, we think that it is impossible for the unbiased mind to reach the conclusion that the business of fire insurance as now conducted in this state by corporations created, licensed and regulated by the state is not a business affected with a public interest, but that the storage of grain by private individuals is so affected. Yet such is the conclusion we reach, unless, so far as in us lies, we overturn the decision of the federal Supreme Court in Munn v. Illinois, a decision that has been followed in cases so numerous that their citation from state reports would be superfluous, and of which Mr. Justice Harlan, speaking at a later period, said, "The doctrines of Munn v. Illinois have never been modified by this Sup. Ct. 18, 27 L. Ed. 835.

The conclusion we reach from these considerations is that the business of the defendants is in point of fact one that directly affects the interests of the public, and that such public interest has been recognized as a subsisting one by the Legislature of this state, and that in point of law the business of the defendants is affected with a public

2. We have next, therefore, to consider whether or not the contract by which the defendants have agreed that their several corporations shall be bound is ultra vires such corporations. In this regard the 8 domestic companies stand in one respect in a position different from the hundred and odd foreign defendants. These domestic companies received their charters from this state in order that they might transact legitimately a business in which, as we have seen, the public is interested. To this end all general provisions essential to the lawful government of corporations are deemed to be written into their respective charters. Among these general provisions is that "the business of every corporation shall be managed by its directors," either by force of the express mandate of section 12 of the general corporation act of April 21, 1896 (P. L. p. 281), or because such is an imperative implication of the law of corporations. We cannot agree with the views of the respondents' counsel as expressed in their brief, viz., that "The provision that the company shall be managed by a board of directors is simply intended to show where the powers which may be exercised by the company shall, as between the shareholders, and those who deal with the company, reside," or that "The provision in section 12 of the act of 1896 was not intended for the protection of the general public, and failure on the part of the directors to perform their duty in the management of the affairs of the company concerns only the shareholders and the policy holders."

The statute says all that counsel say it means, but it also says more, and we take it that a statute means all that it says. We do not concede or believe that the sole object of section 12 was to inform stockholders of what they already knew, viz., that the business of their corporation was to be managed by the officers selected by them for that purpose rather than by somebody else. Neither do we believe that a corporation affected with a public interest could insert in its certificate of incorporation a frank avowal that its business was not to be managed by its own directors, and then successfully set up as against the state the argument now advanced in justification of the respondents' construction of the statute. Counsel confuses, it seems to us, the force to be given to the statute with the occasions upon which such force is to be given to it. Where the question cannot be raised, the meaning of the statute is immaterial. be therefore a total subversion of law and

States. Civil Rights Cases, 109 U. S. 62, 3 | It is, for instance, immaterial to the public, and to the state representing the public, whether the business of a company organized to manufacture bicycles or to make wall paper is managed by its directors or by its office boys. That is not the case here. These domestic companies were chartered to insure the property of citizens of this state under legitimate conditions. One of the most important and responsible duties that devolved upon the managers of these companies was therefore the fixing of the rates to be charged the citizens therefor. A contract by which the directors of such corporations in conclusive form abdicate their duty of management in this respect, and turn it over to an alien body, is in direct violation of the words and meaning of the statute, and is as typical an instance of an ultra vires act as can well be imagined. To do so in a given instance would be an illegal act, but the act of binding the corporation by contract to a settled policy of illegal acts is beyond the power of the corporation, i. e., is ultra vires. That this is no academic criticism appears clearly from the fact that the Central Association, erected by the contract by which, through a subcommittee of five, rates are fixed, consists of but one representative of each constituent company. Hence in a body of 121 the New Jersey companies have but eight votes, and in the subcommittee they have but one vote to four cast by foreign corporations. It is inevitable, therefore, that the influences affecting such foreign corporations, the losses they may have sustained, the expenses they have incurred, the salaries they design to pay, the dividends they desire to declare, will all be reflected and asserted in the fixing of the rates to be charged for insurance to the citizens of this state. These rates, and these only, the New Jersey companies by the contract in question bind themselves to charge, although such rates may be greatly in excess of anything required or justified by local conditions, or by the business of such domestic companies if managed by their own directors. Pro tanto this amounts to a merger of corporate management accomplished by means other than those sanctioned by law. It also places it out of the power of the domestic companies to manage an important feature of their business with respect to the public interest with which it is affected. While these considerations apply directly to the New Jersey companies only, they apply indirectly to the foreign companies also, who have used their privilege to do business in this state to render feasible a contract scheme that is ultra vires the New Jersey companies. Foreign corporations are permitted to do business in states other than that of their incorporation by comity, not of right. It is fundamental that such corporations have no other or greater powers than do corporations organized under the laws of such state. It would

reason to hold that a foreign corporation had in this state the power to make, with corporations of this state, a contract affecting a matter of public interest that such corporations of this state had not themselves the power to make. Comity does not extend to a permission to combine with domestic corporations in a way that tends to public injury. A court of equity would be short-sighted indeed that did not see this, and short-armed if it could not reach out to prevent it. We have therefore no hesitation in concluding that the ultra vires quality of the corporate contract by which the Newark Fire Insurance Exchange was brought into existence is attributable to all of the corporations that subscribed to such contract, the foreign as well as the domestic.

It is said that a court of equity will not take notice of the ultra vires nature of the contract into which these defendants have entered, for the reason that such contract, being in restraint of trade, is one that they cannot be forced to observe, and this had conclusive weight with the court below. For present purposes the plenary answer is that the test of ultra vires is the power of a corporation to make a contract, not its power to break it.

3. Upon the question whether the contract that resulted from these ultra vires acts tends to affect the public interest injuriously little remains to be said, and that little can be better said under the second branch of this appeal which we shall now proceed to consider. Upon the first branch our conclusion is that, because the business of the defendants is affected with a public interest, a court of equity should restrain their ultra vires acts at the instance of the Attorney General, if such acts tend to public injury, without regard to whether public injury had in fact resulted, and that the contract in question does so tend.

(2) Under the second branch of the case we shall assume that the business of the defendants is not, in the general sense, affected with a public interest and that the Attorney General must show that actual public injury has resulted from an unlawful combination in restraint of trade, and is therefore ultra vires the contracting companies.

As this was the point of view from which the learned Vice Chancellor regarded the case in advising that the information be dismissed, it is necessary at this stage to determine whether the reasoning that led the court below to apply to the Attorney General, seeking to avoid a contract repugnant to public policy, the same rule that obtains in that court when a party to such contract is seeking to enforce it, is sound.

Upon this point the court below laid down two propositions: First, that the Attorney General could not maintain a suit to enjoin parties to an agreement regulating rates, though against public policy as in restraint of trade; and, second, that the fact that the lagreement contrary to public policy, in that

parties to such agreement were corporations made no difference.

As to the first of these propositions it is perhaps only necessary that we should withhold our assent; but, as to the second we must record our express dissent.

Before leaving the first of these propositions however, we should say that the fault we find with the Vice Chancellor's conclusion is not in the soundness of the rule of mere unenforceability as applied to the class of cases in which it properly obtains, but in the extension of such rule to a subject not properly, or at all, within its purview, viz., the right of the state to preventive relief in aid of public policy. There is something startling, not to say appalling, in the proposition that the state is to be met in its courts with a denial of its right to relief, upon the ground that the rule of nonintervention that is applied to the violators of such public policy must also be applied to the public that is injured by such violation.

The rule in question is itself an application of the maxim "in pari delicto, etc.," and hence is in strict analogy with the judicial policy, by force of which courts decline to aid in the distribution of plundered property, but it is quite illogical to say to the man who has been despoiled, "Because we refused our aid to those who despoiled you, therefore we must decline to aid you." Yet this, or something very like it, is what we are asked to say.

The case of Mogul Steamship Company v. McGregor (23 Q. B. D. 598) cited by the Vice Chancellor, and relied upon by counsel for respondents, is not in point. There a court of law decided that a contract in restraint of trade, made by one set of shipowners, did not give another set of shipowners a legal cause of action against them for damages. The case has no bearing whatsoever upon the attitude of a court of equity when a suit is brought on behalf of the state in the interest of the public.

That the reasoning of Mogul Steamship Co. v. McGregor, even within the lines of its decision, is not likely to commend itself to jurisprudence generally is pointed out in an instructive article on "The Case of the Monopolies" by Sidney T. Miller, Esq., in the "Michigan Law Review" for November, 1907. Upon the point we are considering the case has no bearing whatsoever.

This digression should not, however, be further extended, as the same ground is necessarily covered in expressing our dissent from the second proposition, on which the court below based its dismissal of the Attorney General's information, viz., that the fact that the defendants were corporations made no difference as to the right of the Attorney General to maintain such suit.

Laying aside, therefore, the rule applicable to individuals who have entered into an



it is in restraint of trade, and taking up a question that could by no possibility be in- defendants, in rebuttal of this presumption, corporate power to enter into or continue under such an agreement, we perceive at once that such question lies entirely outside of the rule that was deemed in the court below conclusively to foreclose it. That such contracts are contrary to public policy is admitted upon all sides, in fact it is precisely because of their contravention of public policy that the courts refuse to countenance them. In the creation of its corporations no state, I suppose, confers upon them in express terms the power to make contracts that violate its public policy. Where such a power is not expressly given, it will certainly not be deemed by a court of equity to exist by implication. A contract that a corporation has neither the express, nor the implied, power to make is one that is beyond its power to make, i. e., ultra vires.

The circumstance that a corporation makes such a contract relying upon the nonintervention of the courts does not clothe the corporation with the needed power that it lacked to make such contract; it merely shows the inducement to make it, and how such violator of public policy will under such rule be protected from public redress by the very agreement by which the public is in-The rule of mere unenforceability jured. thus relied upon makes, however, an exception, even as to the parties in pari delicto, which is thus stated by Judge Story: "In cases where the agreements or other transactions are repudiated on account of their being against public policy, the circumstance that the relief is asked by a party who is particeps criminis is not in equity material. The reason is that the public interest requires that relief should be given; and it is given to the public through the party." Story Eq. § 298; Cone v. Russell, 48 N. J. Eq. 208, 217, 21 Atl. 847.

It would seem, therefore, that the rule enforced by the learned Vice Chancellor applies to actions that are based on the reprobated contract, but not to those in which its repudiation may be assumed by the court, whether as fact or as fiction.

The fiction of acting for the public by which relief is granted to a party in pari delicto must a fortiori apply to the public itself when actually acting in its own inter-The fundamental principle recognized by this line of cases is that one who has entered into a contract that contravenes public policy owes to the public the continuous duty of withdrawing from such contract. A duty thus owing to the public is, upon familiar principles, presumed by courts to be performed, and such presumption should be indulged in by the courts whenever necessary to give to the public, acting through its official representative, the same standing that the actual performance of such duty gives to one in pari delicto to act for the public.

It would be inconceivably absurd that the volved in or decided in such a case, viz., the should be heard to say that, because to their original violation of public policy they had superadded a violation of another public duty, they were immune from ordinary judicial control. Yet such is the state of our jurisprudence under the rule enunciated in the court below, unless such presumption or legal fiction is invoked in aid of violated public policy.

> Speaking for myself, the extension of the rule of nonenforceability, based as it is upon the maxim in pari delicto, to the case of the state seeking to prevent public injury seems to be without the slightest foundation in sound logic, or justification in right reasoning. Be this as it may, the fact is that, if upon neither of these grounds preventive relief may be had by the state, no combination can be so hostile to the public interests, or so flagrant in its deflance of public policy, but that it may effectively shield itself from such interference on behalf of the public, by the simple device of casting its proposed violation of public policy in the form of a contract for a self-imposed restraint of trade. I cannot believe that this is the actual state of our jurisprudence on this vitally important subject.

> Concluding, as we do, that the line of reasoning that limits the Court of Chancery, in all cases involving contracts in restraint of trade, to the single policy of their nonenforcement is fundamentally at fault, and that the defendants have not by their violation of public policy effectually entrenched themselves outside the pale of preventive law, it remains to be considered whether certain facts that were merely assumed in the court below, viz., that the contract in question is one that fixes rates and stifles competition, and is detrimental to the public, are sustained by the testimony. If they are, and if injury has thereby resulted to the public, the duty of a court of equity to enjoin the defendants from continuing to act under such ultra vires contract is clear. The contract. without question, fixes and maintains rates. and so controls the placing of insurance, and the channels through which that business flows, that it inevitably reduces competition to the minimum, if it does not absolutely eliminate it. This much appears from the contract itself and in the testimony. The remaining question, viz., that of injury to the public, is not so much one of disputed fact as of the sufficiency of a proffered justification of an established fact. The marked increase of cost to the insured, coincident with the going into effect of the contract is a salient and palpable fact that in the case of any other commodity of equal necessity, would carry its own irrefutable conclusion as to whether or not it was a public injury. The debatable questions are whether such increased price of insurance is not justified and rendered noninjurious to the public (1) as be

means and methods necessary to the proper conduct of the business of insurance; and (2) whether such increase of premium rates, while immediately burdensome, is not ultimately beneficial to the insured by adding to the solvency of the insurers, and swelling the fund out of which indemnity must come in case of loss. The first of these suggestions does not appeal to us, for the reason that it is perfectly obvious that everything that is attained by this contract in the way of equipment for the proper conduct of the business of the defendants could be attained by them severally or acting in unison, without involving their combination to regulate rates and stifle competition. The masterful way in which these reprobated features of the contract are effectuated forbids us to treat them as mere incidents of a system for the gathering of statistics and the dissemination of data. The other suggestion by which the increase of price to the insured is justified as being ultimately beneficial to him is more persuasive, and would probably be entirely so if any substantial warrant for such suggested benefit could be found in the contract. It cannot, however, be found there,

In order that the insuring public be ultimately or at all benefited by the increased cost of insurance it is required to pay, it is essential that such increase, over and above the cost of the operation of a company, should go, not in dividends to its stockholders, or in salaries to its officers, but to a fund, by whatever name called, by which greater solvency would be given to the company, and its increased ability to respond to losses assured. For this, however, there is no provision in the contract. In such case-1. e., where an increase of earnings results from a contract made by the officers of a company acting for its stockholders-we must, in the absence of any suggestion to the contrary, deem that such contract was made for the benefit of such stockholders. If, contrary to this normal presumption, the intention in making such contract was that such increased earnings were to go to some fund in which the insured would have an interest, it is so highly probable that a provision of such importance would be mentioned in such contract that the failure so to do forbids us to assume that such an intention existed. It is certain that this contract contains no such provision that the insured can lay hold of, or by which the subscribing companies could be bound. We cannot avoid, therefore, the following conclusions: (1) That the increase of price wrought by this combination of insurers has not been justifled: (2) that such increase works actual injury to the public; (3) that the contract by which such combination was affected is in restraint of trade, and repugnant to public policy on that account; and (4) that it is unreasonable, in that it transcends the legitimate purposes for which the defendants were created or licensed, and that such com-

ing merely incidental to the adoption of means and methods necessary to the proper conduct of the business of insurance; and (2) whether such increase of premium rates, while immediately burdensome, is not ultimately beneficial to the insured by adding to the solvency of the insured by adding to the solvency of the insured by adding to the solvency of the insured by adding to the defendant such combination effected and its continuance perpetuated, are the defendants needs no further argument. That the defendants should be enjoined from such continuance follows from what has already been said.

The notion that this conclusion runs counter to anything that was decided by this court in Raritan Railroad Company v. Traction Co., 70 N. J. Law, 743, 58 Atl. 832, can rest only upon a misunderstanding of that decision, or arise from a failure to read the opinion delivered in that case. The contract there under consideration was one between a railroad company and a traction company, by which the former agreed "not to lower its present rate of fare unless required by law." In his opinion Mr. Justice Pitney (now Chancellor) makes it perfectly clear that what was decided was that section 15 of the general railroad act of 1873 (Gen. St. p. 2643) in terms absolved a raflroad company affected by it from the exercise of that judicial discretion, respecting rates of fare, that otherwise would be addressed to it as an impartial arbiter between its stockholders and the public, and vested in such railroad company an uncontrolled discretion, within the limits fixed by the Legislature itself, to establish such rates as its own interests, without regard to the public, might require. Upon this point the opinion concludes with this language: "Any construction of section 15 of the act that places the railroad company in the attitude of an impartial arbiter as between it and the public being thus found to be inadmissible, because it runs counter to fundamental principles, we have before us a statutory scheme which in terms confers upon the company an uncontrolled discretion to subserve its own interests in making and, from time to time, changing the rates of fare and of freight, subject only to the maximum rates prescribed, and to further legislative action from time to time thereafter." It is clear, therefore, that what was decided was the construction of a statute and its effect in absolving railroad companies from an attitude toward the public that otherwise would exist. The decision, therefore, instead of militating against our present conclusion, is impliedly at least in its favor. The judges who dissented in the case cited did so be cause their construction of the statute differed from that of the majority of the court.

The result reached upon either branch of the present appeal is that the decree brought up by it should be reversed, and the case remitted to the Court of Chancery to the end that an injunction may issue in accordance with the specific prayers of the information and the views herein expressed.

SWAYZE, J., dissents. See 73 Atl. 414.



(79 N. J. L. 170)

SUMMERTON et al. v. CFTY OF ELIZA-BETH et al.†

(Supreme Court of New Jersey. June 1, 1909.) 1. STATUTES (§ 123*) — INCLUSION OF MORE THAN ONE OBJECT — "SYSTEM OF SEWERAGE."

Where an act of the Legislature authorizes the construction of an intercepting sewer, or a system of sewerage, in any city through which a river, stream, or creek runs, and into which a river, stream, or creek runs, and into which the sewage of the city is emptied, so that all sewers emptying into such stream shall thereaft-er be connected with such intercepting sewer or sewers, the words "or a system of sewerage" refer to the word "intercepting," and should be read, in connection with it and the purpose of the act, as meaning a system of intercepting sewers, for in considering the constitutionality of a statute the substance of the legislative provision is given preference to the form in which it is expressed, and the statute does not expresse two objects within the constitutional prohibition

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 123.*]

2: STATUTES (§ 123*) - EXPRESSION OF SUB-JECT IN TITLE.

Where the title of such statute declares as one of its purposes the granting of authority to build intercepting sewers "to receive all such sewage, to be disposed of in such manner as shall be deemed proper," it sufficiently expresses the object of an act which authorizes the establishment of outlets or please of densit for tablishment of outlets or places of deposit for the sewage carried by such intercepting sewers. [Ed. Note.—For other cases, see Statutes, Dec. Dig. § 123.*]

REGULATION OF MUNICIPAL AFFAIRS.

A statute applying to all cities through which a river, stream, or creek runs, into which the sewage of the city is emptied, authorizing the building of intercepting sewers to remove such pollution from, and the cleansing of, such streams, is not an illusory or unconstitutional classification. classification.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 102; Dec. Dig. § 93.*]

(Syllabus by the Court.)

Certiorari by Walter A. Summerton and another to review two ordinances of the City of Elizabeth, one authorizing the construction of an intercepting and certain lateral newers, and the other providing for the issuing of bonds to meet the cost of such construction. Ordinances sustained.

Argued June term, 1909, before REED, BERGEN, and VOORHEES, JJ.

McDermott & Enright, for prosecutors. James C. Connolly, for defendant City of Elizabeth. F. J. Faulks, for defendants Mc-Cloud & Brennan.

BERGEN. J. The common council of the city of Elizabeth adopted two ordinances, which this writ brings under review; one authorizing the construction of an intercepting, and certain lateral, sewers, and the other providing for the issuing of bonds to raise the money necessary to meet the costs of such construction. The only legal support for these ordinances is an act of the Legisla-

ture passed in 1907 (P. L. 1907, p. 267), which the prosecutors insist does not comply with the requirements of the Constitution of the state. The testimony taken in this proceeding shows that the city of Elizabeth has a general system of sewers which for the most part discharge the sewage of the city into the Elizabeth river, a stream which runs through the city, and has thereby become polluted to an extent likely to endanger the health of the inhabitants of the city. It is proposed to abate the nuisance by constructing an intercepting sewer, which following substantially the course of the river, will receive all of the sewage which is now emptied into the river, and conduct it to tide water. In order to accomplish this, lateral sewers will have to be constructed in addition to the intercepting sewer, and the general system altered in some particulars.

The prosecutors claim that the statute which it is urged justifies these ordinances violates the Constitution of the state in the following particulars: (1) That it embraces more than one object; (2) that it embraces objects not expressed in the title; (3) that it is a local or special law regulating the internal affairs of towns or countles. The title of the act reads as follows: "An act to authorize cities of this state through which any river, stream or creek runs, and into which the sewage of any city empties, to build and construct intercepting sewers to receive all such sewage to be disposed of in such manner as shall be deemed proper, and to provide for the alteration of a general system of sewerage and drainage in cities, and to cleanse and otherwise improve such rivers, streams or creeks, and to issue bonds to meet the expense of such work." The preamble and first section of the act runs as follows: "Whereas, many of the cities of this state are so situated that they are traversed by rivers, streams or creeks, into which such cities drain all or part of their sewage, thereby rendering such rivers, streams or creeks foul, noxious and detrimental to health; therefore, be it enacted by the Senate and General Assembly of the state of New Jersey: It shall be lawful for * * * any city through which any river, stream or creek runs, and into which the sewage or part of the sewage of such city is emptied * * to order and cause an intercepting sewer or sewers, or a system of sewerage, to be built and constructed in such city, or any part thereof, and to alter a general system of sewerage for such city, or any part thereof, so that all sewers within the district intended to be drained by such intercepting sewer, and now emptying into such river, stream or creek, shall thereafter be connected with such intercepting sewer or sewers into which all sewage matter from such connecting sewers shall thereafter be discharged."

The first point pressed by the prosecutors is

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that the act authorizes the building of "a sys-| towns or counties by a special law, in viotem of sewerage" as an improvement distinct lation of the constitutional prohibition on from an intercepting sewer, and that, as they are not kindred but separate objects, the act is one which the Constitution condemns. Without admitting the correctness of this deduction, we are of opinion that the act does not provide for a separate system of sewerage to be constructed without reference to an intercepting sewer. What the act authorizes to be built is an intercepting sewer or sewers, or a system of sewerage and the alteration of a general system "so that all sewers within the district intended to be drained by such intercepting sewer, and now emptying into such river, stream or creek, shall thereafter be connected with the intercepting sewer." What the Legislature intended to authorize by this act was the building of an intercepting sewer for the purpose of purifying a stream of water, running through a city, which is used as a receptacle and conveyor of the sewage of such city, with such laterals or alterations of the existing system as may be necessary to accomplish this result. We think that such intention is expressed in the act with sufficient clearness, and that the words "or a system of sewerage" refer to the preceding word "intercepting"; that is, authority is given to bulld an intercepting sewer or sewers or a system of intercepting sewerage, and that the power conferred is limited to a system "now emptying into such river, stream or creek." In considering the constitutionality of a legislative act, courts ought to, and do, regard the substance of the legislative provision in preference to the form in which it is expressed. Rutgers v. New Brunswick, 42 N. J. Law, 51-54. The disputed statute manifestly embraces but one object, and that is the granting of authority to build an intercepting sewer, and such alteration of an existing general system of sewerage, as may be required to drain the existing sewers into a system of intercepting sewers, and is not therefore unconstitutional upon the alleged ground that it embraces more than one object.

The second objection urged is that the statute embraces objects not expressed in the title, because the title contains no reference to a system of sewerage, or to the establishment of outlets or places of deposit. We are unable to discover any basis for this objection. So much of it as refers to a system of sewerage is disposed of by what has already been said, and the establishment of outlets or places of deposit is an incident of the power to construct an intercepting sewer, and is sufficiently expressed in the title by the words "to build and construct intercepting sewers to receive all such sewage to be disposed of in such manner as shall be deemed proper."

The third objection is that the statute undertakes to regulate the internal affairs of

that subject. The argument is that the statute does not embrace all cities, because it is limited to cities through which any river, stream, or creek runs, and into which the sewage of any city empties, and that this classification does not embrace a group of objects distinguished by characteristics sufficiently marked and important to make them a class for legislative purposes. The principal point pressed in support of this proposition is that the classification is illusory, in that cities having a stream running through them in which sewage is emptied are not substantially different, for the purpose of such legislation, from cities bounding upon a stream into which sewage is being emptied. We think that the classification is justifiable and not illusory. Where the stream is a boundary line between one municipality and another, both of which are using the stream for the purposes of a sewer, the building of an intercepting sewer by one municipality, and not by the other, would not abate, nor would the cleansing of one-half of the stream remove, an existing nuisance detrimental to the public health. To accomplish that purpose joint action of the two municipalities would be required, and an entirely different method of procedure would have to be provided by the Legislature. The evidence discloses that there are a number of cities in this state having streams running through them into which sewage is deposited, over which such cities have absolute and undivided jurisdiction, and the necessity for intercepting the flow of sewage into such a stream, and the cleansing of the entire stream in order to remove and prevent the continuance of polluting influences, presents a condition which can only arise in cities where the entire stream is within the limits of the city. and can be wholly dealt with by that municipality, without the aid of another corporate body.

For the reasons given we have reached the conclusion that the statute is not such a local or special law as is prohibited by article 4, § 7, par. 11, of the Constitution of the state.

The proceedings brought under review by this writ are affirmed.

(78 N. J. L. 289)

BROWNING et al. v. BOARD OF CHOSEN FREEHOLDERS OF BERGEN COUNTY.

(Supreme Court of New Jersey. June 9, 1909.)

BRIDGES (§ 8*) - CONSTRUCTION - AUTHORITY OF CHOSEN FREEHOLDERS.

The resolution of the board of freeholders of Bergen county, providing for the construc-tion of a bridge over the Hackensack river, between certain streets in Hackensack and Ridgefield Park, is a valid exercise of the power con-

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ferred by chapter 16, p. 27, and chapter 64, p. 93, P. L. 1906.

[Ed. Note.—For other cases, see Bridges, Dec. Dig. § 8.*]

(Syllabus by the Court.)

Certiorari by the State, on the prosecution of J. Hill Browning and others, against the Board of Chosen Freeholders of the County of Bergen, to review a resolution thereof. Resolution affirmed.

Argued February term, 1909, before REED, TRENCHARD, and MINTURN, JJ.

Griggs & Harding, for prosecutors. ther A. Campbell and William B. Gourley, for defendants.

MINTURN, J. Under the provisions of P. L. 1892, p. 308, as amended in P. L. 1902, p. 360, and in P. L. 1906, p. 93, and again in P. L. 1908, p. 153, the board of chosen freeholders of the county of Bergen undertook, upon the report of a committee of the board recommending it, to build a bridge over the Hackensack river between Railroad avenue in Ridgefield Park, and Riverview Place in Hackensack, and for that purpose passed a resolution on November 2, 1908, at a regular meeting, setting forth that the construction of such a bridge was "necessary," "advisable," and "a public necessity." The resolution further provided that the cost of the proposed bridge should not exceed \$158,000. Plans and specifications for the construction of the bridge had been ordered and adopted, and proposals or estimates for doing the work, in accordance therewith, were duly advertised for and received. On July 24, 1908, the proposals were received, and on October 29th the committee of the board to whom the bids were referred reported unaminously in favor of accepting the bid of F. R. Long Company, for the sum of \$153,185.13. At the July meeting five bids were received, one of which was rejected because unaccompanied by the certified check required by the specifications. Of the others, the F. R. Long Company was the lowest, and announcement of the amount of the respective bids was made by the clerk of the board at that meeting. The bids, in addition to the sum in bulk bid for the work, contained unit prices for additions and deductions in the work, as necessity or economy might require the board to make.

The prosecutors as taxpayers challenge the legality of the board's action. Section 1 of the act of 1906, authorizes and empowers the board of chosen freeholders, "whenever in any county of this state it shall be necessary or advisable to erect a bridge," to so declare by resolution, to be adopted by not less than a majority of all the members of the board. There can be no question seriously made that, under this provision, the necessity for a bridge over the river was vested by the Legislature in the board, and, unless this discretion can be shown to be illegally or fraudulently exercised, it cannot be disturbed. State v. Freeholders of Essex, 23 N. J. Law, 214; McKinley v. Freeholders of Union, 29 N. J. Eq. 164: Ferguson v. Passaic, 60 N. J. Law, 404, 38 Atl. 676.

The prosecutor insists that the board illegally exercised the power vested in them, because the bidders did not base their estimates upon similar work, and were not upon an equal footing in that regard. The force of this objection is derivable from the fact that, after the bids had been received, the board of chosen freeholders found it necessary, upon the ground of economy and practical construction, to order some changes to be made in the work. The specifications required the bidders to state their price for constructing the entire bridge, and reserved to the board the right to extend or diminish the amount of work to be done, and for that purpose required the bidder to state a unit price upon certain material and classes of work therein specified. The original plan required 16 spans on the westerly side of the river, between the westerly terminus of the bridge and the last abutment. was concluded by the board to substitute an embankment for these spans, and the original embankment provided for in the plans was changed in accordance with the reservation contained in the specifications. It is difficult to perceive how any bidder could be misled under these circumstances. The very purpose of calling for a unit price might indicate to any intelligent bidder a desire upon the part of the board to use it as occasion might require, in the extension or for changes or alterations of the work; but specific and express notice of the fact was conveyed to the bidder in the reservation contained in the specifications, and the board were within their rights in exercising this power as public convenience or necessity might require, so long as the changes thus made produced no radical departure from the original scheme. We are not concerned to know the public reasons, which made this change of plan seem judicious or necessary, for the prosecutors do not attack the bona fide intent of the board, by testimony or by argument. It is significant, however, in this connection, to remember that the effect of the change was to reduce the proposed cost of the bridge by over \$12,000 below the lowest bulk estimate. It is also to be remarked that the interest of the county was properly safeguarded by requiring bids in this dual form, for it can well be imagined that without such a guaranty an accepted bid, upon a bulk basis in the event of necespower to determine the advisability of and sary changes thereafter found to be neces-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs, 1907 to date, & Reporter Indexes

sary, might leave the county in a quagmire of dispute and litigation.

Our attention is next called by the prosecutor to the claim that the board had no power to erect this structure, at the points mentioned, because it cannot at present be joined by any existing public highway. is a sufficient answer to this objection to state that we consider the testimony makes it manifest that the proposed bridge can and will be so joined to existing thoroughfares. Railroad avenue in Ridgefield Park. on the east side of the river, is an established highway; and Henry Place and River View Place on the west side of the river, it is quite clear from the testimony, are dedicated streets, which have been laid out and mapped by one Schmultz, the owner of the fee, and the map so made has been duly filed. The owner of the fee, it appears, has sold land abutting upon the streets thus dedicated, according to the map filed. In addition to this, Schmultz has executed what may be termed a "quasi declaration of trust" to the county, conferring upon it an absolute right to the use of the streets thus dedicated, and finally the village of Hackensack has, through its proper committee, adopted a resolution providing for the genéral improvement of the public street known as Henry Place, which will be an approach to the proposed bridge, provided that the bridge be constructed as intended, with its westerly outlet at that point. It requires but a meager citation of authorities to make it manifest that here we have all the necessary indicia of a dedication, upon which the public authorities have the right to act, in furtherance of the performance of a public duty. Trustees v. Hoboken, 33 N. J. Law, 14; Mayor & Council v. Morris Canal, 12 N. J. Eq. 553. We do not find it necessary therefore to determine the contention raised and elaborated by counsel for the prosecutors, as to the legal inability of the county to construct a bridge without a public approach, and leading on either side to private land, for the reason that we do not perceive that it arises on the facts of this case. In our judgment, chapter 16, p. 27, and chapter 64, p. 93, P. L. 1906, affecting a cognate question, must be read in pari materia. Vane v. Newcombe, 132 U. S. 220, 10 Sup. Ct. 60, 33 L. Ed. 310; U. S. v. Freeman, 3 How. (U. S.) 556, 11 L. Ed. 724; Black on Interpretation, 204. We conceive therefore that ample power is conferred by both acts not only to construct the bridge with is necessary abutments and approaches, and to empower the county to issue bonds for the payment of the cost thereof, but to authorize the condemnation of land if necessary for the purpose, which land may be condemned, so far as this statutory enactment is concerned, after the board has resolved to construct the bridge.

We see nothing of force in the contention that, because the federal War Department did not give its assent to the construction of the bridge in accordance with the plans, until December 12, 1908, the resolution in question is invalid. The giving of such assent is a mere regulation for the protection of commerce and navigation, and the fact that it was given, as appears in the record, eliminates from the case the necessity of discussing the propriety of procuring it, as a condition precedent to the passage of the resolution in question. Nor is there any force in the contention that the proposals were ambiguous regarding the kind of cubic yards of embankment required, and it is enough to say, in answer to this contention, that no bidder appears to have been misled by any such alleged ambiguity. We have examined the remaining reasons urged by the prosecutor as grounds for setting aside this resolution, and find that they contain nothing of such a substantial nature, not already incidentally adverted to or discussed. as to require further elaboration.

The resolution in question is affirmed, with costs.

(75 N. J. E. 384)

FRITTS et al. v. DELAWARE, L. & W. R. CO.

(Court of Chancery of New Jersey. May 8, 1909.)

1. RAILBOADS (§ 60*)—DISCONTINUANCE OF RAILBOAD STATION—RIGHTS OF INDIVIDUAL.

A railroad company will not be enjoined from withdrawing from a railroad station the personal attendance of an agent, though the railroad contracted with an individual that one be kent but the individual will be remitted to be kept, but the individual will be remitted to his suit for damages, as public policy requires that railroads be free to serve the public without being hampered by private contract.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 134, 136; Dec. Dig. § 60.*]

MANDAMUS (§ 133*)—RAILROADS (§ 60*) STATION - ABANDONMENT-GROUNDS-EDY BY MANDAMUS.

Any right which the public have to compel a railroad to maintain a station at a certain point is a legal one, enforceable by mandamus, and not by injunction to prevent the discontinuance.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 268; Dec. Dig. § 133; Railroads, Cent. Dig. § 134; Dec. Dig. § 60.*]

3. RAILBOADS (§ 60*)—RAILBOAD COMMISSION

QUESTIONS TO BE PRESENTED. Since by Act May 15, 1907 (P. L. p. 448) railroad commission was formed giving it control over railroads generally, any question as to the right to prevent a railroad from discontinuing a railroad station should in the first instance be submitted to the commission.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 136; Dec. Dig. § 60.*]

Bill by Fritts and others against the Delaware, Lackawanna & Western Railroad Company to enjoin the discontinuance of a railroad station. Bill dismissed.

Stalman, for defendant.

GARRISON, V. C. This is a bill filed by the complainants to secure an injunction against the defendant, preventing the latter from discontinuing a railroad station at Broadway, Warren county, in this state.

The proofs show that the defendant company had established a station at the place above named, and maintained a man in charge thereof. On a certain date they announced that they were going to abandon the station. It turns out from the proofs that they did not mean that they were not going to stop any trains at that place thereafter, but that they were going to withdraw from it any personal attendance of an agent.

No charter or statutory provision requiring the establishment or maintenance of this station was shown to exist. In its general features the case was so nearly similar to that of Jacquelin v. Erie Railroad Company, 69 N. J. Eq. 432, 61 Atl. 18 (Garrison, V. C. 1905) that its decision would be controlled by that case. The only distinguishing feature was that one of the complainants claimed that by a deed, in which he was a grantor and the railroad company a grantee, there was a provision requiring the railroad company to maintain a station on the land granted. I shall not analyze the proofs to determine a disputed question of fact as to whether the station is in any sense of the word on the granted land. I am inclined to the opinion that it is not. I think that the facts show that it is on an adjacent tract, and that the granted tract was used as a means of approach. Even if the station building itself had been on the granted tract, I am still of the opinion expressed by me in the Jacquelin Case, above cited, that if a private individual has acquired by contract a right to compel a railroad company to maintain a station at a certain point, such right will not be enforced by injunction restraining the discontinuance of the station, but the party will be remitted to a suit for damages, and that this principle will be applied because public policy requires that the railroads be free to properly serve the public, which they could not do if the courts enforced private contracts concerning the number of trains and places of stopping. which would hamper them in the proper running of their roads.

So far, then, as the right which any complainant here may claim to have by reason of private contract, I refuse relief upon the principle just stated.

So far as the right is public, I refuse relief for the reasons stated in the Jacquelin Case.

Furthermore, since the erection of the Railroad Commission by the act of May 15, 1907 (P. L. p. 448), I incline to the opinion that all such matters should, in the first instance at least, be submitted to the commissioners for

Oscar Jeffrey, for complainants. Max M. | their action—not determining (as of course I should not before the point is raised) whether the court has otherwise jurisdiction. Certainly, where the state has erected a commission for the express purpose of dealing with just such questions, citizens should be referred, in the first instance at least, to that commission. Whether they have other rights which the courts will enforce I do not decide, because I am not called upon now to decide that.

I will advise a decree dismissing the bill, without costs to either party. The latter qualification is put in by consent of the defendant, who said that it would not insist upon its right to costs.

(78 N. J. L. 190)

HORANDT v. CENTRAL R. CO. OF NEW JERSEY.

(Supreme Court of New Jersey. June 8, 1909.) 1. EVIDENCE (§ 586*) - WEIGHT AND SUFFI-

CIENCY-POSITIVE AND NEGATIVE EVIDENCE. Evidence of witnesses, whose attention was not specially called to the matter, that they did not hear a whistle or bell rung by a train approaching a highway grade crossing is of slight value in comparison with the positive affirmative evidence of other witnesses that they did hear the bell or whistle, especially when such latter witnesses testify to some action on their part as a result of so hearing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2482-2435; Dec. Dig. § 586.*]

2. RAILROADS (§ 337*)—ACCIDENT AT CROSS-ING—FAILURE TO RING CROSSING BELL.

The failure of a railroad company to ring a crossing bell as a signal of the approach of a train cannot be regarded as negligence causing an accident to travelers on the highway, who were unaware of the existence of the crossing or the bell, and therefore did not rely on the latter as a warning. ter as a warning.

[Ed. Note.—For other cases, see R Cent. Dig. § 1094; Dec. Dig. § 337.*]

3. RAILROADS (§ 309*)—CROSSINGS — SPECIAL PRECAUTIONS.

A railroad is not bound to use extra precautions because of special elements of dans at one of its crossings, unless it is responsible for the existence of those dangers.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 981; Dec. Dig. § 309.*]

4. RAILROADS (§ 327*) — ACCIDENT AT CROSS-ING-DUTY OF TRAVELER.

A traveler on a highway approaching a rail-road crossing is not relieved from the responsi-bility of looking and listening for trains by reason of his ignorance of the existence of such crossing, if the presence of the railroad is obvious to any one reasonably using his ordinary powers of observation.

[Ed. Note.—For other cases, see Railroa Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*] see Railroads,

5. Negligence (§ 89*)—Implied Negligence
—Injuries to Wife—Negligence of Hus-BAND.

The rule laid down in Pennsylvania Rail-road v. Goodenough, 55 N. J. Law. 577, 28 Atl. 3. 22 L. R. A. 460, does not apply to cases in which, by reason of the death of the husband, he cannot be joined as plaintiff.

[Ed. Note.—For other cases, see Cent. Dig. § 132; Dec. Dig. § 89.*] see Negligence,

(Syllabus by the Court.)

Actions by Carrie S. Horandt, as executrix, by Carrie S. Horandt, by Ruth Horandt, by next friend, and by Reinhardt Bender, by next friend, against the Central Railroad Company of New Jersey. The suits were tried together, and verdict for plaintiff found in each case. Rules to show cause made absolute.

The four above-entitled suits grow out of a collision between an automobile owned and driven by deceased, Christopher Horandt, and a railroad train of the defendant company at Keyport, Monmouth county, on Sunday, July 7, 1907. Christopher Horandt was killed, and the automobile demolished. His wife, Carrie S. Horandt, his daughter, Ruth, and nephew, Reinhardt Bender, who were riding in the automobile, were all injured. The four suits were tried together at the Passaic circuit, a verdict for plaintiff found in each case, and rules to show cause granted why the verdicts should not be set aside and new trials had. No exceptions were reserved, and questions of both law and fact were argued on the return of the rules. The members of the party were on their way from Asbury Park to Paterson, and were passing northwardly through Keyport, about 4 p. m. of July 7th, on a main thoroughfare called Broad street, which is crossed by a single-track railroad operated by the defendant at an angle on the left or west of Broad street of 66 degrees 29 minutes and on the right, of 113 degrees 81 minutes. On the northerly side of the railroad, and less than 200 feet west of the center of Broad street, was the Keyport railroad station, with its semaphore signal. On each side of the railroad ran a line of telegraph poles and their wires. The track and its rails and ties show plainly on both sides of Broad street in the photographs submitted in evidence. There was a standard warning sign reading, "Look out for the Locomotive" on the west curb of Broad street some 23 feet south of the track, and on the other side of Broad street a post with an alarm bell, which bell was not ringing, however, and a sign which was undecipherable because of old and new lettering having run together, except the word "Danger," which clearly appeared in large letters in the center. Broad street is perfectly straight and almost level for a long distance south of the railroad, from which direction the automobile approached. Looking toward the right, the view of the railroad was unobstructed after approaching within 96 feet of the track. On the left, until within 75 feet of the track, a clear view of the railroad and of the station is shut off by buildings, the last of which is a small one-story garage, the nearest point of which is 62 feet from the south rail of the track, measured along the west side of Broad street, and, if projected at right angles to the center line of Broad street, would be 75 feet from the center of the track; but

track for a long distance are in full sight. There were no safety gates or flagman. The day was clear. It was a quiet Sunday afternoon. There was no other traffic of consequence going on in Broad street, and the wind was blowing from the direction of the train. The automobile was moving northward at about 12 miles an hour, and collided with the locomotive of a special train, which was traveling northeastwardly or toward the right at a rate of about 25 miles an hour. On the part of the plaintiff it was claimed that the statutory signals by ringing bell or blowing whistle were omitted, that neither signal was given, and that neither Mr. Horandt, nor any one in his party, was aware of the existence of a railroad at that place, or saw or heard the train until the moment of collision, or too late to avoid it. Motions to nonsuit and to direct a verdict for defendant were denied. and the case submitted to the jury on the theory (a) of negligence in failing to give the statutory signals; (b) that the jury were entitled to find the crossing a peculiarly dangerous one by reason of the angle of the tracks, obstructions to view, etc., and, in the language of the trial judge, to exact of the railroad company the duty of giving some visible notice of the approach of trains: (c) that negligence might be inferred from the placing of a crossing bell at the crossing, and the failure to sound it as a signal of the approach of the train in question.

Argued February term, 1909, before GUM-MERE, C. J., and SWAYZE and PAR-KER, JJ.

Wayne Dumont and Clifford L. Newman, for plaintiffs. William A. Barkalow and Frederic J. Faulks, for defendant.

PARKER, J. (after stating the facts as above). Our examination of the evidence and proceedings in this case satisfies us that the verdict should be set aside and a new trial granted, and this on several grounds.

1. We are of opinion that the verdict, so far as predicated on the alleged failure of the defendant to give the statutory crossing signals by bell or whistle, was clearly against the weight of evidence. The three survivors of the accident testified they were looking straight ahead, saw no sign of a railroad, and heard no bell or whistle. Six other witnesses, at varying distances from the track, testified for the plaintiffs that they heard neither bell nor whistle. One was positive that the whistle did not blow, but was not sure about the bell, and said it might have rung, but he did not hear it. On the other hand, one witness, who was at the automobile garage, which hid his view of the train, was apprised of its approach by hearing the bell ring; another, who was driving on Main street, which is the next street west of Broad street, stopped his horse on account of hearing the bell, so as to let the train go by, from this point onward the station and the and says that the bell continued to ring as



the train crossed Main street. He also testified to continuous blowing of the whistle, but probably confused this with the blowing off of steam as testified to by another witness. His wife, who was with him in the carriage, gave similar testimony. Three other disinterested witnesses, Mr. Kellogg, Miss Kruser, and Mrs. Flynn, testified positively to the ringing of the bell for a considerable distance before the train reached the crossing. Mrs. Flynn said she was engaged in conversation at the time, and had to stop on account of the noise of the bell and of escaping steam from the locomotive. In addition the engineer, fireman, and baggageman of the train all swore definitely and positively to the ringing of the bell all the way from Matawan yard, a distance of over a mile. The case for the defendant is not as strong as in Eissing v. Erie Railroad, 73 N. J. Law, 343, 63 Atl. 856, but the evidence seems nearly, if not quite, as cogent as in Holmes v. Penna. R. R. Co., 74 N. J. Law, 469, 66 Atl. 412, in which the Court of Appeals sustained a direction of verdict for the defendant on the ground that the positive evidence of the statutory signals entirely destroyed the probative force of negative evidence for the plaintiff, from which, if uncontradicted, the absence of such signals might have been inferred. Without going so far as to say that this phase of the case should have been removed from the consideration of the jury, it is obvious that a finding, on this evidence, of absence of signal by bell or whistle cannot be fairly supported.

2. There was another theory on which the court instructed the jury, erroneously as we think, that they might find the defendant guilty of negligence causing the acci-The court charged that, as the evidence showed that the crossing bell was not sounded as the train approached, the jury might consider that fact as bearing not only upon the question of defendant's negligence, but also upon the question of notice to the plaintiff driving the automobile, as he approached the crossing. The case for the plaintiffs rested on the theory that they were unaware of the crossing, and that no adequate notice of it was given. Hence it is evident that they piaced no reliance on the bell to warn them of the approach of the train, in which case only could the failure to ring it be regarded as negligence directly tending to cause the accident. There was error, therefore, in charging the jury that failure to ring the crossing bell to signal the approach of the train might be regarded as such negligence.

3. The court also erred in charging the fury that, by reason of the physical conditions existing, they might regard the crossing as a place of extra danger, and hold the company to a duty of extra precautions, and especially of giving visible notice of the approach of the train. The charge on this point was as follows: "It appears that the

company has located its tracks through, or alongside of, some buildings, and slightly depressed those tracks as they cross Broad street, at an acute angle of 66 degrees and 29 minutes, and that bushes and other obstructions obscured the train from the vision, to some extent, of one approaching the crossing on Broad street. If you think that the existence of the buildings, and the course of the acute angle in the case, rendered the use of this railroad crossing dangerous, so that, in its ordinary use of the street called Broad street, this statutory signal would not give reasonable warning of the approach of trains, then it is for you to say whether the railroad company should not have provided some other notice of the approach of a train, such as the construction of a gate, the presence of a flagman, or a crossing bell. But you can only say that such a duty on the part of the railroad company existed provided you come to the conclusion that, because of the existence of the houses, buildings, and the angle at which the railroad crosses the street, or other obstructions, the use of the railroad crossing was extrahazardous to the people using Broad street to such an extent that the ordinary statutory signals would not give fair warning of the approach of trains. Should you come to that conclusion, you would have a right to exact of the railroad company the duty of giving some visible notice that the train was approaching, and a failure to do what you think ought to have been done would, under those circumstances, be negligence chargeable to the company." The rule is well settled that, when a railroad company has created at a crossing a place of extra danger, it is bound to use extra precautions (Penna. R. R. Co. v. Matthews, 86 N. J. Law, 531, 535); but only when the situation has been created by some act of the company (N. Y. L. E. & W. R. R. v. Leaman, 54 N. J. Law, 202, 23 Atl. 691, 15 L. R. A. 426; Phila. & Reading R. R. Co. v. State, 61 N. J. Law, 71, 38 Atl. 820; Siracusa v. Atlantic City R. R. Co., 68 N. J. Law, 446, 53 Atl. 547). As will appear later, we do not think that the evidence showed the place to be one of extra danger; but, conceding this for the present, there was nothing in the case to show that any alleged dangerous feature of the crossing was occasioned by the act of the company. The charge in this respect, therefore, was erroneous.

4. We turn now to a point which relates solely to the right of recovery by the executrix of Christopher Horandt, deceased, viz., the contributory negligence of said deceased. He was driving the automobile. The other plaintiffs, including his wife, were mere passengers, exercising no control over his actions; and, as the trial judge correctly charged, unless there was something that they individually should have done, in the exercise of due care, to avoid injury (and of this there is no claim), they are not chargeable with contributory negligence, as negli-

them. N. Y., etc., R. R. v. Steinbrenner, 47 N. J. Law, 161, 54 Am. Rep. 126; Consolidated Traction Co. v. Hoimark, 60 N. J. Law, 456, 38 Atl. 684; Noonan v. Consol. Traction Co., 64 N. J. Law, 579, 46 Atl. 770. With regard particularly to Mrs. Horandt it may be remarked that her case is not controlled by the decision in Pennsylvania R. R. Co. v. Goodenough, 55 N. J. Law, 577, 28 Atl. 3, 22 L. R. A. 460, in which it was held that, in actions by husband and wife for a tort to the wife, his contributory negligence would defeat the suit because of his commonlaw interest in, and control of, the recovery. The present case differs in that there is no husband to exercise any such control, he having perished in the accident; and, as a result, the right of action inures to the wife alone. This makes it unnecessary to consider the effect of the statute of 1906 (P. L. p. 525), giving to married women the right of suing, without joinder of the husband, for all torts to person or property, and which was considered by Judge Lanning to divest the husband of all interest in the suit. Long v. Penna. R. R. (C. C.) 149 Fed. 598.

Coming now to the question whether deceased was himself guilty of contributory negligence, we think that any one approaching this railroad crossing via Broad street from the south, and having knowledge or notice of its existence, could not fail to see an approaching train if he exercised due care. A reference to the statement of facts at the head of this opinion will exhibit the correctness of this view. To the right, for a distance of nearly 100 feet from the track, the view of a train was over an open field, and unobstructed by anything but the line of telegraph poles, which was negligible as a factor. To the left, from which direction the train approached, the view was equally clear for an indefinite distance down the track, on passing the small garage, over 60 feet from the nearest rail. The photographs submitted on this phase of the case are convincing; and that the driver of an automobile, approaching under these circumstances, could and should see a train in ample time to avoid collision by stopping is a proposition that needs but to be stated. In this aspect of the case it may be remarked that the question whether the crossing was a place of extra danger was not a jury question, and should have been decided by the court in the negative. Going one step farther, we resort to the general rule that, if the circumstances are such that a party in the exercise of ordinary care would, of necessity, become aware of an existing situation, he is charged with knowledge of that situation, and solute.

gence of the deceased cannot be imputed to | cannot escape responsibility by pleading actual ignorance of it. This rule is applicable in the present case. The physical situation pointed unmistakably to the presence of a railroad at that place. True, there were no gates; but there was a railroad crossing sign of full size, plainly visible, except as to the small section covered by a telegraph pole. The bell signal post and sign, though the latter was partly illegible, were fully as large as the crossing sign, and conspicuous enough, and the word "Danger" plain enough to attract attention and provoke inquiry. As the auto car approached, the track itself came into view on both the right and left, bordered with two lines of telegraph poles. The ties were visible, not obscured by the weeds and grass to any extent. Within 60 feet of the railroad the view to both right and left was over an open lot, with the railroad stretching out on both sides, and the station and its semaphore in full view. By that time, at the speed of the automobile and train, as testified to, the train itself was within plain sight, and doubtless passing the station. It is inconceivable that any one having his faculties, and using them in the most casual way, could fail to become aware, not only of the crossing, but of the train itself. Only one explanation seems open, and that is that the driver of this automobile, not expecting a railroad at that place, gave no attention to his surroundings, and pursued his way with eyes fixed on the roadway just ahead of him until too late to stop. Due care in driving an automobile, or any other vehicle, demands at least some attention to the surroundings, and railroads are so plentiful in this state that the presence of a railroad track in a town or village is naturally to be expected. The railroad was lawfully there. It had complied with the statute by erecting the crossing sign. It might be too much to say that travelers were thereby charged with notice of the presence of a railroad track, but we need not go so far as this. Our view is that, taking this and the other indications together, the presence of that track was perfectly obvious; that any traveler using ordinary care for his safety would necessarily see the indications of the railroad, and would be therefore charged with notice of it, and, having that notice, could not get into collision with a train at that point, unless through his own negligence or some inevitable accident. In this view of the case of Carrie S. Horandt as executrix of her deceased husband, the court should have directed a verdict for the defendant.

The rules to show cause will be made ab-

(30 R. L 18)

HENRY V. CHERRY & WEBB.

(Supreme Court of Rhode Island. June 22, 1909.)

1. LIBEL AND SLANDER (§ 1*)-DEFINITION OF

A "libel" is a malicious defamation expressed in printing or writing, or by signs, pictures, etc., tending to injure the reputation of another, thereby exposing such person to public hatred, contempt, or ridicule.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 5, pp. 4116-4125.]

2. Libel and Slander (§ 68*)—Action—Na-TURE AND FORM.

An action on the case is maintainable for

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 169; Dec. Dig. § 68.*]

8. LIBEL AND SLANDER (§ 97*)-PLEADING

MALICE.

A declaration for libel, consisting of publication of plaintiff's picture in connection with a mercantile advertisement, failing to charge malice, or that the publication was defamatory, scandalous, or otherwise than the exact truth, is demurrable.

[Ed. Note.—For other cases, see Libel and Slauder, Cent. Dig. \$ 284; Dec. Dig. \$ 97.*]

4. PROPERTY (§ 2*) - ATTRIBUTES - MENTAL PRODUCTIONS.

Property in the production of one's mind, in conformity with all other property rights, is capable of passing by descent to one's heirs or representatives, and may be protected by them because of ownership.

[Ed. Note.—For other cases, see Property, Cent. Dig. § 2; Dec. Dig. § 2.*]

5. COMMON LAW (§ 1*)—DEFINITION—"LAW."
"Law" is defined to be a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong. The laws of a state are more usualwrong. The laws of a state are more usually understood to mean the rules and enactments promulgated by legislative authority or long-established local customs having the force of law.

[Ed. Note.—For other cases, see Common Law, Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 5, pp. 4014-4023; vol. 8, p. 7701.]

6. Constitutional Law (§ 321*)—Right to

Though in a free government every man has an adequate legal remedy for every injury done to him, the form and extent of the rem-edy is necessarily subject to legislative power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 950; Dec. Dig. § 321.*]

7. CONSTITUTIONAL LAW (§ 29°) — PUBLIC RIGHTS—NONEXECUTING PROVISIONS.

Const. art. 1, § 5, declaring that every person within the state ought to find a certain remedy by having recourse to the laws for all injuries or wrongs which he may receive to his person, property, or character, and ought to obtain right and justice freely, without purchase or delay, etc., is not self-executing.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 32; Dec. Dig. § 29.*]

8. CONSTITUTIONAL LAW (§ 255*)—"LIBERTY."
Const. U. S. Amend. 14, and Const. R. I.
art. 1, § 10, providing that no person shall be
deprived of "liberty" without due process of claw, were borrowed from the thirty-ninth article of the Great Charter, declaring that no
free man shall be taken or imprisoned, or dis-

seised, or outlawed or punished or in any ways destroyed, nor "will we pass upon him, or send upon him, unless by legal judgment of his peers, or by the law of the land"; the words corresponding to "liberty" in the first pronouncement being "taken," "imprisoned," "outlawed," and "punished," which are not confined to mere freedom from incarceration or imprisonment.

[Ed. Note.—For other cases, see Constitutional. Law, Cent. Dig. §§ 736-745; Dec. Dig.

For other definitions, see Words and Phrases, vol. 5, pp. 4128-4130; vol. 8, pp. 7705, 7708.] 9. Constitutional Law (§ 83*)-"Personal

9. CONSTITUTIONAL LAW (§ 83*)—"PERSONAL LIBERTY."

"Personal liberty" is the power of locomotion, of changing situation, of removing one's person to whatever place one's inclination may. direct, without imprisonment or restraint, except by course of law. It includes, not only the right to go where one pleases, but to maintain himself in a lawful manner while there, to live and work where he choses to earn his livelihood by a lawful calling, to enter inte contracts essential to carry out his avocation, as well as mere freedom from imprisonment. It also includes the right of one to use his fac-It also includes the right of one to use his fac-ulties in all lawful ways.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 150-151½; Dec. Dig. § 83.*

For other definitions, see Words and Phrases, vol. 6, p. 5345.1

10. NUISANCE (§ 1*)—DEFINITION.

Nuisance is anything done to the hurt or annoyance of the land or hereditaments of another. other. The theory is the doing of something intrinsically lawful in a manner damaging to others; it being the resulting damage that creates the wrong

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 5, pp. 4855-4864; vol. 8, p. 7734.]

11. NUISANCE (§ 42*)-RIGHT OF ACTION-SPECIAL DAMAGES.

An action for a nuisance cannot be maintained, in the absence of special damages in addition to mere mental suffering.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 101; Dec. Dig. § 42.*]

12. CONSTITUTIONAL LAW (§ 83*)—RIGHT OF PRIVACY—"RIGHT TO BE LET ALONE."

The constitutional "right to be let alone" refers only to the right to be free from hodily injury, or from a reasonable fear of bodily injury, at the hands of a fellow being, and does not include a right to be free from public comment.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 150-151½; Dec. Dig. § 83.*]

13. ASSAULT AND BATTERY (§ 2°)—DEFINITION OF "ASSAULT,"
"Assault" consists of an offer to do bodily

harm, made by a person who is in a position to inflict it; an essential element being a reasonable apprehension of imminent physicial injury, so that any movement, however threatening, which does not produce fear of physicial harm, is not an assault.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 1; Dec. Dig. § 2.*

For other definitions, see Words and Phrases, vol. 1, pp. 532-538; vol. 8, p. 7582.

Tor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tisement as containing plaintiff's picture.

[Ed. Note.—For other cases, see Torts, Dec. Dig. § 8.*]

Case Certified from Superior Court, Providence and Bristol Counties; Charles C. Mumford, Judge.

Action by James N. Henry against Cherry & Webb. A demurrer having been filed to the declaration, the case was certified to the Supreme Court for advice. Questions answered, and case returned to superior court for further proceedings.

Bassett & Raymond (R. W. Richmond, of counsel), for plaintiff. Edwards & Angell (Francis B. Keeney and Seeber Edwards, of counsel), for defendants.

DUBOIS, C. J. This is an action of trespass vi et armis, brought by the plaintiff in the superior court. The material portion of the plaintiff's declaration, in two counts, reads as follows:

"First Count. For that at the time of the committing of the grievances hereinafter complained of the defendants were engaged in a general mercantile business of buying and selling dry goods, ladies' garments, etc., in said city of Providence, and extensively advertised their wares and merchandise in the public newspapers published in said Providence; that on the 10th day of April, A. D. 1908, the defendants, with force and arms, invaded the plaintiff's right of privacy in this, to wit, that they published in connection with their aforesaid advertisements a likeness or picture of the plaintiff in the issue of the Providence Evening Bulletin of that date, which said paper is one of the public newspapers in said Providence and has a large and extensive circulation throughout said city and state; that said picture or likeness of the plaintiff was easily recognized by his friends and acquaintances; that the plaintiff was pictured as seated in an automobile, apparently driving the same, and also in said picture were several other persons, represented as sitting in the rear seat of said automobile; that the said picture or likeness appeared in a prominent place in said newspaper and was likely to and did attract much attention. Below the picture, in heavy black type, were the words 'Only \$10.50,' and below, on the next line, in heavy display type, were the words, 'The Auto Coats Worn by Above Autoists are Water-Proof, Made of Fine Quality Silk Mohair-\$10.50-in Four Colors.' And the plaintiff avers that he is not a public character and has in no way waived his right of there, to wit, on said 10th day of April, A. of April, A. D. 1908."

picture as a part of a mercantile advertisement of automobile coats without his permission, though it exposes him to humility, jeers, and gibes of his friends, who recognized the advertisement of the plaintiff, and knowing that they had no authority so to do, caused said likeness or nisture of the plaintiff to be published in or picture of the plaintiff to be published in said Evening Bulletin, which said publication tended to and did make the plaintiff the object of much scoff, ridicule, and public comment, contrary to the plaintiff's right of privacy in the premises so far as the acts of the defendants were concerned. And the plaintiff avers that the said publication was a trespass upon his said right of privacy, and as a result of said invasion of his right of privacy by the defendants as aforesaid he has been made the object of much ridicule, scoff, and gibes by those of his friends and acquaintances who have recognized his likeness in said publication, and has suffered great mental anguish, all of which the defendants did against the peace and to the damage of the plaintiff, as he says, one thousand dollars, as laid in his writ dated the 21st day of April, A. D. 1908."

"Second Count. For that, at said Providence, on the 10th day of April, A. D. 1908, the defendants then and there published in the Evening Bulletin, a public newspaper printed in said Providence and having a large circulation throughout sald city and state, a picture or likeness of the plaintiff that would be and was recognized by the friends and acquaintances of the plaintiff; that in such picture the plaintiff was represented as apparently driving an automobile, in which were seated several other persons; that beneath said picture, in heavy black type, were the words, 'Only \$10.50,' and below, on the next line, in heavy display type, were the words, 'The Auto Coats Worn by Above Autoists are Water-Proof, Made of Fine Quality Silk Mohair-\$10.50-in Four Colors'; that said picture was 'featured' in a prominent place in said newspaper, and tended to and did attract much attention; that said picture or likeness of the plaintiff. taken in connection with the words inserted beneath it (which said words are above referred to in this count), tended to and did expose the plaintiff to unwarranted humiliation and to the scoff, jeers, and gibes of his friends and acquaintances who recognized the said likeness or picture of the plaintiff. And the plaintiff avers that said publication of his said likeness or picture and of the words of the advertisement in connection therewith, hereinbefore referred to, was without his knowledge or consent, and was wholly unwarranted on the part of said defendants, and that by reason of said unwarranted publication of his said likeness or picture as aforesaid he has been subjected to great humiliation and held up to public ridicule and has suffered mental anguish therefrom. to the damage of the plaintiff, as he says, privacy, and that the defendants then and \$1,000, as laid in his writ dated the 21st day

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

To this declaration the defendants demur-|ings until the question is heard and deterred upon the following grounds: "First, the form of action should be trespass on the case, and not trespass, as declared upon"and to the first count for the reasons following: "First, said count sets forth no cause of action; second, said count alleges no right for the invasion of which the plaintiff is entitled to recover damages against the defendants; third, the law does not regard the right of privacy as a right for the invasion of which a person is entitled to recover damages"-and to the second count for the following causes: "First, said count is indefinite and uncertain in its statement of the cause of action, and it is impossible therefrom to determine whether the plaintiff relies upon an action for alleged libel, or for an alleged invasion of his right of privacy; second, said count states no cause of action against the defendants; third, if the plaintiff relies upon an action for libel, the alleged publication is not defamatory; fourth, if the plaintiff relies upon an action for libel, the alleged publication is not libelous per se, and said count contains no averment of special damages; fifth, said count alleges no right for the invasion of which by the defendants the plaintiff is entitled to recover damages against the defendants."

Whereupon a justice of the superior court entered the following order of certification: "This cause being before the court for hearing upon the defendant's demurrer to the plaintiff's declaration, and thereupon certain questions of law arising which, in the opinion of the court, are of such doubt and importance and so affect the merits of the controversy that they ought to be determined by the Supreme Court before further proceedings, it is ordered that the following questions be certified to the Supreme Court under the provisions of section 478 of the Court and Practice Act, namely: First. Has a person at common law a right designated as a 'right of privacy,' for the invasion of which an action for damages lies? Second. Is the unwarranted publication of a person's photograph for advertising purposes actionable at common law, where the only injury alleged is that of mental suffering?"

The provisions of Court and Practice Act 1 478, under which the questions have been certified for our determination, are as follows: "Sec. 478. If in any proceeding, civil or criminal, in the superior court or in any district court, prior to the trial thereof on its merits, any question of law shall arise which in the opinion of the court is-of such doubt and importance, and so affects the merits of the controversy that it ought to be determined by the Supreme Court before further proceedings, or if a motion in arrest of judgment be made, the court in which the cause is pending may certify such question or motion to the Supreme Court for

mined."

Treating the first question literally, it might easily be answered in the negative, for we are unable to find any opinion, decision, or dictum which determines that such a right was so designated at common law; but we are unwilling to dismiss so important and interesting a question upon such a technical ground. We prefer to treat both of the questions as broadly as possible within the limits of the case in which they have arisen. Perhaps the questions may as well be considered as if they read: Has a person a right of privacy, for the invasion of which an action for damages lies at common law? Is the unwarranted publication of a person's photograph for advertising purposes an invasion of such right? and, Can an action for such an invasion be maintained at common law, where the only injury alleged is that of mental suffering? It is apparent that, if the first question should be answered in the negative, no necessity would exist for answering the others, and that, if the first should be answered affirmatively and the second in the negative, it would then become unnecessary to answer the third.

The consideration of the case may be simplified by eliminating the second count of the declaration, which, as claimed by the plaintiff, charges the defendants with libel. "A libel is a malicious defamation expressed in printing or writing, or by signs, pictures, etc., tending to injure the reputation of another, and thereby exposing such person to public hatred, contempt, or ridicule. And an action on the case is maintainable against any person who falsely and maliciously publishes any libel against another." 2 Selwyn's Nisi Prius (7th Am. Ed.) *1045. It is perfectly clear, upon inspecting the second count, that nothing therein contained charges the defendants with malice, or with the publication of anything defamatory, scandalous, or otherwise than the exact truth. Such a count cannot be regarded as charging libel against the defendants, and as they have demurred to the same as aforesaid, and as the same is clearly bad on demurrer, it may be disregarded in the further consideration of the case.

It must be conceded at the outset that the common law recognizes sundry personal rights and privileges, and gives a right of action for interference with the same, and that some of these rights so recognized include immunity from intrusion. But, as we understand the question, the right of privacy therein alluded to contemplates a simple right, uncomplicated with and uninfluenced by other rights, as, for example, the right to liberty, property, or reputation. The theory that every one has a right to privacy, and that the same is a personal right, growing out of the inviolability of the person, defined by Judge Cooley in his work on Torts that purpose and stay all further proceed- (2d Ed.) p. 29, as: "Personal Immunity.

The right to one's person may be said to be a right of complete immunity, to be let alone" -and that a person is entitled to relief at law or in equity for an invasion of the same, is generally understood to have been first publicly advanced in an article entitled "The Right to Privacy," published in 4 Harv. L. Rev. 193 (December, 1890), wherein some of the necessities for invoking such relief are set out, as follows:

"Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right 'to be let alone.' Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the housetops.' For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons, and the evil of the invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer. The alleged facts of a somewhat notorious case, brought before an inferior tribunal in New York a few months ago, directly involved the consideration of the right of circulating portraits; and the question whether our law will recognize and protect the right to privacy in this and in other respects must soon come before our courts for consideration. Of the desirability -indeed, of the necessity-of some such protection, there can, it is believed, be no doubt, The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry, as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand."

this article the theory has been presented in cases before various tribunals; but it has never been approved or adopted by any court of last resort before the year 1905, when, in the case of Pavesich v. N. E. Mut. L. Ins. Co. 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101, 106 Am. St. Rep. 104, 2 Am. & Eng. Ann. Cas. 561, it was held that the invasion of a person's right of privacy is actionable, regardless of special damage to person, property, or character. Such right of privacy was defined by Mr. Justice Cobb, speaking for the court, as the right, if one so desires, "to live a life of seclusion," and by way of illustration he remarks that the right would prevent the publication of "those matters and transactions of private life which are wholly foreign, and can throw no light whatever" on the competency for office of any public man. In Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 478, 89 Am. St. Rep. 828 (1902), Chief Judge Parker describes it as the right that a man has "to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals, or newspapers, and, necessarily, that the things which may not be written and published of him must not be spoken of him by his neighbors, whether the comment be favorable or otherwise." Judge Gray, in his dissenting opinion in Schuyler v. Curtis, 147 N. Y. 484, 42 N. E. 22, 31 L. R. A. 286, 49 Am. St. Rep. 671 (1895), held that the erection of a statue of a deceased relative violated the right.

The right of privacy is said to be the "right to be let alone." As is pointed out by Cobb, J., in Pavesich v. N. E. Mut. L. Ins. Co., supra, the Roman law recognized a right of privacy when it made it actionable to speak to one without permission, or to follow him on the street. It is asserted that a man has a right to withdraw from the world. to leave a blank as if he never had been, and other human beings are forbidden to recognize his existence or speak of his memory. In the case of Schuyler v. Curtis, 27 Abb. N. C. 387, 15 N. Y. Supp. 787, and in the Appellate Division of the same court (64 Hun, 594, 19 N. Y. Supp. 264), the right of privacy was recognized as prohibiting the erection of a statue of a deceased relative, on the theory that the flaunting of the memory of the plaintiff's deceased relative before the world invaded the plaintiff's right to be let alone, This case was reversed in the Court of Appeals (147 N. Y. 434, 42 N. E. 22, 31 L. R. A. 286, 49 Am. St. Rep. 671); but the court was of the opinion that if the right of privacy existed, in a proper case it would prohibit talk of one's deceased relatives, or a statue of them, and presumably a picture published From time to time since the publication of | in the newspaper, as effectually as if the suit

forms of interference with the mental well- Schuyler had died with her." being of an individual whether by publishout as possessed of peculiar qualities. The gravamen of the offense would consist in the terference of equity on a violation of complainant's property rights. After citing the equity will interfere to prevent what are deemed to be violations of personal legal rights, and the only limitation upon the application is that the legal right which is to be protected shall be one cognizable as property." A careful reading of the opinion leads to the conclusion that it was because the judge regarded this right as one of property that equity could furnish relief when it was prohibited from so doing in cases of libel and injury to the reputation generally. In the dissenting opinion of the same justice in Roberson v. Rochester Folding Box Co., supra, a dissent concurred in by two other justices, he writes: "I think that this plaintiff has the same property in the right to be protected against the use of her face for the defendant's commercial purposes as she would have if they were publishing her literary compositions." In this opinion, also, the right of equity to interfere is based purely on the right of property.

No reason save the above analogy is given in the opinion for considering the right of privacy as a property right. In our opinion, the analogy is not a sound one. Property in the productions of one's mind, in conformity with all other property rights, is capable of passing by descent to one's heirs or representatives, and can be protected by them because of ownership of property. Thus in Duke of Queensbury v. Shebbeare, 2 Eden, 329, an injunction issued at the instance of the representatives of Lord Clarendon to restrain the Clarendon's history, though defendant had

was brought by the person whose picture was half and in a mere representative capacity; as, for instance, an executor or administrator, These definitions show that the right of in regard to the assets of a deceased. privacy contended for would embrace all . . . Whatever right of privacy Mrs.

In the case of Pavesich v. N. E. Mut. L. ing his picture, by gossip, or by pointing him Ins. Co., supra, Mr. Justice Cobb, having made the concession that prior to 1890 every. adjudicated case, both in this country and in . interference with his right of seclusion, ir- England, which might be said to have involvrespective of the intent of the intermeddler. ed a right of privacy, was not based upon the Mr. Justice Gray, in his dissenting opinion existence of such right, but was founded upin Schuyler v. Curtis, supra, regards the right on a supposed right of property, or a breach: of privacy as a "form of property," and bases of trust or confidence, or the like, and that his claim that equity should interfere by an therefore a claim to a right of privacy, ininjunction solely on that ground, quoting dependent of a property or contractual right, Prince Albert v. Strange, 2 De Gex & S. or some right of a similar nature, had up to 652, Gee v. Pritchard, 2 Swanst. 402, and oth- that time never been recognized in terms in; er English cases, all of them basing the in- any decision, and that the entire absence for a long period of time, even for centuries, of: a precedent for an asserted right, should, above decisions, the judge proceeds: "These have the effect to cause the courts to proceed decisions are authority for the doctrine that with caution before recognizing the right, for fear that they may thereby invade the, province of the lawmaking power, argues as; follows: "But such absence, even for all: time, is not conclusive of the question as to: the existence of the right. The novelty of the complaint is no objection, when an injury cognizable by law is shown to have been: inflicted on the plaintiff. In such a case, 'although there be no precedent, the common' law will judge according to the law of nature. and the public good.' Where the case is new in principle, the courts have no authority to give a remedy, no matter how great the grievance; but where the case is only new in instance, and the sole question is upon the ap-' plication of a recognized principle to a new case, 'it will be just as competent to courts' of justice to apply the principle to any case that may arise two centuries hence as it was' two centuries ago.' Broom's Leg. Max. (8th; Ed.) 193. This results from the application ! of the maxim 'Ubi jus ibi remedium,' which ! finds expression in our Code, where it is declared that 'For every right there shall be a' remedy, and every court having jurisdiction of the one may, if necessary, frame the other.' Civ. Code Ga. 1895, § 4929. The individual surrenders to society many rights and privileges which he would be free to exer-1 cise in a state of nature, in exchange for the benefits which he receives as a member of society. But he is not presumed to surrender all those rights, and the public has no defendant from publishing copies of Lord more right, without his consent, to invade the domain of those rights which it is necessarily the manuscript from a person to whom it had to be presumed he has reserved than he has been given by the Earl of Clarendon. It has to violate the valid regulations of the organbeen decided, however, that the right of pri- ized government under which he lives. The vacy dies with the person. Justice Peck- right of privacy has its foundation in the ham writes as follows in Schuyler v. Curtis, instincts of nature. It is recognized intuisupra: "Whatever the rights of the relative tively; consciousness being the witness that may be, they are not, in such a case as this, can be called to establish its existence. Any rights which once belonged to the deceased, person whose intellect is in a normal condi-, and which a relative can enforce in her be- tion recognizes at once that as to each indi-

vidual member of society there are matters | nominal damages will be awarded. Second. private and there are matters public so tar as the individual is concerned. Each individual as instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those of his rights which are of a public nature. A right of privacy in matters purely private is therefore derived from natural law. This idea is embraced in the Roman's conception of justice, which 'was not simply the external legality of acts, but the accord of external acts with the precepts of the law prompted by internal impulse and free volition.' McKeldey's Roman Law (Dropsie) 123. It may be said to arise out of those laws sometimes characterized as immutable, 'because they are natural, and so just at all times and in all places, that no authority can either change or abolish them.' 1 Domat's Civil Law, by Strahan (Cushing's Ed.) 49. It is one of those rights referred to by some law-writers as absolute, 'such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it.' 1 Bl. 123." In the course of his opinion he dismissed from his consideration the case of Atkinson v. Doherty Co., 121 Mich. 372, 80 N. W. 285, 46 L. R. A. 219, 80 Am. St. Rep. 507 (1899), with the remark that all that was decided in that case was that the right of privacy dies with the person, and "therefore the decision in its facts is authoritative no further than the decision of the New York Court of Appeals in Schuyler v. Curtis." He asserts that his conclusion is in conflict with neither of these cases and closes the discussion of them with the remark that the right of privacy is personal.

It is obvious that a right cannot be one of person and of property at one and the same time. The conclusion would seem to be that, if the right of privacy exists and has been recognized by the law, it must be as a personal tort right. It cannot be a right of property. The gravamen of the offense in a violation of the right of privacy is the interference with the seclusion of the individual, and not of the publication. the case of Pavesich v. N. E. Life Ins. Co., supra, the case relied on by the plaintiff, and in the plaintiff's own case, the count charging the violation of the right of the privacy is trespass vi et armis for a direct injury to the person like an assault. If, however, the publication were an ingredient of the action, then the proper count would be trespass on the case for an indirect injury to the person, as is the case in libel and slander. The right of privacy is recognized in the Georgia case as violated when the only damage alleged is mental suffering. The law divides all causes of actions into two classes with respect to damages. First, those in which the act, in and of itself, is unlawful. In this class, damage will be presumed, and,

those in which the act is regarded as lawful. unless actual damage results, and in this class pecuniary loss must be shown. In the first class may be placed all direct infringements of absolute personal or property rights, such as false imprisonment, assault, trespass on land, or conversion. In all of these, the act of false imprisonment, or assault, etc., being shown, the right of action is complete, and nominal damages may be recovered of right. In the second class may be placed all actions on the case, such as nuisances, negligence in general, and libel and slander. In none of these will mental suffering alone sustain a right of action. Owen v. Henman, 1 Watts & S. (Pa.) 548, 37 Am. Dec. 481; Sparhawk v. Union Passenger Ry. Co., 54 Pa. 401; Lynch v. Knight, 9 H. L. Cas. 577; Pollard v. Lyon, 91 U. S. 225, 23 L. Ed. 308; Dockrell v. Dougall, 78 L. T. (N. S.) 840 (1898); Simone v. Rhode Island Co., 28 R. I. 186, 66 Atl. 202, 9 L. R. A. (N. S.) 740. One apparent exception exists to this rule: In libel and slander, when the words spoken or pictures published are of such a nature that the court can conclude, as a matter of law, that they will tend to degrade the person, or hold him up to public hatred, contempt, or ridicule, or cause him to be shunned and avoided, then pecuniary damage is presumed, and the words are held libelous or slanderous per se. 25 Cyc. 253.

If the gravamen of the action for a breach of the right of privacy is the publication of the information or of the picture taken, then the injury is an indirect injury to the person, resembling libel, and, in common with that action, actual pecuniary damage must be alleged and proved to entitle the plaintiff to recover. If, however, the invasion of the right of seclusion is the gravamen of the action, the case is analogous to assault, and, the pecuniary damages being presumed by the law, the mental suffering sustained because of the peculiar method of publishing may be shown by way of aggravation of damages. It is evident, therefore, that the gist of the action for a breach of the right of privacy is the violation of a right of personal seclusion, and not the subsequent publication: (1) Because of the definitions of the right of privacy; (2) because of the form of action, trespass vi et armis, and not trespass on the case; (3) because no special damage is alleged.

In no opinion or dictum is the right of privacy based upon natural right prior to the opinion in the case of Pavesich v. N. E. Life Ins. Co., supra. Mr. Justice Gray in his dissenting opinions in Schuyler v. Curtis, supra, and in Roberson v. Rochester Folding Box Co., supra, and Judge Colt in Corliss v. Walker (C. C.) 64 Fed. 280, 31 L. R. A. 283, contend for the existence of the right of privacy as an extension of the right of property. The opinion in the Pavesich Case, supra, however, in the absence of proof of actual damage, is founded upon the doctrine of a natural

right. This was the second case, involving | right is not to be legitimately inferred from the existence of the right to privacy, that was decided by a court of last resort. In the first case, viz., Roberson v. Rochester Folding Box Co., supra, the question whether such a right existed was decided in the negative. Commenting upon this decision, Mr. Justice Cobb made allusions to both the majority and minority opinions, and among others the following: "In Roberson v. Rochester Folding Box Co. (1901) 64 App. Div. 30, 71 N. Y. Supp. 876, decided by the Appellate Division of the Supreme Court of New York, it appeared that lithographic likenesses of a young woman, bearing the words 'Flour of the Family,' were without her consent printed and used by a flour milling company to advertise its goods. The declaration alleged that in consequence of the circulation of such lithographs the plaintiff's good name had been attacked, and she had been greatly humiliated and made sick, and been obliged to employ a physician, and prayed for an injunction against the further use of the lithographs and for damages. It was held that the declaration was not demurrable. It was also held that, if a right of property was necessary to entitle the plaintiff to maintain the action, the case might stand upon the right of property which every one has in his body. This case came before the Court of Appeals of New York in 1902, and the judgment was reversed. 171 N. Y. 540, 64 N. E. 442, 59 L. R. A. 478, 89 Am. St. Rep. 828. This is the first and only decision by a court of last resort involving directly the existence of a right of privacy. The decision was by a divided court; Chief Judge Parker and three of the associate judges concurring in a ruling that the complaint set forth no cause of action either at law or in equity, while Judge Gray, with whom concurred two of the associate judges, filed a dissenting opinion, in which it was maintained that the injunction should have been granted. the ruling of the majority is limited in its effect to the unwarranted publication of the picture of another for advertising purposes, the reasoning of Judge Parker goes to the extent of denying the existence in the law of a right of privacy, 'founded upon the claim that a man has a right to pass through this world without having his picture published, his business enterprises discussed, or his eccentricities commented upon, whether the comment be favorable or otherwise.' The reasoning of the majority is, in substance, that there is no decided case, either in England or in this country, in which such a right is distinctly recognized; that every case that might be relied on to establish the right was placed expressly upon other grounds, not involving the application of this right in any sense; that the right is not referred to by the commentators and writers upon the common law or the principles of equity; that the existence of the its nonexistence as a legal right."

anything that is said by any of such writers; that a recognition of the existence of the right would bring about a vast amount of litigation; and that in many instances where the right would be asserted it would be difficult, if not impossible, to determine the line of demarcation between the plaintiff's right of privacy and the well-established rights of others and of the public. For these reasons the conclusion is reached that the right does not exist, has never existed, and cannot be enforced as a legal right. We have no fault to find with what is said by the distinguished and learned judge who voiced the views of the majority as to the existence of the decided cases, and agree with him in his analysis of the various cases which he reviews, that the judgment in each was based upon other grounds than the existence of a right of privacy. We also agree with him so far as he asserts that the writers upon the common law and the principles of equity do not in express terms refer to this right. But we are utterly at variance with him in his conclusion that the existence of this right cannot be legitimately inferred from what has been said by commentators upon the legal rights of individuals, and from expressions which have fallen from judges in their reasoning in cases where the exercise of the right was not directly involved. So far as the judgment in the case is based upon the argument ab inconvenienti, all that is necessary to be said is that this argument has no place in the case if the right invoked has an existence in the law. But if it were proper to use this argument at all, it could be said with great force that as to certain matters the individual feels and knows that he has a right to exercise the liberty of privacy, and that he has a right to resent any invasion of this liberty; and if the law will not protect him against invasion, the individual will, to protect himself and those to whom he owes protection, use those weapons with which nature has provided him, as well as those which the ingenuity of man has placed within his reach. Thus the peace and good order of society would be disturbed by each individual becoming a law unto himself, to determine when and under what circumstances he should avenge the outrage which has been perpetrated upon him or a member of his family." Mr. Justice Cobb pays tribute to conservatism, but warns against its undue application, as follows: "The valuable influence upon society and upon the welfare of the public of the conservatism of the lawyer, whether at the bar or upon the bench, cannot be overestimated; but this conservatism should not go to the extent of refusing to recognize a right which the instincts of nature prove to exist, and which nothing in judicial decision, legal history, or writings upon the law can be called to demonstrate

It is evident, therefore, that the court and in Clark v. City of Providence, 16 R. L. considered the right of privacy as a natural right, and that natural rights are something reserved from all governments when society was formed; in other words, that there are rights reserved to the people, other and above those guaranteed by the Constitutions of the United States and states, and that these rights are enforceable in a court of justice. It is also obvious that, the right being reserved from all government when society was formed, its binding force on the Legislature, a branch of the government, is as transcendent as it is on the judiciary, a branch of the same government. There are no rights reserved from the government under English political theory, because the Legislature is sovereign, except as limited by a constitution. This is clearly seen in the acknowledged absolute powers possessed by the British Parliament. As is said by Blackstone: It is "the place where that absolute despotic power, which must in all governments reside somewhere, is intrusted by the constitution of these kingdoms." 1 Bl. Com. 160. And he instances examples wherein Parliament has shown its unlimited power by altering the succession to the crown, by changing the established religion, by modifying and recreating the constitution, as in the Act of Union, and the septennial and triennial statutes. This body has also supreme judicial power. In other words, Parliament is absolutely supreme. But it needs no argument to show that this admitted supremacy in Parliament is inconsistent with any transcendent legal rights reserved against it by the people.

. The General Assembly of Rhode Island succeeded to all the powers of the British Parliament, except as limited by the Constitution of the United States or the state of Rhode Island. This is the doctrine laid down by Cooley, Const. Lim. p. 104. The learned author writes: "In creating a legislative department and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power as it rests in, and may be exercised by, the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose, and to the limitations which are contained in the Constitution of the United States. In Taylor v. Place, 4 R. I. 324 (1856), Ames, C. J., admitted that the General Assembly originally "exercised supreme legislative, executive, and judicial power," and held an act of the Legislature setting aside a verdict of the Court of Common Pleas void, because the Constitution of 1842 had given all judicial power to the courts. In State v. Keeran, 5 R. I. 497, the same judge, writing for this court, sustained an act because its "repugnancy to the Constitution" was not made "plainly to appear" to him. In State v. Copeland, 3 R. I. 33 (1854), it was held that the people themselves could

387, 15 Atl. 763, 1 L. R. A. 725 (1888), the court said that "in our opinion the General Assembly has in this matter [control of fisheries and oyster beds] the authority, not simply of the English crown, but of both crown and Parliament, except so far as it has been limited by the Constitution of the state or by the Constitution and laws of United States."

Since, therefore, except when expressly limited, the General Assembly exercises all of the legislative powers of sovereignty possessed by the British Parliament, which is all-powerful, and since acts of that body are tested merely by the principles of the Constitution, and never by standard of transcendent rights alleged to have been reserved by the individual when he entered into society, there is no room in our constitutional theory for any transcendent right or instinct of nature except as guaranteed by that Constitution. A reference to the class of alleged rights now under discussion may be found in the opinion of State v. McCrillis, 28 R. I. 165, 66 Atl. 301, 9 L. R. A. (N. S.) 635 (1907), where Mr. Justice Blodgett cites with approval the case of State v. Travelers' Ins. Co., 73 Conn. 255, 47 Atl. 299, 57 L. R. A. 481 (1900), denying the existence of "the vague notion of a higher law." "The courts are not guardians of the rights of the people of the state, except as those rights are secured by some constitutional provision which comes within the judicial cognizance." Cooley Const. Lim. (6th Ed.) p. 201. And see People v. Mahaney, 13 Mich. 481.

In this connection the following remarks are illuminating: "In our system the law of nature has formally retreated from one untenable position. • • • We find a series of dicta, extending to the early part of the eighteenth century, to the effect that statutes contrary to 'natural justice' or 'common rights' may be treated as void. This opinion is most strongly expressed by Coke; but, like many of his confident opinions, is extrajudicial. • • • In England it was never a practical doctrine. The nearest approach to real authority for it is a case of the twentyseventh year of Henry VI., known to us only through Fitzherbert's Abridgment, where the court held an act of Parliament to be inoperative, not because it was contrary to natural justice, but because they could make no sense of it at all. Sir Thomas More, after the verdict against him for a novel statutory treason, and before judgment, objected that 'this indictment is grounded upon an act of Parliament directly repugnant to the laws of God and His Holy Church,' and 'is therefore in law, among Christian men, insufficient to charge any Christian man.' The objection was disregarded without being expressly overruled. It is easy to understand why Elizabethan lawyers refrained from adducing this example. At this day the courts not exercise powers given to the Legislature; have expressly disclaimed any power to con-

trol an act of Parliament. Blackstone characteristically talks in the ornamental part of his introduction about the law of nature being supreme, and, when he comes to particulars, asserts the uncontrollable power of Parliament in the most explicit terms, following herein Sir Thomas Smith, a civilian whose political insight was much greater than that of the common lawyers of his time. It hardly needs to be pointed out that, in states where there is a distinction between a written constitution, or fundamental constitutional laws, however called, and ordinary legislation, the question whether any particular act of the Legislature is or is not in accordance with the Constitution depends, not on any general views of natural justice. but on the interpretation of the constitutional provisions which are the supreme law of the land." Pollock's Expansion of the Common Law (1904) p. 121.

Law, as defined by Blackstone, is "a rule of civil conduct, prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." 1 Bl. Com. 44. Mr. Justice Story writes: "The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of Swift v. Tyson, 16 Pet. 18, 10 L. Ed. 865, Mr. Chief Justice Marshall, in McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579 (1819), regards the making of laws as an attribute of sovereignty, and it is the stamp by the sovereign power that gives the principle its binding legal force. No one would question that it was morally wrong to impute unchastity to a female, and yet at common law, in the absence of pecuniary damage, no legal right was violated. Pollard v. Lyon, 91 U. S. 225, 23 L. Ed. 308. It is morally wrong to frighten A. by negligent conduct, and yet no legal right is violated, unless physical injury results. Simone v. R. I. Co., 28 R. I. 186, 66 Atl. 202, 9 L. R. A. (N. S.) 740. In Burke v. Mechanics' Savings Bank, 12 R. I. 513 (1880), Judge Durfee, rendering the decision for this court, enforced the commonlaw rule that a house built on the land of another becomes the property of that other. In the case before the court there was no question of the good faith of the transaction, and no one would doubt that according to the principles of natural justice the lender of the money should receive some return for the proceeds enriching the complainants, yet this court held that it was beyond the power even of the Legislature to give relief. "At most," reads the opinion, "they [the complainants] were under a moral obligation to pay for the house; and a Legislature cannot convert such an obligation into a debt." The same judge, in discussing the unconstitutionality of betterment law when retroactively applied said: "Morally it may be wrong for

But in law it is his right, to deprive him of which, retroactively, is lack of due process of law. The courts, therefore, clearly recognize a distinction between a moral duty or natural justice and legal rights. So, in State v. Town Council of South Kingstown, 18 R. I. 258, 27 Atl. 599, 22 L. R. A. 65 (1893), where the action was mandamus to compel the defendant to hold an election, Douglas, J., said: "When the law is made, it is for the court to enforce it, or to punish for disobedience of it. * * * If the law has not provided for this case, then the sole remedy is with the Legislature; but if the Legislature has already expressed its will in the form of law, the sole specific remedy is in the court."

In an opinion to the General Assembly, 8 R. I. 299 (1854), this court, in commenting on the provisions of the Constitution of 1842 providing for separation of the governmental departments (article 8; article 4, \$ 2; article 10, § 1,) made use of the following language: "These provisions of the Constitution create two separate and distinct, but co-ordinate, departments of the government; the one vested with the legislative, the other with the judicial, power of the state. Fach is vested with excl e power in its appropriate sphere. * * The power exclusively conferred upon the one department is, by necessary implication, denied to the other. The courts, therefore, cannot enact laws. Their power is to judge and determine, to declare what the law at any time is, not what it ought to be or shall be." And this method of interpretation was affirmed by Judge Ames in Taylor v. Place, 4 R. I. 324 (1856). The question before the court in that case involved the power of the Legislature to set aside a verdict of the court and to grant a new trial. The opinion holds that the assembly did not have the power, because all of the judicial power was given to the courts. To show the necessity of arriving at this conclusion Justice Ames says: "Does any one doubt that the Constitution, by this form of words, vests all the legislative power in the two houses of the assembly?" In State v. Town Council of South Kingstown, 18 R. I. 258, 27 Atl. 599, 22 L. R. A. 65 (1893), Mr. Justice Douglas, speaking for this court, said: "To declare what the law is or has been is a judicial power; to decare what it shall be is legislative." Cooley on Const. Lim. 113. If added citations are needed to establish a universally recognized principle, they may be found in Chief Justice Marshall's famous definition that the difference between the departments undoubtedly is that the Legislature makes, the executive executes, and the judiciary construe, the law" (Wayman v. Southard, 10 Wheat, 46, 6 L. Ed. 253), or the equally famous statement by Justice Woodbury, "to comthe owner of the land to become the owner of pare the claims of parties with the laws of the improvement before, as after, the law." the land before established is in its nature

a judicial act" (Merrill v. Sherburne, 1 N. braced within the right of personal liberty. H. 199, 8 Am. Dec. 52). Publicity in one instance, and privacy in the

It has been shown that natural justice is not law: To make it law is therefore a legislative act, forbidden by the Constitution to the courts of this state. Mr. Justice Blodgett, speaking for the court in State v. McCrillis, supra, where it was contended that an ordinance requiring the removal of snow from the sidewalk by abutting owners was unconstitutional as unequal taxation, said: "It is obvious that there is no specific provision that taxation shall be uniform and equal, expressed in the Constitution of this state, and it is equally obvious that it is not our province to determine what ought to be there, but is not there." In State v. Dalton, 22 R. I. 77, 46 Atl. 234, 48 L. R. A. 775, 84 Am. St. Rep. 818 (1900), where the trading stamp law was declared unconstitutional, Mr. Justice Tillinghast, in rendering his opinion against the validity of the law, intimated that he personally did not approve of the trading stamp business, and the opinion closes with numerous illustrations of hardship caused outside the remedy of the law. In the License Tax Cases, 5 Wall. 462, 469, 18 L. Ed. 497, Mr. Chief Justice Chase said: "This court can know nothing of public policy, except from the Constitution and the laws, and the course of administration and decision. * * * It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must in general be addressed to the Legislature." See, also, People v. Mahaney, supra, where it was held that an argument attacking an act because it violated "fundamental principles of our system" not covered by the Constitution was an argument to address to the Legislature.

In the Pavesich Case, supra, the court found that the right of privacy is "guaranteed to persons in this state both by the Constitutions of the United States and of the state of Georgia, in those provisions which declare that no person shall be deprived of liberty except by due process of law." In another portion of the opinion the principle of the right of privacy is found to have been guaranteed by an interpretation of the word "life." The court said: "All will admit that the individual who desires to live a life of seclusion cannot be compelled, against his consent, to exhibit his person in any public place, unless such exhibition is demanded by the law of the land. * Subject to the limitation above referred to, the body of a person cannot be put on exhibition at any time or at any place without his consent. The right of one to exhibit himself to the public at all proper times, in all proper places, and in a proper manner is embraced within the right of personal liberty. The right to withdraw from the public gaze at such times as a person may see fit, when his presence in public is not

Publicity in one instance, and privacy in the other, are each guaranteed. In reaching the conclusion just stated, we have been deprived of the benefit of the light that would be shed on the question by decided cases and utterances of law-writers directly dealing with the matter." The court also said: "The liberty of privacy exists, has been recognized by the law, and is entitled to continual recognition. But it must be kept within its proper limits, and in its exercise must be made to accord with the rights of those who have other liberties, as well as the rights of any person who may be properly interested in the matters which are claimed to be of purely private concern. Publicity in many cases is absolutely essential to the welfare of the public. Privacy in other matters is not only essential to the welfare of the individual, but also to the well-being of society. The law stamping the unbreakable seal of privacy upon communications between husband and wife, attorney and client, and similar provisions of the law, is a recognition, not only of the right of privacy, but that for the public good some matters of private concern are not to be made public, even with the consent of those interested. It therefore follows, from what has been said, that a violation of the right of privacy is a direct invasion of a legal right of the individual. It is a tort, and it is not necessary that special damages should have accrued from its violation in order to entitle the aggrieved party to recover. Civ. Code Ga. 1895, § 3807."

It is proper to point out that the comprehensive provisions of Civ. Code Ga. 1895, \$ 4929, hereinbefore set forth, are entirely lacking in our Constitution or statutes. The provisions most closely resembling the same are to be found in Const. art. 1, § 5, as follows: "Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely and without purchase, completely and without denial, promptly and without delay, conformably to the laws"and in Court and Practice Act, § 2: "The Supreme Court shall have general supervision of all courts of inferior jurisdiction to correct and prevent errors and abuses therein when no other remedy is expressly provided. It may issue writs of habeas corpus, of error, certiorari, mandamus, prohibition, quo warranto, and all other extraordinary and prerogative writs and processes necessary for the furtherance of justice and the due administration of the law," etc. The above provision of the Constitution is contained in the Declaration of Rights and Principles.

public gaze at such times as a person may see fit, when his presence in public is not demanded by any rule of law, is also emsection of the Constitution: "Although, in a



an adequate legal remedy for every injury done to him, yet the form and extent of it is necessarily subject to the legislative power." In other words, the constitutional provisions are not self-executing and require legislative assistance. In the words of Stiness, C. J., in Crafts v. Ray, 22 R. I. 183, 46 Atl. 1043, 50 L. R. A. 604, in relation to the following clause in Const. art. 1, § 2: "'All laws, therefore, should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among its citizens.' The form of this clause is advisory, and not mandatory." And regarding the same clause Ames, C. J., in the Matter of Dorrance Street, 4 R. I. 249, said: "We will not stop to notice the very general language and declaratory form of this clause, setting forth principles of legislation rather than rules of constitutional law, addressed rather to the General Assembly by way of advice and direction, than to the courts by way of enforcing restraint upon the lawmaking power." And again: "Indeed, the language in question can hardly be said to impose any restriction upon the assembly at all, except what would be imposed by the fact of our free institutions, and the general principles of constitutional law, here and everywhere in this country prevalent. Had the Constitution been wholly silent upon this subject, a greater latitude could not have been given by these principles than seems to be studiedly implied in the form, spirit, and general terms of this sentence." Under our Constitution (article 3): "The powers of the government shall be distributed into three departments: The legislative, executive and judicial." The function of adjusting remedies to rights is a legislative rather than a judicial one, and up to the present time the Legislature of this state has omitted to provide a remedy for invasion of the right of privacy. Furthermore, our statutes do not contain any provisions equivalent to those of Civ. Code Ga. 1895, \$ 3807, supra: "What are torts.—A tort is a legal wrong committed upon the person or property independent of contract. It may be either: (1) A direct invasion of some legal right of the individual; (2) the infraction of some public duty by which special damage accrues to the individual; (3) the violation of some private obligation by which like damage accrues to the individual. In the former case no special damage is necessary to entitle the party to recover. In the two latter cases such damage is necessary."

But inaction upon the part of the Legislature, however long continued, cannot confer legislative functions upon the judiciary. Whenever public opinion becomes sufficiently strong, legislative action is sure to follow; for, in general, legislation is the coinage of public opinion into statutes. It is a well-established rule of constitutional interpretation | siana, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed.

free government, every man is entitled to the Constitution must be interpreted as they were understood at the time of the adoption of the present Constitution. Thus in State v. Nichols, 27 R. I. 69, 60 Atl. 763 (1905), Mr. Justice Blodgett, speaking for this court, held that the word "infamous" did not include a crime punishable with imprisonment for any period less than one year, because the statute in force in 1843 did not debar persons, unless thus convicted, from certain political and civil rights. So in Shaw v. Silverstein, 21 R. I. 500, 44 Atl. 931 (1899), it was held that the right of trial by jury did not extend to the facts set forth in an affidavit annexed to the writ of arrest, because the procedure by affidavit was not in existence at the time of the adoption of the Constitution. The same principle applies in Gunn v. Union R. R. Co., 23 R. I. 289, 49 At. 999 (1901), upholding the right to grant a new trial for a verdict contrary to the evidence. In Conley v. Woonsocket Institution for Savings, 11 R. I. 147 (1875), Chief Justice Durfee held that article 1, § 5, of the state Constitution, declaring that the plaintiff ought to obtain right and justice freely, was borrowed from the Magna Charta, and that, as in England it did not prohibit judicial fees, so it would not in Rhode Island. This court has therefore held that it is not at liberty to construe into the Constitution new principles which did not exist at the time of the adoption of the Constitution, and, further, that when the form of words used in . the Constitution is borrowed from an older source, it comes laden with its previous meaning. As a matter of common knowledge, the clauses under discussion (Const. U. S. Amend. 14, and article 1, § 10, Const. R. I.) were borrowed from the thirty-ninth article of the Great Charter: "No freeman shall be taken, or imprisoned, or disseized or outlawed, or banished, or in any ways destroyed; nor will we pass upon him, or send upon him, unless by legal judgment of his peers. or by the law of the land." The words corresponding to "liberty" in this pronouncement are "taken," "imprisoned." "outlawed," and "banished," and are not confined to mere from incarceration ("imprisonfreedom ment").

Blackstone defined "personal liberty" as the "power of locomotion, of changing situation, of removing one's person to whatever place one's inclination may direct, without imprisonment or restraint, unless by course of law." 1 Bl. Com. 134. From this it would logically follow that the right of personal liberty included, not only the right to go where a person pleased, but also to maintain himself in a lawful manner while there, "to live and work where he chose, to earn his livelihood by a lawful calling, enter into contracts essential to carry out his avocation, as well as mere freedom from incarceration." Judge Peckham in Allgeyer v. Louias laid down by this court that the terms of 832. The same learned judge defined the

\term "liberty" in essentially the same manner in People v. Gillson, 109 N. Y. 399, 17 N. E. 845, 4 Am. St. Rep. 465, as meaning "the right, not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation." This was the definition adopted by this court in State v. Dalton, 22 R. I. 77, 46 Atl. 234, 48 L. R. A. 775, 84 Am. St. Rep. 818 (1899), in which it was held that a law prohibiting the gift of a stamp entitling the purchaser of a given article to obtain another specified article from a third party was a deprivation of liberty, because the Legislature has no right to prohibit a man from "carrying on his business in his own way, provided always, of course, that the business and the mode of carrying it on are not injurious to the public, and provided, also, that it is not a business which is affected with a public use or interest." It is true, therefore, that 'the idea underlying "liberty" would undoubtedly prohibit another from exhibiting the body of one without his consent. But it is also true that the exhibition of a picture of one does not restrain his movements, does not curtail his choice of occupation, nor abridge his freedom of contract.

It would be a work of supererogation to cumber this opinion with an analysis of the English and American cases, prior to the Cases of Roberson and Pavesich, supra, to show that the same are not authority in support of the existence of the right to privacy, because the same have been carefully reviewed, not only in the cases above mentioned, but also in the article in the Harvard Law Review already referred to, and in the note to the case of Pavesich v. New England Mut. Life Ins. Co., 2 Am. & Eng. 'Ann. Cas. 574. We pass, therefore, to the consideration of the claim of Mr. Justice Cobb that the principle of the right of privacy was well developed in the Roman law. and from there was carried into the common law, where it appears in various places. He finds that "shouting until the crowd gathered round one," or "following an honest woman or young boy or girl," or "attracting attention to another as he was passing along the highway or standing upon his private grounds," were actionable at Roman law. The recognition of the principle underlying these actions in the Roman law is found in the common law in the law of nuisance, both public and private; for example, public scolds and eavesdroppers. Lord Coke is found to have sanctioned it in Semayne's Case, 5 Coke, 91, when he gives force to the maxim that "every man's house is his castle." So, too, the same court claims, every Constitution sets its approval on a tort right of privacy when it prohibits unreasonable search. The law of evidence contributes to this ever-present right "to be let that, because certain results may be obtained

alone" when it forbids husband and wife to divulge privileged communications, and sets a seal upon the knowledge of an attorney gained from his client. From these instances the court concludes that the legal principles of the Roman law are introduced into the common law, and that "liberty of privacy has been recognized by the law and is entitled to continual recognition."

It is difficult to discover how the theory of public nuisance, the first principle of which is that a private individual cannot remedy his fancied wrong, is made to support an absolute right of privacy such as has been described in the Roman law and sanctioned in the Georgia case. Blackstone defines a nuisance as "anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another." 3 Bl. Com. (Sharswood's Ed.) *216. The very theory of nuisance is the doing of something intrinsically lawful in a manner damaging to others, and it is the resultant damage that creates the wrong. The right of privacy, on the other hand, which the Supreme Court of Georgia seeks to establish, is an absolute tort right, the merest interference with which is an actionable wrong. In nuisance, not only must special damages be alleged to sustain an action, but it is well settled that mental suffering alone will not constitute damage sufficient to sustain an action (Owen v. Henman, supra; Sparhawk v. Union Passenger Ry. Co., supra); a branch of a similar rule obtaining in libel and slander cases not actionable per se where special damage must be shown (Lynch v. Knight, supra; Pollard v. Lyon, supra; Dockrell v. Dougall, supra); and in negligence cases (Simone v. Rhode Island Co., supra). In the right of privacy, however, in the Georgia case, and in the case now before the court, no damage is alleged The law of other than mental suffering. nuisance, not only does not recognize a right of privacy, but is in theory incompatible with it.

The rule, "Every man's house is his castle," does not rest on a right of personal privacy; otherwise, the same immunity would follow the person when without his house, or when the officer had found the outer door open and broke in an inner paneling. same is true of provisions as to unreasonable searches, based squarely on this old maxim and now defended by the Constitution. So, too, it is apparent that the divulging of communications between husband and wife rests on some principle other than the right of privacy, else the bar would still continue when testifying against each other in a divorce suit. These rules are and always have been based on principles of sound public policy, irrespective of the wishes, or desires, or interests of the persons affected. It is not claimed that these instances were ever based on a right of privacy. The contention is at best that they might be or ought to be, and by applying the theory of absolute right of sault and that of the right of privacy is most privacy, therefore a right of privacy is established. Such an argument is fallacious, and that words alone can never constitute an assumble to the right of privacy in the common law.

Every exponent of the right of privacy cites as an authority in support of his contentions one sentence in Cooley on Torts, p. 29, where the learned author is discussing the right of personal immunity, and the sentence is as follows: "The right to one's person may be said to be a right of complete immunity; to be let alone." The meaning of this sentence is amply explained by the one immediately following: "The corresponding duty is not to inflict an injury, and not, within such proximity as might render it successful, to attempt the infliction of an injury. In this particular the duty goes beyond what is required in most cases; for usually an unexecuted purpose or an unsuccessful attempt is not noticed." The paragraph is given over entirely to a discussion of the doctrine of assault. The author is not, therefore, ushering in a new right of complete immunity. The right "to be let alone" refers unmistakably to the right to be free from bodily injury, or from a reasonable fear of bodily injury, at the hands of a fellow being.

The principle underlying the right of privacy is not analogous to that upon which assault is based. In State v. Baker, 20 R. I. 275, 38 Atl. 653, 78 Am. St. Rep. 863 (1897), this court, speaking through Mr. Justice Tillinghast, adopted the definition of assault given by Mr. Bishop as "any unlawful physical force, partly or fully put in motion, creating a reasonable apprehension of immediate physical injury to a human being" (2 Bish. Cr. L. § 23), and it was held in that case that the firing of a loaded pistol at a man was an assault, even though the intention of the person firing was merely to scare the person shot at, because "it [the firing] was an act which was well calculated to inflict serious personal injury, and from such an act the law implies malice." In State v. Hunt, 25 R. I. 69, 54 Atl. 937 (1903), it was held that an assault "consists in an offer to do bodily harm, made by a person who is in a position to inflict it." Numerous other definitions of both civil and criminal assault are found collected in 3 Cyc. 1020, 1066. An essential element in all is a "reasonable apprehension of immediate physical injury," and the movement, however threatening, which does not produce the fear of physical harm is not an assault. Tuberville v. Savage, 1 Mod. 8; 1 Ames, Cas. Torts, 2. Apprehension of immediate physical harm is not an essential element of the right of privacy. But the incompatibility between the principle of as-

sault and that of the right of privacy is most strikingly brought out by the familiar rule that words alone can never constitute an assault. Cooley, Torts, 167. If words cannot constitute an assault, how, then, can writings; and, if writings cannot, how could the publication of a picture? It would seem reasonable to conclude that the principle of the right of privacy finds no support in the doctrine of assault.

It has also been suggested that the principle of the right of privacy finds support in the law of libel. Enough has already been said to show the fallacy of this contention.

The foregoing considerations, together with an examination of the authorities, lead us to the same conclusion as that reached by a majority of the court in Roberson v. Rochester Folding Box Co., supra (page 556 of 171 N. Y., page 447 of 64 N. E. [59 L. R. A. 478, 89 Am. St. Rep. 828]) viz., "that the socalled 'right of privacy' has not as yet found an abiding place in our jurisprudence, and, as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided." It may be proper to state, however, that since the rendition of the foregoing decision the Legislature of the state of New York has enacted chapter 132, p. 308, of the Laws of New York of 1903, entitled "An act to prevent the unauthorized use of the name or picture of any person for the purposes of trade," which went into effect September 1, 1903, whereby persons offending against its provisions are not only declared to be guilty of a misdemeanor, but also are made liable, in civil actions, at the suit of persons injured by such unauthorized use of name or picture, to respond in damages, including exemplary damages, for such injury. The constitutionality of this statute has been sustained by the Court of Appeals of New York in the case of Rhodes v. Sperry & Hutchinson Co. (Oct. 23, 1908), 193 N. Y. 223; 85 N. E. 1097.

As we have been unable to discover the existence of the right of privacy contended for, we must answer the first question, certified to us, in the negative.

The second question, considered solely with reference to the first count of the declaration, the second count for libel being insufficient for that purpose, as hereinbefore set forth, must also be answered in the negative.

Having thus decided the questions certified to us, we herewith send back the papers in the cause, with our decision certified thereon, to the superior court for further proceedings.

(78 N. J. L. 77)

TOWN OF KEARNY et al. v. MAYOR, ETC., OF JERSEY CITY et al.

(Supreme Court of New Jersey, June 7, 1909.)

WATERS AND WATER COURSES (§ 190*)
PUBLIC WATER SUPPLY — AUTHORITY O
MUNICIPALITY TO FURNISH TO ANOTHER
"CONTROLS."

Jersey City is entitled to take water from a reservoir at Boonton through a pipe line, un-der a contract which provides that no water shall be sold or furnished to any other person or municipality, from any point on the main pipe line between the intake at Old Boonton and the Bergen reservoir at Jersey City, the pipe line being intended for the exclusive use of Jersey City, and that no water shall be furnished by the contractor to any consumer of Jersey City water. Held that Jersey City "controls" waterworks within the meaning of the act of April 16, 1897 (P. L. p. 232), and is thereby empowered to contract to supply a private corporation with water within the bounds of the adjoining municipality of Keerny. municipality of Kearny.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 190.*

For other definitions, see Words and Phrases, vol. 2, pp. 1549-1552; vol. 8, p. 7617.]

2. WATERS AND WATER COURSES (§ 201*)—
PUBLIC WATER SUPPLY—CONTRACT BY
BOARD TO FURNISH WATER.

The board of street and water commissioners of Jersey City is the governing body of the
city with respect to water; and a contract made
by it. under the act of April 16, 1897 (P. L.
p. 232), does not require the assent of any other
board.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 201.*]

3. WATERS AND WATER COURSES (§ 201*)—PUBLIC WATER SUPPLY—AUTHORITY OF MUNICIPALITY TO FURNISH TO ANOTHER.

The word "corporation" in section 1 of the act of October 11, 1907 (P. L. p. 676), means a private not a municipal composition.

private, not a municipal, corporation.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 201.*]

4. WATERS AND WATER COURSES (§ 190*)— PUBLIC WATER SUPPLY — OBTAINING FROM OUTSIDE SOURCE.

Section 2 of the act of October 11, 1907 (P. L. p. 677), which prohibits the obtaining of water from an outside source by means of pipes and conduits, without the consent of the board having charge of the public water supply within a municipality, applies only to municipalities which maintain or operate an adequate water supply and stead ready to furnish water to the supply, and stand ready to furnish water to the

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 190.*]

(Syllabus by the Court.)

Certiorari by the Town of Kearny and others to review a resolution whereby the city agreed to supply to the Pennsylvania Railroad Company for 25 years all the water it desired to purchase. Resolution sus-

Argued February term, 1909, before the CHIEF JUSTICE and SWAYZE and PAR-KER, JJ.

Gilbert Collins and Robert H. McCarter, Warren Dixon, for Jerfor prosecutors. sey City. James B. Vredenburgh and Al-Boonton reservoir. We are therefore called

bert C. Wall, for Pennsylvania Railroad Company.

SWAYZE, J. The question in this case is the validity of a contract made by the board of street and water commissioners of Jersey City, by which the city agreed to obtain and supply to the Pennsylvania Railroad Company, during a continuous term of 25 years, from January 1, 1908, all the water which the railroad company desired to purchase for use within the county of Hudson outside the limits of Jersey City. The object was to secure a supply of water for what are known as the "meadows shops," which are situate on the edge of the territory of the town of Kearny, remote from the rest of the town.

We pass over the objections raised to the right of the prosecutors to maintain this suit, and the question of laches in applying for the writ, for the reason that we think the case ought to be disposed of in favor of the defendants upon the merits. The contract is questioned on three grounds: (1) Lack of power in the city to make it; (2) improvidence in its terms; (3) that it is in contravention of the act of October 11, 1907 (P. L. p. 676).

We think power to make the contract was given to the city by the act of April 16, 1897 (P. L. p. 232). That act makes it lawful for the governing body of any municipal corporation owning or controlling waterworks to make a contract with any adjoining municipal corporation, or with any private corporation therein, to furnish a supply of water for a term of years. Kearny adjoins Jersey City, and it is not questioned that the Pennsylvania Railroad Company is a private corporation therein within the meaning of the statute. The question raised is whether Jersey City owns or controls waterworks. There is no doubt that it owns the old pumping station at Belleville, now disused, and the pipe system needed for the distribution of the water, and also the Bergen reservoir. We agree, however, with the contention of the prosecutors that the power ought not to be rested on these facts. That would be following the act in its letter, but not in its spirit. We think that when the Legislature gave this authority to vend water to a municipal corporation owning or controlling waterworks, it intended to confer the power upon those municipalities, and those only, that had an available water supply. We agree, also, that in view of the existing pollution of the Passaic river, which made necessary the abandonment of the source of supply at Belleville several years since, the power of Jersey City cannot rest upon the possibility of its obtaining water at that point. It must therefore rest upon the right of Jersey City to the new supply from the

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

or controls that water supply.

The decree in the suit brought by Jersey City against the Jersey City Water Supply Company for specific performance of a contract for the new Boonton water supply was made June 4, 1908—that is, after the contract between Jersey City and the Pennsylvania Railroad Company now in question. The decree directs a conveyance upon payment of a price to be ascertained by makequitable owner of the property is not apempowers, not only municipal corporations that own waterworks, but those that control them, to make contracts. This provision applies to the present situation. By the original contract for the Boonton supply between Flynn and Jersey City the city is entitled to take the water by the million gallons, as she has done continuously now for several years; and, as long as that condition continues, the contract provides that "no water shall be sold or furnished by the contractor to any other person or municipality from any point on the main pipe line between the intake at Old Boonton and the Bergen reservoir at Jersey City, said pipe line or lines being intended for the exclusive use of Jersey City; nor shall any water be furnished from any waterworks by said contractor to any consumer of Jersey City water." This provision gives Jersey City the exclusive right to the water, and it is no stretch of language to hold that one who has the exclusive right to the water has the control; and, since no water can be furnished from the waterworks to any consumer of Jersey City water, the city could no doubt enforce this negative covenant by proceedings in equity. Such exclusive right, and the power to shut out other consumers, amount to control. One of the objects of the act of 1897 was no doubt to make available for public use water that otherwise would be wasted, and it was natural for the Legislature to empower a municipality which controlled the supply to vend the water outside, as well as within, its municipal limits. Control is used in this act as contrasted with ownership. It does not connote an actual possession, but the right to the usufruct. This Jersey City has to the full extent. We do not accede to the view that the language

upon to determine whether Jersey City owns, to the use of this water for its own inhabitants. The provision was intended to benefit, not to restrict, Jersey City. The language itself is taken from the specifications embodied in the original proposal of Jersey City for bids, and we can hardly persuade ourselves that any one ever supposed it to be a limitation of the city's rights, until this suggestion was brought out by the stress of the present case. But even if we adopt the view for which counsel contends with ing certain deductions from the contract evident sincerity, it does not follow that price, which deductions are to be there- water needed by Jersey City to carry out after ascertained; but the decree provides its contracts is not supplied for the excluthat in the event that Jersey City fails to sive use of Jersey City. No one would conmake the requisite payment within four tend that the water was to be supplied for months after the amount has been ascer- municipal purposes only. It was intended tained, its right to purchase the waterworks for a public water supply, to be sold, for shall be terminated, and the water supply the most part to consumers other than the company may apply for a dismissal of the city itself, and we can see no difference in bill. In view of this provision of the decree this respect between the Pennsylvania Railwe think the ordinary rule which holds the road Company, which receives the water in vendee under a contract of sale to be the Kearny, and the Erie Railroad Company and the Central Railroad Company, which plicable. This conclusion does not dispose receive their water in Jersey City. If the of the present controversy. The act of 1897 city is authorized to sell by the act of 1897 the provision of the contract that the supply is for the exclusive use of Jersey City does not stand in the way.

Section 2 of the act of April 11, 1897 (P. L. p. 232), enacts that, where the waterworks are under the control of a board of water commissioners, no contract shall be made for a term exceeding three years without the consent of the governing board of the city owning said waterworks. It is urged that this section invalidates the present contract, which was not assented to by the board of aldermen. Section 2 evidently applies only to a city which owns its waterworks, and that is not the present case. If this view is too narrow, and lays undue stress upon the words with which the section closes, the same result is reached by taking the broader view of the peculiar powers of the board of street and water commissioners in first-class cities. These powers, under the act of 1891 (Gen. St. 1895, p. 465, \$ 39), and the amendment of section 2, Act April 22, 1897 (P. L. p. 249), are very different from the powers of a mere board of water commissioners in the ordinary sense. It was said by the Court of Errors and Appeals in Oliver v. Jersey City, 63 N. J. Law, 634, 44 Atl. 709, 48 L. R. A. 412, 76 Am. St. Rep. 228, that "the board of street and water commissioners is the governing body of Jersey City, and it enacts all the local laws of that city respecting streets and water." Counsel for the prosecutors, in the opening of one of the briefs. speaks of this very contract as "the action of the governing body of Jersey City," and we think he accurately characterizes the board of street and water commissioners. The resolution did not require the consent of any other board.

We cannot say that the contract is imreferred to was meant to limit Jersey City provident. Even if the price at which the

water is sold to the railroad fails to make inicipality has control. Whether the Legisproper compensation for the cost of the plant and the expense of maintaining the water department, it does not follow that the bargain is a bad one for the city. It enables the city to dispose of millions of gallons of surplus water that would otherwise go to waste, and the increase in the amount of sales decreases the average cost per million gallons of the whole. The price to be paid by the railroad is very much more than the price paid by the city for the water alone. Whether the contract makes a sufficient allowance to cover the other items of cost of delivery is a matter of business judgment which, perhaps, does not admit of nice mathematical calculation, depending as it does on various uncertain elements. are not to substitute our judgment for that of the municipal authorities, unless the contract is clearly improvident, and that is not proven.

We think the act of October 11, 1907 (P. L. p. 676) does not sustain the position of the prosecutors. Section 1 forbids any person, firm, or corporation to supply water to any other person, firm, or corporation for use within the municipality, without the consent of the board having charge of the water supply. The collocation of "corporation" in this section with the words "person" and "firm" indicates that a private corporation, and not a municipal corporation, is meant; and the general usage in our statutory language, which makes a distinction between corporation and municipal corporation, supports this construction.

Section 2 of the act does not make it illegal to contract for a supply of water from a source outside the municipality. What it forbids is the obtaining of water from an outside source, by means of pipes and conduits, by a corporation within the limits of the municipality, without the consent of the board having charge of the public water supply within the municipality. No penalty is imposed for a violation of this section. It is not declared in specific terms illegal, and the only remedy given by the act is an action at law or in equity to enjoin the violation of its provisions. A corporation in a case within this section, which chooses to make such a contract, may perhaps be exposed to the risk that it never can obtain the water contracted for by reason of inability to secure the necessary consent of the municipality within whose limits it is doing business, but that consent is not made a condition precedent to the right to contract. It may even be doubtful whether the Legislature has the constitutional right to make a contract for the purchase of water dependent for its validity upon the consent of a third party. The right to prohibit, as this statute does, the obtaining of water by means of pipes and conduits, if it is to be justified, must rest upon the fact that ordinarily those pipes and conduits are placed in the public streets, of which the mu-

lature can go further, and prohibit one who buys water outside the municipality from bringing it within the municipal limits, by means of pipes and conduits laid wholly on private property, is a question that does not now call for discussion. If such an exercise of power is to be sustained, it must be upon the theory that the Legislature has the right to give a municipality the monopoly of the supply of water within its bounds—a right which was sustained in the case of a private water company. New Orleans Waterworks Company v. Rivers, 115 U. S. 674, 6 Sup. Ct. 273, 29 L. Ed. 525. Such a monopoly could probably only be sustained in a case where the municipality itself stood ready to furnish an adequate supply. Fortunately, however, we are not now called upon to pass upon this question of legislative power. Section 2 of the act of 1907 applies only to municipalities maintaining or operating a public water supply. A water supply necessarily connotes an adequate supply—a supply which will enable the consumer to obtain water from the municipality. Anything less than that would be, as to the particular consumer, no supply at all. That this must have been the legislative intent is made clear by the language immediately following, which speaks of the "supply of water furnished by the municipality." This must mean the supply which the municipality itself stands ready to furnish. Unless we adopt this construction, the statute would operate to deprive consumers of this prime necessity at the will of the local board; for they cannot get it of the municipality within whose limits they are because it is unable to supply them, and they cannot get it elsewhere, except possibly in barreis or bottles, because the local board refuses its consent. The facts of the present case make the statute inapplicable. On April 22, 1908, when the contract before us was made, the town of Learny was unable to furnish any supply whatever to the railroad at the meadows shops, a most important point for the railroad to obtain water; so important apparently, under any existing arrangements, that a failure to obtain an adequate supply at this point might paralyze the interstate traffic over hundreds of miles of track. The town had a public water supply at that time. bought from the water companies. Whether it was adequate for the necessities of the railroad is a disputed point, but immaterial, since the town had no pipe by which it could supply the water. The meadows shops were several miles from the Kearny water system. The right to supply the railroad had been expressly reserved by the water companies in their contracts with Kearny, and the necessary pipe line belonged to the companies, or one of them. It was not until December 28, 1908, that the water company waived its reserved right to sell water to the railroad, and consented that the pipes of the company might



be used as part of the public water supply system of the town of Kearny, for the purpose of delivering water therefrom to the Pennsylvania Railroad at the meadows shops or elsewhere. This was more than eight months after the contract between Jersey City and the railroad company, now questioned. It was, however, only five days after Kearny had resolved to take legal measures to prevent the introduction or continuance of any water supply to the railroad from any municipality or water company other than the supply provided by the town. The agreement between the water company and Kearny of December 28th was the result of a proposal made by the water companies to the town on December 23d, and accepted by the town on that day. It is evident that agreement was the result of an attempt, on the part of the water companies, to regain indirectly, through the medium of the town, the right to supply the railroad, which they had lost in 1906. The situation then is this: When the contract between Jersey City and the railroad company was made, Kearny was unable to supply the railroad with any water whatever. As to the railroad company, Kearny did not maintain or operate a public water supply. Her operations were confined to a part of her territory quite remote from the meadows shops. The act of 1907 did not therefore apply, and the contract is not vitiated. We need go no farther.

All that is before us for review is the resolution and agreement of April 22d. They were within the power of Jersey City to adopt, and the proceedings are therefore affirmed, with costs.

(78 N. J. L. 268)

PAONESSA v. RUH.

(Supreme Court of New Jersey. June 7, 1909.)

1. Appeal and Error (§ 1008*) — Review — Questions of Fact.

Section 206 of the district court act (P. L. 1898, p. 630) confines the Supreme Court on appeal to the consideration of questions of law and the determination of the legality of the admission or rejection of evidence. Questions of fact determined by the district court judge or by the verdict of a jury are final and conclusive between the parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-8969; Dec. Dig. § 1008.*]

2. APPEAL AND EBROR (§ 987*) - REVIEW -SUFFICIENCY OF EVIDENCE.

The transmission to the Supreme Court from the district court of the stenographer's notes as a state of the case, in compliance with the act of 1905 (P. L. 1905, p. 259), confers upon this court no authority to weigh the evidence. dence. The practice permitted under this stat-ute of returning the whole case should be con-fined to cases such as those arising on motions

of evidence, as the case may be, to justify the trial court in its rulings.

[Ed. Note.-For other cases, see Appeal and Error, Dec. Dig. \$ 987.*]

(Syllabus by the Court.)

Appeal from District Court of Jersey City. Action by Charles Paonessa against Charles F. Ruh. Judgment for plaintiff, and defendant appeals. Aftirmed.

Argued February term, 1909, before GAR-RISON, BERGEN, and VOORHEES, JJ.

Isaac F. Goldenhorn, for appellant. Randolph Perkins, for appellee.

VOORHEES, J. This is an appeal from the First district court of Jersey City, in which judgment was rendered for the plaintiff. Suit was brought to recover \$250, which the defendant took as a bonus to extend a mortgage on the plaintiff's property which was never extended. There is no agreed state of the case. The stenographer's notes have been sent up in lieu thereof under the statute of 1905 (P. L. 1905, p. 259). Among the reasons filed are that the proofs do not support the state of demand, and there was a variance between the demand and the proofs. A motion to nonsuit was made founded on these objections. Another reason urged was that there was no evidence before the court which would sustain the judgment. It was shown that the defendant, being the holder of a mortgage about to expire, was asked to extend it for three years or obtain somebody who would take a mortgage on the property to fall due three years hence. He asked and obtained \$250 to accomplish it. A search of title was furnished by the plaintiff. The plaintiff and his wife executed a new mortgage, left it with the defendant to put on record, having told the defendant that he was about to sell the property, which was one of the reasons why he wanted the extension. Several days after he had left the mortgage with the defendant, who did not demur to the arrangement, but afterwards promised to send the papers to the title company who would record them. the plaintiff sold the place. The defendant did not place the mortgage on record. The new loan was not procured, and the defendant, after the property had been sold, called in his mortgage. He had on the 8th of April stated in writing that the plaintiff had paid his fees except the search fees and the new title policy which were to be paid to Mr. Zabriskie. The state of demand sets out: "The plaintiff demands of the defendant for that the defendant took from the plaintiff the sum of \$250 as a bonus to extend a mortgage on the property of the plaintiff, which said to nonsuit, or to direct a verdict, or where it is necessary to determine whether there is any evidence, or whether there is an entire absence that the plaintiff expended the sum of \$30

Tur other cases see same topic and section NUMBER in Dec. & Am. Digs. 1997 to date, & Reporter Indexes 73 A.--8

ant had not been carried out, and that the consideration for which the payment had been made to the defendant had failed. These facts were substantially set forth in the state of demand. Section 206 of the district court act (P. L. 1898, p. 630) confines the Supreme Court on appeal to the consideration of questions of law or the determination of the legality of the admission or rejection of evidence, and section 205 provides that the questions of fact determined by the judge or upon the verdict of a jury shall also be final and conclusive between the parties. The judgment should therefore be affirmed. It may be well to state here that the transmission to this court of the stenographer's notes as a state of the case, in compliance with the act of 1905 (P. L. 1905, p. 259), confers upon this court no authority to weigh the evidence. The practice permitted under this statute of returning the whole case should be confined to cases such as those arising on motions to nonsuit, or to direct a verdict, or where it is necessary to determine whether there is any evidence, or whether there is an entire absence of evidence, as the case may be, to justify the trial court in its rulings.

(75 N. J. E. 819)

ATWOOD et al. v. CARMER et al. WIEBKE v. SAME.

(Court of Chancery of New Jersey. May 10, 1909.)

1. Mortgages (§ 606*) — Foreclosure — Re-

DEMPTION PENDING SALE.

Any defendant, as to whom provisions for foreclosing his right of redemption are expressly made by the final decree on foreclosure, canny made by the final decree on foreclosure, cannot be denied the right of redemption pending sale, by application in the suit Itself: and, under section 30 of the chancery act (Rev. 1902 [P. L. p. 521]), providing for making a person a party to a suit, either before or after an interlocutory or final decree therein, this application to be made a party to the suit itself, if the right exists, can be made by a purchaser after decree.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. \$ 606.*]

2. Mortgages (§ 599*)—Foreclosure—Right

OF REDEMPTION.

The right of redemption on foreclosure, not being by the terms of the final decree cut off till sale, continues till that time.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. \$ 599.*]

3. MORTGAGES (\$ 594*)—FORECLOSURE—OPER-

ATION OF DECREE—RIGHT OF REDEMPTION.

The decree itself on foreclosure does not operate as a merger of the debt, or of the estate of the mortgagee, but it does fix finally, as between the parties and those claiming under them, the time and method of foreclosing the right of redemption; and, as this is made on Dec. Dig. § 600.*]

for a search in anticipation of obtaining such extension."

There was evidence from which the court might find as a matter of fact that the agreement made between the plaintiff and defendant had not been carried out, and that the search and the court that the search and the court that the agreement made between the plaintiff and defendant and the court that the search are search in anticipation of complainant, who will have the right to enforce it by execution, it would seem to follow necessarily from the nature of the decree that every defendant, or claimant under him, whose right to enforce it by execution, it would the decree that every defendant, or claimant under him, whose right to enforce it by execution, it would seem to follow necessarily from the nature of the decree that every defendant, or claimant under him, whose right to enforce it by execution, it would seem to follow necessarily from the nature of the decree that every defendant, or claimant under him, whose right of redemption is for complainant, who will have tion after decree.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 594.*]

4. Mortgages (§ 594*)—Foreclosure—Right OF REDEMPTION.

Before any decree for sale taken by the mortgagee, or at least before the filing of first mortgagee, the bill to foreclose, a subsequent incumbrancer, in order to redeem against the first mortgagee's consent, must show special equities.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 594.*]

5. Mortgages (§ 594*)—Foreclosure—Right OF REDEMPTION.

By electing to take decree against subsequent incumbrancers and to have a sale foreclosing their equities of redemption, the first mortgagee must, pending the sale, proceed sub-ject to their right of redemption, as the decree in such a case, at least if complainant is pro-ceeding to sale under his execution, creates a special equity, which leaves defendants the ab-solute right of redemption pending the sale.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. \$ 594.*]

6. MOBTGAGES (§ 606*)—FORECLOSURE—MANNER OF REDEMPTION PENDING SALE AND PERSONS ENTITLED—MATTERS TO BE SET-TLED BY APPLICATION IN SUIT.

The manner of redemption pending sale on foreclosure, and the persons entitled thereto, are matters which should be settled by application in the suit itself, in order to control the execution; and, as equities as to the right of redemp-tion may exist between different defendants, notion may exist between different defendants, notice of the application, if necessary, should be given to the defendants who might be affected, as well as to complainant, and so a decree providing for a sale only, and not for redemption, must, if complainant so insists, be so controlled or modified on application for further directions in the suit or to control the execution, and cannot be affected by a mere payment to the sheriff.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 606.*]

7. Mortgages (§ 606*)—Foreclosure—Varing Rights of Complainant in Decree.

The rights of a complainant, given by a decree on foreclosure, should not be varied, without his consent, unless by a subsequent order of court.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 606.*]

8. Mortgages (\$ 600°) — Foreclosure -AMOUNT REQUIRED TO REDEEM.

A second mortgagee will be entitled to redeem pending sale, on payment of the amount of a decree on foreclosure of a first mortgage, with interest and sheriff's costs, and also the amount paid by a purchaser of the decree for insurance on the premises since his purchase, which he is entitled to add to the decree, as the original mortgage covered such insurance which had expired; but, as against subsequent incum-brancers without notice, he could not add to the decree an amount previously deducted for payments made by the mortgagor, which inure, by operation of law, to the benefit of the subsequent incumbrancers.

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

9. MORTGAGES (\$ 606*) - FORECLOSURE-PER-SON TO WHOM PAYMENT MUST BE MADE ON REDEMITION.

The payment on redemption pending sale on foreclosure must be made to complainant, or his solicitor, within a time to be fixed.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 606.*]

10. MORTGAGES (\$ 606*) - FORECLOSURE RIGHTS OF SECOND MORTGAGEE ON REDEMP-TION.

On redemption by a second mortgagee pending sale on foreclosure of a first mortgage, he is entitled to the bond and first mortgage uncanceled, and his right to such redemption and de-livery cannot be prejudiced by a supplemental bill to add to the decree, filed without notice to parties adversely affected.

[Ed. Note.--For other cases, see Mortgages, Dec. Dig. \$ 606.*]

11. EQUITY (§ 429*) — SUPPLEMENTAL BILL ADDING TO DECREE—NECESSITY OF NOTICE TO ADVERSE PARTIES.

Under strict practice, a supplemental bill to add to the terms of a decree cannot be filed without notice, at least to parties adversely affected.

[Ed. Note.-For other cases, see Equity, Cent. Dig. § 1030; Dec. Dig. § 429.*]

Suit by Laura A. Atwood and others against Abbie A. Carmer and others for foreclosure of a mortgage, in which complainants obtained a decree; and suit by Frederick Wiebke against Abbie A. Carmer and others, to increase the decree on the foreclosure which had been assigned to him, and to enjoin the sale. Rights of the parties as to redemption pending sale determined, and the bill filed by Wiebke is dismissed as to one of the defendants without prejudice.

F. Lehlbach, for complainant Wiebke. Mr. Oram and H. C. Pitney for defendants Neighbor and others.

EMERY, V. C. The complainant Mrs. Atwood, holder of a first mortgage, obtained a final decree on foreclosure on November 23, 1905, directing a sale of the mortgaged premises for the payment of her debt, \$12,765, with interest from November 21, 1905. The mortgagors and owners, Mr. and Mr. Carmer, were parties defendant, as were also subsequent incumbrancers, including George W. Cole, the second mortgagee. No proof of the subsequent claims was made in the foreclosure suit, and the decree for sale directed payment only of the complainant's mortgage, the surplus, if any, to be brought into court. The final decree further directed "that the defendant stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to the said mortgaged premises, when sold as aforesaid, by virtue of this decree." The original execution contained directions as to sale of the mortgaged premises to pay complainant's debt and pay the surplus into court. This was issued December 21, 1905, returnable to February term, 1906, but the premises were not sold

court, made about two years later on complainant's ex parte application (March 2, 1908), a new execution was issued for the payment of \$12,420 as still unpaid on the decree, with interest from August 19, 1907. After the issue of the new execution, James Howard Wells, the son-in-law of Mr. and Mrs. Carmer, to whom they made a voluntary conveyance of the mortgaged premises on February 16, 1906 (shortly after the decree and first execution), filed a bill on April 18, 1908, against Mr. and Mrs. Atwood, to set aside the order for new execution, and stay sale under it, to which suit the complainant's solicitor, Mr. Hart, and the sheriff were also parties. The sale was restrained pendente lite, and by final decree, made by consent in the Wells-Atwood suit on December 23, 1908, it was decreed that the decree and new execution in the Atwood-Carmer suit remain effective, but that the execution be amended in so far as to require the sheriff to make of the premises the amount directed in it, less \$353.20, with interest from September 24, 1908. The deduction is the amount found by the master's report in the case to have been paid by, or on behalf of, the mortgagor or owner of the equity, and not credited before the issue of the new execution. The restraint of sale under the new execution was also discharged, and the sheriff, after several adjournments, under the direction of Mrs. Atwood's solicitor, who declined to grant further delay, proposed to sell the property on February 10, 1909. Under an arrangement made, or claimed to have been made, with Mr. Carmer, on behalf of his wife as the equitable owner, a Mr. Wiebke then bought the Atwood mortgage and decree, and on February 10, 1909, the day fixed for the sale, Wiebke took an assignment of the bond, mortgage, and decree. Mrs. Atwood refused to assign, unless she received the full amount of the second execution, without credit for the deduction directed by the decree in the Wells-Atwood suit, and Wiebke, as part of the consideration for the assignment, and, as he claims, by agreement with Mr. Carmer, was to purchase the property at the sale for the full amount of the execution, without deduction, and, if he purchased, hold the premises for six months, subject to an agreement to reconvey on repaying within that time the amount advanced, with other advances for insurance, taxes, etc. On taking the assignment the sale was adjourned until February 24, 1909. In the meantime Mr. Carmer, who acted for Mrs. Carmer, and Wells, who held the title for Mrs. Carmer, applied to Mr. Neighbor, and also to a Mr. Stickle, for advances necessary to take up the Atwood mortgage; and, as part of the plan for carrying out this arrangement, Wells under this execution, and by order of the made a voluntary conveyance of the prop-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1997 to date, & Reporter Indexes

erty to a Mr. Matthews, acting on behalf of Mr. Stickle and Mr. Neighbor. The real equity of redemption in the premises apparently still remained in Mrs. Carmer at the time of the present application, but she has since died. Mr. Neighbor, on February 24, 1909, took an assignment of the mortgage from Cole, who was a party to the original Atwood-Carmer suit, as mortgagee, and Mr. Neighbor, who was not a party to that suit, also held later mortgages; one given to him by Mr. and Mrs. Carmer January 26, 1906, after the decree in the suit, another by Wells on December 17, 1907. On February 24, 1909, at the sheriff's office, and before the sale was opened, Mr. Oram, a solicitor, who declared he was acting on behalf of Matthews as the owner of the equity of redemption, offered to pay to Mr. Wiebke, who was present with his solicitor, Mr. Greenberg, the amount due on the decree, and asked for an assignment of the decree. They refused unless the \$353.20 which had been paid to Mrs. Atwood was also paid. Mr. Oram then offered to pay the sheriff the amount due on the decree, but did not expressly offer the amount in satisfaction of the decree. The sheriff, by Mr. Greenberg's directions, refused to receive it, and the sale was adjourned to March 3, 1909. Wiebke on March 2d filed his bill, claiming the benefit of the decree to secure his additional claims, and to enjoin the sale under the execution, and for an accounting as to what is due under the decree, including, among other things, insurance on the premises not included in the decree. The defendants to this bill are Mr. and Mrs. Carmer, Wells, Cole, Neighbor, and the sheriff, but none of the parties to the original bill, except Mr. and Mrs. Carmer and Cole. On the application for preliminary injunction it appeared to me, from the answering affidavits filed, that, as to the defendant Neighbor, a subsequent mortgagee, the substantial question whether the arrangement with Carmer (claimed to be acting on behalf of the owner of the equity), as to the decree standing for more than the amount due after deducting the credit of \$353.20, was valid, or could be enforced to the detriment of his security: and, for the purpose of bringing about a final hearing on this question, with little delay and expense, I suggested that Neighbor, as subsequent mortgagee, file a petition in the original foreclosure suit for redemption of the Atwood mortgage, on paying the amount due on the decree. Such petition was accordingly filed, and hearing on the same came on together with hearing on the application for injunction in the Wiebke-Matthews suit, the affidavits being used together, and the affiants cross-examined in open court on both sides so far as desired.

On the hearing it was conceded by counsel for Wiebke that, in view of the decisions of our courts, called to his attention since the

as against subsequent incumbrancers, the amount claimed to have been agreed to be paid by Carmer in addition to the face of the decree could be added; but it is now claimed that, as against the Carmers and Wells and Matthews, voluntary grantees, the agreement, if proved on the final hearing, may be effective to charge their interest in the premises subject to the previous incumbrances. The injunction pendente lite asked is against the sheriff receiving from any of the defendants any sum in settlement of the execution, and a temporary restraining order against the sheriff also to that effect was made. As to the defendant Neighbor, it is clear that, if he has the right after the decree for sale, which was made on the foreclosure to redeem or satisfy the mortgage by paying the amount, either by way of redemption or satisfaction, then the restrain against the sheriff should not embrace him, if the sheriff is the proper officer or person to whom payment should be made on redemption. The real question, so far as he is concerned, is whether, after a decree such as was made in this case, a subsequent incumbrancer, becoming such after the decree, can, without becoming a party to the suit, and also without an order of the court, pay to the sheriff, against complainant's cousent, the amount of the decree, and whether a tender of such payment, coupled either with a demand for an assignment, or with a demand that the bond and mortgage be delivered uncanceled, is a valid tender, unless made by an order of the court in the cause after the decree and before sale, fixing the manner in which the right of redemption or satisfaction is to be exercised in case the parties do not agree.

In Cassidy v. Bigelow, 25 N. J. Eq. 112 (1874), Chancellor Runyon held that a second mortgagee had an absolute right to redeem the first mortgage at any time after it was due, and to receive an assignment, but this absolute right was denied by the Court of Errors and Appeals, and the right of the second mortgagee to redeem against the consent of the first mortgagee was declared to exist only in case of special equities, such as endangering his security, of which the first mortgagee must be advised, and the right to an assignment was denied. In this case the subsequent mortgagee, after decree for sale, and before sale, filed a bill to redeem after a tender of amount due to the mortgagee himself, on the decree demanding an assignment. The mortgagee refused to accept the tender and deliver an assignment, but offered to accept the amount due in satisfaction of the decree. The court below held that the tender was good, and decreed redemption on paying the amount due, without interest, and with an assignment, basing its decree on a general and absolute right of the second mortgagee to redeem. The Court of Appeal, holding the tender accompanied by a demand filing of the bill, it could not be claimed that, of assignment not good, directed a redemp-



principal, interest, and costs, basing the right of redemption solely on the special equities of the case, and directed that on the payment the second mortgages should be subrogated. In neither court was the question considered whether, after a decree for sale providing that a defendant's equity of redemption should be foreclosed by sale, there was, pending the sale, any right of redemption by application in the foreclosure suit itself. In several cases I have had occasion to consider specially this status as to redemption pending sale, under a decree of this character, and I am not able to reach a conclusion denying such right to any defendant as to whom provisions for foreclosing his right of redemption are expressly made by the final decree. And under section 80 of the chancery act (Rev. 1902 [P. L. p. 521]) this application to be made a party in the suit itself. if the right exists, can be made by a purchaser after decree.

The above decree, for sale to pay complainant's debt only, contained, it will be observed, a decree also foreclosing all rights of defendants, "when sold as directed by the decree." This decree for sale, made under section 53 of the chancery act, is in lieu of the decree of strict foreclosure. Such decree fixed a time beyond which the right of redemption ceased; and the fixing of such time was a necessary incident to making the equitable right to redeem available. Pending this time, the right of redemption existed, and the court, in a strict foreclosure suit, often enlarged it beyond the time fixed. Dan. Ch. Pr. *999 (6th Am. Ed.). And the right of redemption not being by the terms of the final decree cut off until sale, it must, I think, continue to exist until that time.

In Campbell v. Macomb, 4 John. Ch. (N. Y.) 534 (Ch. Kent, 1820), this right of redemption, by paying off the decree, was given to the purchaser of the equity of redemption, and for the reason (page 536) that the whole inducement to the sale is to obtain satisfaction of the sum actually due. Under the English practice the decree for sale in foreclosure contains the express provision that, "after default in payment," the sale be made. 2 Dan. Ch. Pr. *1266. In Howard Savings Institution v. Essex B. & L. Assoc., 46 Atl. 223 (N. J. Ch. 1900), I held that, if the owner of the equity by purchase after decree, and with complainant's consent, paid the amount of the decree to the sheriff, in satisfaction of the decree, he was entitled to a delivery by the complainant of the mortgage canceled, or for the purpose of cancellation, and might enforce delivery by petition in the suit.

The decree itself does not operate as a plainant is proceeding to sale under his exmerger of the debt, or of the estate of the mortgagee (Deshler v. Holmes [Err. & App. 1888] 44 N. J. Eq. 585, 18 Atl. 75), but it does finally, as between the parties and those claiming under them, the time and method of foreclosing the right of redemption; and,

tion, without assignment, and on payment of principal, interest, and costs, basing the right of redemption solely on the special equities of the case, and directed that on the payment the second mortgages should be subrogated. In neither court was the question considered whether, after a decree for sale providing that a defendant's equity of redemption should be foreclosed by sale, there was, pending the sale, any right of redemption to a polication in the foreclosure suit it-

Before any decree for sale taken by the first mortgagee, or at least before the filing of his bill to foreclose, the rule settled by the Court of Errors and Appeals (Cassidy v. Bigelow), as generally applicable, would apply, viz., that against the first mortgagee's consent, the subsequent incumbrancer, in order to redeem, must show special equities. A first mortgagee, who has not by his own judicial proceedings called upon the subsequent incumbrancers to pay his mortgage, or directly affected or impaired the right of the subsequent incumbrancer to realize on his security, is in a position to claim the protection of this general rule against redemption, so long as he desires the security to remain. But by filing a bill which in terms asks a decree or payment and foreclosure on default, followed by taking a decree for sale to pay his mortgage, and expressly foreclosing the equity of redemption of subsequent incumbrancers on such sale, he calls on the subsequent incumbrancers and the owner for payment. By his own act he has affected their securities, and any suit to enforce them would be subject to a saie under his execution at any time. It seems to me, therefore, that, having elected to take decree of foreclosure against subsequent incumbrancers, and to have a sale foreclosing their equities of redemption, the first mortgagee, who is proceeding to a sale under his execution, must, pending the sale, proceed subject to the right of redemption. This right of redemption is the fundamental equitable right, the existence of which is the sole basis of the entire proceeding in equity, and it must exist, I think, until by express decree it is foreclosed. Such foreclosure is never decreed in equity without an opportunity for redemption, and the question, therefore, is whether a decree for sale to pay a prior incumbrance, and foreclosing subsequent incumbrancers on sale, does not of itself, in the absence of express provision to the contrary in the decree, create a special equity, which leaves to the defendants thus to be foreclosed the absolute right of redemption pending the sale. I think this is the effect to be given to the decree, at least if the complainant is proceeding to sale under his ex-The manner of this redemption ecution. pending sale, and the persons entitled to it, are matters which should be settled by application, in the suit itself, for the purpose of controlling the execution for sale. And as

tion may exist between different defendants, notice of the application should perhaps regularly be given to the defendants who might be affected, as well as to the complainant. Regularly the control of the execution, so as to authorize the sheriff to execute or return the writ, otherwise than by the sale expressive for sale in foreclosure differs from a judgment at law, which merges the original debt, and where the sheriff, without further direction, sentitled to receive payment in satisfaction of a fieri facias without sale. 1 Arch. Pr. *269.

In the present case Mr. Neighbor claims the right to make payment to the sheriff, as second mortgagee, and to have the delivery of the bond and mortgage uncanceled, leaving to him the benefit of the mortgage and decree; and the tender to complainant before suit, made on behalf of the owner, was accompanied by the demand of an assignment, and the offer to pay the sheriff the amount of the decree, made on behalf of this owner. was not made in satisfaction of the decree and mortgage. These questions, as well as the rights to redeem, as between defendants, must be settled by the court, and upon notice, if necessary, by an application in the suit to control the execution for this purpose. And in the absence of any express provision in the decree itself as to redemption after decree, the express direction for sale only, to pay the debt, must, if complainant so insists, be so controlled or modified upon application for further directions in the suit or to control the execution, and cannot be effected by a mere payment to the sheriff, nor should his rights given by the decree be varied, without his consent, unless by a subsequent order of the court.

The defendant Neighbor, as second mortgagee, will be entitled to redeem upon payment to complainant of the amount of the decree, with interest and sheriff's costs, and also the amount actually paid by Wiebke for insurance on the premises since purchasing the decree. As the original mortgage covered such insurance which had expired, the purchaser had the right to protect his interest by insurance after the decree, and by supplemental bill, or otherwise, if necessary, to have this amount added to the decree. Wiebke is not, however, entitled, as against subsequent incumbrancers without notice, to add to the decree the amount previously deducted, as being payments made by the owner. By operation of law such payments inure to the benefit of the subsequent incumbrancer. Traphagen v. Lyons, 38 N. J. Eq. 613, and cases cited on page 615, etc. (Err. & App. 1884). This payment of the amount due on the decree, with interest and insurance. together with the sheriff's costs for which

to be fixed, and on such payments the incumbrancer redeeming (Mr. Neighbor) is entitled to a delivery of the bond and mortgage uncanceled. His right to such redemption and delivery cannot be prejudiced by a supplemental bill, based on the right to add to the decree. Under strict practice a supplemental bill to add to the terms of the decree cannot be filed without notice, at least to parties adversely affected (2 Dan. Ch. Pr. *1523, etc.); and, on such application, had it been made, the right of Neighbor to redeem would have been protected. As to Neighbor. therefore, upon his paying the amount due on the decree, the bill filed by Wiebke to have the amount of the decree increased will be dismissed as against him, but without prejudice to filing a bill against him to redeem his mortgages, as well as the amount paid complainant, in case Wiebke on his suit obtains a final decree establishing his additional claim as a lien on the lands. On settling the order I will hear counsel as to any further directions. Order will be settled on Monday, May 10th, at 2:30 p. m., at chancery chambers, Newark. Costs will not be allowed to either party-not to the complainant Wiebke, because the substantial and only dispute between himself and Mr. Neighbor, at the time of the disputed tender, was the right to add the additional amount to the decree, which dispute has been decided against complainant on the basis of decisions previously made, and covering the point involved -nor will costs be allowed to the defendants applying to redeem, because an assignment was demanded or requested at the time of tender, and because the offer to pay the sheriff was not an offer of payment in satisfaction of the decree, and the present application is for a payment, with claim for a delivery of the bond and mortgage uncanceled. Such payment complainant, after his decree for sale, was not bound to consent to; nor was the sheriff authorized to accept it unless ordered by the court.

(75 N. J. E. 371)

TAYLOR v. PUBLIC SERVICE CORPORA-TION OF NEW JERSEY et al.

(Court of Chancery of New Jersey. April 28, 1909.)

1. ELECTRICITY (§ 6*) — USE OF STREETS — RIGHTS OF LANDOWNER.

Under Act May 22. 1894 (P. L. p. 477), authorizing cities to erect poles in the streets for public lighting without the consent of abutting landowners or previous designation of the streets, a landowner cannot restrain the placing of poles and wires in front of his premises for transmission of electricity for public lighting.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 6.*]

2. ELECTRICITY (§ 6*) — USE OF STREETS — RIGHTS OF LANDOWNER.

complainant is liable, must be made to the of poles and wires in front of his premises for

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

119

transmission of electricity for private lighting, where the previous designation of the streets by the city has not been made, and the consent of the abutting landowner has not been obtained, as required by Act May 10, 1884 (P. L. p. 331), Acts 1893 (P. L. p. 412), and Acts 1896 (P. L. p. 322).

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 6.*]

3. ELECTRICITY (§ 6*) — STATUTORY PROVISIONS — CURATIVE STATUTES — CONSTRUCTION.

Act May 18, 1898 (P. L. p. 458), curing defects in proceedings by municipalities purporting to authorize electric lighting companies to construct and maintain lines for furnishing light, was intended to cure irregularities and invalidities of municipal action, and did not affect the right of a landowner, whose consent was not obtained to the construction of a line in front of his premises as required by law, to maintain an action to restrain the maintenance of such line.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 6.*]

4. ELECTRICITY (§ 6*) — RESTRAINING MISUSE OF ELECTRIC LINES—JURISDICTION.

OF ELECTRIC LINES—JURISDICTION.
Equity has jurisdiction to restrain an electric lighting company from misusing the wires on poles in front of complainant's premises by the transmission of an unauthorized and excessive voltage.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 6.*]

Bill by Alexander M. Taylor against the Public Service Corporation of New Jersey and the Paterson & Passaic Gas & Electric Company for injunction. Heard on pleadings and proofs in open court. Decree for complainant.

This is a bill filed by the complainant, who is the owner of real estate in the city of Passaic to restrain the defendants from stringing and using certain wires, to convey electricity, on poles in front of the complainant's property.

The issues and facts will be fully stated hereafter.

Geo. P. Rust and Arthur S. Corbin, for complainant. L. D. H. Gilmour, for defendants.

GARRISON, V. C. The complainant is the owner of a tract of land fronting for about 240 feet on Central avenue in the city of Passaic, having acquired title thereto in April of 1899. Upon his land is erected a row of three-story brick stores and dwellings, the dwelling portions of which are occupied by some 30 families.

The Public Service Corporation is the lessee of the Paterson & Passaic Gas & Electric Company, which was formed by the consolidation of the Passaic Lighting Company and several other companies. The Passaic Lighting Company, in turn, was formed by the consolidation of the Passaic Gaslight Company and the Passaic Electric Light, Heat & Power Company. This last-named corporation on the 7th of November, 1887, addressed

to the common council of the city of Passaic a petition as follows:

"Passaic, N. J. November 7th, 1887.

"To the Honorable The Common Council, of the City of Passaic, N. J.—Gentlemen: The undersigned, representing the Passaic Electric Light, Heat & Power Company, respectfully inform your honorable body that the said company is prepared to establish in this city a plant for the purpose of furnishing light, heat and power for commercial, domestic and municipal purposes in the most economical and best approved methods. The said company respectfully request from your honorable body the privilege of placing their lines through, over or under the streets, alleys and highways of the city of Passaic. All poles will be set subject to the approval of the street committee or street superintendent, and also subject to the consent of property holders in the vicinity of whose property the poles are to be placed. Said poles will be painted slate color, or any other desired tint.

"Soliciting a favorable consideration, your petitioners will ever pray.

"C. A. Stelling, General Manager of the P. E. L., H. & P. Co."

On the 5th of December, 1887, this petition was returned to the petitioner because the company had not been incorporated. It was incorporated on the 18th of January, 1888, under the general corporation act. On January 6, 1888 (no explanation being made concerning these dates), the above petition was returned to council by Stelling, general manager, who informed the city council that the company was now incorporated. This petition was on that day, January 6, 1888, received and referred to the street committee, who later submitted a report, the material parts of which are as follows:

"Your committee on streets recommend that the petition of the Passaic Electric Light, Heat & Power Company be granted, provided further, that they will do and perform all things required of them in the erection, construction and maintaining of their said plant that may be required by the city of Passaic, or any privilege that said city may demand in regard to the use of their poles by said city under a forfeiture of said privilege."

This report was, on the same day, acted upon, and the recommendations therein contained adopted.

Since whatever rights the defendants have arise out of these proceedings, and it is immaterial in which company they are vested (since no point is made respecting that), I shall hereafter refer to the owner of the right, or the claimant of the right, as the defendant.

pany and the Passaic Electric Light, Heat & In 1895 the defendant entered into an Power Company. This last-named corporation, on the 7th of November, 1887, addressed electric lights, arc and incandescent, for

lighting the streets of the said city for a term of five years.

In 1897 the defendant erected, in front of the premises described in the bill of complaint, three poles, 30 feet high and 40 inches in circumference, one at the corner of Jackson street and Central avenue, one at the corner of Van Buren street and Central avenue, and a third about halfway between said streets, and on these poles strung wires for the purpose of supplying electricity for the street lights, and also for lights in private houses.

At this time the property in question was not owned by the complainant, but by his predecessor in title.

These said poles have lately been removed, and the wires formerly thereon placed upon an additional cross-arm, on the larger poles which have been erected in their places. These last-named poles have been put approximately in the places of the old poles, and are 53 feet high and 60 inches in circumference.

In addition to the wires which had been carried on the old poles it is the intention of the defendants to place upon these poles wires for the transmission of alternating current electric power of a voltage of over 6,500 volts.

This power is to be manufactured in the city of Paterson, and transmitted therefrom to the company's power house in the city of Passaic, through Central avenue, past the property of the complainant before mentioned. Said electric current is then to be distributed from said power house throughout the city of Passaic, and the various surrounding communities, for public and private consumption.

The defendants have not any grant or consent from the complainant for the erection of any poles in front of his premises. No grant or consent in writing by any predecessor in title of these premises is produced or proven by the defendants.

The wires in use in front of the complainant's property carry a current of about 1,200 volts, which is the amount needed by the company to supply their customers, municipal and individual.

The complainant contends that the carrying of 6,600 volts by the high-tension system sought to be placed upon these poles will create a dangerous situation, and much proof was offered upon this point. Since I do not put my decision upon any question of the existence of a nuisance, or of a servitude imposed in addition to what the owner consented should be imposed, I do not find it necessary to pass upon the weight of the evidence or the issues presented thereby.

The complainant's position, further, is that, the defendants not having secured from the owner of the property at the time of the erection of the poles, or at any time thereafter, any consent in writing (or otherwise, so far as appears) to the erection and maintenance of these poles, they may be only erected and

maintained for the purpose of carrying out the contract to light the streets, that the defendants are acting without warrant in using these poles to carry wires to supply private customers, and that there is no warrant or right for the placing upon these poles of the wires of the high tension system to carry the 6,600 volts from Paterson to Passaic, and thence to the outlying communities.

The complainant, however, does not insist upon exercising his right to prevent the use of these poles or wires for private lighting; i. e., wires such as were used before the projection of the high-tension system, and which carried about 1,200 volts. He does, however, insist upon his right that these poles shall not be used for the high-tension system.

At the time of the erection of these poles in 1897 the law was as follows: Public lighting was regulated by the act of May 22, 1894 (P. L. p. 477), and a municipality might, under that act, without the consent of the abutting landowners, or previous designation of streets, use the streets and erect poles, or cause poles to be erected, for public lighting. Acts May 10, 1884 (P. L. p. 331), 1893 (P. L. p. 412), and 1896 (P. L. p. 322), applied to private lighting companies which desired to use streets for private lighting, and required the consent of the abutting landowners, and the designation of streets by the city, before poles could be erected. Meyers v. Electric Company, 63 N. J. Law, 573, 44 Atl. 713 (Ct. of Er. 1899).

If, therefore, the defendants, by virtue of their contract and the proceedings of the municipality, had a right, as against the municipality, to erect these poles for the purposes of public lighting, the complainant, or any landowner similarly situated, could not prevent the placing of the poles, or their being used, for the purposes of public lighting. But if the company was in this position, and used the poles for stringing wires for private lighting, the landowner, with respect to whose land no consent in writing had been given, had the right, by ejectment or by report to equity, to restrain such mis-French v. Robb, 67 N. J. Law, 260, 51 use. Atl. 509, 57 L. R. A. 956, 91 Am. St. Rep. 433 (Ct. of Er. 1901); Andreas v. Gas & Electric Co. of Bergen County, 61 N. J. Eq. 69, 47 Atl. 555 (Pitney, V. C., 1900).

I do not understand that the defendants seriously, if at all, deny the application and effect of the above authorities; and, in passing, it should be pointed out, I think, that the defendants are peculiarly situated in this case because of the form of their alleged municipal consent. It will be observed that in the petition presented by the company it is recited that "all poles will be set subject to the approval of the street committee or street superintendent, and also subject to the consent of property holders in the vicinity of whose property the poles are to be placed." The testimony is silent as to the method of the adoption by the council of the consent.

The recommendation of the committee, pro- of municipal action, and had no reference to. viding that the petition should be granted upon certain conditions, is merely recited to have been "received and adopted." It may well be, therefore, that this company, by the municipal procedure in question, has only acquired the right, even as against the municipality, to set poles solely at places where they have obtained the consent of the abutting property owners, in accordance with their own expressed intention. However this may be, it is entirely clear that in 1897, when these poles were erected, there was not the slightest right, as against the land described in the bill, to use the poles erected in front thereof to carry wires for private light-

The defendant, however, contends that this situation is cured, and the maintenance of the poles, as against the complainant, legalized by the act approved May 18, 1898 (P. L. p. 458), the material parts of which are as follows: "All proceedings heretofore had or taken by the several municipalities of this state, purporting to authorize the construction of pole lines, to be used by electric light companies for the purposes of their business and under which pole lines have been constructed, and all contracts entered into by the several municipalities with electric light companies in the carrying out of which pole lines have been erected by such companies, shall be taken to be legal and binding, and to have authorized the erection of such pole lines and to authorize their maintenance for public and commercial use; and the electric light companies which shall have so constructed pole lines, and placed thereon wires for the purpose of furnishing electric light in the streets of any municipality, shall be deemed to have and possess in such streets all legal authority necessary to be secured from such municipality in order in such streets to lawfully construct, reconstruct and maintain such pole lines and wires with proper appliances for the supplying of light for public or commercial use.

The act of 1894 (P. L. p. 477) provided that the governing body might by ordinance or resolution provide for the lighting of streets, and, as we have seen, it was under this act that the company's right to maintain poles in the streets without the consent of the abutting landowners was vindicated. Meyers v. Electric Co., supra; French v. Robb, supra.

It does not appear, as I have just pointed out, in the case at bar that the municipal proceeding was either by ordinance or resolution-apparently it was by motion only that the alleged consent of the muncipality was given. In this very case, therefore, there was a condition which probably existed in many other instances in which proper proceedings to grant "the legal authority necessary to be secured from the municipality" had not been had.

ed to cure such irregularities or invalidities effect of the act of 1898, above stated, was

and did not affect, those cases in which the consent of abutting property owners was required. It seems to me that, if it had been the intention to deal with the rights of private individuals, rather than the rights of the public represented by the municipality, there would have been some reference at least to such private rights. I do not see why there would not have been a direct reference, and direct legislation with respect thereto. If the act had intended to legalize, as against abutting property owners, poles to be used for private lighting, and which had been erected on their property without their consent, it would have said so. It does nothing of the sort. It legalizes poles erected under contracts with municipalities, and by reason of proceedings in municipalities in so far as the legality of such municipal proceedings is concerned. It, therefore, serves to save to this defendant the right, as against the city of Passaic, to maintain these poles in the streets for public lighting, notwithstanding the irregularity or invalidity of the action of the city in not acting by ordinance or resolution. It does not, in my view, affect at all the rights of a nonassenting abutting property owner with respect to the poles placed opposite his property, and leaves him, as he was before, entitled to object to their use for any purpose other than public lighting.

It is argued by the complainant that, even if the act of 1898 had attempted to deprive the abutting property owner of his right in cases where he had not consented to the use, such attempt would be futile, because unconstitutional, and authorities are cited for this position, among them Andreas v. Gas & Elec. Co. of Bergen County, supra. To this the response of the defendant is that the dedication of the street to public purposes deprives the landowner of the right to object to erections placed therein by municipal consent. provided such erections are used for public purposes, and are proper for such use in streets.

I do not pass upon this question because of my finding, above stated, that the act of 1898 was not intended, and does not properly express any intention, to legislate at all with respect to the rights of private landowners, but merely seeks to make effective, as against the municipality, or any one objecting on behalf of irregular proceedings of the municipality, whatever was done to vest the legal rights necessary to be secured from the municipality to maintain poles then erected. If this were not so, the unanimous decision of the Court of Errors and Appeals in the case of French v. Robb, supra, would not have been what it was. In that case the municipal proceedings were taken on the 30th of November, 1897, and the pole was renewed in 1899, so that it undoubtedly was originally In my view the act in question was intend-erected before the act of 1898; and, if the to legalize the poles erected theretofore, as | 4. Electricity (§ 4°)-Electric Companies against a nonassenting abutting landowner, the plaintiff in that case would not have succeeded in his ejectment against the right of the company to use the pole for private lighting, as the Court of Errors and Appeals decided that he should succeed.

While the court does not refer to the act of 1898, it is quite obvious that, if it had considered that act as applicable, it would have referred to it. By silence it is decided that the act of 1898 did not legalize the erection of the pole, as against the private landowner, excepting for municipal purposes, and that as to its use for private lighting, he had the right to bring ejectment, and to restrain such misuse by action in equity.

The defendants in this suit did not by demurrer raise any question of the propriety of equity taking jurisdiction; and, besides the direct statement of the Court of Appeals in French v. Robb, supra, it seems clear, on reason and authority, that this court has jurisdiction to restrain the misuse of the pole by the defendants. French v. Robb, supra; Andreas v. Gas & Elec. Co. of Bergen County, supra.

The injunction will therefore go to prevent such misuse, and will prevent the using of any wires on the poles in front of the complainant's property for the high-tension system projected by the defendants.

(75 N. J. El. 379) CITY OF PASSAIC v. PUBLIC SERVICE CORPORATION OF NEW JERSEY et al.

(Court of Chancery of New Jersey. April 26, 1909.)

1. ELECTRICITY (§ 4*) — STA SIONS—CURATIVE STATUTES. 4*) - STATUTORY PROVI-

Act May 18, 1898 (P. L. p. 458), curing defects and irregularities in proceedings by municipalities to authorize electric lighting companies to construct and maintain in its streets lines for furnishing light, rendered valid a previous grant of such authority by a city, in form of a motion, instead of by ordinance or resolu-

[Ed. Note.-For other cases, see Electricity, Dec. Dig. 4 4.*]

2. ELECTRICITY (§ 4°) — FRANCHISE—FORFEI-TURE—CONDITIONS PRECEDENT.

city is not entitled to restrain an electric lighting company from maintaining and using its line of poles and wires on the ground of a forfeiture of its privilege, without first giving the company notice of a claim of such forfeiture, and an opportunity to be heard.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 4.*]

8. ELECTRICITY (\$ 4*) - REGULATION AS TO ELECTRIC COMPANIES.

If a city has power, by regulation, to pro-hibit electric light wires carrying more current than a stated amount, and to prohibit the erection of poles over a certain size such right can be exercised only by general ordinance.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 4.*]

ABUSE OF CORPORATE POWERS — WHO MAY SUE.

The right of action, if any, against an electric lighting company for abuse of its charter powers in transmitting electricity from the city, where its plant and franchise is situated, to outlying communities is in the state, and not the city.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 4.*]

Bill for injunction by the city of Passaic against the Public Service Corporation of New Jersey and the Paterson & Passaic Gas & Electric Company. Heard on pleadings and proofs in open court. Decree for defendants.

Geo. P. Rust, for complainant. L. D. H. Gilmour, for defendants.

GARRISON, V. C. This case was, by consent, tried and submitted with the case decided above.

The bill charges that the defendants have lately erected, on the easterly side of Central avenue, the large poles mentioned in the preceding opinion, which poles are unsightly and dangerous; that the purpose of the poles is to carry wires, upon which an electric current is to be transmitted, from the city of Paterson to the city of Passaic, and thence through Central avenue to Monroe street, to Hamilton avenue, and thence to the power house of the defendants, located at the intersection of Passaic street and Columbia street in the city of Passaic; that the said current is to have a voltage of 6,500 volts; that on all of the said streets just named the defendants have erected, or contemplate erecting, similar poles, for the purpose of distributing therefrom electricity to the citizens and residents of the city of Passaic and of the various surrounding communities; that no authority or permission has been given to the defendants by the city for the erection of said large poles, and the stringing thereon of said electric wires for the transmission of the aforesaid high voltage current; and that the acts of the defendants in this respect are without grant or consent, and are entirely illegal: that for the purpose of supplying electricity for the public and private lighting of the city of Passaic a current not exceeding 1,200 volts is all that is required; and that the carrying of upwards of 6,500 volts is unnecessary and extremely dangerous to life and property.

The prayer is that the defendants may be restrained from further proceeding with the construction of said poles and wires for the transmission of the high-tension system, and from the use of said poles for any purpose, and that the court will compel the wires which have already been strung as aforesaid, and the large poles which have already been erected as aforesaid, to be taken down and removed.

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

filed a demurrer and answer.

They demur upon the ground that there is no equity in the bill, that the complainant has an adequate remedy at law, and that it appears by the bill that the court of equity has no jurisdiction over the alleged cause of

They answer by admitting the facts as set up in the bill, and claim that by the action of the municipal authorities on the 6th of January, 1888, which is set out in full in the opinion in the case of Taylor against the same defendants (73 Atl. 118), they obtained full power and authority to do that which they are doing.

No evidence was introduced as to conditions at any other place than on Central avenue in front of the premises of Taylor, as set forth in the opinion in Taylor's Case, and what I have to say is entirely confined to what was proven with respect to that portion of the street, or streets.

I do not know whether I correctly apprehend the exact attitude which the city takes in this matter, as little attention was paid, in the argument or in the briefs, to the city's case; the entire stress being placed upon the rights of Taylor. It would seem to me, however, that the utmost claims which the city could put forth would be either (a) that the defendants have no right, because of the lack of valid municipal action, to place any poles in the streets at the place in question; or (b) that there was a condition, contained in the privilege granted the defendant companies by the city, that the said companies must "do and perform all things required of them in the erection, construction and maintaining of their said plant that may be required by the city of Passaic * * * under a forfeiture of said privileges," and that this work is either "erecting, constructing or maintaining the plant," and may by the city be required to be done differently under penalty of forfeiture; or (c) that the city, in the exercise of the police power, and the power to regulate the use of its streets, may prevent wires carrying electricity of a nigher voltage than a fixed amount, beyond which no user of the streets for such purposes may go; or (d) finally, that the maintenance of these poles and wires is a nuisance.

I will take these up in their order, and suggest briefly the law relating thereto. It seems perfectly clear that, if this work is mere replacement of poles legally erected under valid authority, no attack can be made, excepting such as would have applied to the poles originally placed.

(a) As has been indicated in the opinion in the Taylor Case, the proofs do not show a granting, by ordinance or resolution, of the have before stated, I hold that the act of municipal body of the rights claimed by the 1898 legalizes their existence as against the defendants. full in the above case, and it would appear mere size of the poles constitutes a nuisance. therefrom that the privilege, as it was called, As to the high-tension system, the proofs do

By permission of the court the defendants was granted upon motion. I incline to the opinion that the act of May 18, 1898 (P. L. p. 458), was intended to meet just such cases, and to legalize, as against the municipality, the poles then erected, under what otherwise would be invalid municipal action. Therefore the first ground of complaint is without merit, because of the curative legislation just referred to. As will be seen by reference to the opinion in the Taylor Case, these poles were originally erected in 1897, and therefore come within the language of the act of 1898.

(b) The second suggested ground is that, by reason of the condition contained in the grant of the privilege, the municipality may require the company to erect, construct, and maintain its plant in a certain way, upon pain of forfeiture. Granting that this is so, it would appear that this bill is premature, because, before the city could act upon the situation as if the privilege were forfeited, it must first take proper procedure to forfeit it. If the claim of the city is that the defendants have done that which causes a forfetture of their privilege, either by erecting poles of an undue size, or projecting the use of a current of an undue amount, or otherwise constructing or maintaining their plant in a manner violative of the privilege, they must give the defendants notice and an opportunity to be heard, and take action, quasi judicial in character, declaring the forfeiture. Nothing of this sort has been done; and, in default of it, I do not think the city has any right to invoke the aid of the court to take its place in determining whether a breach has taken place which should result in forfeiture, and thereupon to declare a forfeiture, and deal with the defendants as if they were without the protection of the municipal consent or privilege aforesaid.

(c) The third suggested ground of complaint is that the city has the right and power to regulate the use of the streets, and the maintenance therein of wires carrying electric current, and, in the course of such regulation, might prohibit wires carrying more current than an ascertained and stated amount, or prohibit the erection of poles over a certain size. I do not decide, because I do not have to, whether the city has this power; but, assuming that it has, I am quite clear that it must exercise it by some general ordinance defining the offense or regulating the matter. Until this is done I do not think the city has any right to proceed in individual cases, because, until there is a law, there is no offense.

(d) As to the last suggested ground, I am not prepared, upon the pleadings and proofs in this case, to hold that these poles and wires constitute a nuisance which should be restrained in equity. As to the poles, as I The procedure is set forth in municipality; and I do not find that the not make it at all clear that there is any no liability upon the prosecutor for payment such danger therefrom as to constitute its of plaintiff's wages; that about August 18th presence in the street a common nuisance.

Finally, if it be contended, as there is some suggestion, that because it is intended to carry this power from Paterson to Passaic, and thence to outlying communities, there is some abuse of the charter powers of the company, this, of course, can only be taken advantage of by the state, and not by the complainant herein. There is, of course, a remedy at law in the complainant, if his case were well founded; but I am not inclined to refuse relief here because thereof, as it may well be that such remedy would not be adequate, if the complainant were entitled, with respect to the wires to carry the high-tension system, to relief at this time.

The result is that the bill in this case must be dismissed, and I will so advise.

(75 N. J. L. 785)

CURRY v. CONGRESS HALL HOTEL CO. (Court of Errors and Appeals of New Jersey. Nov. 18, 1907.)

1. Corporations (§ 432*)—Authority of Sec-BETARY—EVIDENCE.

Where, in an action against a hotel company for services rendered the lessee of the hotel, recovery was sought on the ground that the secretary of the company had agreed with the lessee that the company would pay the servants, and the evidence of the authority of the secretary to bind the company was meager, unpaid orders, signed by the lessee, addressed to the cashier of the company, and calling for payment to other servants, were irrelevant.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 432.*]

2. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERBOR—ADMISSION OF EVIDENCE.
The error in admitting the orders in evidence was prejudicial as inducing the jury to believe that the secretary possessed the necessary authority.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050,*]

Error to Supreme Court.

Action by Alfred Curry against the Congress Hall Hotel Company. There was a judgment of the Supreme Court reversing on certiorari a judgment for plaintiff and ordering a new trial, and plaintiff brings error. Affirmed.

The following is the per curiam opinion in the Supreme Court:

"The writ brings under review a judgment of the common pleas entered upon the verdict of a jury in favor of the plaintiff, on an appeal from a small cause court. Plaintiff's case was: That in the summer of 1897 he took employment as a servant in the Congress Hall Hotel, being employed by one Edward K. Cake, who was conducting the hotel under some form of lease or contract with the hotel company that confessedly imposed

Cake became financially embarrassed, and a Mr. Moore, the secretary of the Congress Hall Hotel Company, and who transacted the season's business with Cake for the company, came to the hotel and agreed with Cake that the company would pay the servants all that was due them at the time, and all that might become due in the future, if they would continue at work; that upon the strength of this agreement Cake turned the hotel over to the company, and the company ran it for two or three weeks thereafter, and until it was closed for the season; that as a part of the arrangement between Cake and Moore the latter instructed Cake to give to each of the servants a due bill for the amount that was due to them, saying that they could present these for payment at the Girard House in Philadelphia; that up to the 30th of August there were \$39.32 due to the plaintiff, Curry, for wages (whether for services rendered before or after August 13th, or for services rendered partly before and partly after that date, does not appear).

"We find error in the admission, over objection, of two written orders signed by Oake and addressed to the cashier of defendant company, calling for payment of certain sums to employes other than the plaintiff. Timely objection was made on the ground that these papers were immaterial and irrelevant. We think the point was well taken. There was no suggestion that the orders had been at any time recognized by the company. On the contrary, with respect to one of them, plaintiff had already proved that it had been presented for payment to the cashier of Congress Hall, who, upon plaintiff's theory, was at the time representing defendant, and that payment had been refused. The evidence thus admitted was not only irrelevant and immaterial, but, in the peculiar state of the proofs, was, we think, clearly prejudicial to the defendant. The evidence tending to show Moore's authority to represent the defendant in assuming payment of the wages due from Cake to his employes was slender at best. The documentary evidence referred to was calculated to show that Cake relied and acted upon Moore's authority, and thereby to persuade the jury that he possessed it.

"The judgment will be reversed, and a new trial awarded; costs to abide the event of the suit."

Matthew Jefferson and John W. Wescott, for plaintiff in error. Carrow & Kraft, for defendant in error.

PER CURIAM. The judgment of the Supreme Court brought up by this writ of error is affirmed, for the reasons given in the per curiam opinion in the Supreme Court in the cause.

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(78 N. J. L. 184)

FISHBLATT V. ATLANTIC CITY.

(Supreme Court of New Jersey. June 7, 1909.)

1. CERTIORARI (\$ 62*)-HEARING-TIME FOR. L. CERTIORABI (§ 62*)—HEARING—TIME FOR.
Under section 5 of the certiorari act (Act
April 8, 1903 [P. L. p. 344]), after the plaintiff's reasons for reversal are filed, either party
may bring the action on for argument before
any justice of the Supreme Court at chambers
by giving 5 days' notice within 15 days after
the resone ere filed. the reasons are filed.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 171; Dec. Dig. § 62.*]

2. Statutes (§§ 97, 123*) — Constitutional Law (§§ 232, 289*)—General of Special Laws—Title of Act—Due Process of Law

-EOUAL PROTECTION OF THE LAWS.
The act approved April 26, 1894 (P. L. p. 146), conferring powers upon cities located on or near the ocean to lay out public parks, is constitutional.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. §§ 97, 123;* Constitutional Law, Dec. Dig. §§ 232, 289.*]

3. MUNICIPAL CORPORATIONS (§ 911*)—PUBLIC PARKS—AUTHORITY TO ISSUE BONDS.

Under the act approved April 3, 1902 (P. L. p. 284), which was adopted by Atlantic City as its charter, that city has power by ordinance to issue its corporate bonds in amounts not exceeding the limit prescribed in the act for the purpose of providing moneys with which to lay out and open, and to purchase and condemn land for and within the limits of a public park along the ocean front established by ordinance along the ocean front established by ordinance pursuant to the authority conferred by the act approved April 26, 1894 (P. L. p. 146).

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 911.*]

4. MUNICIPAL CORPORATIONS (§ 917*)—ISSUE OF BONDS—OBDINANCES—DEFINITENESS.

OF BONDS—ORDINANCES—DESIRALED OF bonds
In an ordinance the authorization of bonds not to exceed a certain amount is equivalent, in legal effect, to fixing the amount of such bonds at such sum.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 917.*]

(Syllabus by the Court.)

Certiorari by Isabella F. Fishblatt to review an ordinance of Atlantic City. Ordinance sustained.

Argued February term, 1909, before TREN-CHARD, J.

Thompson & Cole, for prosecutrix. Harry Wootton, Godfrey & Godfrey, and Gilbert Collins, for respondent.

TRENCHARD, J. This writ of certiorari brings up for review an ordinance of Atlantic City. The argument thereof is brought on by the respondent before me at chambers. The prosecutrix objects that the statutory conditions to an argument at chambers before a single justice of the Supreme Court, have not been complied with. I think they have. Five days' notice was given within 15 days after reasons were filed. By section 5 of the certiorari act (Act April 8, 1903, [P. L. p. 344]) such notice is sufficient. It is not necessary, as contended by the prosethan 15 days from the day reasons were filed. | 74 N. J. Law, 178, 181, 64 Atl. 1081.

The ordinance under review is for a bond issue of \$500,000 for public park purposes. Atlantic City was originally incorporated in 1854 (Act March 8, 1854 [P. L. p. 278]). Inspection of its charter shows that the city fronts upon the Atlantic Ocean, and, indeed, the court will take judicial notice of that fact. Nothing in that charter or any supplement thereto authorizes public parks. an act approved April 26, 1894 (P. L. p. 146), any city in this state located on or near the ocean, and embracing within its limits or jurisdiction any beach or ocean front, may open and lay out on and along such beach or ocean front a public park or place for public resort and recreation, and may acquire lands for such purpose by purchase and condemnation. No provision for payment for the lands was made, and therefore each city would have to resort to its charter powers.

First. It is contended by the prosecutrix that the act of 1894 is unconstitutional. The grounds given for its invalidity are that it is a special law regulating the internal affairs of cities, contains more than one object, does not display its object in its title. deprives landowners of their property without due process of law, and denies them the equal protection of the laws. The act has been held constitutional by the Court of Errors and Appeals. Seaside Realty Co. v. Atlantic City, 74 N. J. Law, 178, 64 Atl. 1081, affirmed, on the opinion below (N. J.) 71 Atl. 912. True, the only point urged against the act in that case was its alleged obnoxiousness to the constitutional prohibition against special legislation. There is nothing, however, in the other points now made against the act. Its title clearly expresses its object, and that object is single. In giving effect to section 7, art. 4, Const., the courts give paramount consideration to the general object of the act-the general purpose of the legislative scheme. The general object of the act being ascertained, the Legislature may include in it provisions of a multiform character designed to carry into execution the legislative purpose, which are not inconsistent with or foreign to the general object of the act. Easton & Amboy R. R. Co. v. Central R. R. Co., 52 N. J. Law, 287, 19 Atl. 722. What counsel means by the suggestion that the act deprives landowners of their property without due process of law, or denies them equal protection of the laws, is difficult to surmise. Their property cannot be taken without compensation, and all property within the limits of the authorized park is put on an equal footing. Similar objections to the act of April 8, 1903 (P. L. p. 387), which affected the act of 1894 by permitting the city to acquire the state's land under water against any pre-emption of a riparian owner, were held untenable cutrix, that it be noticed for a day not later in Seaside Realty Company v. Atlantic City,

er in the city council of Atlantic City to enact the ordinance in question. If the original charter of Atlantic City were the only legislation to which resort could be had, this point would be well taken, and the general act of 1895, hereinafter mentioned, would be unavailable because of its limitation as to the amount of bonds authorized. The authority for the ordinance in question will be found in "An act relating to regulating and providing for the government of cities," approved April 3, 1902 (P. L. p. 284), which has been adopted by Atlantic City as its charter. Section 66 of that act provides that it shall be lawful for the city council whenever in their opinion the public good requires it by ordinance "(1) to lay out and open any * * * public park * * within such city, * * * and to purchase or condemn for any such purpose, when necessary, any lands and real estate upon making compensation to the owner or owners thereof as is hereinafter mentioned and provided, and such power shall belong exclusively to the city council. * * * " By section 105 it is provided as follows: "It shall be lawful for the city council, in the name of the city, under authority of this act, to issue its corporate bonds for any sum not exceeding fifteen per centum of the taxable value of the property rated for assessment; and such obligations shall be issued in the name of the city and under its corporate seal and shall be signed by the mayor and attested by the city clerk and countersigned by the city treasurer; they shall be of such denominations and bear interest at such rate, not exceeding five per centum per annum, and be payable at such times and places not exceeding thirty-five years from the date of issue as the city council may determine; they shall be disposed of at not less than their par value; the proceeds of such securities may be used for the purpose of making any of the improvements authorized by this act and for other lawful purposes; provided, that in every instance the issue of bonds shall be authorized by ordinance and the purpose for which the bonds are to be used shall be expressed therein, and the proceeds thereof shall be used for no other purpose. * * *" The ordinance under review ordains, in section 1, "that in pursuance of the power and authority conferred upon the city council of Atlantic City by an act of the Legislature of this state, entitled, 'An act relating to, regulating and providing for the government of cities,' approved April 3, 1902, and duly adopted by said city at an election held for that purpose on May 6, 1902, and under and pursuant to other statutes of said state in such cases made and provided, and for the purpose of providing moneys with which to lay out and open the public park mentioned in the ordinance referred to in the title of

Secondly. It is urged that there is no pow- | lands and real estate for such purpose within the limits of the public park or place for public resort or recreation along the beach or ocean front of Atlantic City, established pursuant to the ordinances referred to in the title of this ordinance, there be issued bonds to an amount not to exceed five hundred thousand dollars (\$500,000) of this city. The other provisions of the ordinance bring it fully within section 105, above cited, of the act of 1902. The previous ordinances referred to are one approved October 13, 1899, establishing a public park upon the ocean front, and upon its face based upon the act of 1894 above mentioned, and an amendment to said ordinance approved April 10, 1907, which amends the location of the park as originally established. It may well be that this later ordinance would suffice to bring the public park established within section 66 of the act of 1902, and, if necessary, resort might possibly be had to that section as its authority, but this is not necessary. The act of 1894, the ordinance of 1899 passed thereunder, with its amendment of 1907, are amply sufficient to invoke the power conferred by section 105 of the act of 1902 for the issue of bonds for the purpose declared in the ordinance under review. By stipulation it appears that the entire bond issue of Atlantic City is well within the limit of 15 per centum of the taxable value of the property in said city rated for assessment, and therefore the discretion of the city council to issue bonds is limited only by the restriction that the proceeds thereof are to be used for the purpose of making any improvement authorized by the act of 1902, or "for other lawful purposes." No other force can be given the language of the act of 1902 than that, whenever a city is authorized by any law to expend money, it may issue bonds wherewith to raise the money. But the prosecutrix points to the subsequent language of the proviso which is "whenever bonds are issued to provide the funds for any of the purposes authorized by this act," etc., and says that, in view thereof, "other lawful purposes" means only charter purposes. I think there is no merit in the contention. The pertinent language of the section is this: "The proceeds of sucn securities may be used for the purpose of making any of the improvements authorized by this act, and for other lawful purposes; * * * whenever bonds are issued to provide funds for any of the purposes authorized by this act, any part of the costs and expenses of which is authorized to be assessed upon the property benefited, the assessments for benefits in every such case shall be exclusively appropriated for the redemption of the bonds so issued, and shall be kept separate from the other funds of such city, and devoted exclusively to this use." So far from this language being a limitation of the bond issue to charter purposes, it seems to me that it this ordinance, and to purchase and condemn has directly an opposite effect if the words construed as referring to only charter purposes, for the condition as to assessments for benefits is imposed only on bonds issued for such purposes, and the plain inference is that bonds may be issued for other lawful purposes, and on those no condition is imposed. In my judgment, however, the construction contended for is not correct. I think the words "purposes authorized by this act" refer back to the words "purpose of making any of the improvements authorized by this act, and for other lawful purposes." Whenever bonds are issued for any lawful purpose in which an assessment for benefits is involved, then the condition of applying the assessment to the redemption of the bonds comes into effect.

I think, notwithstanding the suggestion of the prosecutrix to the contrary, that the establishment of a public park under the act of 1894 is a lawful purpose, and the authority to issue bonds therefor is complete. As above stated, in the absence of some enabling legislation, Atlantic City would have been compeiled to pay for a park established under the act of 1894 by taxation subject to the right (under section 8 of the act of 1894) to recoup special benefits by an assessment therefor. That right of recoupment, of course, still remains, but the cost in the first instance may be met by a bond issue. Before the adoption by Atlantic City of the act of 1902, there would have had to be resort to enabling legislation such as "An act to authorize cities in this state to issue bonds in certain cases," approved March 22, 1895 (P. L. p. 464), which authorizes a bond issue not exceeding \$100,000 in all cases where any city is or may be authorized to purchase or condemn lands for public purposes, and no adequate provision is made or authority given to provide for the payment therefor. The act of 1895 is not a supplement to the act of 1894; although it. is very likely that the later act was prompted by the incompleteness of the former one. If it were in fact a supplement, or if the act of 1894 itself limited the bond issue, there would be no restraint upon subsequent Legislatures increasing the amount of the lawful bond issue of any city availing itself of the act of 1894, there being no limit fixed on the cost of the park. It is further urged that no authority to issue bonds for the acquisition of a park under the act of 1894 can be conferred, unless extended to all cities that may have availed themselves, or may avail themselves of that statute. This contention is untenable. The act of 1894 does not attempt to deal with collateral powers of the various cities affected by it. Every city circumstanced within the purview of the statute may establish a park. All details, except as to the authorized assessment of special benefits, are left to the machinery of with costs.

"purposes authorized by this act" are to be the particular city. Action in some cities may be by resolution; in others must be by ordinance. In some cities a majority vote of the council may suffice for corporate action; in others a larger vote may be requisite. In some cities the mayor may have a veto power; in others not-and so on indefinitely. Similarly in some cities there may be power to issue bonds for public purchases: in others not. So as to the enlargement of powers of cities. If such enlargement be by general law, it will operate as to the parks established under the act of 1894, as well as on any other subject within its range. The act of 1902 is general, in that any city may adopt its provisions. It is no more reasonable to assail the power for a bond issue for purchases lawful to the city that adopts the act than to assail any of the manifold powers therein that are not given to cities at large.

> Again, it is argued that, in order to support the ordinance under review, the one hundred and fifth section of the act of 1902 must be given a retroactive effect which is not permissible. I think not. The city urges only a prospective application of the section. There might be some force in the argument if the bond issue ordained was to be in payment of lands purchased or condemned for the park before 1902, but none whatever where the bond issue is ordained "for the purpose of providing moneys with which to lay out and open the public park, and to purchase and condemn lands for such purpose within the limits of" the park established, pursuant to the ordinances referred to. It cannot be successfully argued that the machinery and powers of government of Atlantic City under the act of 1902 cannot be applied to an antecedent situation in that city. If the city having established a park under the act of 1894 shall now proceed to acquire and pay for it, it must do so under the act of 1902. The bond issue now ordained is in aid of such purpose and acquisition, and is undoubtedly a lawful purpose within the prospective purview of the act of 1902. Having found power to enact the ordinance in question in the Atlantic City charter, it has been unnecessary to consider whether like power is conferred by the act of March 22, 1904 (P. L. p. 86), to which reference has been made by counsel.

> Lastly, it is argued that the ordinance in question is void because it is said to be indefinite as to the amount of bonds to be issued. It provides for the issuing of bonds "in an amount not exceeding \$500,000." But I think that in an ordinance the authorization of bonds not to exceed a certain amount is equivalent, in legal effect, to fixing the amount of such bonds at such sum. Knight v. West Union, 45 W. Va. 194, 32 S. E. 163. The ordinance under review is affirmed,

(78 N. J. L. 90) STATE V. ALBERTALLI.

(Supreme Court of New Jersey. June 8, 1909.) CRIMINAL LAW (§ 400*)—EVIDENCE—DOCU-MENTARY EVIDENCE.

Upon a sale of goods the vendor delivered to the vendee a memorandum of the sale, and retained a carbon copy. *Held*, that the carbon copy was admissible as evidence as a duplicate original for the purpose of showing the nature and terms of the transaction.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 400.*]

(Syllabus by the Court.)

Error to Court of Quarter Sessions, Bergen County.

Giuseppe Albertalli was convicted of an illegal sale of intoxicating liquors, and brings error. Reversed.

Argued February term, 1909, before the CHIEF JUSTICE, and SWAYZE and PARKER, JJ.

Wendell J. Wright, for plaintiff in error. John S. Mackay (Ernest Koester, on the brief), for the State.

SWAYZE, J. The plaintiff in error was convicted of the illegal sale of liquor. The controversy reduced itself at the trial to the question whether two gallons of wine, which had been delivered to one Merkindino, had been sold to her, or had merely been given to her in exchange for a portion of a quantity which had previously been sold; that quantity being above the quantity for which the defendant needed a license. The defendant offered in evidence a duplicate bill for the goods which had been delivered to Merkindino, which was in the nature of a sales slip. The testimony showed: That a white slip and a yellow slip were made out at the same time, one being a carbon copy of the other; that the white slip was delivered to Merkindino, and the yellow slip retained by the defendant. This slip contained a memorandum of the exchange of wine and showed that the amount paid by Merkindino included nothing on account of the wine. It therefore tended to corroborate the testimony on the part of the defendant and the testimony of Mrs. Merkindino herself on cross-examination. The paper was excluded, seemingly because it was supposed to be a mere copy. We think this view was erroneous. white slip and the yellow slip were duplicate originals, and, while they were copies one of the other, the yellow slip was as much an original as the white slip. The fact that it was a carbon copy, instead of being written with pencil or pen and ink, is not significant. This error was clearly prejudicial to the plaintiff in error, and the judgment must, accordingly, be reversed.

In reversing this judgment, however, we insanity, but the case was tried apparently must not be understood as expressing approval of the form in which the matter is tablished, it was enough to justify recovery. Presented. The parties have apparently un-

dertaken to bring the case up under section 186 of the criminal procedure act of June 14, 1898 (P. L. p. 915); but it is evident from an inspection of the record that the whole record is not before us. In fact, the judge merely certifies "that the foregoing is a true statement of the facts upon the trial," and the facts are set forth in narrative form. We have accepted the signature to this certificate as amounting to a signature of the bill of exceptions which the statement shows the defendant prayed and the judge sealed. Strict practice would require that exception to be signed and sealed separately, and not at the conclusion of the whole statement of facts on the trial.

GOLDBERG V. WEST END HOMESTEAD CO.

(Supreme Court of New Jersey. June 7, 1909.)

INSANE PERSONS (§ 73*)—INTEREST (§ 89*)—

ACTION BY GUARDIAN—PAYMENT ON CONTRACT—RECOVERY.

In a suit by the guardian of a lunatic to recover money paid by the lunatic upon a contract for the sale of land, the trial judge properly charged that knowledge of the insanity by the defendant must be proved, and that, if the plaintiff was entitled to recover, interest should be allowed from the date of the payment, but commissions upon the sale paid by the defendant should not be charged against the plaintiff.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 125, 132-138; Dec. Dig. § 78; Interest, Dec. Dig. § 39.*]

(Syllabus by the Court.)

· Error to the Circuit Court, Essex County.

Action by Harris Goldberg, by his guardian, against the West End Homestead Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Argued February term, 1909, before the CHIEF JUSTICE and SWAYZE and PARKER, JJ.

Riker & Riker, for plaintiff in error. Michael J. Tansey, for defendant in error.

SWAYZE, J. This was an action to recover back money wnich ...ad been paid upon a contract for the sale of land upon the ground that the plaintiff was a lunatic at the time of the contract and of the payments made thereon. The payments were made in June, 1906. An inquisition in lunacy taken in March, 1907, found that he had been a lunatic since March, 1906, and, in addition, there was medical testimony justifying the inference that he was a lunatic at the time the contract and payments were made. The trial judge properly charged that it was necessary for the plaintiff to prove that the defendant had knowledge of the plaintiff's insanity, but the case was tried apparently upon the theory that, if the lunacy was established, it was enough to justify recovery.

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

lunacy proceedings which was made May 28, 1907, adjudicated that the plaintiff had been insane for only 11 months prior thereto. No other ground was specified. We agree with the trial judge that the inquisition was prima facie evidence of the lunacy, but, if not, there was still sufficient evidence to require the submission of the case to the jury. The point that there was no evidence of knowledge of the lunacy on the part of the defendant was not raised at the trial. We think, also, that the trial judge was right in excluding evidence of business transactions by the plaintiff several months after the date in question. The fact that he transacted other business at those times is too remote to indicate anything as to his mental condition at the time of the transactions with the defendant. The trial judge was also right in allowing interest from the date of the payments. If the defendant knew of the plaintiff's lunacy, as the jury have found. it had no right to take his money. Having taken it under circumstances which justified his reclaiming it, they are chargeable with interest. The same reasoning prevents them from being credited with the amount they had paid out for commissions on the sale of the property, for nothing could justify them in spending what they knew to be the lunatic's money.

We said in Miller v. Barber, 73 N. J. Law. 38, 62 Atl. 276: "Payment or tender of the consideration money received by the lunatic is a condition precedent to the avoidance of the contract." In this case the lunatic had been in possession of the premises for some three months, and had collected the rents. These rents ought to have been tendered before the suit was begun, but no question of that kind is raised by this record. course pursued by the plaintiff in error precludes a consideration of this question, for the reason that its counsel requested a charge that the jury must put the defendant in the position it was in before the contract was made. This is a very different proposition from the rule of Miller v. Barber, requiring a tender of the consideration at the time of rescission; that is, prior to the commencement of the action. It is argued by the brief for the plaintiff in error that it should be credited with all of the rents which were collectible, whether they were collected or not. This question also is not presented by the record. On the contrary, the request to charge was that, if the jury found in favor of the plaintiff, they must put the defendant in the position it was in before the contract was made; and that is, the plaintiff must pay the commission of \$360, and refund the rents collected by or for him, and that these sums ought to be deducted from the \$2,000. This request was erroneous, in that it claimed the allowance for the commis-

entirely upon the fact that the decree in the | sions, but, even if that had been omitted, it requested only that the defendant should be credited with the rents actually collected by or for the plaintiff. The judge charged that the rents received by or for the plaintiff must be deducted, and the jury seem to have done so, for the verdict was for the exact amount which had been paid without any allowance for interest. The interest, in fact, was a little more than the rents actually collected. We find no error in this record, and the judgment is affirmed, with costs.

(75 N. J. E. 512)

GOULD v. HURLEY et al.

(Court of Chancery of New Jersey. May 12, 1909.)

1. Deeds (\$ 207*)—Execution—Evidence. Evidence, in a suit to avoid a deed. held to show it was signed and acknowledged as it purported to have been.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 614-624; Dec. Dig. § 207.*]

2. Deeds (§ 58*)-Delivery.

There was a delivery of a deed where, a father having put property in his daughter's name, she, at his request, executed a deed thereof to a third person, and gave it to the father, who sent it to the grantee's attorney.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 130-135; Dec. Dig. § 58.*]

8. GIFTS (§ 49*)—EVIDENCE.

A gift of lots by father to daughter is not proved by the testimony of the mother that, when the father got the daughter's signature to a consent for a trolley line, he said it would benefit her lots, and testimony of her husband that the father once told him he had given the daughter some property, at the place where the daughter some property, at the place where the lots were located, and on another occasion, when asking him to sign a deed, stated he had a splendid opportunity to dispose of the daughter's property at such place, for her advantage, [Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 95-100; Dec. Dig. § 49.*]

4. Evidence (§ 217*)—Admissions and Dec-LARATIONS.

Evidence of oral admissions and declara-tions is to be received with great caution.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 760; Dec. Dig. § 217.*]

5. Fraudulent Conveyances (§ 174*)—Va-Lidity Inter Partes.

The principle that a fraudulent convey-ance is good inter partes cannot avail the grantee where she, at her grantor's request, conveyed the lots to another, and the latter, who had in fact purchased only one lot, conveyed the others to another person for the original grantor's benefit

[Ed.: Note.—For other cases, see Fraudulent Conveyances, Dec. Dig. § 174.*]

6. Fraudulent Conveyances (§ 174*)—EF-FECT BETWEEN PARTIES.

It cannot avail one, whose father put lots in her name as a cover, in seeking to avoid the deed she made thereof to another, at her fasale was not made between her father and her grantee; they, or the parties representing them, being content.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Dec. Dig. § 174.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Action by C. Edith Gould against Timothy Hurley and others. Decree for defendants.

Rulif V. Lawrence, for complainant. Lewis Starr, for defendants.

WALKER, V. C. In his lifetime Frederick J. Anspach was the owner of eight certain lots in the borough of Spring Lake, N. J., and on May 9, 1896, his wife joining him in the deed, he conveyed them to his daughter, C. Edith Gould, the complainant, for an expressed consideration of "one dollar and other valuable consideration." She claims the lots as a gift from her father. She never had possession of them, nor of the deed for them. Upon the death of her father in 1905, his deed to her and a deed signed by her in blank as to a grantee, for the same premises, were found among his effects.

On May 2, 1900, at her father's request, she made a deed, her husband joining her, whereby the title to the premises was divested out of her and put in the defendant Timothy Hurley. The consideration recited in this deed is \$650; Mr. Anspach having negotiated a sale of one of the lots for that amount to Hurley, \$100 to be paid in cash, and \$550 to be secured by a mortgage on the lot to be conveyed to him. Prior to the making of the deed to Mrs. Gould by her father, the latter had entered into negotiations with Hurley for the purchase by Hurley of the one lot, and Hurley signed a memorandum in writing, obligating himself to make the purchase. On July 1, 1901, the complainant's father sent to Joseph McDermott, Esq., counselor at law, who represented Hurley, two deeds, one for the eight lots made from the Goulds to Hurley, and one for seven of the same lots to be made by Hurley and wife to Mr. Anspach's brother James. The lot not included in the deed from Hurley and wife to James Anspach was the one for which Hurley had bargained. These two deeds remained with Mr. McDermott until after the death of Frederick J. Anspach. The deed from Hurley and wife to James Anspach was drawn by Mr. F. J. Anspach himself and inclosed to Mr. Mc-Dermott, but was not executed by Hurley and wife because it was a deed of warranty and Mr. McDermott was unwilling to allow Hurley to execute any but a bargain and sale deed with covenants against the grantor. The transaction was not closed during the lifetime of F. J. Anspach because of unpaid taxes which were a lien against the lot to which Hurley was to take title. After the death of her father, and in 1907, Mrs. Gould paid \$516 of taxes on these premises. This was after she knew that Hurley claimed one of the lots and that the estate of her father claimed the beneficial ownership in the seven lots conveyed by Hurley to James Anspach after her father's death. Hurley, it should be remarked, has had possession of his lot since he signed the agreement to purchase, Gould to Hurley, he stated that he took the

and has improved it. Of course, her father's dealings with Hurley do not bind her, but they have a bearing upon the status of the other defendants, and are pertinent in that aspect.

Mrs. Gould claims that she never knowingly executed, and never acknowledged, the deed from herself and husband to Timothy Hurley. She testified that she signed but one paper with reference to these lots, which was at the request of her father, and which she said was explained to her by him as a consent for the construction of a trolley line in front of the lots in question. Besides the deed to Hurley, she was confronted with the deed for the same lots without date and without the name of any grantee, which she admitted having signed, and there was also produced to her three other papers consenting to the construction of trolley tracks with reference to the lots, all of which she admitted she had signed. It would appear then that her recollection extended to only one of the trolley consents, and that her mind was an entire blank as to the two deeds and the other two consents for the trolley company. The acknowledgment to the deed to Hurley purports to have been made before James S. Phillips, a commissioner of deeds for the state of New Jersey, residing in Philadelphia, on May 2, 1900, the date of the execution of the deed, and is regular in form, containing the separate acknowledgment of Mrs. Gould, as required by our statute. She says she never appeared before Mr. Phillips and never acknowledged the execution of the deed. Mr. Gould, her divorced husband, also stated that he did not appear before Mr. Phillips and acknowledge the instrument. He, however, admited that on several occasions he had acknowledged papers before Mr. Phillips at the request of Mr. Anspach, his father-in-law. He says that when he signed the paper it had not been signed by Mrs. Gould, and she says that when she signed it it had not been signed by him. Their testimony concerning the transaction was given approximately eight years after the execution of the deed, and is, in my judgment, unreliable as to the facts. Mrs. Gould, while positive that she executed but one paper with reference to the Spring Lake lots, was compelled to admit upon cross-examination that she signed five papers in all; two of them being deeds. Her husband, who had been divorced from her, asserted that he had not acknowledged the deed, but admitted that he had acknowledged the execution of several documents before the commissioner who took this acknowledgment. Mr. Phillips, the commissioner, testified that he had known F. J. Anspach a number of years and had taken acknowledgments of deeds for him for lands in New Jersey made by himself and members of his family. Shown the deed from Mrs.

acknowledgment, and the certificate was writ- | sign the deed, he told him that he had a ten by him, although he said he had no recollection of the circumstances under which the acknowledgment was made, and frankly said that he did not know either Mrs. Gould or her husband, and he said that the facts stated in the certificate to the best of his knowledge were true. I do not see why he would not assert unequivocally that they were true, in reliance upon his certificate; but, being a cautious man, doubtless, and not remembering the incident at all, he made the somewhat stereotyped reply that the facts were true to the best of his knowledge. He should, it seems to me, have been willing to have stated that they were true, because of his certificate. However, I do not think that the answer creates any uncertainty as to the fact, and I am prepared to believe, and do believe, that Mrs. Gould and her husband not only signed, but also acknowledged, their deed made to Hurley.

The facts and circumstances concerning the signing and acknowledgment of the deed in this case are. under the law, as enunciated by our courts, sufficient to prove its due execution and to uphold the transaction. Tooker v. Sloan, 30 N. J. Eq. 394; Black v. Purnell, 50 N. J. Eq. 865, 24 Atl. 548. That the deed from Mrs. Gould and husband to Hurley was delivered is too plain, it seems to me, to admit of controversy. It will be remembered that F. J. Anspach, her father, put the title in Mrs. Gould without any consideration passing from her to him; and she, it would appear, willingly executed the deed to Hurley at her father's request, and parted with the deed to her father, if, indeed, she ever had it in her possession, for her father inclosed it to Mr. McDermott in his letter to him of July 1, 1901, and he (Mr. McDermott) retained it until he lodged it for record on June 11, 1907, and produced it upon the trial. It is certainly to be presumed that Mrs. Gould gave the deed to her father the moment she signed it, or left it with him, which amounts to a delivery, and parted with all control over it. This constitutes a valid delivery. Jones v. Swayze, 42 N. J. Law, 279; Vreeland v. Vreeland, 48 N. J. Eq. 56, 21 Atl. 627.

In her bill and on the argument it was claimed that Mr. Anspach had made a gift of these lots to his daughter. Her mother, the widow of F. J. Anspach, was sworn and testified that she recalled the signing of a paper by her daughter with reference to a trolley consent, and that at the time he procured his daughter's signature the father said that it would benefit her lots at Spring Lake. Assuming that the witness accurately remembers what Mr. Anspach said some eight years before she testified, that loose declaration cannot be admitted to prove a gift | of these lots to Mrs. Gould, nor can the statement of Mrs. Gould's former husband to the drawing the mortgage, and that it should

splendid opportunity to dispose of the Spring Lake property for Edith's advantage, or his other statement that Mr. Anspach once told him that he had given her some property at Spring Lake. Evidence of oral admissions and declarations belong to a class of proofs which should be received with great caution. Even when they proceed from the mouths of honest and disinterested witnesses, they are liable to imperfection and error; and a word, or a look, misunderstood, will produce upon the mind of the hearer an impression entirely different from that which the speaker intended to convey. Jones v. Knauss, 31 N. J. Eq. 609, 616. Both of the parties testifying to these statements are apparently interested in the complainant; Mrs. Anspach, the mother, naturally so, and Mr. Gould, the former husband, although divorced, by his manner upon the stand and his apparent friendliness with his former wife in the courtroom, gave every evidence of a lingering interest in her. I do not say that these witnesses have willfully misrepresented what the decedent said, but my judgment is that they are mistaken or have misinterpreted the looks or language of Mr. Anspach when he made the declarations to which they testify. These declarations are meager and of an inconclusive character, and certainly, in view of the other facts of the case, they cannot be given controlling effect, but must be subordinated to what appears to me to be the true facts.

It may be asked why Mr. Anspach put the title to these lots in the name of his daughter. The answer is probably to be found in the two facts: One, that his wife refused to sign a deed at his request, and this about the time the conveyance from father to daughter was made; and, the other, that a judgment had been recovered against Mr. Anspach in Pennsylvania by a gentleman named Paul for a large amount of money, and Mr. Paul about the time of the conveyance was pursuing Mr. Anspach in New Besides, Mr. Ans-Jersey by attachment. pach was in the habit of placing the title to properties in his brother and other members of his family, for his own purposes and convenience. If I be right in my conclusion. that Mrs. Gould executed, acknowledged, and delivered the Hurley deed, she has no interest in the claim of the estate of her father to ownership in the seven lots conveyed by Hurley to James Anspach, who, as before stated, admits that he has no beneficial interest in them, and that he holds the title for the estate of his brother. Hurley and wife have executed to Mrs. Gould a mortgage on the lot remaining to him. The mortgage bears even date with the deed from Mrs. Gould to him, and is for \$450. It is admitted that counsel made a mistake in effect that, when Mr. Anspach asked him to have been for \$550. Another mistake was

putting it in the name of Mrs. Gould, for in therefore the costs of all parties, except Mrs. his letter of instruction to counsel on July 1, 1901, Mr. Anspach expressly directed that the mortgage be made in his own favor, meaning, of course, his own name. Gould claims that, if her father were attempting to put title out of himself and in her for the purpose of forestalling Paul in the collection of his judgment, the executors of her father's estate cannot recover the title from her because of the rule that a conveyance made in fraud of creditors. while void as to them, is good inter partes, as the law will not aid a fraud doer, but will leave the parties to the transaction in statu quo. This might be a serious consideration in the case sub judice if if were not for the fact that Mrs. Gould herself made a conveyance of the property to a third person, namely, Hurley, for her father, and therefore, if the rule is to be applied at all, it will be in aid of a status which leaves her divested of title.

It is also claimed on behalf of the complainant that the minds of Mr. Anspach and Hurley never met, and that a complete agreement for sale between them was not made. This is a question in which the complainant is not concerned. It is true the memorandum signed by Hurley was not enforceable for want of particulars as to the time the mortgage should run and the rate of interest it should draw, etc. (Potts v. Whitehead, 20 N. J. Eq. 55; Moore v. Galupo, 65 N. J. Eq. 194, 55 Atl. 628); but the defendants appear to have no quarrel with each other on that score, and, besides, Hurley has actually executed a mortgage to Mrs. Gould. It can be decreed to be reformed if necessary by making it stand as security for \$550, instead of \$450, and Mrs. Gould can be decreed to assign it to the executors of her father's estate.

There will be a decree: That the complainant has no right, title, or interest in any of the eight lots in question; that the title of Hurley to the lot which remains in him is absolute; that the bond from him and the mortgage from him and his wife to the complainant be canceled; that he execute a proper bond and mortgage to the executors of the estate of Frederick J. Anspach, deceased, for \$550, secured on his lot. with lawful interest, unless it shall become necessary to decree a reformation of the bond and mortgage already made, in which event they will be reformed and ordered to be delivered; that the defendant, James Anspach, convey to the executors of the estate of Frederick J. Anspach, deceased, the seven lots, title to which were vested in him by the conveyance from Hurley and wife. The entanglement in which this affair has been inwolved was caused by the carelessness and loose methods of the late Frederick J. Anspach, owner of premises in his lifetime, and lands in question, that the defendant was en-

Gould, will be ordered to be paid out of his estate. Mrs. Gould will be decreed to pay her own costs.

Whether Mrs. Gould's payment of taxes upon the premises is to be considered as compulsory, in which event she will be entitled to be subrogated to the lien of the borough of Spring Lake and to be repaid those taxes, or whether her payment of them was voluntary, is a question which was neither raised nor discussed upon the argument. It is important, and, as a fairly large sum is involved, I will hear counsel for the complainant, upon notice to the defendants, as to whether or not Mrs. Gould is entitled to subrogation and repayment with reference to the taxes.

(78 N. J. L. 198)

KARR v. NEW YORK JEWELL FILTRA-TION CO.

(Supreme Court of New Jersey. June 8, 1909.)

COURTS (§ 6*)-JURISDICTION-LOCAL ACTIONS INJUBY TO REALTY.

The courts of this state have no jurisdiction of an action on the case for negligent injuries to plaintiff's real property and building situated in the District of Columbia, by making excavations on adjacent property, and that plaintiff will be without a remedy, unless the court takes jurisdiction, is immaterial.

[Ed. Note.—For other cases, see Courts, Dec. Dig. \$ 6.*]

Action by Jacob Karr against the New York Jewell Filtration Company. On demurrer to pleas. Judgment for defendant on demurrer.

The declaration contains three counts. The first count alleges that at the time of the injury complained of the plaintiff was seised of certain described property in the city of Washington, D. C., on which stood certain buildings, and that the defendant, with force and arms, broke and entered the close of the plaintiff, and did excavate thereon in such a manner as to weaken and injure the walls of the buildings, and to cause the same to settle, etc. The second count is not in trespass, but in case, and alleges that on the date in question the plaintiff was seised of the same tract of land, and that the defendant was engaged in the construction of a tunnel adjacent to the plaintiff's property, and it became and was the duty of the defendant to use due care, and to so excavate and construct said tunnel as not to interfere with or damage the property of the plaintiff; but that the defendant failed to exercise this care, and by reason of such failure the buildings on plaintiff's land were made to settle, and the walls and floors were cracked, etc. The third count alleges, as before, that the plaintiff was seised of the

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(82 Conn. 244) ,

gaged in the construction of a tunnel, and that it was the duty of the defendant to excavate so as not to interfere with or damage the plaintiff's property, and that the defendant failed to support the ground around its excavation, and to support the property of the plaintiff, but excavated and tunneled in such a way as to deprive plaintiff's land of its support, causing his buildings to settie and walls to crack. To each of these counts the defendant interposes a plea to the jurisdiction on the ground that the cause of action set out in the respective counts accrued out of the jurisdiction of this court. namely, in the District of Columbia. each of these pleas the plaintiff demurs, upon the ground that the declaration shows that the cause of action is of such a nature that it can properly be sued for, and action main-

the jurisdiction of this court. Argued February term, 1909, before GUM-MERE, C. J., and SWAYZE and PARKER, JJ.

tained thereon within this state, and within

Collins & Corbin, for plaintiff. Chauncey G. Parker, for defendant.

PARKER, J. (after stating the facts as above). The plaintiff concedes that the first count, which sets up a pure case of trespass quare clausum fregit, cannot stand. maintains, however, that the causes of action set up in the second and third counts of trespass on the case should have the cognizance of this court, and it is intimated in the briefs that, unless this court does take cognizance of these causes of action, the plaintiff will be without remedy, on the ground that jurisdiction cannot be obtained over the defendant by service of process within the District of Columbia.

We are unable to distinguish this case in principle from Hill v. Nelson, 70 N. J. Law, 376, 57 Atl. 411, approved by the Court of Errors in Doherty v. Catskill Cement Company, 72 N. J. Law, 315, 65 Atl. 508. The latter case is more nearly in point, as the deciaration set up negligence and nuisance, rather than trespass. Doherty had an ice pond, and the defendant carried on, upon a neighboring property, the business of making cement, and permitted cement dust and fumes and smoke to escape, which plaintiff says injured and destroyed his ice, and interfered with the use of the plaintiff's property for the purposes of an ice pond. 30 N. J. Law Journal, 114.

As to the claim that the plaintiff will be without redress unless the court takes cognizance of his suit in this state, we can only say that the same question was considered and disposed of by Justice Dixon in Hill v. Nelson, at page 378 of 70 N. J. Law, at page 411 of 57 Atl.

There will be judgment for the defendant on the demurrer.

TICE v. MOORE et al.

(Supreme Court of Errors of Connecticut. June 10, 1909.)

1. MECHANICA' LIENS (§ 111*) — RIGHTS OF SUBCONTRACTOR—SUBROGATION.

Under the Connecticut statutes relating to mechanics' liens, a subcontractor is only subrogated to the rights of the original contractor, so that where the contractor, without fault on the owner's part, has abandoned his contract before substantial performance, so that nothing is due him from the owner under the contract, the subcontractors have no lien for labor or materials furnished.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 144-146; Dec. Dig. § 111.*] see Mechanics';

2. Contracts (# 295*)—Building Contracts -PERFORMANCE.

Where a contractor agreed to build a house for complainant for \$3.945, and abandoned the contract when the building was in such a stage, that it would require an expenditure of \$2.200 to complete it, there was no substantial perform-

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \$\frac{2}{3}\$ 1353, 1356, 1362; Dec. Dig. \$\frac{2}{3}\$.

3. MECHANICS' LIENS (§ 115*)—INVALIDITY—

Under Gen. St. 1902, \$ 4138, which provides that payments to a contractor, not made in good faith or made before due, without giving notice of the intended payment to subcontractors known to be furnishing materials and labor, are void as against such subcontractors, a payment of \$1,000 to a contractor, made in good faith, when it was due, and before the owner had knowledge that subcontractors were furnishing labor and materials for the work, was good as against such subcontractors.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 150-159; Dec. Dig. § 115.*]

4. MORTGAGES (§ 116*)—PROCEEDS.
Where plaintiff permitted her contractor (to raise money on her real estate with which to improve the same, and knew that the lender retained from the proceeds a commission and certain expenses, all of which were chargeable by plaintiff to the contractor as a part of the first payment on the building contract, such items. were properly treated, as against plaintiff, as a part of the first advance on the mortgage note by the lender.

Note. -For other cases, see Mortgages, [Ed. Dec. Dig. 116.*]

5. MOBTGAGES (\$ 116*)—PROCEEDS—PAYMENT. Where a loan was procured on plaintiff's property with which to improve it, and the lender agreed to pay the money to the contractor in specified sums as the work progressed, but instead paid \$100 to the contractor before it was due, and the contractor subsequently abandoned the work before substantial performance, such payment was properly disallowed as a part of the mortgage debt.

[Ed. Note.—For other cases, see Mortgages, 'Dec. Dig. § 116.*]

6. BILLS AND NOTES (§ 452*)—CONSIDERA-TION-TRANSFER

Where plaintiff executed a note to a building contractor as a part payment on the con-tract price, and the contractor failed to substantially perform, but abandoned the work and absconded, the note was without consideration, and neither the contractor nor his transferse with notice could enforce it.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 13741/2; Dec. Dig. § 452.*]

7. Husband and Wife (§ 169*)—Wife's Sep-abate Property — Mortgage — Signa-TURE OF HUSBAND.

Where a wife mortgaged her separate property to obtain money with which to improve the same, the fact that the husband signed the note and mortgage was no reason why they should not be discharged and surrendered when paid, or if void.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 169.*]

Appeal from Superior Court, New Haven County; Ralph Wheeler, Judge.

Action by Magdalena A. Tice against Milton E. Moore and others to quiet title and determine the validity and amount of certain liens on plaintiff's real estate. From a judgment sustaining some of the liens and disallowing others, plaintiff and certain of the lienors appeal. Reversed and remanded.

The plaintiff on June 5, 1907, entered into a written contract with Moore to build a house upon a lot then owned by her in New Haven. At the time the contract was signed, she gave him two notes amounting to \$3,945, the contract price for the house. One of the notes was for \$3,400, the other for \$545, each payable on demand to his order, the larger note being at 5 per cent. interest, and the smaller at 6 per cent., and each secured by a mortgage on the lot, that securing the larger note being the second mortgage. contract recited that these two mortgages were given in consideration of the house being built by Moore and to compensate him therefor. The contract was the only consideration for the notes. Moore then contracted with different parties for the mason, carpenter, and plumbing work upon the house and for the lumber required in its construction. These parties began to furnish labor and materials in constructing the building and are parties to this action as claimants for mechanics' liens. After this work was begun, and before August 9, 1907, the W. T. Fields Company, at the request of Moore, agreed with him to make a loan of \$3,000 at 6 per cent. to be secured by a first mortgage upon the plaintiff's property when the building should be completed; the money to be advanced as the work progressed, \$1,000 when the house was roofed in, \$1,000 when it was plastered, and \$1,000 when it was fully completed. Moore caused to be prepared a note for \$3,000 at 6 per cent. payable to the W. T. Fields Company and a mortgage upon the plaintiff's lot to secure the same, another note to his own order on demand for \$955 at 5 per cent., with a second mortgage on the plaintiff's lot to secure it, and releases of the mortgages which had been given him to secure the first two notes. He then informed the plaintiff that the orginal papers were wrong and would have to be changed, and that he had to have 6 per cent. On August 14, 1907, she at his request went to the

ployed to prepare the papers and there executed the new notes and mortgages, and Moore and the defendant Hall, who had become the owner of the \$545 note, executed the releases of the former mortgages, and the conveyancers on August 14th caused the papers to be recorded in the proper order. The house was at this time roofed in, and the first payment from the W. T. Fields Company was due, and they paid \$940 to the conveyancers, retaining, with the knowledge and consent of the plaintiff, \$60 as commission. The conveyancers by order of Moore paid Hall the amount due upon the note for \$545, paid \$18 for insurance, and \$18.10 for the expense of the preparation and recording of the conveyances, and the balance to Moore. The plaintiff had knowledge of these payments, and at the time was informed that the Fields Company would pay \$1,000 more when the house was plastered, and another \$1,000 when the house was completed, and assented to the arrangement. The Fields Company on August 23d, without the knowledge of the plaintiff, paid Moore \$100. She understood and believed that she would not become liable on the note for \$945 unless and until the house was completed, and Moore knew this. At the time of this transaction, the parties all knew that material and labor was being furnished in the construction of the house, but none except Moore knew by On August 31st Moore transferred for a valuable consideration the note for \$945, and assigned the mortgage securing the same to the defendant Hall. The court found that Hall took the mortgage knowing that the house was not completed, and that the plaintiff had received no consideration for the note except the contract with Moore, and knew of the equities existing between Moore and the other parties, and was not an innocent purchaser for value. On or about September 19, 1907, Moore abandoned his contract, left town, and has not been heard from since. At or about the same time, the subcontractors abandoned the work, gave notice of their liens, and filed liens on the plaintiff's property. Moore's failure to complete his contract was not due to the fault of the plaintiff. There is nothing due to him from her. The amount which would have been required to complete the house at the time of its abandonment would not have been less than \$2,200. The cost and value of the work and materials which have gone into it is \$1,854.65. All the defendants filed answers claiming liens. The W. T. Fields Company and Hall by virtue of mortgages, and the subcontractors for their work and materials as mechanics and materialmen, and asked for the foreclosure of the same. The court ' held: That the subcontractors had liens to the full amount of the labor and materials furnished by them in the construction of the building to the time when they abandoned it: offices of the conveyancers whom he had em- that their liens had priority over the mort-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



gage of the W. T. Fields Company; that | there was due to the W. T. Fields Company upon their mortgage \$1,000 only; and that nothing was due to the defendant Hall upon the mortgage for \$945.

Ward Church and Charles F. Clarke, for appellant Magdalena A. Tice. George E. Hall, Ernest L. Isbell, and John R. Booth, for appellant George E. Hall. Talcott H. Russell and George S. McLaren, for appellant W. T. Fields Company. Charles S. Hamilton, J. Birney Tuttle, and Charles A. Capen, for appellees.

THAYER, J. (after stating the facts as above). The principal questions in this case are whether the subcontractors, who claim liens upon the plaintiff's real estate for labor and materials, furnished under contracts with the original contractor, in the construction of her building, are entitled to such llens, and, if so, whether those liens have priority over the mortgage of the defendant the W. T. Fields Company. The superior court held that they are entitled to such liens, and that the liens have priority over the mortgage.

Statutes allowing liens in such cases are of two classes. In one the lien is allowed upon the ground that the subcontractor is equitably entitled to a lien which would otherwise attach in favor of the original contractor; in the other upon the ground that the labor or materials furnished have so enhanced the value of the real estate that it would be inequitable to allow the owner to be enriched at the expense of the subcontractor. Waterbury Lumber & Coal Co. v. Coogan, 73 Conn. 519, 521, 48 Atl. 204. Under statutes of the latter class, the subcontractor has an independent right of lien, and is not simply subrogated to the rights of the contractor. Under such statutes it is held that the subcontractor's right of lien cannot be defeated by the default, misconduct, or even the fraud of the original contractor. Berger v. Turnblad, 98 Minn. 163, 167, 107 N. W. 543, 116 Am. St. Rep. 353. Under statutes of the former class, the subcontractor is simply subrogated to the rights of the original contractor. If, had he paid the subcontractor, the original contractor would not under the statute be entitled to file a lien for the amount so paid, the latter is entitled to no lien. So under such statutes, where a contractor, without fault on the owner's part, has abandoned his contract before its substantial completion, so that nothing is due him under his contract, the subcontractors have no lien for labor or materials furnished by them. Larkin v. McMullin, 120 N. Y. 206, 209, 24 N. E. 447; Hollister v. Mott, 132 N. Y. 18, 21, 29 N. E. 1103. And this is so although the expense of completing the improvement accord-

work remaining unpaid. Id. Our statute is of this class. Waterbury Lumber & Coal Co. v. Coogan, supra. In the present case Moore, the original contractor, abandoned his contract wrongfully and without fault on the part of the plaintiff, and left her building incomplete and requiring an expenditure of at least \$2,200 to complete it. The court has found that, nothing is due him. Under these circumstances he could be entitled to no lien under the statute upon the plaintiff's property, and it follows that the subcontractors are not.

The plaintiff has apparently been enriched by labor and materials which they furnished. but they did not furnish them to her. To her they came into no contractual relations on which to found an equity for a reimbursement due to them from Moore. The payment of \$1,000 made to Moore before he abandoned the contract was made in good faith when it was due and before the plaintiff had knowledge that these subcontractors were furnishing labor and materials for the work. No claim is or can be made that, under such circumstances, the subcontractors can claimliens to the amount of that payment by reason of section 4138 of the General Statutes of 1902, which treats payments not made in good faith, or made before due, without giving notice of the intended payment to subcontractors known to be furnishing materials and labor, as void against such subcontract-The subcontractors' liens being void, there is no question of priority between them and the Fields mortgage. The court found due to the W. T. Fields Company upon its mortgage note \$1,000, and interest, thus allowing the commission of \$60 and the amounts paid for insurance and expenses of the conveyancers, which the plaintiff claims should not have been allowed, and, disallowing the \$100 paid by the W. T. Fields Company to Moore on August 23d, which it claims should have been allowed.

The plaintiff's claim as to the commission and payments for insurance and expenses is answered by the finding, which is that the commission was retained with her knowledge and consent, and that she gave an order for the payment of \$940, the balance of the \$1,000 payment, and knew at the time that the insurance and expenses were to be paid out of it. All of these items were chargeable by her to Moore as a part of the first payment and were understood manifestly by all parties to be such. These items were properly treated as a part of the first payment on the mortgage note. It was the understanding of all the parties that, after the first payment by the W. T. Fields Company, no further payments should be made to Moore by it until the house should be plastered. Having made the payment of \$100 to him before it was due and without the knowledge of asing to the contract would be less than the sent of the plaintiff, it was properly disallowbalance of the contract price for the entire ed as a part of the mortgage debt.

The defendant Hall holds the note for \$945 and the second mortgage given to secure it. The court has found that he is not an innocent purchaser for value, and that he took them subject to the equities affecting Moore. Moore knew that unless he fulfilled his contract and completed the house there was no consideration for the note. He knew that the plaintiff so understood and believed, and that she understood that she would not be liable to pay the note unless and until the house was completed. He could not in good conscience call upon the plaintiff to pay the note unless he completed the house. Hall, if the court's finding is to stand, is in the same position that Moore would be if he continued to hold the note. The house being unfinished, and the contract abandoned, the note is with out consideration and void in his hands. It does not appear that any money of his went to the plaintiff's benefit in respect to her house. She has not therefore been enriched at his expense, and he has no equity against her by reason of having added to the value of her property. He excepts to and assigns as error the court's refusal to make certain changes in and additions to the finding as requested by him. We cannot say, from the evidence which has been certified in support of the exceptions, that the court erred in refusing to make any of the changes or additions which, if made, would be material to his claim. His demurrer to the complaint was properly overruled. It was based upon a wrong conception of the cause of action stated. The complaint is not a model pleading. but its purpose clearly was to bring the partfes all into court, have them state their claims upon the plaintiff's property, interplead as to their priority of lien, and have the court determine what liens existed upon the property, what liens had priority, and decree their cancellation upon payment of the amount due. The demurrer treats it, so far as it regards Hall, simply as an action for the cancellation of the \$945 note and mortgage upon the ground that they were given through mistake or fraud. The suit might result in determining that he had no lien, or it might result in a judgment that he cancel the note and mortgage upon the plaintiff's redeeming them. His demurrer was not adapted to this latter aspect of the complaint.

The fact that the plaintiff's husband signed the note and mortgage is no reason why her property should not be discharged and the note and mortgage given up when paid, or if void. That fact, which appeared in the complaint, therefore afforded no ground for demurrer.

There is error in the judgment of the superior court and it is set aside, and the cause is remanded for the entry of a judgment in conformity with the views above expressed. The other Judges concur. (82 Conn. 255)
KELLY et al. v. CITY OF WATERBURY.

(Supreme Court of Errors of Connecticut. June 10, 1909.)

1. EMINENT DOMAIN (§ 274*)—PUBLIC IM-PROVEMENTS—INJUNCTION—ADEQUATE REM-EDY AT LAW.

The remedy at law of owners of property taken by a city for a street to determine their right to sums assessed to them as damages before the work is completed, and to test the legality of the proceedings, is adequate, and an injunction will not lie to restrain the city from entering on the land, where it does not appear that irreparable injury would result if the city should proceed to do so.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 753-768; Dec. Dig. § 274.*]

 Eminent Domain (§ 274*)—Public Improvements—Damages—Remedies of Owners.

If the assessments of damages are legal, the owners can recover whatever is due them in an action at law, whether payable before or after the improvement is completed, and if the proceeding by the city is illegal, and it wrongfully enters upon the land, trespass will lie, in which the validity of the assessment can be as effectually tried as in a suit to restrain the city from entering on the land.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 753-768; Dec. Dig. § 274.*]

Case Reserved from Superior Court, New Haven County; George W. Wheeler, Judge. Action by Thomas Kelly and others against the City of Waterbury. Reserved by the superior court upon an agreed statement of facts for the advice of the Supreme Court of Errors. Judgment of dismissai advised.

Action for an injunction to restrain the defendant from removing buildings situated on the plaintiffs' land or interfering with their property claimed to have been taken by the defendant by a new layout of one of the city streets, brought to the superior court for New Haven county and reserved by the court, G. W. Wheeler, J., upon an agreed statement of facts for the advice of this court.

Edward B. Reiley and Terrence F. Carmody, for plaintiffs. William E. Thoms, for defendant.

THAYER, J. Upon and prior to December 20, 1906, such proceedings were had by the board of aldermen and other officers of the city of Waterbury that it claimed to have made a new layout of James street and to have taken for the public use in so doing lands belonging to the plaintiffs whereon buildings or parts of buildings are standing. The damages in excess of benefits accruing to each of the plaintiffs were assessed to each, and they were notified that unless the buildings or parts of buildings standing upon the land taken were removed on or before July 8, 1907, the defendant would proceed to remove them. This suit is brought to prevent such action on the part of the de-

amor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fendant and a temporary injunction was secured to prevent it pending the litigation.

Prior to July 8, 1907, demand upon the treasurer and comptroller of the city was made by the plaintiffs for sums which had been assessed to them for the taking of their land, and those officers refused to pay the The defendant claims that by an amendment of its charter (Sp. Laws 1905. c. 822, § 1; 14 Sp. Laws, p. 773) such damages are payable only after the work of the new layout is completed. It is ready and willing to pay now if it is legally bound to pay The plaintiffs before the work is done. claim that the provision of the amendment to the charter which postpones the payment of the damages until the completion of the work violates the constitutional provision that the property of no person shall be taken for public use without just compensation therefor. They claim also that the layout and assessment were illegally made because the expense thus incurred exceeded the amount in the city treasury appropriated to "streets and new work" for the fiscal year ending December 31, 1906, and thus violated a provision of the defendant's charter that the city shall not in any fiscal year "incur any liability or expense by contract or otherwise for any object or purpose for which an appropriation has not been made or in excess of the appropriations for any purpose."

The claims thus made are fully discussed in the briefs upon which the case is submitted; but it will be unnecessary to consider them, because the agreed statement of facts shows that the plaintiffs have adequate remedy at law. If the assessments are legal, the plaintiffs can recover whatever is due them in an action at law, whether payable before or after the work of improvement is completed. If the layout is illegal, and the city wrongfully enters upon the plaintiff's land, it will be liable in an action at law for the trespass, and in such an action the validity of the assessment can be as effectually tried as in the present action. The agreed statement of facts upon which this case is reserved for advice does not show that any irreparable injury will result to the plaintiffs should the city proceed as it threatens to do to enter upon their land. The plaintiffs have demanded the amounts assessed in their favor, and it is evident that the real question between the parties is whether the plaintiffs are entitled to the payment as of the time the land was taken or only after the improvement is completed. The law is adequate for the determination of that question, and equity should not be asked to inter-

The superior court is advised to render judgment for the defendant dismissing the complaint and dissolving the temporary injunction. No costs will be taxed in this court for either party. The other Judges concur.

(82 Conn. 252)

CRONIN et al. v. PACE et ux. (Supreme Court of Errors of Connecticut. June 10, 1909.)

1. CONTRACTS (§ 232*)—BUILDING CONTRACTS -Modification-Compensation.

Where a written building contract, when read in connection with a city ordinance, requiring good and sufficient stairways or other means of egress in case of fire, as directed by the building inspector, did not require the tractor to fireproof the hallways in the building in question, an agreement between the contractor and the owner for such fireproofing constituted a new agreement as to that item, taking it out of the original contract, and therefore entitled the contractor to charge the reasonable value thereof as extra.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1076; Dec. Dig. § 232.*]

2. CONTRACTS (§ 167*)—BUILDING CONTRACTS

—ACTION—FINDINGS.

That a city ordinance required a fireproof ceiling in the basement of a certain class of buildings did not show that a contractor was required to furnish that kind of ceiling in the building he had contracted to construct, in the shaence of a finding that the building in questioner. absence of a finding that the building in ques-tion was of the class described in the ordinance.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 750; Dec. Dig. § 167.*]

3. CONTRACTS (\$ 167*)—BUILDING CONTRACTS STATUTES.

Pub. Acts 1905, p. 881, c. 178, § 22, providing that the floor of the cellar or the lowest floor of every tenement house shall be water-tight, and the cellar ceiling shall be plastered except where the first floor above the cellar is constructed of iron beams and fireproof filling, imposed a duty on the owner, and did not re-quire such construction from a contractor whose contract did not specify the same, only provid-ing that his construction should conform to the building and plumbing ordinances of the city, as distinguished from statutory requirements.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \$ 750; Dec. Dig. \$ 167.*]

Appeal from District Court of Waterbury: Frederick M. Peasley, Judge.

Action by Daniel V. Cronin and others against Angelo V. Pace and wife to recover a balance for services and materials in the construction of a building. From a judgment for plaintiffs, defendants appeal. Affirmed.

Charles W. Bauby, for appellants. rence F. Carmody, for appellees.

RORABACK, J. On July 14, 1905, the plaintiffs by written contract agreed to build a three-story, six-family house for the defendants according to certain plans and specifications, which provide that: "The contractor must fulfill all requirements of the Waterbury building and plumbing ordinances, whether the plans or specifications agree with them or not." The building and plumbing ordinances in force at that time required: "Every non-fireproof building hereafter erected or altered for a tenement house, and more than three stories in height, shall have a cellar ceiling plastered on metal lath or protected by noncombustible material of equal sufficiency. The cellar ceiling in every dwelling house, as defined in section 31 of this ordi-1 furnish a plaster board ceiling in the cellar nance, more than three stories in height, shall be lathed with metal lath and plastered." October 2, 1905, while the plaintiffs were at work on said building, another contract was entered into between the parties, providing for an additional story for said building. The work to be done under the second contract is described as follows: "The contractor shall and will provide all the materials and perform all the work for the construction of the fourth story on the brick block of the said owner. The fourth story to be the same height as the present third story and the same construction, as shown on the drawings and described in the specifications, which drawings and specifications become hereby a part of this contract." A short time before the building was completed the building inspector of the city of Waterbury informed the plaintiffs that under the provisions of the ordinances of Waterbury and the Public Acts a plaster board ceiling would have to be provided for the cellar of said building. The plaintiffs completed their work under both of said contracts about April 1, 1907, and also performed certain other extra work for the defendants, at their request, for which they promised to pay the plaintiffs a reasonable sum. A charge of \$50 for fireproofing the hallways is included in these items as extra work. The plaintiff did not construct the plaster board ceiling in the cellar, a reasonable charge for which would be \$50.

One question presented by the appeal is whether the court erred in allowing the plaintiffs' charge of \$50 for fireproofing the hallways. Neither the written contract, plans, nor specifications mentioned this item. Section 80 of the ordinances of the city provides "that every dwelling house occupied by or built to be occupied by three or more families or more than three stories in height shall be provided with good and sufficient stairways, or other means of egress in case of fire, as directed by the building inspector." The written contract, when read in connection with this ordinance, imports at most that the plaintiffs were to provide good and sufficient stairways or other means of egress in case of fire. The agreement cannot be fairly construed so as to include fireproofing the hallways. The court has found that the defendants requested the plaintiffs to furnish fireproofing in the hallways, for which the defendants promised to pay a reasonable sum. It is apparent that the parties were in a controversy as to this branch of the work and made a new agreement or arrangement as to this item. In case of disagreement as to a particular item, a new agreement in respect thereto takes such item out of the original contract. Stewart v. Keteltas, 36 N. Y. 388.

The defendants contend that under the contracts and the plumbing and building ordinances it was the duty of the plaintiffs to ton A. Phelps.

of said building. The plaintiffs' compliance with the contracts is a question of fact, on which the court below has found in favor of the plaintiffs. The question before us is, not whether as a matter of law the contract was performed, but whether from the facts found it appears that the court below erred in holding that the plaintiffs were not bound by the terms of the contracts to put in the ceiling described in the defendants' answer and ap-West v. Suda, 69 Conn. 60-63, 36 Atl. peal. 1015. The fact that the ordinances called for a particular kind of ceiling in a certain class of buildings does not show that the plaintiffs were to furnish this kind of ceiling in the building in question. There is nothing in the finding showing that the building involved in the present controversy is one of the class included within the provisions of the ordinances.

Section 22, c. 178, p. 381, of the Public Acts of 1905, provides that "the floor of the cellar or the lowest floor of every tenement house shall be water tight, and the cellar ceiling shall be plastered, except where the first floor above the cellar is constructed of iron beams and fireproof filling." This statute imposes a duty for the owner. A contractor's duty is defined by his contract. The contract in the present case did not provide that the plaintiff should construct the building in conformity with statutory requirements.

There is no error. The other Judges concurred.

ROE v. PHELPS.

(Supreme Court of Errors of Connecticut. June 10, 1909.)

TRIAL (§ 143*)—DIRECTION OF VERDICT— CONFLICTING EVIDENCE. Where the evidence on the controlling issues

was conflicting, so that the weight and probative effect of the testimony of the opposing witnesses were important in determining the issues, it was error to direct a verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 148.*]

TRIAL (§ 139*)—DIRECTION OF VERDICT-WHEN PROPER.

A verdict should only be directed where the evidence is such that it would be the trial court's duty to set aside a different verdict if rendered. [Ed. Note.—For other cases, see Trial, Cent. Dig. \$ 332, 338-341; Dec. Dig. \$ 139.*]

APPEAL AND EBBOB (§ 690*)—REVIEW—QUESTIONS PRESENTED BY FINDINGS.

Errors in rulings on evidence will not be considered on appeal, where the questions in-volved are not presented by the findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2897; Dec. Dig. § 690.*]

Appeal from Court of Common Pleas, Litchfield County; Gideon H. Welch, Judge. Action by John W. Roe against Carring-From a judgment for de-

*For other cases see same topte and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

peals. Reversed, and new trial ordered.

Wilbur G. Manchester, for appellant. Wellington B. Smith and Frank B. Munn, for appellee.

RORABACK, J. Upon the trial of this case, it was admitted, or testified to and not denied, that the plaintiff had a secondhand turbine water wheel which he wanted to sell. The defendant owned an extensive farm of land in Colebrook, upon which there was a stationary sawmill, other buildings, and valuable standing timber. Some time during the latter part of the season of 1905, the plaintiff sold this water wheel, which was taken to Colebrook for use in the defendant's mill. The plaintiff offered evidence tending to prove that in the fall of 1905, after negotiations with the defendant and his father, Carrington Phelps, alleged and claimed to be the defendant's agent, he sold the water wheel in question directly to the defendant. The defendant admitted that the wheel was purchased for the mill upon his farm and claimed and offered evidence to show that his father made the purchase for his own benefit and upon his own credit.

One question presented by the appeal is: Were the facts and circumstances established by the evidence such as to warrant the court in directing a verdict for the defendant? The plaintiff, among other things, upon his direct examination, stated: "Q. Now, if you will please give the conversation that took place on the occasion. Perhaps you might first state who was present? A. His father was there with him, Mr. Phelps, the father, and the young man, Mr. Phelps. Q. That is the defendant, Carrington A. Phelps? A. Yes. Carrington A. Phelps talked with me regarding the new wheel, and he wanted to know if I thought the wheel would answer their purpose. I had some talk with his father before about it, and I told him I thought it would. He said if it would he would take it, as he said they wanted to saw timber with it. Q. Did he tell you where? A. Yes, sir. Q. Where was it that he said he wanted to saw timber with it? A. On his land. Q. Where was this? A. Up in Colebrook." The court, in directing the jury to return a verdict for the defendant, stated: "In this case it is incumbent upon the plaintiff to prove by a preponderance of evidence that he sold this water wheel to the defendant, Carrington A. Phelps, through his duly authorized agent, Carrington Phelps, Sr. Plaintiff does not claim in his testimony that he sold the machinery to the defendant in person, but only through Carrington Phelps, Sr., as agent of the defendant. The plaintiff must prove by a preponderance of evidence that the said Carrington Phelps, Sr., was the agent, express !

fendant on a directed verdict, plaintiff ap- or implied, of the defendant to make this purchase of this machinery. It is an admitted fact that the name of the defendant was not used in the negotiations of sale and purchase, nor was the word 'agent,' or any word implying agency, used or expressed in any form." The judge directed a verdict for the defendant upon the theory that there was no evidence to go to the jury in support of the plaintiff's claim upon the controlling issues in the case.

From an examination of the record it is apparent that the court misapprehended the nature and extent of the plaintiff's claim, and the effect of the evidence. It appears that the evidence as to the controlling issues was conflicting. The weight and probative effect of the testimony of the opposing witnesses were important questions in the consideration and decision of the facts in issue. A verdict should be directed only where the state of evidence is such that the judge can see that, if a different verdict was rendered, it would be his duty to set it aside. Currie v. Consolidated R. Co., 81 Conn. 383, 71 Atl. 356; Bradbury v. South Norwalk, 80 Conn. 298, 68 Atl. 321; Pigeon v. Lane, 80 Conn. 237, 67 Atl. 886; Hogben v. Metropolitan L. I. Co., 69 Conn. 503-511, 38 Atl. 214, 61 Am. St. Rep. 53; Cook v. Morris, 66 Conn. 196-211, 83 Atl. 994.

Errors are assigned for certain rulings on evidence, but the questions involved are not presented by the finding of facts, and therefore cannot be considered.

There is error, and a new trial is ordered. The other Judges concur.

(82 Conn. 258)

FARRINGTON ▼. CHEPONIS & PARNA-RUSKY.

(Supreme Court of Errors of Connecticut. June 10, 1909.)

1. Trial (§ 120°)—Misconduct of Counsel.

Remarks of plaintiff's counsel in a personal injury action, after defendant had cross-examined at length several boys who were witnesses, each of whom had cried during the examination, that defendant's counsel had made every boy crywhile on the stand by trying to make them lie, were improper and calculated to seriously prejudice defendant, and were reversible error, where the trial court did not rebuke the attorney or caution the jury not to be influenced by them.

[Ed. Note—For other cases—eac. Trial Dec.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 120.*]

2. Trial (\$ 304*) — Appeal and Ebror (\$ 1069*)—Disqualification of Juror—Prej-

Where several boys cried during a lengthy cross-examination by defendant's counsel, and cross-examination by defendant's counsel, and plaintiff's counsel remarked that he had made every boy on the stand cry by trying to make them lie, a semiaudible remark by a juror, "That's right," indicated such prejudice as te disqualify him, and was ground for reversal; the trial court not having rebuked the juror er cautioned the jury that they should not be prejudiced by observations.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 725; Dec. Dig. § 304; Appeal and Error, Cent. Dig. § 4136; Dec. Dig. § 1069.*]

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

8. DAMAGES (§ 144*) — INSTRUCTIONS — CON-FORMITY TO PLEADINGS—ITEMS OF DAMAGE. In an action for personal injury, it was error to permit the jury to consider the length of time plaintiff was prevented by his injuries

'time plaintiff was prevented by his injuries from performing his work as a newspaper carrier, where such damages were not alleged or proved.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 144.*]

4. Damages (§ 143*) — Pleading — Allegations—Consequential Damages.

In a personal injury action, plaintiff must, allege the consequences which he claims resulted from the wrongful act, in order to recover consequential damages.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 143.*]

5. MASTER AND SERVANT (§ 804*) — INJURIES TO THIBD PERSON—SCOPE OF EMPLOYMENT.

In an action for injuries claimed to have been caused by the negligence of defendants' driver in colliding with plaintiff, plaintiff must prove that defendants' servant was acting in the prosecution of defendants' business when the accident occurred, and that plaintiff's injuries were caused by defendants' negligence, in order to recover, so that it was error to permit a recovery merely if plaintiff was injured by the act of defendants' servant independent of what he did himself.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 304.*]

6. MUNICIPAL CORPOBATIONS (§ 705*) — IN-JURIES TO THIRD PERSONS — CONTRIBUTORY NEGLIGENCE—VIOLATION OF ORDINANCE.

If plaintiff's violation of an ordinance when , he was injured by being struck by defendants' wagon substantially contributed to his injury, he could not recover.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1517; Dec. Dig. § 705.*]

Appeal from District Court of Waterbury; George H. Cowell, Judge.

Action by William Farrington against Cheponis & Parnarusky. From a judgment for plaintiff, defendants appeal. Reversed, and a new trial ordered.

Edward B. Reilly, for appellants. John H. Cassidy, for appellee.

to recover for injuries claimed to have been sustained through the negligence of the defendants' servant in driving the defendants' horse attached to a wagon in such a manner that it collided with the plaintiff while he was engaged in coasting on a public highway in Waterbury.

The defendants' appeal is based upon several assignments of error; one relating to the action of the court as to improper remarks of counsel and of a juror made during the trial of the case. The question and the manner in which it arose appear from the finding as follows: "The plaintiff introduced as witnesses a number of boys who were coasting on Hill street at the time of the injury, and who were eyewitnesses of the accident. These witnesses were as follows: The plaintiff, 15 years; John Farrington, the plaintiff's brother, 17 years; Michael Can-

field, 17 years; and Harry Carter, 15 years. Each witness was subjected to a severe crossexamination by James E. Russell, one of the defendants' counsel. William Farrington was under cross-examination for an hour and a half. John Farrington and Michael Canfield for fully an hour, and Harry Carter during the entire forenoon session, from 10 a. m. to 12:30 p. m. During some part of the crossexamination each boy cried as a result of Mr. Russell's questioning, but did not change the testimony given on the direct. Harry Carter upon cross-examination was asked several questions in relation to the defendants' horse, when he cried. The following then occurred. Question by Mr. Russell, attorney for the defendants, upon cross-examination: Q. Why do you feel bad about that? Mr. Cassidy, attorney for the plaintiff: 'You have made every boy cry that has been on the stand trying to make them tell a lie.' At this point one of the jurors said semiaudibly, 'That's right.' Mr. Russell at once protested against remarks of that kind, and, after the jury had been excused and sent to their room, moved that the jury be discharged from further consideration of the case. The court denied the motion, and stated that: 'I think, in my charge to the jury, possibly I can say that they must regard the evidence and not the manner of counsel, and to remove any possible claim that the manner of counsel has affected the merits of the case." Exceptions as to the rulings of the court and the conduct of the trial were then taken. It does not appear that any further reference was made to this subject by the court. The record discloses that the plaintiff obtained a verdict for \$500. The law will not sanction the invasion of another's right when it appears that he was not given a fair trial. The improper remarks of counsel were material and well calculated to seriously prejudice the defendants' case with the jury. The comment of the juror indicated such prejudice as disqualified him in the proper performance of his duty. All this, if properly objected to, is ground for reversal, unless its effect was in some way overcome. Wilson v. United States, 149 U. S. 60, 13 Sup. Ct. 765, 87 L. Ed. 650, 652. The presiding judge did not rebuke either attorney or juror and failed to caution the jury that they should not be influenced by these improper observations.

The charge was erroneous in its statement as to the rule of damages. In speaking of the plaintiff's right to recover, the court said, in part: "In coming to any determination, if you should arrive at the question of damages, you should take into consideration the length of time he was incapacitated from attending to his duties as a newspaper carrier." No such element of damages was alleged in the complaint, nor does it appear that such damages were proved or claimed upon the trial. The plaintiff in his complaint must give the

**For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

defendant fair notice of what he claims, and | 8. Executors and Administrators (§ 206*) in an action for consequential damages must state the consequences which he claims to have resulted from the wrongful act charged. The special damage which the court instructed the jury the plaintiff was entitled to recover should have been distinctly averred in his complaint. Eldridge v. Gorman, 77 Conn. 699-792, 60 Atl. 643.

In speaking of the conduct of the parties, the court stated: "If he [the plaintiff] was not careless, was not guilty of any conduct, so that the injury was the natural consequence of what he did, if he was injured by the act of the defendants' servant independent of what he did himself, why, then, he would recover." This was erroneous. The plaintiff had alleged and was bound to prove that the servant who was driving the defendants' horse was in the prosecution of the defendants' business; also, that the plaintiff's injuries were caused by the defendants' negligence. There was apparently no question that the plaintiff was engaged in the violation of an ordinance. If this act essentially contributed to his injury, he could not recover. Upon this point the charge was plainly inadequate. The driver's conduct after the accident related to a past event, and evidence of it was not admissible as part of the res gestæ. Morse v. Consolidated Ry. Co., 81 Conn. 395, 899, 71 Atl. 553.

The comments of the court complained of by the defendants may not be made upon another trial and need not be considered at this

There is error, and a new trial is ordered. The other Judges concur.

(710 Md. 521)

PEARRE V. SMITH.

(Court of Apreals of Maryland. May 20, 1909.)

1. Words and Phrases — "Family" —
"Household."

A "family" is a collective body of persons

living in one house, and under one manager. It consists of those who live with the pater familias: The word is often used interchangeably with "household."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2673-2691; vol. 8, p. 7661; vol. 4, p. 3361.]

2. Executors and Administrators (§ 206*)—
"Head of a Family"—Claims Against ESTATE.

Where decedent, after retiring from busi-, went to reside with his sisters, and furnished a part of the coal and provisions, he was under no obligation to support any of the members of the household, including complainant, a ward of one of his deceased sisters, and was not the head of the family so as to render his estate responsible for services rendered therein by the ward.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 733; Dec. Dig. § 206.*

For other definitions, see Words and Phrases, vol. 4, pp. 3225-3233; vol. 8, p. 7677.]

SERVICES AS PART OF FAMILY-RIGHT TO COMPENSATION.

Where complainant, a ward of decedent's sister, lived in the family for several years, and rendered services as such, without expectation or promise of compensation, or contract to pay for the services, express or implied, she could not recover therefor against decedent's estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 733; Dec. Dig. § 206.*]

4. TRIAL (§ 174*)—INSTRUCTIONS—DIRECTION OF VERDICT.

A requested charge that on the evidence and pleadings the verdict must be for defendant was properly rejected as too general and indefi-nite; the proper form being that there was no evidence legally sufficient to entitle plaintiff to recover under the pleadings.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 398; Dec. Dig. § 174.*]

5. Executors and Administrators (§ 258*)-

SERVICES TO DECEDENT-INSTRUCTIONS. Where there was no material evidence that complainant rendered any services to decedent personally, the court erred in instructing that, if complainant was not a member of decedent's family, and rendered useful services to him in his lifetime, the fact of their rendition was prima facie evidence of their acceptance by him, and, in the absence of proof to the contrary, or of an express contract, raised an obligation to pay what they were reasonably worth, was improper.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 904; Dec. Dig. § 253.*]

Appeal from Circuit Court, Howard County; Wm. Henry Forsythe, Jr., Judge.

Suit for work and labor by Isabella Smith against James W. Pearre, as executor of George R. Leach, deceased. Judgment for plaintiff, and defendant appeals. Reversed, and no new trial ordered.

Argued before BOYD, C. J., and BRISCOE, SCHMUCKER, WORTHINGTON, THOM-AS, and HENRY, JJ.

Carlyle Barton and Redmond C. Stewart. for appellant. John G. Rogers, for appellee.

SCHMUCKER, J. The appeal in this case is from a judgment of the circuit court for Howard county in favor of the appellee against the appellant, as executor of the estate of George R. Leach. The suit was brought on the common counts in assumpsit to recover the value of services alleged to have been rendered to the defendant's testator and his family in his lifetime. The defense was made under the general issue pleas. The trial resulted in a judgment for \$800 in favor of the plaintiff, from which the appeal was taken.

It appears from the evidence on behalf of the plaintiff-the defendant offered nonethat the services sued for consisted of aiding the testator's sisters, during more than 20 years prior to his death, in the performance of current domestic labor in the household composed of him and them. The evidence does not tend to show that the serv-

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

press or implied contract, or that there was a design at the time of their rendition to charge for them, or an expectation on the part of the recipients to pay for them. or that any claim for payment was asserted, or demand therefor made upon the testator during his lifetime. The evidence, on the contrary, shows that the services in question were voluntarily and cheerfully rendered by the appellee, who was an inmate of the household, without being required to pay either board or lodging. It further shows that when she was, on several occasions, presented with sums of money by different members of the family, in the absence of a demand therefor on her part, she accepted them without, so far as the record shows, suggesting the existence in her favor of a right to compensation. We have definitely determined in a series of cases that services performed under such circumstances by a member of the family are not sufficient to support a claim against a decedent's estate for compensation. Bantz v. Bantz, 52 Md. 686; Bixler v. Sellman, 77 Md. 496, 27 Atl. 137; Gill v. Staylor, 93 Md. 453, 49 Atl. 650; Duckworth v. Duckworth, 98 Md. 100, 56 Atl. 490.

In 2 Page on Contracts, p. 1183, § 778 (citing Bixler v. Sellman, supra) it is said: "Persons who live together as members of the same family, and render personal services each to the other, generally do so from motives of affection, and not because of the expectation of a financial reward therefor. Accordingly the mere rendition of personal services between persons so situated does not establish a liability on the part of the person receiving such services to make compensation to the person rendering them, even though the services may be performed at the express request of the person receiving the benefit thereof, or may be voluntarily accepted by him." In our view although the appellee was not a blood relation of the decedent and his sister, she should, upon the undisputed evidence in the case, be regarded as having been a member of his family. The word "family" is often used in a restricted sense to describe a group of persons connected by ties of kindred, such as parents and children, but it has a variety of meanings according to the connection in which it is used, and it should be so construed in each case as to give it the significance appropriate to its use. 19 Cyc. 450; 12 A. & E. Encycl. 866; Sheehy v. Scott, 128 Iowa, 551, 104 N. W. 1139, 4 L. R. A. (N. S.) 365; Downes v. Long, 79 Md. 385, 29 Atl. 827. Webster defines it to be a collective body of persons who live in one house and under one manager, and that meaning has been approved in many cases cited in the footnote found on page 866, 12 A. & E. Encycl., supra. 1 Bouvier's Law Dictionary, p. 758, says that in common parlance the family "consists of those who live under the same roof with the pater familias," and also cites different cases as authority one.

ices were rendered in pursuance of an express or implied contract, or that there was a design at the time of their rendition to charge for them, or an expectation on the used.

It appears from the evidence that the appellee was taken about the year 1869, when but 8 years old, by Mr. Leach's widowed sister Mrs. Belt, as a ward, from the Children's Aid Society, and was admitted into her family, and educated and taught the trade of dressmaking by her. The relation thus established between the appellee and Mrs. Belt continued until the death of the latter about 7 years ago. About 20 years ago Mrs. Belt, taking the appellee with her, moved from the farm, which she had theretofore occupied, to Lisbon in Howard county, where she and her unmarried sisters, Martha and Louisa, and her brother, Mr. Leach, who was a bachelor, resided together as one family, in a house in which he then conducted a store. Five years thereafter Mrs. Belt built a residence at Lisbon, and she and her two sisters and her brother, who then retired from business, moved into her house, and lived together there as one family until they, with the exception of Louisa Leach, successively died. During all of these years, until the death of Mrs Belt about 7 years ago, the appellee remained with the family thus constituted, and performed the services in question by participating with Mr. Leach's sisters in the discharge of the current domestic duties of the household. Louisa Leach, the testator's surviving sister, and Albert Hobbs, an intimate friend of the family throughout its entire history, both testified for the appellee, as plaintiff, that she was always treated as a member of the family while she resided with them. According to Louisa Leach's testimony the appellee did such of the domestic work as she chose to, just as any member of the family. After Mrs Belt's death the appellee did not reside permanently with the family. but paid them visits of some length from time to time, during which she assisted, as she had formerly done, in the performance of household duties, and nursing such of them as were ill. The services thus rendered by the appellee in the long series of years covered by them were doubtless considerable, and there was evidence tending to show that they were valuable, and that Mr. Leach, the testator, in his lifetime said to several other persons that the appellee had been very faithful, and that her services had not been properly recognized by his sister Mrs. Belt. and declared his purpose to make the matter right, but, so far as the record shows, he never made any provision for the appellee. There is, however, no evidence tending to show that the services were rendered under such circumstances as to fairly imply an understanding that a charge was to be made for them and met by payment, which we held in Bantz v. Bantz, supra, to be necessary to support such an action as the present all of the appellee's services were rendered, not to the appellant's testator, Mr. Leach, but to his sisters, and mainly during the life of Mrs. Belt. That fact was conceded at the hearing of the appeal, but was met with the contention that Mr. Leach was the head of the family, consisting of himself and his sisters, and as such was responsible for the ordinary and necessary expenses incident to the maintenance of that family. We cannot yield our assent to that contention. Without pausing to inquire what are the liabilities of the "head of a family," we must say that in our opinion the evidence in the case does not tend to prove that Mr. Leach was the responsible head of the family of which he was a member. He was under no legal obligation to support his adult sisters, and there is no evidence that he in fact defrayed the expenses of their maintenance. The family resided in the house of his sister Mrs. Belt. His sister Louisa testified that he furnished coal, wood, bread, meat, and butter, and that she got the groceries and sugar, and sometimes the bread, and attended to everything inside, and that she was the head of the family after Mrs. Belt got in bad health. The evidence shows that Mrs. Belt was a person of property, and the just inference is that she also contributed in her lifetime to the support of the family. In view of these circumstances, and the further fact that the evidence shows Mr. Leach to have been in very moderate circumstances, the record must be regarded as presenting no legally sufficient evidence that he was in fact the responsible head of the family. It rather tends to prove that no one member of the family stood in that relation to the others.

The record contains six bills of exceptions, two of which relate to the court's action on the prayers, and the others to the admission of evidence objected to by the defendant. It will not be necessary for us to notice the exceptions relating to the admissibility of evidence, because, even with the aid of the testimony objected to, the appellee, as plaintiff, for the reasons already stated by us, failed to present evidence legally sufficient to entitle her to recover.

At the close of the plaintiff's case below the defendant asked the court, by her first prayer, to instruct the jury "that on the evidence and pleadings in this case their verdict must be for the defendant," but the court rejected the prayer. There was no error in rejecting that prayer, as it was in a form which we have several times held to be too general and indefinite. Robey v. State, 94 Md. 67, 50 at 1.11, 89 Am. St. Rep. 405; Western Md. R. R. v. Carter, 59 Md. 311; Hobbs v. Batory, 86 Md. 71, 72, 37 Atl. 713. The court would have been justified in granting a prayer in proper form, instructing the jury that there

The evidence also shows that practically was no evidence legally sufficient to entitle of the appellee's services were rendered, the plaintiff to recover under the pleadings in to the appellant's testator. Mr. Leach, the case.

There was reversible error in granting the plaintiff's second prayer, which submitted generally to the jury the question whether the appellee was a member of the testator's family, and instructed them, if they found that she was not such, and had rendered useful and valuable services to him and for his benefit in his lifetime, the fact of their rendition was prima facie evidence of their acceptance by him, and, in the absence of proof to the contrary of any express contract, raised an obligation to pay what they were reasonably worth. This prayer was specially excepted to for want of evidence legally sufficient to show that any services were rendered to Mr. Leach, or that he had any family. The only evidence we find in the record tending to show that the plaintiff rendered any services to Mr. Leach personally is the statement made by the witness Hobbs that she waited on Mr. Leach during his last illness "just the same as one of the family," but he also said he did not know how long she was present in his last illness. The prayer under consideration is a substantial copy of the plaintiff's second prayer, which was approved by us, in Gill v. Staylor, supra, in which the facts were materially different from those now before us. In that case the services rendered to the intestate consisted, not of such work about a household as is ordinarily done by its inmates, but in carrying on a butchering business for the testatrix, and it was there testified by many witnesses, and practically conceded, that the services had been both rendered and received with a cotemporaneous expectation of being paid for. Furthermore, the doctrine, that no promise to pay will be implied for services, and accepted, where the service is rendered by a member of the family of the decedent, was expressly recognized and approved in Gill v. Staylor.

There was also reversible error in rejecting the defendant's second prayer, which instructed the jury that the undisputed evidence showed that the plaintiff lived with the defendant's testator as a member of the family, and that, as it failed to show a design on the plaintiff's part at the time of the rendition of the services to charge for the same, or an expectation on the part of the testator to pay for them, their verdict must be for the defendant.

It being apparent that the case must be reversed for the errors we have pointed out, it is unnecessary to review the rulings upon the other prayers. The judgment appealed from will be reversed, and, as the appellee has not made out a case entitling her to recover, no new trial will be granted.

Judgment reversed, with cost, without a new trial.

(110 Md. 497)

RECK V. RECK.

(Court of Appeals of Maryland. May 20, 1909.)

1. APPEAL AND ERROR (§ 870*) - QUESTIONS

REVIEWABLE.

The overruling of a demurrer to the bill is not reviewable unless an appeal is taken from the ruling.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3507; Dec. Dig. § 870.*]

2. CANCELLATION OF INSTRUMENTS (§ 37*)

2. CANCELLATION OF INSTRUMENTS (§ 37°)—BILL—SUFFICIENCY.

A bili, in a suit to set aside a deed on the ground that it was procured by undue influence and fraud, which alleges that defendant used his influence on the aged plaintiff, and represented to him that his property was in danger of being seized by pretended creditors, and induced plaintiff to execute to defendant a deed under the agreement that defendant would on demand reconvey to plaintiff, that the land was not subject to the payment of any claim against plaintiff, and that such representations were false, etc., states a cause of action as against a demurrer, for it shows that the conveyance was not the voluntary act of plaintiff, but was induced by the fraud and undue influence of deduced by the fraud and undue influence of defendant.

[Ed. Note.—For other cases, see Cancellation of Instrumenta, Dec. Dig. \$ 37.*]

8. ABATEMENT AND REVIVAL (\$ 60°)—D OF PLAINTIFF PENDING SUIT—EFFECT.

OF PLAINTIFF PENDING SUIT—EFFECT.

The death of plaintiff, pending the suit, abates the suit, and no further proceedings can be taken therein until his representative has been made a party, so that testimony in behalf of defendant, given after the death of plaintiff and before the representative was made a party, must be stricken out.

[Ed. Note.—For other cases, see Abatement and Revival, Dec. Dig. § 60.*]

4. Deeds (§ 211*)—Suit to Set Aside—Fraud -Evidence.

Evidence held to show that a deed executed by a father to his son was procured by the un-due influence and fraud of the son, authorizing the setting aside thereof.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 211.*]

5. DEEDS (§ 70*)-VALIDITY-FIDUCIABY RE-

Where a fiduciary relation exists whereby trust and confidence are reposed on the one side and influence and control are exercised on the other, equity, independent of positive fraud, through public policy, will interpose to prevent a man from stripping himself of his property.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \$ 174; Dec. Dig. \$ 70.*]

6. DEEDS (§ 196*)—VALIDITY—FIDUCIARY RE-LATIONS—BURDEN OF PROOF.

A conveyance, whereby benefits are secured by a child from his father conveying all his property, when not executed with good faith, will be set aside, and in such case the burden of establishing perfect fairness is on the grantee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 589; Dec. Dig. § 196.*]

Appeal from Circuit Court, Carroll County; Wm. Henry Forsythe, Jr., Judge.

Suit by Henry Reck against Charles F. Reck. From a decree of dismissal, complainant appeals. Reversed and remanded.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTH-INGTON, THOMAS, and HENRY, JJ.

Edward O. Weant and David N. Henning, for appellant. Charles O. Clemson and Benjamin F. Crouse, for appellee.

PEARCE, J. The bill in this case was filed October 4, 1907, by Henry Reck against his son, Chas. F. Reck, in the circuit court for Carroll county. It alleges that the plaintiff on April 12, 1897, was seised of a tract of land in Carroll county mentioned in the bill, and described in a deed filed therewith as containing 23 acres and 3 perches, more or less. It then charges: That Charles F. Reck, using his influence on the plaintiff, who was then 75 years of age, and intending thereby to obtain the plaintiff's said property for himself, represented to the plaintiff that said property was in danger of being seized and executed upon by pretended creditors of the plaintiff, and that he would be thus subjected to litigation and costs, and so induced the plaintiff to execute to said Charles F. Reck, on April 12, 1897, a deed for said tract of land described as above stated, upon the agreement between them that said Charles F. Reck would, on demand, reconvey said property to the plaintiff, provided he had not been required to apply the same to the payment of any debt of the plaintiff existing on the date of said deed; that said land was not then, or since, subject to the payment of any claim against the plaintiff; that said Charles F. Reck was not required to pay. and did not pay, any money whatever for the plaintiff; that the representations so made by said Charles F. Reck as the inducement for said conveyance to him were wholly false and without foundation, and solely made for the purpose of obtaining the said property of the plaintiff; that the consideration expressed in said conveyance was utterly false, and no money was ever paid or promised to be paid for said property, nor was anything of any value ever paid or promised therefor; that he always retained the control and possession of said property until about three months before filing this bill, when the infirmities of old age compelled him to remove to Baltimore, being then 85 years of age; that he had frequently demanded a reconveyance of the property, which was always refused, though at one time said Charles F. Reck delivered to him the original conveyance above mentioned, pretending that it operated as a reconveyance, but still refusing to make a proper conveyance of the legal title; that he had at that date advertised said property in his own name to be sold on October 5, 1907; that said property was the plaintiff's sole means of support, said Charles F. Reck, having, without right or authority. caused all the plaintiff's personal property to be sold and disposed of. The prayer of the bill was: (1) That the said conveyance be declared null and void, and be set aside; (2) that Charles F. Reck be required to execute

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

a proper reconveyance of said property to the plaintiff, or, in lieu thereof, that a trustee be appointed to take charge of and sell the same for the benefit of the plaintiff, and in the meantime to hold the same subject to the final decision of the court in the premises; and (3) that said Charles F. Reck be enjoined from selling or controlling said property, or exercising any acts of ownership or authority over the same.

An injunction was issued, accordingly, on the same day, with the usual leave to move for a dissolution upon filing an answer. On November 1, 1907, Chas. F. Reck demurred to the whole bill, insisting that it appears from the face of the bill that the plaintiff executed the conveyance for the purpose of defrauding his creditors, and that he is consequently not entitled to relief in equity. Upon a hearing on the demurrer, it was overruled by Judge Thomas, who held: That upon the allegations of the bill, admitted by the demurrer, "the case presented was not one of conspiracy on the part of the father and son to defraud the creditors of the former, but of fraud and imposition on the part of the son, whereby he acquired, without any consideration, the property of the father; that the act of the plaintiff, which the defendant contended was fraudulent and disentitled him to relief, was not his free and voluntary act, but was induced by the fraud, undue influence, and imposition practiced upon him by the defendant, and they cannot therefore be said to be in pari delicto, in which case the party imposed upon will be relieved in equity"-in support of which there was cited Roman v. Mali, 42 Md. 513, Brown v. Reilly, 72 Md. 489, 20 Atl. 239, and Highberger v. Stiffler, 21 Md. 838, 83 Am. Dec. 593. This demurrer was overruled February 8, 1908, and no appeal was taken from that ruling. Consequently it cannot be reviewed in this court. Chappell v. Funk, 57 Md. 465; Hyattsville v. Smith, 105 Md. 321, 66 Atl. 44. But, if it could be reviewed, we should not hesitate to affirm the ruling for the reasons stated in the opinion filed in the circuit court. While this demurrer was pending, the plaintiff filed a petition in the cause, alleging: That he and his brother, Chas. F. Reck, were the only persons in any event interested in the property; that neither of them were able, even if authorized, to give personal attention to the property, which was producing no revenue; and that it would be to the advantage of both that a trustee should be appointed to sell the same, and hold the proceeds subject to the order of the court upon determination of this suit. Chas. F. Reck answered this petition, admitting all its allegations and consenting to such sale, and on February 13, 1908, D. N. Henning and Charles O. Clemson were by an order or decree of court appointed trustees to make such sale, the proceeds to be held sub-

it does not appear that the trustees have made any sale.

On March 5, 1908, Chas. F. Reck answered the plaintiff's bill, denying all the allegations of fraud, or of the exercise of undue influence in obtaining said conveyance from his father, and denying any agreement or undertanding with his father for the reconveyance thereof to him upon any contingency whatever. He averred that his father was indebted to him at the time of the execution of the conveyance to an amount equal to the consideration named in said deed, viz., \$1,000, and that this consideration was true and bona fide. He admitted that his father continued to reside on the property and to control and use the proceeds as his own until September, 1907, but alleged that this was by his permission, and that he paid all taxes on the property since the execution of the deed. He denied that he ever surrendered said deed to the plaintiff, or reconveyed or pretended to reconvey the property to him, and alleged that the plaintiff took possession of the deed, without his consent, and after he had recorded it in good faith, and also denied that he had sold the plaintiff's personal property or had received and retained the proceeds of any sale thereof, and alleged that the proceeds were paid to plaintiff's wife, his mother, since deceased.

Issue being joined, the plaintiff proceeded to take testimony to support the allegations of his bill; he being the first witness sworn. We were informed at the argument that the sole purpose of producing him as a witness was to show his utter mental incompetency, and his testimony abundantly demonstrates that, at the time it was taken, he was nopelessly incompetent. He could give no intelligible account of the transaction which led to the conveyance or of any question asked him. He said he signed the deed, but did not know why he did so, that he owed Chas. F. Reck nothing at that time that he knew of, and never received anything for the deed that he knew of, and he did not know anything that was said at the time. He could not remember that he had ever been in Franklin Square Hospital, though he was there some time in September, 1907, nor that he had even been at Bay View Asylum, though he had been there several months just before testifying, and was brought from that place the day before he testified, for that purpose. He thought he was then living at Union Bridge in Carroll county, and that he was working there without wages for a man whose name he did not know. The only value of his testimony, or, more accurately, his examination, was to show that he was incapable mentally of testifying. The requisite proof therefore to sustain the bill must be found, if at all, elsewhere.

der or decree of court appointed trustees to James C. Reck, another son of the old man make such sale, the proceeds to be held subject to the further order of the court; but father was 86 years of age at that time; that

in July, 1907, he fell in the haymow on that | and he said he had, but that his "father had farm and dislocated his hip; that he then went to the Franklin Square Hospital in Baltimore, where he remained 11 weeks; that witness then took him to witness' house in Baltimore, where he remained three months and then was sent to Bay View Asylum, where he had been ever since, except the day he testified at Highlandtown in Baltimore county; that he had never been at Union Bridge since July, 1907; that when he first came to the hospital at Franklin Square, and until a short time before he left witness' house, his mind seemed all right, but afterwards gave way, as shown in his examination; that his father had \$26.50 when he went to the hospital, which he handed witness, and which, with \$55 supplied by witness and \$90 paid him by Chas. F. Reck from sale of horse and cow, was all used for his father's benefit at the hospital; that he was sent to Bay View after he had been three months at witness' house, because witness' wife could not manage him, and witness could not leave his employment and stay at home to attend to him. He also testified to a conversation he had with Chas. F. Reck in May, five years previously, at witness' house in Baltimore, when he came there to see a doctor. He said: "My brother, Chas. F. Reck, told us my father was on a note as security for Henry Null, that he thought my father would have it to pay, and that he persuaded my father to transfer the farm to him, and that he would get him off the note, and afterwards would transfer the place back to him. He told me he had done this to save him paying the note. Then he told me that, after he had got him off, he had returned the place back to my father, that it had not cost him anything, that he hadn't anything in the place, and everything was all right between him and pap, and that my father did not owe him anything at the time the deed was made." On cross-examination he testified that in the fall of 1907, Chas. F. Reck told him at Snouffer's livery stable that, if he (witness) would give him what he had in the place, he would turn it over to him, and said he had \$1,200 in the place, but witness told him he had not 1,200 cents in it. He also testified that, when his father was in the hospital, he told him to take charge of his deeds, which were in a bureau drawer at Union Bridge, and he went there and got them, and that the deed then shown him from his father to Chas. F. Reck, filed as Exhibit 1 with the bill, was one of the deeds he took from that bureau drawer.

Catherine S. Reck, wife of James C. Reck, was present at the conversation testified to by him at their house in Baltimore and confirmed his testimony as to the statement made by Chas. F. Reck.

Jeremiah Reck, an uncle of Chas. F. Reck, testified that about four years before that time he had a conversation with Chas F. Reck about the matter, and then asked him if he

failed to have the deed recorded, and he can't do it no more, and I intend to leave it that way while he lives, and then I intend to settle it up straight, unless his wife comes in for more than she ought to have. Then I will stop her. He told me the property was his father's."

Wilson L. Crouse testified that he had been tax collector for nine years in that district and knew the farm in question. He said that Henry Reck paid him the taxes on that farm. for all except the last two years, and he identified receipts given by him for these payments. He also said Chas. F. Reck paid the taxes for the last two years, and that the property was assessed to Chas. F. Reck on witness' tax book for 1907.

Hezekiah Baker testified: That he had known both parties for 50 years. That, about 25 years before, Henry Reck owed Chas. F. Reck a note of \$75 for guardian money due him. "Henry asked his son if he needed the money. He replied, 'I don't just need it, but I can make — ' Then Henry counted down and gave the \$75 to Chas., and Chas. said: 'I can't just put my hand on the note, but I will give it to you some other time.' After that Charles brought suit against Henry, who would not pay the note because he had paid it before. Charles had counted interest on the note for about \$300."

Henry T. Null testified that he was a brother-in-law of Henry Reck, who was security for him on a note of \$250 to Miriam Albaugh. He said: "Henry Reck notified me to have him released, which was 8 or 10 years ago. Then I gave my own individual note to Mrs. Albaugh and took up the note on which Reck was security and left it at Silas Senseney's store for Henry Reck. He was only on one note for me." This was the testimony in chief for the plaintiff, which was concluded June 8, 1908.

Henry Reck died June 30, 1908, leaving a will by which James C. Reck was appointed executor, to whom letters testamentary were granted, and on July 22, 1908, he was made party plaintiff in the place of the deceased; the defendant, through his counsel, agreeing to the order of court for that purpose. The defendant, Chas. F. Reck, testified in his own behalf, and Frank T. Shriver, John W. Davis, John C. Boone, Samuel L. Johnson, Samuel F. Koontz, and Chas. F. Myer also testified in his behalf, and these were the only witnesses for the defense. The plaintiff, in rebuttal, produced Mr. David N. Henning as a witness on July 27, 1908, and he testified that, a short time before the bill was filed in the fall of 1907, Chas. F. Reck came to his law office at his request. He said: "I asked him whether he paid-I either used the word paid or gave -his father anything for the property of which he had the deed (meaning the deed for the property mentioned in this case) at the time the deed was executed. He said he did bad ever deeded the farm back to his father, not give or pay his father anything for the

since that time he had, at various times, let his father have money. I then asked him how much money he let his father have, and he said he didn't know. I asked him if he would not make a statement or some kind of an account to show what these amounts were which he said his father had gotten and return the deed to his father. I said I thought we could make a settlement if his father owed him anything. It could be paid, and he could return his father's property, which he declined to do, and I then filed the bill in the case."

The plaintiff excepted to all the testimony in behalf of the defendant because, at the time each of these witnesses testified. Henry Reck had died, and no one had been made a party to the suit in his stead to prosecute the same, and the circuit court sustained these exceptions and struck out all the testimony for the defendant. There can be no question that this action was correct. In such case "it is necessary that the person to whom the interest of the deceased party is transmitted should be before the court, and, until he is made a party, the suit, though not absolutely abated, is deemed defective." 2 Daniels, Ch. "Where the suit was Pr. star page 1507. originally perfect, such an event subsequently happening causes what is technically called an 'abatement'; that is to say, puts the suit in such a condition that no further proceedings can be taken until the defect is remedied." Id. star page 1506. "All further proceedings must be suspended until the suit is renewed against or in favor of the person succeeding to the interest of the deceased, except when the cause has been set down for Alex. Ch. Pr. 101. "Abatement hearing." signifies a present suspension of all proceedings in a suit for the want of proper parties capable of proceeding therein." Miller's Eq. 251; Glenn v. Clapp, 11 Gill & J. 1; Whelan v. Cook, 29 Md. 1. The case was thus left to the court upon the testimony for the plaintiff alone, and the learned judge, being of opinion that this testimony did not sufficiently sustain the allegations of the bill, he dismissed the bill, with costs to the defendant.

In this view, however, we are not able to concur. The court below seemed to rely upon the case of Wenstrom Co. v. Purnell, 75 Md. 113, 23 Atl. 134, in which this court held that: "The onus of proof is upon the plaintiff, who seeks to set aside a contract executed or partly executed, to establish the alleged fraud by clear and indubitable proof; * * * and relief will only be granted in those cases where it plainly appears that the misrepresentation or undue suppression of material facts actually occasioned and brought into existence the contract." In that case the bill was filed by Purnell against the Wenstrom Company and E. L. Tunis to rescind a contract of subscription to the capital stock of the company. Judge Alvey said:

property when he obtained the deed, but action involved, the plaintiff and Tunia. The former testified in his own behalf, and Tunis for the defendants, and there is a sharp conflict in the testimony of these two witnesses as to the main facts of the alleged misrepresentation. * * * It is a wellsettled principle in courts of equity, and especially on allegations of fraud, that if the allegations of the bill are supported only by the testimony of a single witness, and his testimony is positively and precisely dehied by the defendant on oath, or a witness in his behalf, the bill will be dismissed, unless there be corroborative evidence from letters or other documents in the case." But the situation in the case before us is a very different one. The material allegations here are that Charles F. Reck falsely represented to his father, then nearly 80 years of age, that his property was in danger of seizure by reason of his suretyship for Henry Null, and that by this means, and his promise to secure a release, and then to return the property for which he paid nothing, and gave no consideration, he procured the deed in question.

The evidence of the father is worthless for any purpose except to demonstrate his absolute imbecility at the time it was offered, and his production as a witness was at once the readiest and most effective method of demonstration, and the evidence of Chas. F. Reck and of all his witnesses was eliminated by the ruling of the court which we have approved as correct; but the testimony of James C. Reck and Catherine S. Reck, two unimpeached and uncontradicted witnesses, remains, and this clearly and unequivocally proves by Chas. F. Reck's own statement that he did procure the deed by the means charged, and the testimony of Henry T. Null abundantly proves that there was no danger from the suretyship on his note, and that the representation of danger was a false representation. It shows that Chas. F. Reck made no attempt to secure a release from this note, that the demand came from Henry Reck alone, and that, when made, Null instantly went to Mrs. Albaugh, who immediately accepted Null's unsecured note, and surrendered the note on which Henry was security. No more artful and effective means could have been used to get possession of the property of this old man, nearly 80 years of age, than to excite his fear of its loss by reason of that suretyship then existing. While the answer of Charles F. Reck is not evidence in his favor, and his denial therein of the fraud charged in the bill cannot avail him, his statement of fact in the answer may be compared with the statement of witnesses as to the same facts, and, when this is done, the truthfulness and honesty of Charles F. Reck will be sadly discredited. He is flatly contradicted by James C. Reck and his wife, both of whom swear that he admitted to them that he pro-"There were but two witnesses to the trans- | cured the deed upon the representations and

the promise charged in the bill, and also; that he said he had returned the property to his father; and upon the last point he is also contradicted by Jeremiah Reck, who is an absolutely disinterested witness. The testimony of Henry T. Null conclusively shows that Henry Reck's property was never in danger of seizure by reason of that note, and that the representation of such danger and the pretended purpose to secure a release were false and fraudulent, and there is no evidence of any other suretyship which could create such danger. He is contradicted by Wilson L. Crouse, the tax collector, who proves that the taxes, which Chas. F. Reck claims were paid by him, were all paid by Henry Reck, except the last two years. He is further contradicted by Mr. Henning, who testified that he admitted to him that his father was not indebted to him at all at the time of the execution of the deed, and that he then paid or gave nothing to his father, as he had claimed in his answer he had done, and, though he then claimed that he had since at various times let him have money, he refused to say how much, and said he did not know how much. Finally, his inherent dishonesty in a previous transaction with his father was demonstrated by the testimony of Hezekiah Baker in his narration of the attempt to collect by suit the amount of a note long before paid by his father in the presence of Baker upon the son's promise to deliver up the note; and it may here be noted that in his evidence which was excluded he did not attempt to deny or explain his conduct.

In view of all these contradictions and 'discrediting facts, we should reach the same conclusion which we now reach if all the excluded testimony was before us for consideration. We have already said that the parties in this case cannot be regarded as in pari delicto, and that relief cannot be refused on that ground. In Central Bank v. Copeland, 18 Md. 317, 81 Am. Dec. 597, the court said: "A contract, the execution of which is induced by fraud, is void. * * Artifice and force differ only as modes of obtaining the assent of a contracting party." In Cherbonnier v. Evitts, 56 Md. 294, it was said: "It is not inconsistent with the exercise of undue influence or artifice that the instrument assailed was executed voluntarily, and with a knowledge of its contents." In Berger v. Bullock, 85 Md. 441, 37 Atl. 368, a widow with a small property was induced by threats of a contest of the will under which she held the property, and by false statements made by her son, to execute a deed conveying all her property to her daughter and son-in-law. On a bill to annul this deed, the lower court refused the relief, but on appeal that decree was reversed; Judge McSherry saying: "Whilst low, and cause remanded.

courts ought to be slow in setting aside, at the instance of a grantor, a conveyance seemingly made with deliberation, they would fall far short of their plain duty if they failed to rip up and annul an instrument executed by a person whose intention to make it has been brought about by such fraud and deception as this record discloses." And his language may be properly applied to this case. In Highberger v. Stiffler, 21 Md. 352, 83 Am. Dec. 593, the court said: "Wherever a fiduciary relation exists, legal or actual, whereby trust and confidence are reposed on the one side, and influence and control are exercised on the other, courts of equity, independent of the ingredients of positive fraud, through public policy, as a protection against overweening confidence, will interpose to prevent a man from stripping himself of his property. The relation requires the parties to abstain from all selfish projects. The general principle is, if a confidence is reposed, and that confidence is abused, courts of equity will grant relief. One of the most familiar examples is that of parent and child. All contracts and conveyances, whereby benefits are secured by children to their parents, are objects of jealousy, and, if they are not entered into with scrupulous good faith and are not reasonable under the circumstances, they will be set aside, unless third persons have acquired an interest under them, especially where the original purposes for which they have been obtained are perverted or used as a cover. * * The natural relation of the parties was reversed in this case by the influence of time. The parent had become a child, and the child guardian to the parent." In such cases, it is held not necessary to prove the actual exercise of overweening influence, misrepresentation, or fraud, ali-unde the act complained of. The burden of establishing its perfect fairness is thrown upon the grantee or beneficiary in the transaction.

The wisdom of the policy above mentioned, which will not permit one in the position of this old man to strip himself of his property, has a striking illustration in the fact that the son, who acquired his property by the means stated, permitted his father to die in an almshouse, and did not attend his funeral, though it was in his own town. In view of the facts disclosed in the record and of the principles announced in the cases we have cited, the conveyance in question must be annulled and set aside.

We must therefore reverse the decree dismissing the bill, and remand the cause, that a new decree may be passed in conformity with this opinion.

Decree reversed, with costs above and be-

(110 Md, 490)

MOORE v. PUTTS.

(Court of Appeals of Maryland. May 20, 1909.)

1. CONTRACTS (\$ 95°)—VALIDITY—DUBESS.

A lease of certain real estate by defendant to plaintiff required plaintiff to keep the property insured for defendant's benefit for \$26,000 and to pay the premiums. In case the property was destroyed by fire, the tenancy was to terminate; it being also agreed that defendant should sell the property to any person whom plaintiff should obtain for \$30,000. Plaintiff payer produced a nurchaser and the property never produced a purchaser, and, the property having been destroyed by fire, plaintiff threatened to destroy the insurance policies, and refused to pay the premiums to prevent defendant recovering the insurance, unless defendant signed the contract sued on, by which he agreed to pay plaintiff \$4,434.94 and cancel a note for \$175, which defendant thereupon did, though he was not indebted to plaintiff in any sum. Held, that Held, that the contract was unenforceable for duress.

[Ed. Note.—For other cases, see Cent. Dig. § 431; Dec. Dig. § 95.*] Contracts.

2. Evidence (§ 435*)—Written Instruments -Duress.

In a suit to enforce a written contract un-der seal, evidence showing that the contract was obtained by duress was not objectionable as violating the rule that a seal imports consideration.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2021-2024; Dec. Dig. § 435.*]

Appeal from Superior Court of Baltimore

City; Geo. M. Sharp, Judge. Action by Edgar B. Moore against John W. Putts. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, SCHMUCKER, WORTHINGTON, THOM-AS, and HENRY, JJ.

Fleet W. Cox, for appellant. Thomas R. Clendinen, for appellee.

BOYD, C. J. The appellant sued the appellee on an agreement under seal, and the defendant filed a plea that the agreement was procured by fraud and another alleging duress. The trial resulted in a verdict in favor of the defendant.

The material facts in the case are the following: The appellee leased to the appellant a property known as the Fauquier Sulphur Springs for the period of two years, beginning on the 1st day of June, 1899, and ending on the 31st day of May, 1901, with the privilege of an additional year on the terms mentioned in the lease. The lessee agreed to pay the premiums on insurance amounting to \$26,000 to be taken out in the name of and for the benefit of the lessor, which payments, in addition to the monthly sum of \$150, were to be considered the annual rent for the premises. The lessor had the right to annul the lease and to re-enter upon failure of the lessee to pay the rent for the space of 60 days after it was due and payable. The lessee agreed to pay the premiums on the policy of insurance at least 48 hours before the expiration of the policies, and to

miums, so that at no time during the lease the property should become uninsured, and that, in the event of his failure to pay either the premiums of insurance or taxes within the time specified, the lessor had the right to annul the lease. It was further agreed that, "should said hotel be destroyed by fire or so injured as to be unfit for use as a hotel, the said tenancy shall terminate, and all liability for rent hereunder shall cease upon the payment proportionately to the day of fire, and the said tenant shall not be liable for any further rent for or on account of this lease. Then this lease shall be void and at an end, and the said Putts shall not be required to rebuild the said hotel." lease was extended for a year, and on November 14, 1901, the property was destroyed by fire. It was insured through the firm of Hansbrough & Carter, insurance agents, but at the time of the fire the premiums were not paid to the agents, although they had paid them to their companies, and hence kept the insurance in force. Mr. Putts tendered the premiums due, but the agents replied: "Mr. Putts, Mr. Moore placed this line with us, and the courtesy of the business requires for the check to come through Mr. Moore's hands." They told him, however, that, if Moore did not pay the premiums, they would accept them from him. On November 20, 1901, Mr. Putts sent them a check for the premiums still due, which they accepted and collected the money thereon. Moore held the insurance policies, and, according to the testimony of Putts, threatened to destroy them unless he (Putts) signed the agreement sued on. Putts testified that he did not owe Moore anything at the time, and signed the agreement solely because he could not get the policies so as to collect the insurance unless he did. The agreement sued on was dated November 22, 1901, and is as follows: "Whereas certain matters of difference have existed between Edgar B. Moore and John W. Putts; and whereas the parties hereto have agreed to a compromise and settlement of all their said differences in the manner, as follows: Now therefore this agreement witnesseth: That the said parties have agreed together as follows: That the said Putts will, on or before June 1st, 1902, pay to the said Moore the sum of five thousand dollars, less the sum of eight hundred and sixty-four dollars and six cents (864.06), making the net sum to be paid forty-four hundred and thirtyfive dollars and ninety-four cents. That if the said Putts shall sell his property at Fauquier Springs, Virginia, and receive the purchase money therefor, prior to said June 1st, 1902, then the sum last mentioned shall forthwith upon receipt of said purchase money, be paid by said Putts to said Moore; it being understood and agreed that whether said sale be made or not, the said last menexhibit to the lessor the receipt for the pre- tioned sum shall be paid on or before said

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

last mentioned date. That the said payment, when made, shall operate as a full and finai settlement of all matters of differences between the parties hereto of every nature, including an outstanding promissory note of the said Moore for one hundred and seventy-five dollars now held by the said Putts, and which is to be forthwith surrendered by him to said Moore. In case of such sale of said Fauquier Springs property, said Moore agrees to surrender possession thereof within thirty days after the confirmation of said sale, and upon payment of the said sum of four thousand one hundred and thirty-five dollars and ninety-four cents." The sum of \$864.06 and the note for \$175 mentioned in the agreement were for rent then due Putts by Moore. Putts agreed that at any time during the continuance of the lease he would sell at the request of Moore, and convey to him or to such person or corporation as he designated, at and for the sum of \$30,000, all of the property included within the provisions of the lease, which provided how the payments were to be made. Moore undertook to justify his retention of the insurance policies, and to explain the sums named in the agreement sued on by relying on the agreement he had to sell the property.

There are four bills of exception in the record relating to rulings on the testimony and the fifth presents the rulings on the prayers, two having been offered by the plaintiff, which were rejected. It will be more convenient to consider the prayers before passing on the other exceptions. The first asks the court to instruct the jury that "there is no evidence legally sufficient to show fraud or duress exercised upon the defendant by the plaintiff, and therefore their verdict should on the said issue of fraud and duress be for the plaintiff." There would seem to be no possible doubt about the correctness of the ruling of the court in rejecting that prayer. The only pretense for any claim by the appellant on the appellee was that he contended that there was a verbal agreement by which the appellee was to give him 10 per cent. in case of a sale or purchase of the property. There is no such provision in the lease, but, on the contrary, it provided, as we have seen, that the appellee at any time during the continuance of the lease could at the request of the appellant sell and convey the property to such person or corporation as he designated for the sum of \$30,000, and the terms of the sale included the assumption of an existing incumbrance of \$8,000 in addition to the payment to the appellee of \$10,000 cash and a second deed of trust for \$12,000 payable in one year. There was a further provision that, if the incumbrance of \$8,000 be paid before the purchase, then the appellee was to be paid \$10,000 and to take a mortgage or deed of trust for \$20,000-one half in one year and the other half in two years without interest.

But, regardless of what we have said, no sale was in point of fact made before the fire. The appellant himself admitted that he never brought any one to the appellee, who offered to buy or was able to pay \$30,000 for the property. He did say he offered to pay that sum for the property, but admitted he was not able to do so. He also said he was negotiating with a "Mr. Spear, an undertaker of the city of Baltimore. He was a leading Elk"; but he said he did not know whether he could produce Mr. Spear, did not remember his first name, could not tell the street he lived on, and, although called upon to produce him while the testimony was being taken, did not pretend to do so. He did not claim that he had consummated the sale before the fire, and, of course, did not pretend that he or any one would then give \$35,000 for the property which had been destroyed by the fire. The appellee testified that the appellant never told him of any one who was willing to buy the property for \$35,000 or \$30,000, and that he brought no one to him for the purpose of buying it. It could not be pretended from the evidence in the record that the appellant would have had the slightest foundation to recover from or demand of the appellee any compensation for the sale of the property, as no sale was made. Under those circumstances, the appellant had in his possession insurance policies amounting to \$26,000, which he had taken out as required by the lease "in the name and for the benefit of the said John W. Putts, lessor." The appellee testified that the appellant refused to give him the policies unless he executed the agreement, that he threatened to destroy them if he did not and he (appellee) believed he would destroy them. He said: "That. when Moore said he would destroy the policies so I could not collect the insurance, defendant believed he would do so, and the contract sued on was signed solely because of my inability to obtain the insurance policies to collect the insurance unless he did so." He further said he was not indebted to Moore in any way, and that there was no other reason for signing the agreement. This appears in the cross-examination of the appellant: "Q. I ask you, isn't it a fact if he hadn't given you that contract you wouldn't have given him the premiums and policies? A. No. sir; I wouldn't have given the policies and premiums. Q. You would not? A. No. sir." With such evidence in the record, how could such a prayer as the first have been granted? If that testimony is true, it is difficult to imagine a clearer case of fraud and duress in exacting such an agreement of the appellee before he could obtain possession of the policies of insurance which belonged to him. It would be a reflection upon the administration of justice to permit a plaintiff to recover on an agreement obtained as shown by the testimony of the appellee and in effect corroborated by that of the appellant himself.



show that there was no fraud or duress are not applicable to such facts as these. Boulden v. Stilwell, 100 Md. 543, 60 Atl. 609, 1 L. R. A. (N. S.) 258, was an action of deceit. In Spitze v. B. & O. R. R. Co., 75 Md. 162, 23 Atl. 307, 32 Am. St. Rep. 378, the plaintiff filed a replication to a plea relying on releases, in which replication fraud was alleged. but the court held there was no fraud. That case, however, fully recognized the well-established doctrine that an instrument under seal could be impeached and set aside for fraud or duress. It is not claimed in this case as it was in that that the parties seeking to impeach the instrument did not know its contents, but the claim here is that the appellee was by fraud and duress compelled to sign this agreement in order to get possession of the policies of insurance which belonged to him, and which appellant threatened to withhold from him, and even to destroy, unless he did sign the agreement. In Bouldin v. Reynolds, 58 Md. 491, it was held that the court was not justified upon the testimony of the plaintiff alone "in setting aside a deed solemnly acknowledged and long acquiesced in without a murmer and without the slightest hint to the person with whom she had dealt for the space of seven years and more that she had been coerced in the transaction, and that the title of the purchaser was not good by reason of this." Chicora Fer. Co. v. Dunan, 91 Md. 144, 46 Atl. 347, 50 L. R. A. 401, was a case for specific performance, and does not reflect upon the questions here involved.

The second prayer was also properly rejected. Without reference to other questions suggested, it is sufficient to say that, although the issues made by the pleadings were fraud and duress, no reference is made to them or either of them, and the facts submitted by the prayer were unquestionably not sufficient to show there was no fraud or duress. There is no difficulty about the exceptions to the testimony. The appellant contended that it was not admissible to offer evidence to show the want of consideration, as the instrument was under seal. The well-established rule that a seal imports consideration was not attacked or impinged upon, but the evidence was offered as reflecting upon the issues made by the pleadings. It was not only evidence, but competent and relevant evidence, to show in support of the alleged fraud that the appellee owed the appellant nothing, and to show what induced the appellee to execute the agreement. It is sufficient to say in reference to the first exception that, if it be conceded that part of the answer which the plaintiff moved to strike out was objectionable, the portion of it as to what occurred with Moore himself was undoubtedly admissible. Yet the motion was "to strike out the whole of that answer." What we have al-

The cases relied on by the appellant to ready said will relieve us from further reference to the other exceptions.

> Judgment affirmed, the appellant to pay the costs above and below.

> > (110 Md. 244)

BALTZELL et al. v. CHURCH HOME & IN-FIRMARY OF BALTIMORE CITY et al.

(Court of Appeals of Maryland. March 24, 1909.)

1. CHARITIES (§ 39*) - INCORPORATION-VA-

The incorporation of a charitable corpora-tion is not rendered invalid by the failure of the certificate thereof to state that the incorporators are "free white persons, citizens of the United States, and a majority of them citizens of this state," as required by Acts 1852, c. 231.

[Ed. Note.—For other cases, see Charities,

Dec. Dig. § 39.*]

2. RELIGIOUS SOCIETIES (§ 1*)-NATURE AND STATUS.

The mere fact that a corporation is under the control of members of a particular church does not make it a religious corporation.

[Ed. Note.—For other cases, see Religious Societies, Dec. Dig. § 1.*]

3. WILLS (§ 14*) — RESTRICTIONS FOR RELI-GIOUS PURPOSES—CORPORATIONS TO WHOM

APPLICABLE—"RELIGIOUS COBPORATION."

The Church Home & Infirmary of Baltimore City, organized under Acts 1852, c. 231, composed (article 1) of certain persons, "tocomposed (article 1) of certain persons, "to-gether with such clergy of the Protestant Epis-copal Church * * * and laymen of the same as contribute to the funds," the object (article 2) being to provide a home for poor and dis-tressed persons of such church "through the Ladies Church Home Society or other agencies to minister to their temporal and spiritual wants," is not a "religious corporation" within the Declaration of Rights, § 38, requiring legislative sanction to render valid a devise to certain religious institutions.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 35; Dec. Dig. § 14.*

For other definitions, see Words and Phrases, vol. 7, p. 6064.]

4. Perpetuities (§ 8*)—Gift to Charities.

Where property is given to a corporation for such uses as are within the scope of its corporate purposes, or the objects to which the gift is to be applied are such as the corporation. was organized for, the gift cannot be declared invalid on the ground that it was in trust for indefinite objects, or in conflict with the rule indefinite objects, or in conflict with the rule against perpetuities, unless the intention to cre-

[Ed. Note.—For other cases, see Perpetuities, Dec. Dig. § 8.*]

ate a trust be plain.

5. Perpetuities (\$ 8*)-GIFT TO CHARITIES. A testamentary gift to an incorporated charitable home capable of taking gifts, for "maintaining aged and infirm persons in said home, or in maintaining free beds in their infirmary in the discretion of the legatee," is not void on the ground that the class of beneficiaries is too indefinite and the trust obnoxious to the

rule against perpetuities.

[Ed. Note.—For other cases, see Perpetuities, Dec. Dig. § 8.*]

Appeal from Circuit Court of Baltimore City; Chas. W. Heuisler, Judge. Action between Wm. H. Baltzell and others and the Church Home & Infirmary of Bal- | first consider it, although, in doing so, we will timore City and others. From the decree rendered, Wm. H. Baltzell and others appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTH-INGTON, THOMAS, and HENRY, JJ.

Arthur W. Machen, Jr., and Arthur W. Machen, for appellants. Edward Guest Gibson, Charles McH. Howard, George Weems Williams, and Joseph Packard, for appellees.

BOYD, C. J. This is an appeal from a decree of the circuit court for Baltimore City declaring that the devises and bequests in the will of James R. Partridge of one-half of the residue of his estate to the Church Home & Infirmary of Baltimore City and to the Emmanuel Church Home of Baltimore City, equally, are lawful and valid, and directing the trustees under the will to transfer and deliver the real estate and other property held by them to those institutions, together with the income accrued and collected since the death of Margaret R. Woodside, the life tenant. After making some legacies, the testator left the residue of his estate to trustees, with direction to divide the income into two equal parts, and to pay one half to his sister Mrs. Baltzell during her life, and the other half to his sister Mrs. Woodside during her life. Upon the death of either of his two sisters, he directed the trustees to divide the whole trust fund then in their hands into two equal parts; one part to remain in their bands as trustees to afford an income to the survivor of his two sisters, and the other half to be distributed, as therein directed. to certain nephews and nieces. He then directed the trustees, on the death of the survivor of his sisters, to divide the half remaining in their hands into two equal parts and to distribute and pay over the same as follows: "One half or part to the Church Home & Infirmary of Baltimore City, to whom I give and bequeath the same to be kept by said legatees as a separate fund, in remembrance of my wife and daughter, and the income thereof used in maintaining aged and infirm persons in said home or in maintaining free beds in their infirmary in the discretion of said legatees, and to pay over the remaining part or half (of the half of the whole) to the Emmanuel Church Home in the City of Baltimore to whom I give and bequeath the same, to be kept as a separate fund, to be called the 'Annie Mary Partridge Fund' and the income thereof used under their rules and in the discretion of said legatee in assisting or maintaining poor respectable sewing girls or apprentices, unable to pay over two dollars a week for their board or unable to pay anything. This also in remembrance of my wife and daughters."

As there are some questions concerning the bequest to the Church Home & Infirmary which are not involved in the other, we will

refer to and discuss some cases which are applicable to both.

1. The validity of its incorporation is attacked because it is not shown in the certificate that the seven incorporators were "free white persons, citizens of the United States, and a majority of them citizens of this state." Acts 1852, c. 231, under which it undertook to be incorporated, did authorize seven or more such persons to be associated for the purposes named in the act, but while the proper practice was to describe the incorporators, so as to show that they were such as the statute authorized, we do not think the omission to do so made the charter invalid. The act did not in terms require them to be so described in the certificate, but it said in reference to what shall be therein stated: "It shall and may be lawful for such persons to prepare and execute, under their hands and seals, an instrument of writing, specifying therein the objects, articles, conditions, and name, style or title under which they have associated, or mean to associate, and the same to exhibit and present to the judge of the circuit court for the county, or the judge of the superior court of Baltimore City, as the case may be, in which said corporation is intended to be situated, or its principal business transacted." It then provided that the instrument of writing should be acknowledged before and certified by the judge in the same manner as conveyances of real estate were by the laws of this state required to be. The judge was also required to direct it to be recorded in the office for the recording of deeds in the county or city. It was undoubtedly the duty of the judge to satisfy himself that those presenting the instrument to him were such persons as were authorized to be so incorporated, but the mere fact that they did not so state in the charter does not make it invalid. If the incorporators of a proposed corporation stated in such instrument of writing that they were such persons as the act prescribed, when in fact they were not, the statement would not prevent the charter from being forfeited, and it would seem to be equally clear that a charter shall not be invalidated by the mere omission to state such facts. So, without regard to the statutes cited, which are said to have since recognized the appellee as a corporation, we are of the opinion that the omission spoken of did not make the charter invalid.

2. A further objection is made to this bequest on the ground that the thirty-eighth section of the Declaration of Rights (requiring the sanction of the Legislature to certain gifts, sales, or devises) has not been complied with. It therefore becomes necessary to determine whether it is such a corporation as the provision is applicable to.

It is clear that Acts 1852, c. 231, under which this appellee was incorporated, was



not intended for the incorporation of reli-|sense a religious corporation, even though it gious corporations. It authorized the association, "for any moral, scientific, literary, dramatic, agricultural or charitable purpose, or for the purpose of forming any uniform volunteer company, fire engine or hose company, or beneficial, benevolent, or musical soclety or association." Religious corporations were authorized by Acts 1802, p. 476, c. 111, and other acts which might be referred to, and, while such corporations are in a sense corporations for charitable purposes, all "charitable corporations" are not "religious corporations." The provisions in the act of 1852 above referred to were continued in sections 10-17 of Article 26 of the Code of 1860, while sections 88-101 of that article were applicable to "religious corporations." Code of 1904 still provided for a method of incorporating the latter different from what are known as charitable corporations, and indeed Acts 1908, p. 23, c. 240, which made much radical changes in our corporation laws, has left undisturbed the sections in the Code of 1904 in reference to the formation of religious corporations. We refer to those provisions to show that our corporation laws have consistently recognized the distinction between such corporations as the appellee professes to be and those known as "religious corporations," although, of course, a corporation would not be permitted to evade this provision in the Declaration of Rights by calling itself something other than what it really is, or merely by having itself incorporated under one provision of the law rather than another.

The mere fact that a corporation is under the control of members of a particular church does not make it a religious corporation. In State v. Board of Trustees, 175 Mo. 52, 74 S. W. 990, the act there in question provided that: "An institution of learning is hereby authorized and established in or near the town of Fulton, Callaway county, to be known as 'Westminster College,' and in all its interests to be under the care and control of the Synod of Missouri, in connection with the General Assembly of the (old school) Presbyterian Church in the United States of America." Trustees were named in the act, the power to appoint their successors was given to the Synod of Missouri, and the trustees were given the power to appoint the facalty, prescribe the course of study, confer academic degrees, etc. The charter was attacked as being in violation of the Constitution of Missouri of 1820, which ordained that "no religious corporation can ever be established in this state." The court said: "The sum of the argument is that, because the Synod of the Presbyterian Church in Missouri is given the care and control of the interests of the corporation and the appointment of the trustees, it is therefore a religious corporation. A corporation established for purely academic purposes, for education in litera-

be given to the care and under the management of a religious body." Again it was said: "The argument is that, if the religious society has the selection of the teachers and the management of the college affairs, it is enabled to propogate its religious tenets in the youth who come within its influence; but that is an incident of which the law takes no account. It does not charter the corporation to teach religion, but to educate in literature, arts, and sciences; and if, while a youth is receiving such education, he is brought under the influences of a particular religion, the law has no concern with that incident. corporation, for its character, is to be judged by the objects of its creation, as expressed in its charter." It was also held in Missouri that a corporation might lawfully be formed, under its statute regarding fraternal beneficial societies, which limited its membership to members of a particular church, and that such was not a religious Franta v. Bohemian Roman corporation. Catholic Cent. Union, 164 Mo. 304, 63 S. W. 1000, 54 L. R. A. 723, 86 Am. St. Rep. 611. See, also, Colonization Society v. Hennessy, 11 Mo. App. 555; In re Fay's Estate, 37 Misc. Rep. 532, 76 N. Y. Supp. 62; In re Watson's Estate, 171 N. Y. 256, 63 N. E.

But the case which is perhaps most analogous to this is that of Colbert v. Speer, 24 App. D. C. 187. Judge Alvey delivered the opinion. The court was considering a devise and bequests to the Georgetown College, which were objected to because it was contended they were intended to be "for the support, use and benefit of a religious sect, order and denomination, and to a public teacher of the gospel as such." As the Maryland Declaration of Rights was in effect in the district, the decision is peculiarly applicable. The court said: "The fact that the college is or may be under the administrative control of a religious order known as the 'Order of Jesus' does not bring the institution within the prohibition of the Declaration of Rights. The college is not a religious institution intended for the tuition and propagation of a particular doctrine and creed of religious belief, to the exclusion of all other creeds and beliefs; but it is an institution of learning for the admission and education of students of all denominations of religious faith. The act of incorporation of the college does not limit the exercise of the corporate powers conferred to the promotion of any religious creed or denomination, but the college is open to all alike. For limitations of the powers and objects of the college we must look to the charter granted by Congress, and not elsewhere." Judge Alvey quoted at length from Bradfield v. Roberts, 175 U. S. 296, 20 Sup. Ct. 121, 44 L. Ed. 168, which involved an appropriation by Congress for the erection of hospital buildings, a ture, and in the arts and sciences, is in no part of which was about to be applied to the

erection of a building at Providence Hos- be composed of seven persons named, "topital, which was under the auspices and control of an order of sisterhood of the Roman Catholic Church, and it was alleged that the title to the hospital's property was vested in the Sisters of Charity of Emmitsburg, Md. It was objected to on the ground that it was in violation of the Constitution of the United States that "Congress shall make no law respecting an establishment of religion." The Supreme Court in that case said: "Assuming that the hospital is a private eleemosynary corporation, the fact that its members, according to the belief of the complainant, are members of a monastic order or sisterhood of the Roman Catholic Church, and the further fact that the hospital is conducted under the auspices of said church, are wholly immaterial, as is also the allegation regarding the title to its property. The statute provides as to its property and makes no provision for its being held by any one other than itself. The facts above stated do not in the least change the legal character of the hospital, or make a religious corporation out of a purely secular one, as constituted by the law of its being. Whether the individuals who compose the corporation under its charter happen to be all Roman Catuolics, or all Methodists, or Presbyterians, or Unitarians, or members of any other religious organization, or of no organization at all, is of not the slightest consequence with reference to the law of its incorporation; nor can the individual beliefs upon religious matters of the various incorporators be inquired into; nor is it material that the hospital may be conducted under the auspices of the Roman Catholic Church. To be conducted under the auspices, is to be conducted under the influence or patronage, of that church. The meaning of the allegation is that the church exercises great and perhaps controlling influence over the management of the hospital. It must, however, be managed pursuant to the law of its being." The case of Colbert v. Speer was affirmed in Speer v. Colbert, 200 U. S. 130, 26 Sup. Ct. 201, 50 L. Ed. 403, where it was said the reasoning set forth in the opinion of the lower court was entirely satisfactory and concurred in.

The charter of this appellee recites that, at a meeting of the contributors of an institution called the "Church Home for the Relief of the Poor and Destitute," it was resolved that the trustees theretofore charged with the collection of the fund be appointed to continue their work and to manage and enlarge the fund; "Resolved that they have power to add to their number from among the clergy and laity of the Protestant Episcopal Church and that they are authorized to fill vacancies occurring in their body." states that they were desirous of availing themselves of the provisions of Acts 1852, c. 231, for the formation of Corporations for

gether with such clergy of the Protestant Episcopal Church, resident in the city of Baltimore and laymen of the same as contributing to its funds and having been elected thereunto shall assign this constitution." Article 2 is as follows: "The object of this body shall be to provide and sustain a home for poor and distressed persons belonging to the Protestant Episcopal Church and others, and through the Ladies' Church Home Society or other approved agencies to minister to their temporal and spiritual wants." Article 5 provides for "the election of a rector of the Church Home who shall hold his office for the ensuing year and no person shall be elected to the office unless he is a minister of the Protestant Episcopal Church in good standing in the same," and art. 6 provides that the bishop of the diocese shall be ex officio visitor of the Church Home. In 1857 the charter was amended, changing the name to the present one, and providing "that the second article be so amended as to declare more explicitly in accordance with the design upon which the society was founded that the object of the body shall be to provide and sustain a home for the sick as well as other distressed persons." The fifth article was amended so as to provide for the election of rector, warden, chaplain, physicians, or any other officers whom they may deem necessary, and providing that no person should be chosen to any of said offices unless he be a communicant of the Protestant Episcopal Church, and if chosen rector or chaplain shall likewise be a minister of said church.

We have thus referred to the portions of the charter most relied on by the appellants, but it would seem to the clear, under the authorities above cited, that none of those provisions, nor all together, can convert into a religious corporation what on the face of the charter is shown to be intended to be a corporation for charitable purposes. Under Acts 1852 article 2 of the charter perhaps gives more foundation for the claim of the appellants than any other part of it, but that provides: "And through the Ladies' Church Home Society or other approved agencies to minister to their temporal and spiritual wants." By the charter itself it is shown that the charitable purposes were not to be confined to those belonging to the Protestant Episcopal Church, but to them "and others." It certainly would not make a hospital a religious corporation by having a chaplain, or a rector, and authority to call in the Ladies' Church Home Society (whatever that was), or other approved agencies, to minister to the temporal and spiritual wants of the poor, sick, and other distressed persons, ought not to determine this to be a religious corporation. Some institutions of a like character, admittedly of a purely secucharitable purposes. In article 1 the name lar nature, have chaplains, and even chapels of the corporation is given, which was to in which to hold religious services for the benefit of the inmates, but simply because the spiritual wants of the sick and other distressed persons are also administered to cannot convert the institution into a religious corporation. If, as was said by Judge Alvey, "the fact that the college is or may be under the administrative control of a religious order known as the 'Order of Jesus' does not bring the institution within the prohibition of the Declaration of Rights," or if, as was said by the Supreme Court, the fact that the members of the corporation (Providence Hospital) "are members of a monastic order or sisterhood of the Roman Catholic Church, and the further fact that the hospital is conducted under the auspices of said church, are wholly immaterial," surely it cannot be logically said that, because the officers of this corporation are by its charter required to be either ministers or laymen of the Protestant Episcopal Church, it is converted into a religious corporation, although it would not have been if those provisions had been omitted from the charter, notwithstanding such qualifications were in fact required. It would be a manifest evasion of the provision of the Declaration of Rights to permit a corporation to be formed for such purposes as this was and avoid the application of that provision simply by leaving out of the charter such provisions as we have referred to, if it would be applicable if they were inserted.

This is not a gift to a religious sect, order, or denomination, but it is to a corporation organized for charitable purposes, although controlled by the members of a particular The corporation can be required to carry out the objects and purposes of its incorporation as expressed in its charter. The charitable work for which it is organized is not limited to members of the Episcopal Church, but is distinctly declared to be for them and others. The object of the corporation, as expressed in its charter, is to provide and sustain a home for the sick and other distressed persons, which purposes are clearly those of a charitable, as distinguished from a religious, corporation under our corporation laws. As well might it be said that a relief association organized for the relief of the employés of a railroad company was a railroad corporation if the membership and officers were limited to such employés, or that an insurance company limited to insuring officers and employes of banks was for that reason a banking corporation, as to hold this to be a religious corporation by reason of the provisions of the charter above referred to. We can see a possible reason why the membership of a charitable organization such as this cannot be confined to the clergy and laity of a particular church, and, if so confined, it must necessarily be said that a gift to it would be a gift to a religious sect, order, or denomination. The provision in the Declaration of Rights cannot, and ought not to, be ignored when applicable; but it ought not to be unneces-

sarily extended beyond its object and language. We are of the opinion that it is not applicable to this appellee.

3. It is contended by the appellant that the provision in the will for this corporation created a trust, that the class of beneficiaries is too indefinite, and that the trust is obnoxious to the rule against perpetuities. In the first place, the testator gave and bequeathed the one-half of the property in controversy to the Church Home & Infirmary itself, and not to it as trustee for others. The fact that it is directed to be kept as a separate fund, and the income to be used for the purposes named, can make no difference, provided those purposes, or some of them, be within the object of the appellees' incorporation. The latest case on the subject involved a gift to this same corporation and answers the contention of the appellants as to its being kept as a separate fund, as well as some other objections to this bequest. Ege v. Hering, 108 Md. 891, 70 Atl. 221, the will of Miss Sallie Longwell was under consideration. There the gift was to this appellee "to endow a bed according to the custom and purpose of that institution," and it was held to be valid. To "endow a bed" unquestionably contemplated the fund being held separately, and the income applied to maintaining that bed, and Judge Schmucker, in delivering the opinion of the court, said: "The mere fact that it was, by the terms of the will, to be applied to a particular, clear, and well-defined object, plainly within the sphere and function of the institution, has been several times held by us not to be a void gift which could have been made to the same institution for its general corporate purposes"-citing Eutaw Baptist Church v. Shively, 67 Md. 494, 10 Atl. 244, 1 Am. St. Rep. 412; Halsey v. Convention of P. E. Church, 75 Md. 275, 23 Atl. 781: Hanson v. Little Sisters of the Poor, 79 Md. 434, 32 Atl. 1052, 82 L. R. A. 293; Woman's For. Miss. Soc. v. Mitchell, 93 Md. 199, 48 Atl. 737, 53 L. R. A. 711. See, also, England v. Vestry, 53 Md. 466; Erhardt v. Balto. Monthly Meeting of Friends, 93 Md. 669, 49 Atl. 561.

It is difficult to understand how it can be said that "maintaining aged and infirm persons in said home or in maintaining free beds in their infirmary in the discretion of said legatee" is not in accord with the spirit, if not the very letter, of this charter. Especially is this so when the act under which it was granted authorized such a corporation to hold any kind of property and to employ, use, and dispose of it, "according to the articles, objects and conditions of its charter, or according to its articles and by-laws, or in case of a devise or bequest, according to the will and intention of the donor, if the same be lawful and within the proper objects and powers of the said corporation." We have no doubt that maintaining aged and infirm persons is within the objects and powers of the corporation, but, if that could be disputed,

certainly maintaining free beds in the infirmary is. We do not suppose it will be questioned that if a bequest is made to a legatee for either of two purposes, in the discretion of the legatee, and one of them is lawful, and · the other not, that the bequest is valid for the lawful one. A number of cases are cited to that effect in the brief of the appellee, but we will not here refer to them. It would serve no good purpose to compare the decisions elsewhere with those made by our predecessors in Dashiell v. Atty. General, 5 Har. & J. 392, 9 Am. Dec. 572, and Id., 6 Har. & J. 1. Those cases have been too frequently, and too recently, recognized by us to permit us to disturb them, if we were inclined to do so; but there must be a trust which is uncertain as to the beneficiaries, or which creates a perpetuity, in order to justify the court in striking down a devise or bequest, unless, of course, there be other reason for doing so. The cases in this state fully establish the doctrine that when property is left to a corporation for such uses as are within the scope of its corporate purposes, or the objects to which the gift is to be applied are such as the corporation was organized for, then such gift cannot be declared invalid on the ground that it was in trust for indefinite objects, or in conflict with the rule against perpetuities, unless the intention to create a trust be clear. If this were not so, it would be useless to organize charitable corporations of the character of these appellees, for what we are now considering applies to both.

In Eutaw Place Baptist Church v. Shively, supra, it was contended that, as the Sunday school was an unincorporated body, the bequest to the church "to be applied to the Sunday school belonging to or attached to said church" was in trust for an undefined and uncertain body of individuals, who changed from time to time, and consequently the bequest was void because of that uncertainty and want of legal identifications of the objects to be benefited; but the court declined to concur in that contention, and said that the Sunday school was an integral part of the church organization, "and therefore embraced within the scope of the corporate functions and work of the church," and the bequest was capable of being enforced.

In Halsey v. Convention of the P. E. Church, supra, the court said: "The statute of 43 Elizabeth in regard to charities is not, it is true, in force here; but it is well settled that a court of chancery has jurisdiction, independent altogether of the statute, to enforce a trust for charitable and religious purposes, provided the devise or bequest be made to a person or body corporate capable of taking and holding the property so devised and bequeathed, and provided, further, the object and character of the trust be definite and certain." The two cases last cited are quoted and affirmed in Hanson v. Little Sisters of the Poor, supra. See, also, Peter v. Carter, 70 Md. 139, 16 At 1450. The "Trust" refer-

red to in those cases is of the character and requires all such corporations to hold their properties for the purposes for which they are authorized to use them under their charters.

In Bennett v. Humane Imp. Soc., 91 Md. 10, 45 Atl. 888, where property was given to two charitable corporations "provided the trustees and managers of said homes admit and receive into said homes during the existence or continuance of said homes one aged man or one aged woman each and every year for each and every four hundred dollars of the income, * * * and provided also that such aged person so to be admitted shall have always through life maintained a good moral character and that his or her penury shall not have been the result of his vicious or immoral conduct," it was held not to create a trust as to the use of the property when it appeared from the whole will the testator did not intend to create a trust, and when if a trust should be established the entire gift would be defeated, and that such a society takes the property to be given for its general corporate purposes, subject to what was decided to be a condition subsequent. It was held that that will did not create a trust, and that consequently the device was not void, either for uncertainty as to the beneficiaries or in creating a perpetuity.

In Trinity M. E. Church v. Baker, 91 Md. 539, 46 Atl. 1020, a number of devises and legacies were considered, some of which were held to be trusts and void for uncertainty, but we will refer to two which were sustained. The testatrix gave to the trustees of the Randolph Macon College, a corporation, a bequest of \$4,200, "to be applied to aid deserving and promising young women, especially such as expect to enter upon mission work, to attend the Randolph Macon Woman's College, at Lynchburg, as students, such aid to be either by loans or free scholarships, as said trustees may deem best," and also \$800 to the same corporation, "for the education of one or more worthy girls." The court held those two bequests to be valid, because the legatee was an incorporated body having for its object the education of the young, and the evidence showed that a part of its work was carried on through the agency of the Randolph Macon Woman's College at Lynchburg. It was said of the first mentioned bequest: "It is not given as a trust, as has been contended, but it is dedicated by the testatrix to an object entirely within the general scope of the objects and purposes of the corporation. That the testatrix indicated the particular use to which the fund is to be applied does not invalidate the gift." And the court declared that the order was valid for the

and character of the trust be definite and certain." The two cases last cited are quoted and affirmed in Hanson v. Little Sisters of the Poor, supra. See, also, Peter v. Carter, 70 Md. 139, 16 Atl. 450. The "Trust" refer-whatever moneys I may die possessed, be

held in trust by the board of managers of dividual trustees, and were cases in which the Foreign Missionary Society of the Methodist Episcopal Church of the United States of America for the following purposes: After all my debts, bequests and provision for my burial, etc., be paid, that sufficient be used to educate as Bible readers in India six girls; * * * the money remaining after that set aside for education of the aforesaid Bible readers to be applied to the purchase of a building to be used for the education of girls in India to be called the 'M. Adelaide Sherman Home,' and the location of said building to be left to the decision of Bishop Thoburn or his successors." The late Chief Judge McSherry said: "Now, perhaps, had the precise phraseology, which is found in the will before us, been used in making a like devise and bequest to a natural person, it might be said that the design was to create a trust, because the purposes indicated are not those ordinarily performed by an individual; but when it is remembered that the very end which the corporation here made the beneficiary was organized to effect is the education of Bible readers and the instruction of girls in foreign lands, it becomes evident that the property was given to the corporation, not in trust for indefinite objects, but that it was given to it to be used for its recognized and clearly defined corporate purposes. The specific design of the gift is that the proceeds of the property shall be used—that is, spent—by the beneficiary for its chartered ends, and not for some one else's benefit. The corporation is not to hold the fund for the use of others, but it is to spend the fund in the prosecution of its missionary work. * * * The whole scheme of the testamentary disposition contemplates imposing upon the beneficiary in declaratory language precisely the duty which its charter would have required it to perform with respect to this property had such declaratory language been omitted, save as to the number and names of the girls to be educated. These exceptions constitute, think, not evidence of an intention to establish a trust, but they denote simply a condition which has been annexed to the gift." Judge McSherry also said: "What has been said in relation to the six Indian girls is also applicable to the remaining portion of the clause respecting the purchase of a building to be used for the education of girls in India. This is a gift to the society, the property given to be used in the line of that society's mission work. The use is a corporate use within the limits of its charter powers." See, also, Erhardt v. Balto. Monthly Meeting, supra, and Ege v. Hering, supra.

Without further prolonging the opinion by discussing the cases relied on by the appellants, it is only necessary to say that they are distinguishable from those that we have quoted above. Most of them were to intrusts were held to exist; but, unless we overrule many decisions of this court, the contention of the appellants cannot be sus-When a testator designates the use of property left by him to a corporation of a character of these two, and those uses are just such as the corporation would make of it in carrying out the objects and purposes of its incorporation, it is like making a person a trustee for himself to declare such uses a trust. It would be equivalent to saying the corporation took the property in trust for such purposes as its charter authorized. That may be true in the sense indicated above, as all corporations hold their property in trust to use it as its charter and the law requires, but that is not the kind of trust which the appellants would have to establish the existence of in order to sustain their contention.

4. We will only add that what we have just said as to the Church Home & Infirmary is for the most part applicable to the bequest to the Emmanuel Church Home. The very purpose of that corporation, as expressed in its charter, was "the aiding of deserving poor women and children," and the bequest to it provides that the income thereof is to be used "under their rules and in the discretion of legatees in assisting or maintaining poor respectable sewing girls or apprentices, unable to pay over two dollars a week for their board or unable to pay anything." It would seem to be clear that the bequest is for a purpose within the scope of its charter, and hence what we have said along that line in reference to the Church Home & Infirmary is applicable.

We therefore hold that there was no such trust impressed on either of these bequests as made them subject to the objections urged against them, and that both are valid. Having reached that conclusion, it is unnecessary to consider other questions argued.

Decree affirmed, the costs to be paid out of the funds in the hands of the trustees.

(110 Md. 275)

McEVOY et al. v. SECURITY FIRE INS. CO. OF BALTIMORE.

(Court of Appeals of Maryland. March 24, 1909.)

1. Insurance (§ 146*) - Contracts - Con-STRUCTION.

The rule that insurance contracts will not be construed strictly against insurer, but will be construed as other contracts, does not conflict with the general rule, governing the construc-tion of all contracts, that, where doubt exists as to the meaning of a contract prepared by one party on the faith of which the other has incurred obligation, that construction should be adopted which will be favorable to the latter party.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 295; Dec. Dig. § 146.*]

2. INSURANCE (\$ 146*) - CONTRACTS - CON- | Pub. Gen. Laws 1904, art. 16, \$ 196, have STRUCTION.

The mutual intention of the parties to a contract of insurance must govern its construction, where that can be reasonably deduced from the contract itself; but, where the contract is so expressed as to be susceptible of two inter-pretations, that interpretation will be adopted which will uphold, rather than defeat, the validity of the contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 292; Dec. Dig. § 146.*]

3. INSURANCE (\$\$ 421, 423*) - CONTBACTS -CONSTRUCTION.

CONSTRUCTION.

A fire policy, stipulating that insurer shall not be liable for loss caused directly or indirectly by invasion, civil war, etc., "or (unless fire ensues and in that event for the damage by fire only) by explosion of any kind * * * or the bursting of a boiler, or earthquake, or hurricane, or lightning; but liability for direct damage by lightning may be assumed by specific agreement"—does not exempt insurer from liability for loss from fire caused by an earthquake which fire originated in the building consults. quake, which fire originated in the building containing the property insured or spread from its point of origin until it reached the property insured; but for direct loss caused by an earthquake insurer is not liable.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. §§ 421, 423.*]

4. Insurance (§ 333*) — Contracts — Con-STRUCTION.

Where an insurance company expects to rely on a constant and ever ready water supply for the extinguishment of fires, it must clearly provide therefor in its policies.

Note.—For other cases, see Insurance, Dec. Dig. \$ 333.*]

Appeal from Circuit Court of Baltimore City; Charles W. Henisler, Judge.

Proceedings for the liquidation of the Security Fire Insurance Company of Baltimore City, an insolvent corporation. From orders directing the payment of dividends to policy holders on their claims, stockholders and creditors of the corporation appeal. Affirmed.

Argued before BOYD, C. J., and BRIS-COE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, THOMAS, and HEN-RY. JJ.

Charles A. Marshall and Joseph C. France, for appellants. John Philip Hill and Charles Morris Howard, for appellee.

PEARCE, J. The Security Fire Insurance Company of Baltimore City became insolvent in consequence of the conflagration in San Francisco which accompanied or followed the earthquake in that city on April 18, 1906, and its affairs are now in course of liquidation in the circuit court of Baltimore city. In an auditor's account filed June 15, 1908, certain dividends are allowed to a number of San Francisco policy holders upon their claims filed in the case, and to these allowances the appellants being stockholders and creditors of the insurance company, have excepted on the ground that the fire was caused by the earthquake, and that the insurance company is not liable under the terms of the policies.

raised certain questions of law for the opinion of the court, which the court directed to be heard as a preliminary matter upon the allegations of the application and the exhibits accompanying it. These exhibits are two forms of policies referred to in the application, and certain sections of the Civil Code of California: but it is not necessary that these should be set out, nor that the allegations of the application should be noticed specially. The policies upon which the claims are made insure the holders "against all direct loss or damage by fire, except as hereinafter provided," and they were made and accepted subject to the stipulations and conditions printed on the back of said poli-These stipulations and conditions are as follows: "This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, labor, strike, civil war, or commotion, or military or usurped power, or by order of any civil authority, to prevent the spread of fire, whether such order be legal or not, nor in consequence of any neglect of or deviation from police or municipal laws, rules or ordinances where such exist; or by theft at or after a fire; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire in neighboring premises, or [unless fire ensues, and, in that event, for the damage by fire only] by explosion of any kind or from any cause, or the bursting of a boiler, or earthquake, or hurricane, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon." It is upon the construction of these stipulations that the liability of the insurance company depends.

The questions ordered by the court to be heard are as follows:

(a) Under the statement of facts alleged in said application, is the Security Fire Insurance Company of Baltimore City liable for loss or damage to the property of the claimants therein mentioned, caused by earthquake or by dynamite prior to its burning?

(b) Is the Security Fire Insurance Company of Baltimore City liable for loss or damage to the property of said claimants from fire caused by an earthquake, which fire originated in the property or buildings containing the property of these claimants?

(c) Is the Security Fire Insurance Company of Baltimore City liable for loss or damage to the property of said claimants from fire caused by an earthquake, which fire spread from its point or points of origin until it reached and destroyed or damaged the property of said claimants?

(d) Is the Security Fire Insurance Company of Baltimore City liable for loss or dam-The exceptants, proceeding under Code age to the property of said claimants from

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fire, when, by reason of the occurrence of the earthquake, the water supply of the city of San Francisco had been destroyed, the water mains and pipes burst or disconnected, and said water supply rendered useless as a protection against fire or as a means of control or extinguishment thereof?

Upon argument heard the court decreed that the insurance company was not liable for the loss caused as stated in question "a," but decreed that it was liable for the loss caused as stated in question "b," "c," and "d," and from that decree the exceptants have appealed. Question "a," being decided in favor of the appellants, need not be considered, there being no cross-appeal, and in their brief the appellants say they do not urge the point involved in question "d," as an independent ground of exemption from liability and refer to it only for the purpose of showing, as they contend, the strength and reasonableness of their argument upon questions "b" and "c." We are required therefore to determine only the correctness of the court's ruling upon questions "b" and "c."

Counsel on both sides were agreed that, so far as could be ascertained, there is only one case ever decided upon the precise language of the policy now before us, and that is Borgfeldt v. North German Fire Insurance Company, decided by the General Court of Hamburg in a case growing out of this San Francisco confiagration, and a copy of the opinion in that case has been filed with the brief of one of the appellees. The fires which followed this earthquake were most disastrous, both to insurers and insured, making this case one of much importance and we have given to it the careful reflection and examination which its own importance and the elaborate and able arguments of counsel demand. Stated in concrete form, without present regard to the exact phraseology of the clause of the policy in controversy, the appellants contend that the company is not liable for any earthquake-started fire, while the appellees contend that, if fire ensues from an earthquake, the company is liable for the loss by fire, though not liable for any precedent loss caused by earthquake. In the absence of any express or closely analogous, authoritative decision, we must resort to the general rules for the construction of contracts of this character, and to such intrinsic evidence of intention as may be afforded by the language of the policy and its collocation. It must be admitted that in Maryland the rigor of the prevailing rule to construe all insurance policies strictly against the company has been relaxed to this extent: That they are not specially subjected to such rigid construction, but are to be construed as other contracts. Weaver's Case, 70 Md. 536, 17 Atl. 401, 18 Atl. 1034, 5 L. R. A. 478; Hamilton's Case, 82 Md. 91, 33 Atl. 429, 30 L. R.

do not conflict with the general rule as to all contracts, which Mr. Brantly, on pages 183 and 184 of his work on Contracts, states thus: "Where doubt exists as to the construction of an instrument prepared by one party upon the faith of which the other has incurred obligation, that construction should be adopted which will be favorable to the latter party." In Wallace v. German American Ins. Co. (C., C.) 41 Fed. 744, Judge Mc-Crary said: "If the words employed, of themselves, or in connection with other language used in the instrument, or in reference to the subject-matter to which they relate, are susceptible of the interpretation given them by the assured, although in fact intended otherwise by the insurer, the policy will be construed in favor of the assured. As the insurance company prepares the contract, and embodies in it such conditions as it deems proper, it is in duty bound to use language so plain and clear that the insured cannot mistake or be misled as to the duties and burdens thereby imposed upon him." In Indemnity Co. v. Dorgan, 58 Fed. 956, 7 C. C. A. 592, 22 L. R. A. 620, Judge Taft said: "Policies are drawn by the legal advisers of the company, who study with care the decisions of the courts, and with these in mind attempt to limit as nearly as possible the scope of the insurance. It is only a fair rule therefore, which courts have adopted, to resolve any doubt or ambiguity in favor of the insured, and against the insurer." In Berliner v. Travelers' Insurance Co., 121 Cal. 460, 53 Pac. 920, 41 L. R. A. 467, 66 Am. St. Rep. 49, the court said: "Where the terms of a policy permit of more than one construction, that will be adopted which supports its validity."

We can discover no conflict between these cases and the views of our predecessors upon this subject as stated by Judge Alvey in Transatlantic Fire Ins. Co. v. Dorsey, 56 Md. 79, 40 Am. Rep. 403, where it was said: "It is certainly true, as a rule of construction, that where an insurance company attempts to limit or restrict the general operation of its contract of insurance, by special exceptions or exemptions, it is bound to do so by clear and explicit terms; and, if it fail in this, it cannot complain that the party insured is given the benefit of any doubt that may be reasonably raised as to the nature or extent of the exception from the general risk assumed. Where, however, the terms of the contract are clear and explicit, they must be allowed their full force and effect; there being no distinction in this respect between the contract of insurance and any other contract." This last clause is just what was said in Kelly's Case, 32 Md. 435, 3 Am. Rep. 149, and there is no conflict between these cases. Judges Alvey and Miller sat in both cases, two of the most eminent judges who ever sat in this court, and it A. 633, 51 Am. St. Rep. 457. But these cases cannot be said that they repudiated in the latter anything that was said in the former. | good, an insurer ought in justice to be re-It is the understanding and intention of the parties—that is, their mutual intention which is to govern the contract, if it can be reasonably deduced from the contract itself; but if the contract is so expressed as to be susceptible of one interpretation asserted by one party as his understanding, and of another interpretation asserted by the adverse party as his understanding, then there is no mutual intention of the parties, and that interpretation will be adopted which will uphold, rather than defeat, the validity of the instrument. These are not special rules for the construction of insurance con-They are but the application to these contracts of the general rule of construction to all contracts "ut res magis valeat quam pereat," the propriety and necessity of which is especially apparent where the insurer alone prepares the contract and embodies in it what he deems proper.

With these principles in mind, we will now examine the clause we have transcribed and upon the construction of which the decision must depend. An analysis of that clause will in our opinion show that the company has plainly exempted itself absolutely from loss caused by or in consequence of certain conditions or circumstances, and that it has conditionally and partially exempted itself from loss resulting from certain other causes, conditions, or circumstances: (1) It has absolutely exempted itself from "loss caused directly or indirectly by invasion, insurrection, riot, labor strike, civil war, commotion, military or usurped power"; all these being various manifestations of vis major. (2) It has absolutely exempted itself from loss caused by the exercise of any paramount civil authority exerted to prevent the spread of (3) It has absolutely exempted itself from loss in consequence of any neglect of or deviation from police or municipal regulations by the insured, or from loss by the neglect of the insured to use all reasonable means to save and preserve property at and after a fire, or when property is endangered by fire in neighboring premises. (4) It has absolutely exempted itself from loss by theft at or after a fire. (5) It has (conditionally and partially) exempted itself from loss resulting from explosion of any kind or cause, or the bursting of a boiler, or an earthquake, or hurricane, or lightning, unless in any of these cases fire ensues, and in that event it is liable for the damage by fire only. This being a fire policy, there is an adequate reason for each of these provisions, which abundantly justifies the construction we have indicated. When social disorder and violence reign, it has been found by experience to be necessary to contract against their effect upon certain classes of obligations such as those under consideration, and where the state or a municipality intervenes and destroys the property of an individual for the common

leased from the obligation of indemnity against which he could never safely contract. So when the insured by his own neglect causes or directly contributes to the loss insured against, it is fit that he should bear the loss himself; and if property endangered, but not destroyed by fire, is stolen at or after the fire, it does not come within the true intent and meaning of a contract of indemnity against fire. But explosions of any kind, the bursting of a boiler, an earthquake, a hurricane, or even lightning, may destroy property, without fire ensuing, and then such loss does not naturally come within the scope of a fire policy; but an explosion or the bursting of a boiler may, and often does. result in fire either instantaneous or latent. An earthquake or a hurricane may level a building and scatter fire burning within, thus causing the complete destruction of the material. Lightning very generally results in instantaneous fire, and is therefore made in this, as in most fire policies, an exception to its associated risks, and direct loss therefrom may be assumed by specific agreement noted on the policy. The construction of this policy, which we have thus indicated as correct in view of the reasons above stated leading to it, is also sustained by the structure of the clause in controversy which we have pointed out, and by the grammatical rules applicable to determine its meaning.

The bracketed clause, "[unless fire ensues, and, in that event, for the damage by fire only]," both grammatically and logically embraces each of the destructive forces of nature (not necessarily, but sometimes resulting in fire) which follow and are all alike bound up with that bracketed clause. direct loss caused by these independent destructive forces, the company refuses to be bound, but contracts to make good the loss caused by fire ensuing from them. If anything is needed to place the correctness of this interpretation of the policy beyond doubt, it will be found in the closing paragraph of the clause in question, viz., "but liability for direct damage by lightning may be assumed by specific agreement hereon." It is clear beyond question from this language that indirect loss from lightning is embraced in the risk assumed. If this were not so, then, to give any meaning to that paragraph, it would have to read "but liability for all or any damage by lightning may be assumed by specific agreement hereon." We have already shown that the words, "explosion of any kind, bursting of a boiler, earthquake, hurricane, and lightning," are subject to the same precise qualifications and limitations, and, if the policy covers indirect loss by lightning, there is no escape from the conclusion that it also covers indirect loss from earthquake.

The construction we have given to this policy is the same given in the Borgfeldt Case, supra. by the General Court of Hamburg, to a policy containing the identical language now under consideration. That court appears to be constituted of one law judge, and two lay or business judges, and we are not to be understood to refer to that case as in any sense authoritative; but they seem to have brought to their consideration of that case excellent common sense, which, after all is said, seems to be the best solvent of the meaning of ordinary language, unless the instrument is clearly within the scope of some technical and imperative rule of law which is made conclusive. In the course of that opinion the court said: "The intention of the defendant (alone) is of less importance than the question of how this intention was expressed, and how, from an unprejudiced point of view, this provision is to be construed in reference to the remaining provisions." This was said in reference to the defendant's contention that its intention was that the exception as to ensuing fire was to relate only to explosion, and, after the same course of reasoning which we have adopted in this case, the court adds: "The defendant has, without perhaps sufficiently considering the consequences, introduced into the clause taken from the standard policy the words bursting of a boiler, earthquake, hurricane. By so doing it has effected the result that the contents of the parenthesis apply also to these causes." We think this is sound and persuasive reasoning, directly supporting what we have said herein, as to the necessity of mutuality of intention of the parties as to the construction of the contract, when there are two possible constructions, one of which would uphold and the other would defeat the validity of the instrument.

While the precise point in this case was not presented in Dorsey's Case, supra, where explosions only were connected with the parenthetical clause as to loss by ensuing fire, the language of Judge Alvey on page 79 of 56 Md. (40 Am. Rep. 403) in discussing that clause is strongly suggestive of the views we have expressed here. We have been referred in the briefs to four reported cases arising out of the San Francisco fire, all of which we have examined; but as it was admitted at the argument that in all these cases the language of the policies was different from that at bar, and as we do not find any of these cases controlling in this case, it is not necessary to prolong this opinion by any special reference to them, and we cite them here only as in a general way bearing upon the question before us. These cases are: Baker & Hamilton v. Williamsburg City Fire Ins. Co. (C. C.) 157 Fed. 280; Henry Hilp Tailoring Co. v. Williamsburg City Fire Ins. Co. (C. 'C.) 157 Fed. 285; Richmond Coal Co. v. Commercial Union Co. (C. C.) 159 Fed. 985; Board of Education v. Alliance Ins. Co. (C. C.) 159 Fed. 994. We were also referred to Williamsburg City Fire Ins. Co. v. Wil-

out of the San Francisco fire. There also the language of the policy is different from that at bar, but the general reasoning of that decision is in accord with the views we have here expressed.

We have read and considered carefully the elaborate brief and very able argument of the distinguished counsel for the appellant, but we are not able to adopt their views. Their construction requires us to read into this clause (upon the theory that this is exclusively a fire policy) the words "by fire" wherever the word "loss" occurs. There are two insuperable objections to this course: First, that words can only be imported into a written instrument when it is impossible otherwise to reconcile the particular clause with other parts of the instrument. Two iliustrations will suffice to show that this objection applies to the present case. In Commercial Insurance Co. v. Robinson, 64 Ill. 265, 16 Am. Rep. 557, the policy provided that the company should not be liable "for any loss or damage by fire caused by means of invasion, etc., * * * nor for any loss caused by the explosion of gunpowder, etc." The company contended that the words "by fire" should be read into the latter paragraph, after the word "loss"; but the court would not allow it, saying the difference in phraseology between the two clauses is so marked that, when we consider their connection with each other, we cannot resist the conclusion that the difference was intended." In Rerliner v. Travelers' Ins. Co., 121 Cal. 458, 53 Pac. 918, 41 L. R. A. 467, 66 Am. St. Rep. 49, the policy provided for double damages for injuries sustained "while riding as a passenger in any passenger conveyance, using steam," etc. The insured was killed in a railway accident while riding on the engine drawing a passenger train, and the company contended "that the contract itself did not provide for death by an accident while riding upon a locomotive, but only in a conveyance intended for passengers." The court held, however, that the locomotive was a part of the conveyance provided for the transportation of passengers, and that the company "could not import into that clause of the policy conditions as to the part of the conveyance in which the insured must be, and thus by construction work a forfeiture."

For all the reasons we have stated, we are of opinion that the ruling of the learned judge below upon questions "b" and "c" were correct.

them here only as in a general way bearing upon the question before us. These cases are: Baker & Hamilton v. Williamsburg City Fire Ins. Co. (C. C.) 157 Fed. 280; Henry Hilp Tailoring Co. v. Williamsburg City Fire Ins. Co. (C. C.) 157 Fed. 285; Richmond Coal Co. v. Commercial Union Co. (C. C.) 159 Fed. 985; Board of Education v. Alliance Ins. Co. (C. C.) 159 Fed. 994. We were also referred to Williamsburg City Fire Ins. Co. v. Willi

Milling Co. v. Fire Ins. Co., 76 Cal. 239, 18 to grant to the commissioners such further pow-Pac. 267; Baker & Hamilton v. Williamsburg City Ins. Co. (C. C.) 157 Fed. 283.

Rulings and order affirmed. Costs to be paid out of the funds in the hands of the receiver.

(110 Md. 447) LAUER v. MAYOR, ETC., OF CITY OF BALTIMORE.

(Court of Appeals of Maryland. March 24, 1909.)

1. MUNICIPAL COBPORATIONS (§ 406°) — SPE-CIAL ASSESSMENT—STATUTES—VALIDITY.

The right to assess property for special benefits resulting from local improvements is a valid exercise of the power of taxation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1001, 1002; Dec. Dig. § 406.*]

2. MUNICIPAL CORPOBATIONS (§ 408°)-LOCAL IMPROVEMENTS—ASSESSMENT FOR BENEFITS
—STATUTORY PROVISIONS—CONSTRUCTION.

—STATUTORY PROVISIONS—CONSTRUCTION.

Baltimore City Charter (Laws 1898, p. 244, c. 123) § 6, authorizes the city to lay out, open, etc., all streets, etc., and to provide for assessing the expense on the property benefited. Acts 1904, p. 492, c. 274, § 1, provides for issuing stock by the city to be used only for opening the streets, etc., of the annex portion of the city, and section 2 creates a special commission known as the "Annex Improvement Commission." Section 8 authorizes the commission to open and lay out any street, etc., and gives it all powers necessary therefor and authorizes the mayor and council to grant by ordinances any further powers necessary thereto. Section any further powers necessary thereto. Section 5 authorizes the mayor and council to provide by ordinances the proceedings for condemnation of property by the commission, and section 10 empowers them to authorize by ordinance the commissioner for opening streets of Baltimore city to perform the duties of the annex improvement commission. The mayor and council present an authorize the council present an authorize the improvement commission. The mayor and council passed an ordinance authorizing the council passed an ordinance authorizing the commissioner for opening streets to perform the duties of the Annex Improvement Commission, and provided that 'n condemning and opening streets, etc., the procedure of the commissioners should be that prescribed in relation to their ordinary powers of the same nature. Baltimore City Charter (Laws 1898, pp. 339-350. c. 123) §§ 172-195, provide the procedure of the commissioners for opening streets in opening streets, and section 175 authorized the commissioners in such cases, after ascertaining commissioners in such cases, after ascertaining the damages for which the owner should be compensated, and the probable expense of the improvement, to assess all the property the owners of which are directly benefited. *Held*, that the procedure referred to by the ordinance was that prescribed by section 175 of the charter, which expressly provided for assessments for benefits, and, giving the act of 1904 a strict construction, it did not exempt property in the annex portion of the city from assessments for benefits, so that such property was assessable for benefits.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 408.*]

8. Municipal Corporations (§ 406*)—Ordi-nances—Validity—Conformity to Statu-TORY PROVISIONS.

The ordinances requiring the commissioners for opening streets, in opening streets in the annex portion of the city, to make assess-ments for benefits was a valid exercise of the power given it by Acts 1904, p. 494, c. 274, § 3,

[Ed. Note.-For other cases see Municipal Corporations, Cent. Dig. § 1001; Dec. Dig. § 406.*]

4. MUNICIPAL CORPORATIONS (§ 406°) - SESSMENTS FOR BENEFITS — POWERS—

While ordinarily the charter or statutory cowers of a municipal corporation cannot be enpowers of a municipal corporation cannot be enlarged or varied by ordinances, a city may be expressly authorized by statute to confer on a commission created thereby, and vested with certain powers, such further powers as the city deems necessary to execute the purpose of the commission, so that Acts 1904, p. 494, c. 274, \$ 3, authorizing the mayor and council of Baltimore city to grant by ordinance to the Annex Improvement Commission any further powers it deems necessary to the execution of the improvements authorized by the act, was valid.

[Ed. Note.—For other cases, see Municipal

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1002; Dec. Dig. §

5. Taxation (§ 204*)—Exemption—Statuto-BY Provisions—Instructions. Exemptions from taxation are strictly con-

strued.

[Ed. Note.—For other cases, see Cent. Dig. § 322; Dec. Dig. § 204.*] see Taxation.

6. APPEAL AND ERROR (§ 22°) — APPELLATE
JURISDICTION—WAIVER OF OBJECTIONS.

Even though an appeal does not lie to the
Court of Appeals from an order of the Baltimore city court overruling a motion to quash
proceedings of the improvement of the light of the court of the light proceedings of the improvement commission in opening streets, where the right of appeal was not questioned. an appeal to determine whether property improved in the annex portion of Baltimore city is assessable for benefits will be decided; the question being one of public interest.

IEd. Note.-[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 22.*]

Appeal from Baltimore City Court; Conway W. Sams, Judge.

Proceedings by Leon Lauer against the Mayor and City Council of the City of Baltimore. From an order overruling a motion to quash proceedings for the opening of a street in so far as they imposed an assessment for benefits, plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, THOM-AS, and HENRY, JJ.

Leon E. Greenbaum, for appellant. W. H. De C. Wright and Joseph S. Goldsmith, for appellee.

THOMAS, J. This is an appeal from an order of the Baltimore city court overruling a motion to quash the proceedings of the commissioners for opening streets for opening Bentalou street from North avenue to Lafayette avenue, in Baltimore city, in so far as they relate to the assessment of benefits on property owned by the appellant, Leon Lauer.

The street proposed to be opened, and the property of the appellant, is in what is called the "Annex Portion of Baltimore City," and the ground of the motion to quash is that the commissioners for opening streets, acting under the authority vested in them by Acts

🦈 or other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1904, p. 492, c. 274, and the ordinances passed | of the sidewalks on any street, avenue, lane in pursuance of that act, have no power to assess benefits on property in that portion of the city. The right to assess property in particular localities to the extent that it is deemed specially benefited by local improvements is to be referred to the power of taxation, and has been recognized and sanctioned in all the states. The theory on which such assessments are made is that "those whose property is thus enhanced, and who thus receive peculiar benefits from the improvement, should contribute specially to defray its cost." 1 Lewis, Eminent Domain, § 5 (2d Ed.); Gould v. Mayor, etc., of Baltimore, 59 Md. 378; Hagerstown v. Startzman, 93 Md. 609, 49 Atl. 838. The power to make such assessments has been expressly granted to the mayor and city council of Baltimore, and has been exercised by it for a long time. Alexander v. M. & C. C. of Balt., 5 Gill, 383, 46 Am. Dec. 630. By section 6 of its new charter (Laws 1898, p. 244, c. 123) the city is authorized: "To provide for laying out, opening, extending, widening, straightening or closing up, in whole or in part, any street, square, lane or alley within the bounds of said city, which in its opinion the public welfare or convenience may require. To provide for ascertaining whether any, and what amount in value, of damage will be caused thereby, and what amount of benefit will thereby accrue to the owner or possessor of any ground or improvements within or adjacent to said city, for which said owner or possessor ought to be compensated, or ought to pay a compensation, and to provide for assessing or levying, either generally on the whole assessable property of said city, or specially on the property of persons benefited, the whole or any part of the damages and expenses which it shall ascertain will be incurred in locating, opening, extending, widening, straightening or closing up the whole or any part of any street, square, lane or alley in said city."

Acts 1904, p. 492, c. 274, under which, and the ordinances passed in pursuance thereof, the commissioners for opening streets acted in proceeding to open Bentalou street, provides, by section 1, for the issuing of \$2,000,-000 of stock by the mayor and city council of Baltimore, and that the proceeds of the sale of said stock "shall be used only for the purpose of providing the costs and expenses of condemning, opening, grading, paving and curbing the streets, avenues, lanes and alleys of the annex portion of Baltimore city," and by section 2 for a special commission, "to be known as the 'Annex Improvement Commission.' "

Sections 3, 5, 6, 7, 9, and 10 of said act are as follows:

"Sec. 3. That said commission shall have the right and power to condemn, lay out, open, extend, widen, straighten, close, grade and pave any street, avenue, lane or alley or any part thereof, from curb to curb; and to establish and fix the building line and the width | by authorized as its work progresses to turn

or alley now existing or to be laid out, opened, extended, widened, straightened, graded or paved in the annex portion of the city of Baltimore. That said commission shall have all powers necessary and proper in the exercise of said powers; and the mayor and city council of Baltimore are hereby authorized and empowered to grant by ordinance any further powers and duties it shall deem necessary for the proper execution of the improvements intended to be made by this act."

"Sec. 5. That the said commission hereby created shall be the agent of the mayor and city council of Baltimore to acquire by gift, purchase, lease, whatever the duration of the lease, or by other methods of acquisition, or by condemnation, any private property whatsoever, including streets, avenues, lanes and alleys, rights or interests, franchises, privileges or easement, that may be required to open, widen, extend, straighten, close, grade or pave any street, avenue, lane or alley, or to broaden any sidewalk; and as soon as the title to the property acquired as set forth herein has been certified by the city solicitor. said commission shall have the same conveyed to the mayor and city council of Baltimore, and no ordinance shall be requisite to the validity of such conveyance; said streets, avenues, lanes and alleys so conveyed shall become public highways, subject to all ordinances and resolutions relating to streets, avenues, lanes and alleys in the city of Baltimore. That authority is hereby conferred upon the mayor and city council of Baltimore to provide by ordinance or ordinances the proceedings for condemnation of property as herein set forth by the said commission.

"Sec. 6. That no money shall be expended by said commission to pay for the improvement of sidewalks in the said annex, but same shall be done at the expense of the owner or owners of property along and upon the streets, avenues or lanes said sidewalks are to be placed; authority is hereby given said commission to assess said property for the cost and expenses of said sidewalks, and to collect the same as now prescribed by law or ordinances.

"Sec. 7. That said commission is hereby authorized and empowered to contract with any person, persons, company or corporation for the work of opening, grading, curbing and paving the streets, avenues, lanes and alleys of the annex as intended by this act, or to employ the necessary laborers, help and assistants, skilled and unskilled, and perform the work under their own supervision. The costs and expenses of said work and all necessary expense of this commission to be paid out of the loan as provided in section 1 of this act, upon vouchers, approved by the said commission or its chairman, and presented to the comptroller and city register of the city of Baltimore."

"Sec. 9. That the said commission is here-

over from time to time such completed portions of said work as it may see fit to the charge, superintendence and control of the proper city officials, and shall on the termination of its work turn over all the records, writings, maps, reports to the commissioner for opening streets, to be by him preserved and to be used as the papers and records of his office.

"Sec. 10. That, provided, however, in lieu of said commission hereinbefore provided for in section 2 of this act, the mayor and city council may by ordinance authorize and empower the commissioner for opening streets of Baltimore city to perform the duties and functions in this bill heretofore provided for the said commission."

By section 8 the commission is not only given "all powers necessary and proper in the exercise of" the powers expressly conferred, but the mayor and city council are "authorized and empowered to grant by ordinance any further powers and duties it shall deem necessary for the proper execution of the improvements intended to be made by this act," and, by section 5, "to provide by ordinance or ordinances the proceedings for condemnation of property as herein set forth by said commission." In execution of this power conferred by the act on the mayor and city council, it passed, March 6, 1905, Ordinance No. 216, by which the commissioners for opening streets are "authorized, empowered and directed * * * to perform the duties and functions in said act provided for the Annex Improvement Commission," and it is provided, by section 7: "That in condemning, laying out, opening, extending, widening, straightening or closing streets, avenues, lanes, alleys, or parts thereof, under said act, the procedure of the said commissioners for opening streets, except in so far as they shall be authorized by the terms of said act to acquire property, rights or interests, franchises, privileges or easements through voluntary action of the citizen, shall be that now or hereafter prescribed by law in relation to their ordinary duties and powers of the same nature."

Now the procedure of the commissioners for opening streets, in opening streets required by ordinance to be opened, is prescribed by sections 172-195 of the city charter (Acts 1898, pp. 339-350, c. 123), and section 175 provides that: "Whenever the mayor and city council of Baltimore shall hereafter by ordinance direct the commissioners for opening streets to lay out, open, extend, widen, straighten or close up, in whole or in part, any street, square, lane or alley, within the bounds of this city, the said commissioners, having given the notice required by law of their first meeting to execute the same, shall meet at the time and place mentioned in said notice, and from time to time thereafter, as may be necessary, to exercise the powers and perform the duties required of them by said and what amount of value in damage will thereby be caused to the owner of any right or interest in any ground or improvements within or adjacent to the city of Baltimore for which, taking into consideration all advantages and disadvantages, such owner ought to be compensated; and the said commissioners having ascertained the whole amount of damages for which compensation ought to be awarded, as aforesaid, and having added thereto an estimate of the probable amount of expenses which will be incurred by them in the performance of the duties required of them, as aforesaid; and also of the expenses incurred by the city register by reason of said proceedings, shall proceed to assess all the ground and improvements within and adjacent to the city, the owners of which, as such, the said commissioners shall decide and deem to be directly benefited by accomplishing the object authorized in the ordinance aforesaid," etc.

As the sections of the charter referred to contain the only procedure prescribed by law, it is evident that the procedure referred to in Ordinance No. 216 is that prescribed by said sections, and that the commissioners for opening streets, in opening streets in the annex portion of the city, are required by the ordinance, after "having ascertained the whole amount of damage for which compensation ought to be awarded," etc., to "proceed," as directed by section 175 of the charter, to assess benefits on all property deemed and decided by them to be directly benefited thereby. That this is the proper construction of the ordinance would seem to admit of little doubt. The procedure adopted is that prescribed by law "in relation to their ordinary duties and powers of the same nature." These "ordinary duties and powers of the same nature' are their duties and powers in opening streets directed by ordinance to be opened, and it is the procedure prescribed by the charter in relation to them that they are required by the ordinance to follow when opening streets under the act of 1904. The ordinance could not have been more explicit if it had set out in terms the procedure to be followed by the commissioners. Instead of directing them, after ascertaining the damages, etc., to assess the benefits, etc., it requires them in clear, definite, and appropriate terms, in opening streets under the act of 1904, to do the things they are required to do by the charter when opening streets directed by ordinance to be opened. If this is not the proper construction of the ordinance. what are the duties and powers of the commissioners in opening streets under said act? The act simply authorizes them to open streets. It does not provide what they shall do, or how they shall proceed in order to accomplish that object. If they are not required to proceed according to the provisions of the charter, how are they to proceed?

perform the duties required of them by said The learned counsel for the appellant conordinance, and shall ascertain whether any tends that the mayor and city council could

not by ordinance enlarge or modify the powers given by the act, and did not attempt to do so. As a general proposition it is undoubtedly true that, as the powers of a municipal corporation are derived from the law and its charter, these powers cannot by ordinance be enlarged, diminished, or varied. 1 Dillon, Mun. Cor. 817 (4th Ed.); Baltimore City v. Flack, 104 Md. 136, 64 Atl. 702. But this rule can have no application where a city is expressly authorized by law to confer on a commission created by the law, as an agency of the city, and vested with certain powers, such further powers as it may deem necessary for the proper execution of the work sought to be accomplished, and where the city in pursuance of such authority does not restrict or qualify the powers conferred by the law, but grants to the commission such additional powers as in its judgment are necessary and proper to be exercised by it in the discharge of the duties prescribed by the law. Section 6 of Ordinance No. 216 requires the commissioners for opening streets "to perform the duties and functions in said act provided for the Annex Improvement Commission"; and in Flack's Case this court said that: "The power to adopt section 6 of the ordinance was expressly conferred on the mayor and city council by section 10 of the act of 1904 and the power has been exercised in almost the exact language in which it was granted." In that case the right of the mayor and city council to confer on the commissioners for opening streets the powers granted by the act to the Annex Improvement Commission was not questioned, and was distinctly recognized. By section 3 of the act of 1904 the commission, in addition to the powers therein specified, were given "all powers necessary and proper in the exercise of said powers," and it was provided that "the mayor and city council of Baltimore are hereby authorized and empowered to grant by ordinance any further powers and duties it shall deem necessary for the proper execution of the improvements intended to be made by this act." The powers which the mayor and city council were authorized to grant were not the "powers necessary and proper in the exercise" by the commission of the powers expressly granted, for they were conferred by the act, but were such additional powers as it deemed necessary for the proper execution of the work of the commission. The mayor and city council, as we have seen, is authorized by its charter to provide for benefit assessments; and, if by Ordinance No. 216, it conferred on the commissioners for opening streets, when acting as the Annex Improvement Commission, powers not expressly granted by the act of 1904, it did so in pursuance of the provisions of that act.

In Flack's Case it was contended that section 7 of Ordinance No. 216 was invalid because of the alleged unconstitutionality of section 10 of the act of 1904, and that, if it such assessments, and the rule is that exemp-

was not for that reason invalid, it curtailed the powers of the Annex Improvement Commission, but the court held that the act of 1904 was constitutional "throughout all of its' provisions"; and as section 7 of the ordinance did not import "into Ordinance No. 216 any municipal legislation which is hostile to the Act of 1904," it was valid. While in that' case the court was not dealing with the right of the mayor and city council to grant to the commissioners for opening streets the power to make benefit assessments, it did, as we' have said, recognize the right of the mayor and city council, under the provisions of the act, to confer on the commissioners for opening streets the powers of the Annex Improvement Commission. If, by virtue of the act,' the mayor and city council could confer on the commissioners for opening streets ex: traordinary powers not previously possessed. by them, there is no reason why it could not, under the express authority of the act, grant' to the commissioners such powers as were exercised by them in the discharge of their' duties under the charter. But it is not necessary to further discuss the authority of the mayor and city council to pass Ordinance No. 216, for in Flack's Case this court said that the act of 1904 was "constitutional throughout all of its provisions." The authority given by the act to the mayor and city council to grant to the commissioners' for opening streets additional powers is therefore a valid provision, and the mayor and city! council had the right to exercise it.

Appellant further insists that the intention of the Legislature, as gathered from the provisions of the act, was that benefit assessments should not be made, and for that con-' struction relies upon sections 1, 6, and 7. Sec-' tion 1 provides that: "The proceeds of the' sale of said stock shall be used only for the' purpose of providing the costs and expenses: of condemning, opening, grading, paving and curbing streets, avenues, lanes and alleys of the annex portion of Baltimore city." The evident meaning of this provision is that the city shall not apply the money received from' the sale of the stock to other purposes than! those specified by the act. Section 6, after declaring that the commission shall not pay for the improvement of sidewalks, provides: that the costs of such improvements shall be paid by the owners of property, and that the' commission shall assess the property for the same, and section 7 authorizes the commission to contract for the work of opening, paving, etc., or to employ the necessary laborers, etc., "and perform the work under their own supervision," and to pay the costs of said work, and all necessary expenses of the commission, out of the proceeds of the loan provided for by the act. We do not. find in either of these sections any references to assessments of benefits in connection with the costs and expenses of opening streets; and, as the charter expressly provides for

tions from taxations are to be strictly construed, it cannot be successfully contended that they evidence an intention of the Legislature to exempt property in the annex portion of the city from such assessments.

In Richmond v. Daniel, 14 Grat. (Va.) 387, referred to in a note to section 763, 2 Dillon, Mun. Cor. (4th Ed.), the court beld that "exemptions from taxation are to be construed strictly; and, when the power of taxation has been once conferred, it is not to be crippled or destroyed by strained interpretation of subsequent laws." In the case of Sindall v. Baltimore City, 93 Md. 528, 49 Atl. 645, this court said: "This proviso is a restriction of the power of the municipality to levy more than a designated rate of taxes on property annexed to the city limits, until a prescribed condition has been complied with. Like every other exemption from taxation, it must be strictly construed. The taxing power is never presumed to be surrendered, and therefore every assertion that it has been relinquished must, to be efficacious, be distinctly supported by clear and unambiguous legislative enactment." See, also, Balto. v. Greenm't Cemetery. 7 Md. 517, and cases collected in note to Perkins' edition. The inquiry in this connection is not whether the act conferred on the commission power to make benefit assessments, but whether the provisions of the act show such a clear and well-defined purpose of the Legislature to prohibit such assessments as to render invalid an ordinance requiring the commissioners to make them, and passed in pursuance of an authority to grant to the commissioners additional powers. Judged from that point of view, and assuming that the Legislature did not by the act grant to the commission power to make assessments, it was necessary to make other provision for the payment of the costs and expenses. and it does not therefore follow because such provision was made that the Legislature intended to prohibit the mayor and city council from requiring benefit assessments to be made, in the event that it deemed proper to do so.

As the act of 1904 authorizes the mayor and city council to grant to the commission such further powers as it deemed necessary and proper, and as there is nothing in the provisions of the act prohibiting the mayor and city council, in the exercise of that authority, from conferring on the commissioners power to make benefit assessments, Ordinance No. 216, which requires the commissioners, in opening streets in the annex portion of the city, to make such assessments, was a valid exercise by the mayor and city council of the power given to it by the act, and the order of the court below overruling the motion to quash the proceedings of the commissioners for opening streets must therefore be affirmed. We must not, however, be

understood as determining that an appeal lies to this court from an order of the Baltimore city court overruling a motion to quash the proceedings of the commissioners for opening streets in opening streets; but, as the right to appeal in this case was not questioned by counsel, and as the question of the right of the commissioners to assess benefits is one of public interest, we have deemed it proper to decide it.

Order affirmed, with costs.

(82 Vt. 246)

ABBOT v. LA POINT.

(Supreme Court of Vermont. Brattleboro. May 81, 1909.)

1. Frauds, Statute of (§ 123°)—Oral Assignment of Lease—Estate Created.
Under V. S. 2218 (P. S. 2582). providing

that an interest in land created without a writ ing shall be an estate at will only, an oral assignment of a lease creates a tenancy at will.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 272; Dec. Dig. § 123; Landlord and Tenant, Cent. Dig. § 409.]

2. Landlobd and Tenant (§ 120*)—Tenancy

AT WILL—EFFECT OF ASSIGNMENT.

A tenant at will baving no interest that he can convey, his attempt to convey ends his tenancy.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 420; Dec. Dig. § 120.*]

8. EVIDENCE (§ 353*)-LEASE-EFFECT OF RE-COBDING AFTER COMMENCEMENT OF ACTION.

An assignment of a lease is admissible in evidence, though not recorded until after the commencement of the action.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1421; Dec. Dig. § 353.*]

4. Evidence (§ 353*)—Admissibility—Deeds NECESSITY FOR RECORD.

As the delivery of a deed passes the title, a deed may be read in evidence if recorded be-fore the trial, though not recorded at the commencement of the action.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1421; Dec. Dig. § 353.*]

5. FRAUDS, STATUTE OF (§ 123*)—ORAL ASSIGNMENT OF LEASE—EFFECT AS ESTOPPEL

A lessee is not estopped to assert his right to possession of the premises, as against a third person, by an oral assignment of his lease.

[Ed. Note.—For other cases, see Frauds, Statute of, Dec. Dig. § 123.*]

6. LANDLORD AND TENANT (§ 285*)—ACTION FOR POSSESSION—EVIDENCE—ADVANTAGES.

In an action to recover possession from a tenant at will, plaintiff may show, on the question of damages, in what seasons of the year the profit in the business for which the premises were used was made in that locality.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 285.*]

Exceptions from Windsor County Court; Geo. M. Powers, Judge.

Action in ejectment by Sherman F. Abbot against Ezra La Point. Plaintiff had judgment, and defendant brings exceptions. Exceptions overruled, and judgment affirmed.

Argued before ROWELL, C. J., and MUN-SON, WATSON, and HASELTON, JJ.

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Davis & Davis and S. E. Emery, for defend-

MUNSON, J. August 4, 1903, J. E. Brown leased certain premises to H. E. Partridge for five years by an instrument duly executed and recorded. Partridge put in certain fixtures and occupied the premises as a meat market until December 18, 1905, when he sold his interest under the lease and gave possession of the premises, fixtures, and stock to J. P. Meany. Meany occupied until March 1, 1906, when he sold his interest under the lease and gave possession of the premises and property therein to the plaintiff. Each of the above transactions was accompanied by the delivery of an unsigned incomplete carbon copy of the lease from Brown to Partridge. Each of the above assignees paid to Brown the rent accruing during his occupancy. The plaintiff occupied the property until September 21, 1906, when he "sold out" to Geo. H. Bennet, and put him in possession of the premises, fixtures, and stock. Some time in October plaintiff's father delivered to Bennet the carbon copy above mentioned, by what authority did not appear. November 16th plaintiff gave Bennet a bill of sale of the fixtures and stock with a schedule of items attached, and received from Bennet a chattel mortgage of the same to secure a part of the purchase price. Accompanying the bill of sale was a supplemental agreement which provided that Bennet, if he gave sufficient prior notice, might return any or all of said personal property, except the stock in trade and the cart, on the 1st day of April, and have the same credited on the chattel mortgage, and which authorized the plaintiff to sell or remove any or all of the same property previous to April 1st, on giving proper notice. There was no other writing between them.

April 1, 1907, pursuant to notice given March 11th, Bennet returned to the plaintiff certain of the property, including the fixtures, and under date of March 30th plaintiff discharged the chattel mortgage. March 14th Bennet sold some of the remaining property to the defendant, and executed and delivered to him an assignment, written on the back of the carbon copy before mentioned. and covering all his interest in the premises described therein; and on the 1st day of April he gave defendant possession of the property so sold and assigned. Soon after this the plaintiff found defendant in possession and offered to sell him the property returned by Bennet, and on his refusing to buy it demanded possession of the premises, and on his refusing to surrender them brought this action of ejectment. An assignment from Partridge to Meany, dated December 18, 1905, acknowledged April 6, 1907, and recorded December 12, 1907, and one from Meany to the plaintiff, not dated, acknowledged April

Stickney, Sargent & Skeels, for plaintiff. | 5, 1907, and recorded December 12, 1907, both duly witnessed, and each conveying all the assignor's interest in the Brown lease, were offered in evidence by the plaintiff and received subject to defendant's exception. The first assignment, dated December 18, 1905, was in fact signed about April 1, 1907, and after the defendant had taken possession of the premises. Both were made before the suit was brought, and both were recorded before the trial.

We find nothing in the writing given by the plaintiff to Bennet that can be held to cover an assignment of the lease. The defendant did not construe it differently, for he objected to its introduction on the ground that it related to the personal property only, and not to the occupancy of the premises. There is nothing in the exceptions regarding the payment of rent by Bennet to the lessor, and the testimony is not referred to. So there is no basis for the assumption that the lessor accepted Bennet as tenant in place of the plaintiff, and no occasion to examine the case along that line. If Bennet obtained any right to the premises from the plaintiff, it must have been by virtue of some oral agreement. If there was an oral assignment of the lease from the plaintiff to Bennet, it created a tenancy at will only. V. S. 2218 (P. S. 2582); Amsden v. Atwood, 68 Vt. 322, 35 Atl. 311. A tenant at will has no interest that he can convey, and an attempt to convey ends his tenancy. 2 Bl. Com. 146; 1 Mash. Real Prop. 393. So the defendant acquired nothing by Bennet's assignment of his interest in the premises. The assignments received against the defendant's objection gave the plaintiff a valid legal title before the commencement of the suit, and they were properly received in support of the action, although not recorded when the suit was brought. The delivery of a deed duly executed passes the title, and it may be read in evidence if recorded before the trial. Harrington v. Gage, 6 Vt. 532. We see no ground upon which the plaintiff can be estopped from asserting his title. It is claimed that the plaintiff was guilty of gross negligence which operated to deceive the defendant, but counsel do not undertake to specify the matters relied upon.

The court directed a verdict for the plaintiff and submitted the question of damages. The rent was payable in equal monthly installments. A witness improved by the plaintiff on the question of damages was permitted to state in what season of the year the profit in that business was made in that locality. This was objected to because there was no allegation of special damages, and was received as explanatory of the witness' testimony regarding the damages. No error appears.

The other exceptions are disposed of by the views above expressed.

Judgment affirmed.

(75 N. H. 276)

SAWYER . MASONIC PROTECTIVE ASS'N.

(Supreme Court of New Hampshire. Merrimack. May 4, 1909.)

INSURANCE (§ 787*)—BENEFIT CERTIFICATE—, CONSTRUCTION OF POLICY.

Under a benefit certificate providing that a

Under a benefit certificate providing that a disability, to constitute a claim for sickness, shall require absolute, necessary, continuous confinement to the house for not less than 14 days, etc., insured was not entitled to a benefit where, though he was totally disabled from laboring, he was not confined to his house, but was able to and did walk a quarter of a mile from his house to a barber shop.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 787.*]

. Transferred from Superior Court, Merrimack County.

Action by George W. Sawyer against the Masonic Protective Association. Verdict for plaintiff. Transferred from the superior court on defendant's exception to the denial of a motion for nonsuit. Exception sustained.

Assumpsit, for an indemnity under a benefit certificate. The certificate contains the following provisions: "A disability, to constitute a claim for sickness, * * * shall require absolute, necessary, continuous confinement to the house for not less than fourteen days. * * * And no disability * * * shall constitute a claim for a longer period than the insured shall be totally disabled and absolutely, necessarily, continuously, confined to his house."

The plaintiff's evidence tended to show these facts: He was a grocer, and was seriously sick and totally incapacitated for labor from May 2d to September 10th. May 1st his physician began to treat him at his house for paralysis of the throat and other troubles connected therewith. He was confined to his house in Franklin from that time until July 8th, except that he went once or twice a week to the office of his physician for X-ray treatment, and on some of these occasions went beyond the office to a barber shop a quarter of a mile distant from his He occasionally stepped into his store, but did no work there. July 8th he went to York Beach by advice of his physician. On the way he consulted a specialist in Boston, and while at the beach was driven to a barber shop twice a week.

Leach, Stevens & Couch, for plaintiff. Henry F. Hollis, for defendant.

PEASLEE, J. The plaintiff relies upon Scales v. Association, 70 N. H. 490, 48 Atl. 1084. He claims that the case is authority for the proposition that total disability to labor entitles him to recover, although he was not in any sense confined to his house. If such a conclusion is to be drawn from what is said in the first paragraph of the opin-

ion in that case, it cannot now be followed. The disability is to be such as to ordinarily confine one to the house as a matter of necessity. As was said in the Scales Case. the confinement is not a condition precedent. If the insured were taken out because the house was on fire, or if he were carried to a hospital in an ambulance, it would not defeat a recovery; but that case does not decide that one can recover under this policy when he is totally incapacitated to labor, yet in no sense confined to his house. To so hold would be to refuse to give any substantial meaning to the plain language used by the parties in making their agreement. The term used is to be given a reasonable interpretation. It is not to be read out of the contract.

If necessity for confinement to the house is only an evidentiary fact, it is one that must appear. The disability must be of a nature to ordinarily confine one to the house. This is recognized in the Scales Case, and most of the opinion is devoted to showing that the essential fact existed. There was in that case not only a substantial, but a literal and technical, confinement of the insured to his house. The case at bar presents a different state of facts. One who is able to, and does, walk a quarter of a mile from his house to a barber shop, is not then either "connected with" or "appurtenant" to his house. No one would think of saying he was confined to the house. Among people in general, the conclusive answer to the assertion that he was so confined would be that he was seen walking the streets a quarter of a mile from his dwelling. It was largely upon the ground of such general or common understanding of the meaning of the terms used that the Scales Case was decided. The same principle should prevail here. As in that case, there was not to be a strict construction of the term as a condition precedent, so here there cannot be a technical application of the language used in a part of the opinion in the Scales Case. The contract and the opinion in the former case are both to be interpreted reasonably. Construed in this way, the policy is not deceptive. As it cannot be presumed that the association intended to deceive the insured (Scales v. Association), neither can it be inferred that the insured intended to overreach the insurer. If he desired to insure himself against incapacity to labor or transact business, language could easily have been used to express the contract. An unqualified agreement could have been made.

The case differs essentially in its facts from the one relied upon. There was here no evidence to support a finding that the plaintiff's disability was of the class insured against, and the motion for a nonsuit should have been granted.

Exception sustained. All concur.

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(75 N. H. 273)

STATE v. SPIRITUOUS LIQUORS.

(Supreme Court of New Hampshire. Merrimack. May 4, 1909.)

1. Intoxicating Liquors (§ 250*)—Condemnation—Grounds.

That an officer has possession of spirituous liquors, taken from the owner who kept them for illegal sale does not alone authorize their condemnation, but they must have been legally seized pursuant to a lawful warrant.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 250.*]

2. Intoxicating Liquors (§ 249*)—Seaech-Return.

In the absence of a return of a search and seizure of intoxicating liquors, alleged to have been unlawfully kept for sale, it will be presumed that none was made, and that the owner was illegally deprived of his property.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 249.*]

8. Intoxicating Liquors (§ 249°)—Srizure—Warrant—Return.

A return is an essential part of a warrant for a search and seizure of liquor alleged to have been unlawfully kept for sale.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 249.*]

4. Intoxicating Liquors (§ 249*)—Searches and Seizures—Warbant—Return—Inventory.

An unsigned inventory of liquors seised under a search warrant did not constitute a return of the warrant, nor a substantial compliance with its command, or with Pub. St. 1901, c. 251, § 3, requiring the officer to make return of his proceedings on the warrant.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 384; Dec. Dig. § 249.*]

5. Intoxicating Liquobs (§ 252*)—Seizube—Forfeiture.

In 'the absence of the officer's return of a search and seizure of liquors in accordance with the command of the writ, no decree forfeiting the liquors can be ordered.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 252.*]

6. Intoxicating Liquors (§ 249*)—Seizure-Return—Amendment.

Under Pub. St. 1901, c. 222, §§ 7, 8, providing that no writ, return, or other proceedings shall be abated for any error or mistake, when the person or case may be rightly understood by the court, nor for any defect or want of form or addition only, and authorizing amendments in matters of substance on terms, to prevent injustice, a warrant for the search and seizure of intoxicating liquors illegally kept for sale, defective for want of return, may be amended to supply the defect.

[Ed. Note.—For other cases, see Intoxicating Liquors. Dec. Dig. § 249.*]

7. Intoxicating Liquoss (§ 250*)—Forfeiture — Proceedings — Capacity to Institute.

Under Laws 1905, p. 530, c. 117, § 3 (Pub. St. 1901, c. 112, § 35), specially requiring the county solicitor to enforce the liquor laws, the fact that a justice of the peace issued a warrant for the seizure of liquors did not deprive the county solicitor of capacity to file a libel for forfeiture, though chapter 258, § 2, declares that the person making or controlling the seizure shall without unnecessary delay file the libel.

(Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 250.*]

Transferred from Superior Court, Merrimack County; Wallace, Judge.

Libel by the State against Spirituous Liquers for forfeiture. Facts found, and case transferred from superior court. Libel dismissed. Case discharged.

February 24, 1908, John E. Gay, deputy city marshal of Concord, with other assistants, by virtue of a search warrant issued by Edmund S. Cook, justice of the peace and city solicitor of Concord, charging that Elijah and James A. Jacobs unlawfully kept for sale certain spirituous liquors, searched the premises occupied by them in Concord, and seized the liquors in question. The command in the warrant under which the seizure was made was as follows: "We command you, therefore, to take with you suitable assistants, and to suffer no others to be with you, and to search in the daytime the premises described in the annexed complaint. for the purpose of finding said one gallon of spirituous liquor, and the casks, bottles, and vessels containing the same, or used in the sale thereof, and if found, to seize the same, and them safely keep until disposed of according to law, and make return of your proceedings thereon, with an inventory of such things sought as shall be found there, and of such things as, being liable to seizure, have been taken by you and are still in your custody." The officers made no return of the search and seizure on the original warrant, but made an unsigned inventory of the liquor seized on a separate paper, and returned it to court at the same time the warrant was returned. The return of the warrant was made by J. E. Rand, constable of Concord, who returned that he arrested the said Jacobs, and no other return was made on the warrant. The liquor thus seized was used in evidence in the case against the Jacobses before the police court and before the grand jury, and an indictment was returned against both of them on April 9, 1908. The libel was dismissed as to James Jacobs. On the foregoing facts it was found that the libel was filed without unnecessary delay, and the motion of Elijah Jacobs to dismiss as to him was denied, subject to exception. He also moved that the libel be dismissed, on the ground that the statute provisions relating to the search, seizure, and forfeiture of personal property have not been complied with in this case, as shown by the facts reported. The motion was denied, and he excepted.

Thomas F. Clifford, Sol., for the State. Martin & Howe, for claimant.

WALKER, J. The mere fact alone that an officer has possession of spirituous liquors which were taken from the owner, who kept them for illegal sale, does not authorize their condemnation. If they were taken by him by virtue of a search warrant issued upon a complaint, that does not allege that they were kept for an illegal purpose; a li-

bel for their forfeiture cannot be sustained to duty on the part of the officers in serving (State v. Liquors, 68 N. H. 47, 40 Atl. 398), or if whisky is seized upon a warrant authorizing a search for lager beer, there can be no forfeiture of the whisky, although the owner kept it in violation of law. State v. Lager Beer, 70 N. H. 454, 49 Atl. 575. It is essential to the maintenance of a libel in such cases that the seizure be legal. seems that there can be no decree for a forfeiture of property taken under a search warrant, if the constitutional guaranty against illegal search has been violated. Hussey v. Davis, 58 N. H. 317. The fundamental inquiry therefore is: Was the search and seizure legal? When the complaint and warrant authorize the seizure, the questions whether the officer acted by virtue of the warrant, and whether what he did thereunder was legal-in short, whether he acquired possession of the property legally-are ordinarily determinable in the first instance by the return of his doings upon the warrant. It is as much his duty to make a return as to perform the other commands in the warrant. In the absence of a return of a search and seizure the presumption is that none was made; and, if none was made, it would not appear that the owner had been legally deprived of his property under the warrant, or that the possession of the officer was legal. A return is an essential part of the process. Poor v. Taggart, 37 N. H. 544; Clark v. Tilton, 74 N. H. 330, 68 Atl. 335.

In this case the unsigned inventory, filed in court, was not a return, nor was it a substantial compliance with the command in the warrant, or with the statute, which requires the officer "to make return of his proceedings thereon." Pub. St. 1901, c. 251, \$ 3. His possession of the claimant's property did not appear to be legal. The record furnished no sufficient evidence in justification of his possession. The apparent situation of the property was much the same as it would have been if the warrant had not authorized the search, except that in the latter case the defect could not be obviated, while in the former justice may require that the officer be permitted to make a return in accordance with the fact. In the absence of a return of a search and seizure in accordance with the command in the warrant, no decree ordering the liquors forfeited can be ordered. But by an amendment of the return showing a legal search and seizure of the property the libel may be maintained. There is no legitimate reason why an amendment of the return may not be made if justice requires it (Pub. St. 1901, c. 222, §§ 7, 8; State v. Bacheller, 66 N. H. 145, 20 Atl. 931; State v. Collins, 68 N. H. 46, 36 Atl. 550; Langley v. Batchelder, 69 N. H. 566, 568, 46 Atl. 1085), and the reported facts would seem to warrant it. If this is not done, the libel must be dismissed. Carelessness and inattention

and returning process are not to be encouraged.

The other objections presented by the claimant must be overruled. It is argued that the county solicitor was not the proper person to file the libel, because the justice of the peace who issued the warrant was alone authorized to institute proceedings for a forfeiture under the statute, which provides that "the person making or directing such seizure shall without unrecessary delay file a libel." Pub. St. 1901, c. 258, § 2. Whatever the duties of the justice may be in the premises, the right to file a libel is not expressly limited to the person who issued the warrant; and no reason is apparent why it should be. The county solicitor, who is specially charged with the enforcement of the liquor laws, would seem to be a proper party to institute such proceedings. Laws 1905, p. 530, c. 117, § 3; Pub. St. 1901, c. 112, § 35. Whether there was an "unnecessary delay" in filing the libel is a question of fact, which the superior court has answered in the negative; and it cannot be said as a legal proposition that the finding was not supported by the evidence.

Case discharged. All concurred.

(75 N. H. 278)

KEAZER V. COLEBROOK NAT. BANK.

(Supreme Court of New Hampshire. Coos. May 4, 1909.)

1. BILLS AND NOTES (§ 298*)-RIGHTS OF IN-DORSEES.

The holder of dishonored negotiable paper has a claim against all prior indorsers to whom notice has been given, and may collect of either. [Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 298.*]

2. BILLS AND NOTES (§ 439*) - PAYMENT BY

INDORSER—EFFECT.

The payment by an indorser of negotiable paper discharges his own liability on the paper and that of all subsequent indorsers.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1281; Dec. Dig. § 439.*]

3. BILLS AND NOTES (\$ 434*)—LIABILITIES OF INDORSERS.

Where plaintiff, the indorser of a check, on the dishonor thereof, paid the amount due there-on to a bank to which it had been transferred. and thereafter a subsequent indorser, to avoid litigation, also paid the amount due on the check, because the officer of the bank to whom plaintiff had made payment failed to credit him therewith, plaintiff was not entitled to recover of the bank the amount paid by such subsequent indorser.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 434.*]

4. PAYMENT (§ 82*)-RECOVERY OF PAYMENT-GROUNDS.

Money paid either under a mistake of law or in compromise of litigation cannot be recovered by the payor.

[Ed. Note.—For Dec. Dig. § 82.*] -For other cases, see Payment,

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

County, Chamberlin, Judge.

Action by Joseph Y. Keazer against the Colebrook National Bank. Facts found, and case transferred from the superior court. Judgment for defendants.

Assumpsit, for money paid the defendants by R. G. Jameson & Son on February 15, 1904. In June, 1898, the plaintiff was the holder of a check on a Massachusetts bank for \$55, which he indorsed and transferred to R. G. Jameson & Son, who in turn indorsed the check and deposited it in the defendant bank. The check was protested for nonpayment, and both indorsers were duly notified. A few days afterward the plaintiff met Bailey, cashier of the bank, upon the street, out of banking hours, and gave him \$57 in full payment of the check. Soon afterward irregularities were discovered in Bailey's accounts at the bank, and he ceased to be cashier. In 1903 the bank presented the check to the Jamesons for payment. They informed the plaintiff, who told them he had paid the check, instructed them not to pay, and offered to save them harmless from all loss and expense on account of a suit and to give a bond to protect them. Notwithstanding the plaintiff's protest and offer, the Jamesons, not wishing to be involved in a lawsuit, on February 15, 1904, paid the bank \$75.70; the amount then due on the check. Shortly afterward the plaintiff paid Jameson & Son the amount paid by them to the bank. and brought this suit. When Bailey received the money of the plaintiff, he did not have the check in his possession and was not then engaged in the business of collecting it. The money was never paid by him to the bank. At the date of the payment of the money by Jameson & Son, the bank knew of Keazer's claim that he had paid it, of his refusal to pay them, and of his instructions to Jameson & Son not to pay. Both parties moved for judgment.

James I. Parsons and Herbert I. Goss, for plaintiff. Thomas F. Johnson, for defendant.

PARSONS, C. J. The question argued, whether the payment to the defendant's cashier, Bailey, under the circumstances disclosed in the case, was a payment to the bank, does not appear to be material in the present controversy. For obvious reasons, the plaintiff does not claim he can recover the money which he alleges he paid the defendants in 1898 in discharge of his liability as indorser. His claim is for the money paid by Jameson & Son in 1904, in discharge of the claim of the bank against them as indorsers.

The holder of dishonored negotiable paper has a claim against all of the prior indorsers to whom notice has been given and may collect of either. Payment by any indorser discharges his own liability upon the paper and that of all subsequent indorsers. St. Pr. Notes, \$ 401. Assuming that the plain-

Transferred from Superior Court, Coos | tiff in legal effect, as he claims, paid the bank the amount of the check in 1898, the bank had no legal claim against Jameson & Son in 1904. Having been once paid, the claim of the bank against all parties to the paper was extinguished; but the collection by the bank from Jameson & Son of a claim already paid them by the plaintiff would not give the plaintiff title to the money paid by Jameson & Son. The money paid by them was theirs, not the plaintiff's, and it was paid in supposed discharge, not of the plaintiff's liability to the bank, but of their own. If, under the circumstances, Jameson & Son could recover the money paid because the bank acquired no title to it, no recovery can be had by the plaintiff because he shows no title to the money. Their payment discharged the plaintiff from liability to the bank, but did not transfer their money to him.

> It does not appear that the Jamesons have ever assigned their claim to the plaintiff or authorized the use of their names in the litigation; but if it be assumed that such assignment could be established in fact or in law, and that Jameson & Son, despite their antipathy to litigation, could be made plaintiffs, the question would arise whether they could recover the money paid by them in discharge of the liability then claimed against them as indorsers. It is clear they could not. They assented to the claim of the bank and paid the money with full knowledge of the plaintiff's claim of prior payment to Bailey, in the face of his protest, offer of indemnity, and proffer of security, because they did not wish to be involved in Their payment was voluntary, a lawsuit. made either because of a mistake of law, if the plaintiff's claim that his payment to Bailey was a payment to the bank be correct, or because they preferred compromise to litigation, as is expressly found. Money paid under such circumstances cannot be recovered. Strafford Savings Bank v. Church, 69 N. H. 582, 44 Atl. 105; Bradley v. Laconia, 66 N. H. 269, 20 Atl. 331; Pearl v. Whitehouse, 52 N. H. 254; Sessions v. Meserve, 46 N. H. 167; Manchester v. Burns, 45 N. H. 482; Evans v. Gale, 17 N. H. 573, 43 Am. Dec. 614; Peterborough v. Lancaster, 14 N. H. 382, 389; Bean v. Jones. 8 N. H. 149; Webber v. Aldrich, 2 N. H. 461.

> Upon the defendants' contention that the delivery to Bailey, the defendant's cashier, out of banking hours, on the streets of Colebrook, when he was not engaged in collecting the paper, of money which Bailey neglected to pay the bank, was not a payment to the bank, the payment by Jameson & Son to the bank was a discharge of an existing liability due from them to the bank, which cannot be recovered by any one. Upon either view of the legal effect of the transaction between the plaintiff and Bailey there can be no recovery against the bank for the money paid them by Jameson & Son.

Judgment for the defendants. All concur.

(224 Pa. 18)

PAGNACCO v. FABER et al. (Supreme Court of Pennsylvania. March 8, 1909.)

1. MECHANICS' LIENS (§ 264*)—PROCEEDINGS TO ENFORCE—PARTIES—INTERVENTION.

The proceedings on a mechanic's lien, and

the right of parties to intervene to protect their interests, are regulated by statute, and a party wishing to intervene must do so in the manner pointed out; and, if the statute does not au-thorize his intervention, or provide the manner in which he may intervene, the court is without authority to assist him.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 483–486; Dec. Dig. § 264.*] 2. MECHANICS' LIENS (\$ 264*)—PROCEEDINGS TO ENFORCE—PARTIES—INTERVENTION.

TO ENFORCE—PARTIES—INTERVENTION.

Act June 4, 1901, § 23 (P. L. 442), permitting intervention in a mechanic's lien foreclosure by a party having a lien against, estate in, or charge upon, the property, does not authorize intervention by a party resting its claim solely upon an equity arising out of the conduct of plaintiff, entailing a loss upon it, if plaintiff is permitted to enforce his lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 483-486; Dec. Dig. § 264.*]

8. MECHANICS' LIENS (\$ 264*)—PROCEEDINGS TO ENFORCE—PARTIES—INTERVENTION.

Act June 4, 1901, \$ 24 (P. L. 443), permitting intervention in a mechanic's lien foreclosure ting intervention in a mechanic's lien foreclosure by a person having an interest in the property existing at the time of the claimant's contract, or subsequently acquired, does not authorize intervention by a person resting its claim solely upon an equity arising out of the conduct of plaintiff, entailing a loss upon it, if plaintiff is permitted to enforce his lien.

see Mechanics' [Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 483-486; Dec. Dig. § 264.*]

4. MECHANICS' LIENS (§ 291*)-FORECLOSURE. It is incumbent upon a person owning premises, or having an interest therein, to assert his rights as such owner, or his equity arising out of such ownership, in a mechanic's lien foreclosure; and, failing to do so, he is concluded by the judgment for plaintiff. closure;

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 291.*]

Liens, Dec. Dig. § 291."]

5. MECHANICS' LIENS (§ 208*)—RIGHT TO FILE—WAIVER—ALTERATION OF CONTRACT. A building contract, providing for a waiver of the contractor's right to file a mechanic's lien, was, after a change in the ownership of the building, canceled, and an oral contract made with the new owner, whereby the contractor agreed to finish the building, and which did not prohibit the filing of a lien. Held, that the contractor was entitled to enforce a lien for the the work and materials furnished under the subsequent contract, though a third person the subsequent contract, though a third person had insured the completion of the building, relying on the waiver in the original contract

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 208.*]

Appeal from Court of Common Pleas, Philadelphia County.

Petition by the Land Title & Trust Company for a rule to show cause why it should not be permitted to intervene as a party defendant in a mechanic's lien foreclosure by Joseph Pagnacco against Frederick F. Faber and another. Petition dismissed, and petitioner appeals. Affirmed.

In addition to the facts stated in the opin-

port (221 Pa. 326, 70 Atl. 754), it appeared that J. Willison Smith, mentioned as the reputed owner, was in fact an official of the trust company, and that he held the title for the trust company to secure the company.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

John G. Johnson, Edward Brooks, Jr., and Frederick J. Geiger, for appellant. G. Von Puhl Jones, for appellees.

MESTREZAT, J. The facts out of which this controversy arises will be found in the opinion of the court in Pagnacco v. Faber, 221 Pa. 326, 70 Atl. 754, which was heard and decided a year ago. Subsequent to that decision the Land Title & Trust Company, the appellant here, presented its petition to the court below, and, for the reasons therein set forth, prayed the court to grant a rule upon the plaintiff to show cause why it should not intervene as a party defendant, and why the claims of the plaintiff should not be postponed to the rights of the petitioner, and why the said claims should not be legally or equitably disallowed as claims against the property. The petition was dismissed, and the petitioner has taken this appeal.

It is claimed on the part of the appellant that under the facts of the case it has an equity which should estop the plaintiff from maintaining his liens to its prejudice. This equity, it is claimed, "arises out of Pagnacco's contract with Nyce, and Pagnacco's bond to the title company, and is that the title company shall not suffer a loss by reason of Pagnacco's filing liens" against the property. It is contended that, by reason of the contract and the bond given to the title company, Pagnacco should not be permitted to file these liens to enforce his claim for work and materials to the detriment or loss of the title company, which insured the mortgagees of the property against "actual losses by reason of unfiled mechanics' liens and municipal claims and the failure to complete the buildings within eighteen months from the date thereof." The plaintiff successfully resisted the petitioner's application to intervene in the court below, and contends here that it has no right to intervene, and no equity against the plaintiff which justifies its intervention.

The case was here before on appeal by the plaintiff. The action was a scire facias on a mechanic's lien against Faber, owner and contractor, and Smith, reputed owner. Pagnacco entered into a written contract with one Nyce to do the stonework, and make the excavations in the erection and construction of buildings on certain lots of ground in the city of Philadelphia, and in the contract expressly waived the right ion of the Supreme Court, and in the re- to file any liens against the property. After

. *For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Pagnacco had performed certain work, and not be seriously contended that the Land furnished certain materials, Nyce assigned Title & Trust Company, the petitioner, is a his interest in the property to Faber. Pagnacco, alleging that Nyce had not paid him in full for the work and materials he had furnished under their contract, refused to continue his work after the property had passed to Faber until the latter had agreed to pay him for the work and materials be would furnish thereafter. Subsequently Pagnacco filed a lien against Faber as owner and contractor, and against Smith as reputed owner, to enforce a claim for work done and materials furnished under his contract with Faber. He alleged that the work was done, and the materials were furnished, not under the original contract with Nyce, but under the subsequent oral contract with Faber after the latter had become the owner of the premises. This contention was sustained by the verdict of a jury. The trial court, however, set aside the verdict, and entered judgment for the defendant, on the ground, as stated in the opinion of this court, that inasmuch as the plaintiff under the contract with Nyce had waived his right to file a lien, and had given bond to protect him against all such liens, which bond Nyce had assigned to the Land Title & Trust Company, on the strength of which the latter had incurred obligations prior to the purchase by Faber, the plaintiff was equitably estopped from setting up such right to file a lien, notwithstanding his contract with Faber. This court reversed that judgment. holding, inter alia: "The company had the right, under the twenty-fourth section of the act of 1901, to intervene and assert its equities if it chose to do so; but these could only be asserted by itself, and not by another." We directed judgment to be entered on the verdict.

The proceedings on a mechanic's lien, and the right of parties to intervene to protect their interests, are regulated by statute. If one wishes to intervene, he must pursue the manner pointed out in the statute; and, if it does not authorize his intervention, or provide the manner in which he may intervene, the court is without authority to assist him. In this case the Land Title & Trust Company, the petitioner, relies on sections 23 and 24 of the mechanics' liens act of June 4, 1901 (P. L. 442, 448), as conferring upon the court the authority to grant it permission to intervene and assert its alleged equity against the right of the plaintiff to enforce his lien and judgment against the property. It is apparent, however, we think, that neither of these sections authorizes the appellant's intervention. This application was made after a judgment had been obtained on a scire facias on the lien. The twenty-third section permits the intervention of an interested party in such case, but the party seeking to intervene must be a "party having a lien against estate in, or charge upon, the

party within this provision of the statute. It has no lien against the property, nor charge upon it, and hence this section of the statute does not authorize the court to permit the title company to intervene.

We think it equally clear that the petitioner has no standing to claim the right to intervene under the twenty-fourth section of the statute. The party authorized to intervene under that section is one "having an interest in the property described in the claim * * existing at the time of the claimant's contract or acquired subsequently thereto." The petition filed by the title company for leave to intervene does not show that it was, at any time, the record owner of, or held a valid title to, the property, the subject of the plaintiff's lien. The company does not show that it is even a mortgagee, or that it ever had such interest in the premises as brings it within this section of the statute. The words of the statute manifestly contemplate that the party entitled to intervene under these sections must have some estate or title in the property that will be affected injuriously by the enforcement of the lien. Hence the act gives such party a right to "intervene as a party defendant and make defense thereto with the same effect as if he had been originally named as the defendant in the claim filed." There is nothing set forth in the petition of the title company which would bring it within the provisions of this section of the statute. Its right to intervene, as it claims, rests solely upon the equity which arises out of the conduct of the plaintiff, entailing a loss upon the petitioner if he is permitted to enforce his lien. This equity cannot, by any reasonable interpretation of the statute, be held to mean "an interest in the property described in the claim." This is so manifest that further discussion of the proposition is unnecessary.

We do not think that Smith's ownership of the property can avail the land title company in its application now to interveue and assert its alleged rights against the plaintiff. If by reason of Smith's ownership the title company has "an interest in the property described in the claim," or "an estate in the property included in such claim," it had the same rights and interests in the property prior to, and at the time of, the trial on the scire facias on the lien filed by the plaintiff. If it was an owner or had an interest in the property liened, it was incumbent upon it to assert its rights as such owner, or its equities arising out of such ownership; and, failing to do so, it is concluded by the judgment in favor of the plaintiff. If it was the beneficiary or real owner under Smith, it should, as suggested in the opinion of the court when the case was here before, have intervened, and asserted its rights and equities against the claim of the plaintiff. If "an officer of the property included in such claim." It can- company" held title to the property liened "for its protection," then the title company, the petitioner and the appellant here, was a party defendant in the action tried on the scire facias on the lien, and was required to assert its rights in or against the property which was the subject of the plaintiff's lien. The Smith title cannot now give it an interest or estate in the property so as to bring it within the act of 1901 and enable it thereby to intervene in the proceeding.

If, however, the title company was permitted to intervene, we cannot see that it could succeed as against the plaintiff's judgment. By the terms of the contract between the plaintiff and Nyce it is conceded that no valid lien could have been filed by the plaintiff against the property for work and materials furnished under that contract. The appellant here alleges that the inducement to assume liability on the title policies was the plaintiff's agreement with Nyce not to file a lien, and his bond to the latter for the faithful performance of their contract. But the lien which the plaintiff did file, and which this court has sustained, was for furnishing work and materials under another and different contract made, not with Nyce, but with his successor in title to the premises. Plaintiff's written contract with Nyce did not prevent the former from filing a lien for work and materials furnished under a subsequent contract with another party to whom the title to the premises had passed from Nyce, nor did the bond given by Pagnacco to Nyce obligate the former to perform the oral contract with Faber. There was no provision in the oral contract with Faber prohibiting the plaintiff from filing a lien, and this court has held that he was entitled to a judgment upon the lien entered under that contract. If that judgment is valid against Faber, the present owner of the property, and Smith, the reputed owner, and we must assume that it is, the alleged equity of the petitioner arising out of the former contract and the bond to Nyce is not such "conduct" as brings the plaintiff within section 15 of the statute, and equitably estops him from enforcing his lien. The single question here, if the title company was permitted to intervene, would be its right to have priority in payment of its claim over the judgment which the plaintiff has obtained after a trial on a scire facias issued on a lien filed against Faber and Smith for work and materials furnished under the oral contract with Faber, the owner of the property liened. By this judgment it is judicially ascertained that the plaintiff furnished the work and materials as claimed by him in and about the construction of the houses, under a valid contract with Faber, that he was entitled to a lien therefor, and that a judgment thereon was properly entered. If there was no matter set up at the trial which could "equitably estop the claimant" from filing a lien or obtaining a judgment thereon. we are unable to see that anything averred in the appellant's petition discloses any equity "why said claims [of plaintiff] should not be legally or equitably disallowed as claims against the property" of the defendant Faber.

The assignments are overruled, and the order of the court below is affirmed.

(324 Pa, 129)

KITTANNING BREWING CO. v. AMERI-CAN NATURAL GAS CO. et al.

(Supreme Court of Pennsylvania. March 15, 1909.)

1. Injunction (§ 174*)—Practice—Continuing Preliminary Injunction—Hearing.

Continuing a preliminary injunction and refusing to hear defendant's witnesses is reversible error, and equity rule 81, providing that a witness may be examined orally or testimony taken on short rule, does not justify such practice.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 174.*]

2. INJUNCTION (§ 167*)—PRELIMINARY IN-JUNCTION—MOTION TO DISSOLVE. Where a preliminary injunction is awarded

Where a preliminary injunction is awarded without notice, the defendant may move at once for dissolution and is not compelled to wait for complainant's motion to continue at the expiration of 10 days.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 354; Dec. Dig. § 167.*]

Appeal from Court of Common Pleas, Armstrong County.

Bill by the Kittanning Brewing Company against the American Natural Gas Company and the Kittanning Consolidated Natural Gas Company. From the decree, the American Natural Gas Company appeals. Record remitted, with directions.

Argued before FELL, BROWN, MESTRE-ZAT, POTTER, and STEWART, JJ.

Walter Lyon and Heiner & Golden, for appellant. H. A. Heilman, for appellee.

BROWN, J. On November 30, 1908, without notice to the appellant, a preliminary injunction was awarded by the court below, restraining it from shutting off a supply of gas to the appellee. Five days afterwards, on December 5th, on the hearing of the motion to continue the injunction, the appellee, after offering some documentary evidence. called four witnesses, and, upon announcing its case closed, the appellant offered to produce testimony in answer to that submitted by the appellee; but the offer was refused. on the ground, as it appears from the court's ruling, that at that time the appellant had no right to offer any evidence. The unchallenged statement in the history of the case is that the practice in the court below is to hear only the plaintiff's case on the question of continuing a preliminary injunction, and the contention of counsel for appellee is that under equity rule No. 81 such practice is correct. The awarding of a preliminary in-

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

judgment and execution before trial, for hearing of the motion to continue the injunctemporarily the defendant is damnatus inauditus. It is to be resorted to only from a pressing necessity to avoid injurious consequences that cannot be repaired under any standard of compensation. It ought never to be granted except in a clear case of an invaded right, to prevent irreparable mischief; and, when the proof as to the right is so equally balanced as to leave it in doubt, the writ should be refused until the rights of the parties are ascertained and settled. Mammoth Vein Consolidated Coal Company's Appeal, 54 Pa. 183; Brown's Appeal, 62 Pa. 17; Minnig's Appeal, 82 Pa. 373.

When a preliminary injunction is awarded without notice, it is the right of the enjoined to move at once for its dissolution, instead of leing compelled to wait for the complainant's motion to continue at the expiration of five days. Its continuance for even a day may work irreparable wrong to the defendant, whose right to be heard that it be dissolved is no less than the complainant's who procures it without notice on an ex parte hearing. To grant the one a hearing and to deny it to the other would be a mockery of justice. The books teem with in which preliminary injunctions awarded on bills and affidavits have been dissolved on affidavits of defendants denying the equities of the plaintiffs. Defendants were always so heard, and their right to be heard now is not impaired by rule 81, though under that rule ex parte affidavits will not be received. The rule provides: "Witnesses may be examined orally before the judge, or testimony may be taken on short rule, or, when necessary, testimony may be taken before any person authorized to administer an oath, on notice to the other side to appear and cross-examine." If only witnesses for the plaintiff are to be heard on a motion to dissolve or continue an injunction awarded without notice, there is no hearing for the defendant, and he may be compelled to submit to wrong for weeks and months, until on final hearing it is made clear that he ought not to have been enjoined and subjected to injuries for which the plaintiff's bond gives no adequate reparation. What seems to be the practice of the court below is at variance with every idea of equity.

The question before us at this time is not whether the preliminary injunction should be dissolved, but whether the court erred in continuing it without hearing the defendant, asking to be heard. After hearing it the injunction might have been continued. the other hand, it might have been dissolved, and, if so, the defendant's appeal would not be here.

The first, second, and third assignments

junction without notice is somewhat like with directions to the court to reopen the tion and permit the defendant to offer testimony.

(224 Pa. 55)

DELAWARE & ATLANTIC TELEGRAPH & TELEPHONE CO.'S PETITION.

(Supreme Court of Pennsylvania, March 8, 1909.)

1. Telegraphs and Telephones (§ 30*)-In-SPECTION—LICENSES.

Under Act April 17, 1905 (P. L. 183), relating to license fees on public service corporations which have poles, wires, conduits, or ca-bles in public streets, the court, in determin-ing the amount of the annual license fees, is controlled by the cost of inspection and regula-tion to the municipality: and, where there is no inspection or supervision, no license fee can be imposed be imposed.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 19; Dec. Dig. § 30.*]

2. Telegraphs and Telephones (\$ 26*)-MUNICIPAL CONTROL.

Municipalities may require telegraph and telephone poles to be kept in proper condition, and the wires in safe repair, and may provide reasonable inspection and regulation, and impose the cost thereof on the company.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 26.*]

3. Telegraphs and Telephones (§ 30*)-Li-CENSES.

A borough imposed on a telegraph and telephone company annual license fees at \$1 per pole, \$2.50 per mile of wire, and \$30 per mile of conduit. The court, in proceedings under Act April 17, 1905 (P. L. 183), found the rates were reasonable. The superior court on appeal found that the fees charged were should that were reasonable. The superior court on appeal found that the fees charged were about three times the sum paid by the borough for inspection duties during the year, and that the inspection of the conduit after it was let was inspection of the conduit after it was let was merely perfunctory, and very little time was needed in inspecting the pole line, and that after a new construction of a line there was very little to apprehend from the natural decay of material for several years. Held, that the superior court properly reduced the amount of the license fee, the proper rule to guide in such case being the cost of necessary inspection.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 19; Dec. Dig. § 30.*]

Appeal from Superior Court.

In the matter of the petition of the Delaware & Atlantic Telegraph & Telephone Company. From an order of the superior court, modifying the decree of the Delaware common pleas therein, the above-named company and the Borough of Sharon Hill appeal. Affirmed.

Head, J., filed the opinion of the superior court which was as follows:

"The act of April 17, 1905 (P. L. 183), provides that where any dispute shall arise between a municipality and any telegraph, telephone, light, or power company as to the amount of a license fee named in any ordinance for the inspection and regulation, unare sustained, and the record is remitted, der the police power of such municipality,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

such company, either party may apply by petition to the court of common pleas of the proper county, to determine the said dispute. After providing the process to bring the other party into court, and for pleadings to raise the issues of fact out of which the dispute has arisen, the act directs that it shall be heard and determined 'in the way and manner provided by law for the hearing of cases in equity.' The act then provides in section 4 that 'either party shall have the right of appeal from the order of the court, to the Supreme or superior court, as in other cases.' The present proceeding resulted in a decree, entered by the learned court below, that the annual license fees fixed in the ordinances of the borough of Sharon Hill, to wit, \$1 per pole, \$2.50 per mile of wire or cable, and \$30 per mile of conduit, were properly collectible under the evidence produced, and from that decree this appeal is taken.

"Is such appeal but a substitute for the common-law writ of certiorari? If so, our functions are limited to an inspection of the record and a determination whether or not the court had jurisdiction, and the proceedings were regular. If the Legislature intended the appeal to be of this limited character, it would not have been necessary that the right to take it should have been expressly granted. But as the right of appeal has been in terms granted, and as the act, in a previous section, had declared that the cause should be determined 'in the way and manner provided by law for the hearing of cases. in equity,' we are disposed to hold that this appeal, like one from the decree in an ordinary case in equity, brings before us the entire record made up by the exceptions filed to the conclusions of law and fact adopted by the learned trial court. In such a case it has been well settled that the findings of fact adopted by the trial judge, when the ascertainment of such facts involves the balancing of conflicting testimony, the credibility of witnesses, etc., will be regarded by the appellate court as if established by the verdict Where, however, such findings of a jury. are but conclusions or inferences drawn from testimony that is practically undisputed, it becomes our duty to examine the evidence, and determine for ourselves whether or not the findings are warranted by it. The learned court below was not called upon, in this proceeding, to exercise the power possessed by the courts long before the passage of the act now under consideration, viz., to set aside an ordinance because it was unreasonable, oppressive, and arbitrary, resulting from an abuse of the powers of the municipality. The object of this proceeding was simply to determine, from the evidence produced, 'the amount of annual license fees which should be paid to the said municipal corporation in order to properly compensate it for the necessary cost of the services performed, or to

of the poles, wires, conduits, or cables of regulation of the poles, wires, conduits or such company, either party may apply by petition to the court of common pleas of the pany.'

"The dispute in the present case arose out of the fact that the borough of Sharon Hill claimed the right to levy, from the petitioner and other corporations of its class operating in the borough, annual license fees based on these rates, viz.: \$1 for each pole erected, \$2.50 for each mile of wire strung thereon, and \$30 per mile for each mile of conduit laid under its streets. Each of these companies, before beginning the work of construction, was obliged to apply for and obtain a permit, . for which a charge of \$5 was made, and to execute and deliver to the borough a bond with satisfactory security, conditioned that any streets or sidewalks affected by such construction should be restored to proper condition, and maintained in good order there-

"The petitioner itself has constructed in the borough, 2½ miles of conduit, 15.15 miles of wire, and 10 poles, so that its annual license fee would amount to \$113.88. As there was some common use, by the several companies there operating, of portions of property severally owned, the learned court found that all of the annual fees claimed would be:

1	addition to the petitioner's	\$113	88
	Suburban Gas Company:	•	
	4.3 miles pipe	2129	00
	Springfield Water Company:	4120	••
	4.4 miles pipe	-	~
		9100	w
	Citizens' Light Company:		
	175 poles		
	10 miles wire 25 00		
		\$200	00
	Western Union Telegraph Company:		
	36 poles\$ 36 00		
	27 miles wire 67 50		
		\$108	50
	Chester Traction Company:	4200	•
	42 poles\$ 42 00		
	5 miles wire 12 50		
		¥ 54	60
			_
	Total	3/32	55

"It was shown that the borough had committed to its single policeman the duty of inspecting the poles, wires, and conduits of the several companies, and for this service paid him a salary of \$20 per month, or about onethird the amount of the annual license fees levied to compensate it for the services performed in the 'inspection and regulation' contemplated by the act. It was not alleged or proven by the borough that the inspection thus given was not fully up to any municipal requirement, that it was not adequately compensated in the amount paid the policeman, or that a proper inspection, sufficient to enable the borough to discharge every duty it owed to its citizens in the premises, could not have been had even for less money. On the contrary, the testimony offered by the petitioner, which was uncontradicted, tended to prove that, when a conduit has been laid underground, when the frosts of the winter be performed, by it, for the inspection and and the thaws of the spring have once come

and gone, and the overlying surface has been ; then adjusted to the new conditions, all surface indications marking even the location of the buried conduit will have practically disappeared, and inspection of the line thereafter could at best be but little more than perfunctory. It would seem, therefore, that an annual charge of \$30 per mile would go far beyond the compensation contemplated by the act.

"As to the pole and wire structure the evidence would fairly lead to the conclusion that for a period of years after new construction there is but little to apprehend from the natural decay of the material. But such a structure is plainly subject to injury from external causes-high winds, heavy snows, and the like-and therefore might properly be inspected several times each year by a careful municipality. But both poles and wires may be inspected at the same time, and it is manifest from the testimony that no great amount of time need be spent in making an effective inspection of a pole line. The borough, too, has the benefit of the frequent inspections made by the companies themselves, whose business cannot be transacted unless their lines are maintained in efficient working order. The borough is of course not required to accept these inspections as conclusive, and may properly supplement them by its own. But the fact that they are made by competent men, and with the end of maintaining the lines in standard condition, ought not to be lost sight of in a proceeding like the present.

"We are not unmindful, on the one hand, that the object of inspection is the regulation that is to follow, and that reports must be made and so kept that their information is available for the use of councils, whilst, on the other hand, the courts have repeatedly declared that a municipality may not, under the guise of license fees, levy and collect revenue to be expended in the discharge of municipal obligations. Kittanning Boro. v. Telegraph Co., 26 Pa. Super. Ct. 346; Pottsville Boro. v. Pottsville Gas Co., 83 Pa. Super. Ct.

"Realizing the difficulty of arriving at the exact sum which a borough should properly undertake to collect, as license fees, from companies like the petitioner, the Legislature has wisely provided that the question should be subject to a readjudication at the end of Thus, accumulating experience two years. will beget increased knowledge, serious disputes will more rarely arise, and their adjustment will become more easy and accurate.

After endeavoring to give due weight to all of the evidence contained in the record, and an attentive consideration to the aim and object of the statute, we have reached the conclusion that the decree entered by the learned court below should be so modified as to make the maximum sum which the borough shall be authorized to charge as license each mile of conduit, \$1.50 per mile for each mile of wire, and 50 cents for each pole, and the record is remitted to the court below, with direction to enter a decree in accordance with this order. The costs of this appeal to be paid by the respondent, the borough of Sharon Hill."

Argued before FELL, BROWN, MESTRE-ZAT, ELKIN, and STEWART, JJ.

William I. Schaffer and John G. Johnson, for appellant Delaware & Atlantic Telegraph & Telephone Co. Edward P. Bliss, for appellant Sharon Hill Borough.

ELKIN, J. For many years controversies growing out of the imposition of license fees or taxes have arisen between public service corporations and the municipalities in which they do business. A large number of such cases have been considered by our appellate courts, and the rules of law heretofore applicable thereto may be found in repeated decisions of the Supreme Court, from Allentown v. Western Union Tel. Company, 148 Pa. 117, 23 Atl. 1070, 33 Am. St. Rep. 820, to Kittanning Boro. v. Gas Company, 219 Pa. 250, 68 Atl. 728, and of the superior court from Ridley Park Boro. v. Electric Light. etc., Company, 9 Pa. Super. Ct. 615, to Kittanning Boro. v. Water Company, 35 Pa. Super. Ct. 174. These cases are all founded upon ordinances passed prior to the act of 1905 (P. L. 183); and, while they were actions at law, they were considered as if upon certiorari to determine the legal rights of the parties, and without reference to the statutory proceedings authorized by said act. The right to impose these license fees was sustained as a police power, but it was uniformly pointed out that general revenue for the support of the municipal government could not be raised under the guise of a license tax for police regulation. This principle has been recognized in every case, and in no instance has it been suggested that it might be modified or varied or weakened in its application. It is true that under the old forms of action it was often difficult for an appellate court to pass upon questions of fact necessary to determine whether a particular ordinance under consideration did impose a revenue tax or a license fee. Because of this limitation upon the courts the practice became quite general throughout the commonwealth to establish flat rates per pole, per mile, or per car, as the case might be, upon an arbitrary basis, and without reference to the cost of police inspection or supervision.

An examination of the cases will show that the municipalities were given a wide latitude in the imposition of these license charges, and their right to do so was not interfered with, unless for gross abuse. This was the situation when the act of 1905 was passed, and this legislation grew out of the unsatisfactory methods then existing for the determination of such controversies. The purpose fees against the petitioner, \$10 per mile for of the act is stated to be the providing of a

method for the determination by the courts; of common pleas, with the right of appeal, of all disputes between municipalities and telegraph, telephone, light, and power companies, relating to the reasonableness of the amount of license fees. In the third section of the act the duty is imposed upon the court hearing the cause to determine the amount of the annual license fees necessary to properly compensate the municipality for the cost of the services performed, or to be performed, by it for the inspection and regulation of the poles, wires, conduits, or cables belonging to such public service corporations and located within the limits of the municipality. This is a statutory rule binding upon the courts. The amount of the license fees to be charged is measured by the costs of the service performed, or to be performed, during the year for municipal inspection and regulation. If there be no inspection or supervision by the municipality, there can be no license fee imposed, because under such circumstances no expense would be incurred for which the statute makes the companies liable. If there be inspection and supervision, the measure of liability imposed by the act is the cost of the same to the mu-The cost of the service is the nicipality. rule adopted by the Legislature to guide the courts in determining the disputes between the parties. This rule cannot be ignored or lightly set aside, and it should be the central and controlling thought in the mind of the court in the determination of such dis-Of course, when the ordinance is passed in advance of any service rendered it may, and no doubt will, be difficult to fix with mathematical precision the amount of the license fee before the cost of the service is definitely known, and some reasonable allowance must necessarily be made for contingencies that may happen. However, the courts should see to it that under the guise of a reasonable allowance the municipality is not permitted to impose a tax for general municipal purposes, or to disregard the rule which limits the license fee to the cost of inspection. Under this rule no flat per pole or per mile charge can be made applicable throughout the commonwealth, because in no two cases will the cost of inspection be the same. Many boroughs do not inspect at all, and in such cases no license fee can be charged. Other boroughs may require very little inspection, while others may need more, but in each instance the inquiry must be, what is the cost? The Legislature fixed the rule and imposed the duty to determine all such controversies according to that rule upon the courts when proper proceedings are instituted. The rule is imperative and cannot be disregarded.

Another question raised by this appeal is whether the borough authorities in the present case were justified in making any provision for inspection and regulation. It is contended that the inspection by the companies | court below, with instructions to enter judg-

was ample and sufficient to protect the public, and that no municipal inspection was necessary. It is true that the courts have held companies furnishing electricity or operating by electrical forces to the very highest degree of care by way of inspection and maintenance. It is meet and right to do so, because of the great danger to the public having to deal with such agencies. The duty of inspection and maintenance imposed by law upon these companies can be more safely relied on as a protection to the public than the casual and indifferent inspection made by a borough officer without any technical knowledge of the business. There are many things, however, which the borough may properly do by way of police regulation. It can require the poles to be kept in proper condition, the wires in safe repair, and see to it that the conduits and other appliances do not interfere with the public use of the streets. Reasonable latitude must be allowed the municipalities in dealing with this subject; but, on the other hand, they should not be permitted to make useless and unnecessary inspections at the cost of the operating companies. This is also a question for the courts to determine in a proceeding instituted under the act of April 17, 1905 (P. L. 183). In the case at bar we think the borough was justitied in requiring the inspection directed by the ordinance, and hence the only question for determination is as to the amount of the license fee imposed.

The learned judge of the court of common pleas treated the question upon the theory that the borough ordinance should be sustained on the presumption that it was reasonable, without reference to whether it was based upon the cost of inspection or not. In this we think there was error. When the petition was filed under the act of 1905, the proceedings were de novo, and it was the duty of the court to hear and determine the questions involved upon the pleadings, having due regard for the weight of the evidence. The superior court on appeal took up the question, and did modify the decree entered in the court below by fixing the amount of the license fees upon the basis of the cost of inspection, although there may be some doubt as to the strict application of the rule in arriving at the proper amount to be charg-The case was very intelligently coned. sidered by the learned judge who wrote the opinion; and, since the amount involved in this particular case is small, no useful purpose can be served by prolonging the controversy. The per pole and per mile license fee charged in this case cannot be taken as a precedent on which to base charges in other municipalities throughout the commonwealth, because each case must depend upon its own facts, and in every case the cost of inspection must be the measure of liability.

Decree affirmed, and record remitted to the

ment in favor of the borough of Sharon Hill contract was the following: "The contractor for the amount of the license fees as fixed by the superior court; the costs on the appeal to this court to be paid by appellant, and all other costs to be paid as directed by the decree of the superior court." "The contractor will be required to keep a portion of the street open at all times during the progress of the work, of sufficient width to accommodate travel, and at no time shall the road be closed to travel, but a good, safe and sufficient road-

(224 Pa. 30)

NORBECK v. CITY OF PHILADELPHIA. (Supreme Court of Pennsylvania. March 8, 1909.)

1. MUNICIPAL COBPORATIONS (§ 751*)—NEGLIGENCE OF INDEPENDENT CONTRACTOR— LIABILITY OF CITY.

To relieve a city from liability for injuries received in the construction of a street, of which an independent contractor has exclusive control, the accident must be the result of the negligence of the contractor.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1580-1582; Dec. Dig. § 751.*]

2 MUNICIPAL CORPORATIONS (§ 755*)—DE-FECTIVE STREETS—LIABILITY.

Where a city directs a street to be kept open, inviting the public to use it, it is its duty to see that it is maintained in a reasonably safe condition.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1587, 1589, 1590; Dec. Dig. § 755.*]

8. MUNICIPAL CORPORATIONS (§ 751*)—DE-FECTIVE HIGHWAYS—LIABILITY TO TRAV-ELER.

A municipality contracted with an independent contractor to raise the grade of a street, a certain portion of the street to be continuously kept open to the public pending the work, and the city retained control of such portion by its police and inspector. *Held* that, where it permitted a dangerous hole to continue in such portion for three months, it was liable to a person injured by reason of such negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1580-1582; Dec Dig. § 751.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Sadie Norbeck against the City of Philadelphia. Judgment for plaintiff, and

defendant appeals. Affirmed.
Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER. ELKIN, and STEWART, JJ.

Thomas D. Finletter and Harry T. Kingston, Asst. City Sols., and J. Howard Gendell, City Sol., for appellant. Thomas Learning and William J. Lawson, for appellee.

MESTREZAT, J. In February, 1906, the city of Philadelphia was engaged in improving South Broad street from Moyamensing avenue to League Island. The work had been let to a contractor and consisted partly in widening the street from 80 feet to 160 feet. In changing the grade so as to raise the street from 12 to 15 feet above the surrounding country, repaving and macadamizing the cartways and sidewalks, constructing sewers, culverts, inlets, and drains, etc. Among the specifications attached to and a part of the

will be required to keep a portion of the street open at all times during the progress of the work, of sufficient width to accommodate travel, and at no time shall the road be closed to travel, but a good, safe and sufficient roadway shall at all times be maintained open to public use." Broad street is the only public highway leading from the heart of the city to League Island, and hence the necessity for keeping it open for public travel during the time the improvement was being made. It was traversed by trolley cars, carriages, supply and delivery wagons, automobiles, and other traffic between the city and League Island. The work of improving the street was begun at Moyamensing avenue and progressed south towards League Island. In making the improvements the contractor raised the level of the street in three longitudinal strips. He first constructed an embankment on the west side of the street, and on it the trolley tracks were placed, and a plank road was constructed sufficiently wide to permit a wagon to pass one way. The south-bound traffic used this roadway, while the north-bound traffic used the lower grade of Broad street. A similar embankment was then built on the east side of the street, and when completed was used by the north-bound traffic. The two embankments having been finished, the intervening space on the street was filled in to bring the whole street to the proper level.

On February 15, 1906, Norbeck, the plaintiff's husband, was driving a two-horse, fourwheeled brick wagon on South Broad street where it was being improved. A companion was with him, and they both sat on a high seat in the front part of the wagon; the plaintiff being on the right, and driving the horses. They proceeded south almost to League Island, and, after discharging their load on East Broad street they returned to the street and drove north. The Pennsylvania Railroad crosses Broad street a short distance south of the place where the accident occurred, and since the completion of the improvement the tracks on the street are crossed by an overhead bridge. The plaintiff claimed and introduced evidence to show that her husband crossed under the bridge, and, while driving on the roadway on the east embankment north of the bridge, the right front wheel of the wagon was precipitated into a hole, he was thrown to the ground, and the wheel of the wagon passed over him killing him instantly. The plaintiff's witnesses testified that this hole was 4 feet long, 2 feet wide, and hub deep, that it was 400 feet north of the bridge, and has existed there for at least three months. They also testified that at the time of the accident the hole was filled with slush of the color of the road, and was not easily seen or distinguished. The plaintiff contended that at the time of the accident

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the hole which caused him to be thrown from the wagon, and that the part of the road where the accident occurred had been opened and used by the public for at least six months prior to the time Norbeck was killed.

The city's position on the trial was, and its testimony tended to show, that the plaintiff's husband in driving north crossed the bridge over the railroad tracks and then drove northeast to the eastern embankment, a distance of about 150 feet north of the bridge, and as he turned onto the embankment he was thrown to the ground and killed. It was claimed that at the time of the accident Johnson, the companion of the plaintiff's husband, was driving, that the latter was standing up in the wagon with his hands in his pockets, and that the team was going at a rapid rate. It is contended by the city: That the place where the accident occurred was not on a completed or finished part of the highway, and that there was no such hole as described by the plaintiff's witnesses; that, if there was a hole which caused the accident, it was simply a depression and incident to the change in the grade and the width of the street; that at the time and place of the accident the work was in active progress, and the contractor alone was in charge and controlled the whole operation.

The case was submitted in a very fair and careful charge to the jury, and they found in favor of the plaintiff. It is therefore established by the verdict that the accident occurred on the roadway on the east embankment at a point 400 feet north of the bridge, that the road at that point had been opened to the public for several months, and that a dangerous hole had existed there for at least three months prior to the accident. The verdict also negatives the contention of the city that the accident occurred 150 feet north of the bridge, where the roadway was under construction and not completed.

Under the facts as admitted or found by the jury, it is apparent that the court would have committed reversible error had it affirmed the defendant's point and withdrawn the case from the jury. The point was submitted on the theory that the doctrine of Painter v. Pittsburg, 46 Pa. 213, was applicable to the facts of this case. The contention of the city is thus stated in its printed brief: Broad street, the scene of the accident, was, under the contract, in the absolute and entire control of the contractor and not of the city; that the roadway upon the eastern embankment where the accident occurred and the embankment itself were temporary in character, necessarily so from the character of the contract and the work; and that the embankment and the road or way upon it were not in any sense a street or highway accepted by the city as such, and over which it could exercise a control, or upon which it could enter to make or direct necessary repairs to

road was in a good, solid condition, except we think, that the doctrine of Painter v. Pittsburg, 46 Pa. 213, can have no application to the facts developed at the trial of this case. The rule established by that and kindred cases is that a municipality is not liable for the negligence of an independent contractor while engaged in the construction or repair of a street of which he has the exclusive control or charge. But to relieve the municipality from liability in such cases the accident must be the result of the negligence of the contractor, and he must have such exclusive control of the street where the accident occurs as to authorize him to prohibit the use of it by the public.

In the case at bar the agreement with the contractor did not place him in the exclusive control or charge of Broad street where the improvements were being made. Nor was it provided therein that the public could not use that part of Broad street. On the contrary, it was distinctly stipulated, as we have seen, that the contractor should keep a portion of the street open at all times of sufficient width to accommodate travel, and maintain a good, safe, and sufficient roadway for public use. This provision conclusively shows that it was the intention of the city that the street should be open to use by the public, and the duty of keeping it open for such use was imposed on the contractor by his agreement. It was in pursuance of this agreement that the street was kept open for public use, and the contractor could not close it or assume exclusive control over it during the progress of the work. As further evidence of the intention of the city not to place the exclusive control of the street in the hands of the contractor, it was under the surveillance of its policemen, and it had an inspector who inspected the work and reported daily to the city. He testified that his duties required him to see that the material was properly placed, to look out for ruts, to have holes filled up if any existed, and to see that the general traffic was in good shape. It is therefore clear that the city in letting the contract for the improvement of the street did not, during the progress of the work, turn over the street to the exclusive control of the contractor, so that he could exclude the public from its use; but it reserved the right to compel the contractor to keep a good, safe, and sufficient roadway on some part of the street open at all times for public use during the progress of the work. It had the authority, and it was the duty of the city, to enforce performance by the contractor of this stipulation of the agreement, and that it intended to do so appears from the fact that its own official kept close supervision over the work and over the roadways intended for use by the public. Whenever a city or municipality directs a street to be kept open, and thereby invites the public to use it, an obligation is imposed on the municipality to see that it is maintained in a reasonably safe in good condition." It is manifest, condition for travel. If this duty is neglected, and injury results by reason of a defect in the street, the municipality is not relieved by giving notice to one who is primarily liable as between him and the municipality. Wyman v. Philadelphia, 175 Pa. 117, 34 Atl. 621.

The finding of the jury under the instructions of the court establishes the fact that Norbeck was not on a part of the street where the work was in progress and uncompleted, but that he was driving on a finished and completed part of the work, assigned by the contractor for use by the public. The evidence submitted to the jury was amply sufficient to sustain that finding. The hole which caused the accident was not an incident to the improvement being made, nor did it result from defective construction by the contractor, but was caused by the use of that part of the roadway by the public. That it was a very dangerous obstruction is apparent. Its size, as well as the fact that it was filled with a slush of the color of the dirt of the roadway which prevented it being easily seen or discovered, leaves no doubt of its dangerous character. It had been there, according to the evidence, at least three months, and the jury found that the city officials had constructive notice of its existence. It was the duty of the city's inspector, as he testified, to discover and have such dangerous obstructions removed, and this hole certainly called for immediate action by him. It was a menace to every traveler upon that roadway, and it was clear negligence for the city to permit it to remain there. It had the authority to require the immediate removal of the obstruction by the contractor, and if he neglected to remove it the city should have had it done. Its failure in this respect constitutes negligence for which it is liable in this action.

We are of the opinion that the case was for the jury, and it was properly submitted by the learned trial judge.

The assignments of error are overruled, and the judgment is affirmed.

(234 Pa. 1)

In re MACAULEY'S ESTATE. (Supreme Court of Pennsylvania. March 8, 1909.)

WILLS (§ 55*)-ISSUE DEVISAVIT VEL NON-EVIDENCE.

On an application for an issue devisavit vel non, it appeared that testator at times became intoxicated, and had been in the lunatic asylum some years before the execution of the will, but was released on a commission declar-

who begged him for money should not be admitted to the hospital, and his friend supported him in this matter. The will was prepared by a reputable lawyer and witnessed by a friend and femporary resident physician, but there was no evidence that any officer of the hospital had anything to do with the making of the will. Testator at the time was in full control of his faculties and able to attend to his affairs. He faculties and able to attend to his affairs. He had taken great interest in the hospital, and contributed considerable money for appliances used by its patients. *Held*, that the issue was properly denied.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 187-161; Dec. Dig. § 55.*]

Appeal from Orphans' Court, Philadelphia

In the matter of the estate of Joseph Tagert Macauley. From an order refusing an order devisavit vel non, Julia M. Edie appeals. Affirmed.

The following is the opinion of Anderson, J., of the court below:

"The facts in this case briefly are these: Joseph Tagert Macauley, the testator, was a man of means, who was afflicted with an uncontrollable desire for drinking, and, when subject to temptation, became intoxicated. Recognizing this weakness on his part, it was his habit, when living with his family, in order to overcome this desire, to stay in his home for months at a time. Owing to some outbreak, not traceable to his drinking habits, about the year 1888, some of his family had him placed in an insane asylum, where he stayed for about two years; but, having been consulted by a lawyer about signing a deed for some property, the lawyer became convinced of his sanity, and had the question raised by means of a lunacy commission, which, after hearing the case, declared him sane, and he was thereupon released from the asylum. After his release he stopped at the Continental Hotel for a short time, and on account of his habits was taken from there and sent to St. Agnes' Hospital. This was some time in 1890, and he remained there until his death in 1906. During this time he was out of the hospital but a few times, in the earlier years, coming back to it of his own volition. During his stay there all of his immediate family had died; and the only persons who visited him constantly was one Gordon Monges and his wife. Mr. Monges, who had known the testator from youth, was connected with him by marriage, but was not of his kin. In 1896 the testator signed the will in controversy, by which he gave the bulk of his fortune to the St. Agnes' Hospital, making Mr. Monges will, but was released on a commission declaring him sane. Afterwards he voluntarily went to a hospital, where he remained until his death, 16 years thereafter. By his will executed 10 years before his death, he gave the bulk of his fortune to the hospital. At that time all of his immediate family were dead, and his only relatives were certain cousins. He made a friend who had charge of his matters residuary legatee in case of his death within a calendar month. Testator directed that certain cousins given by Mr. Allinson to Mr. Monges, who,

*Fer other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

accompanied by a clerk in Mr. Allinson's office, took it to the hospital, and it was there executed; the clerk, N. L. Bright, and Dr. Harry S. Greenleaf, one of the physicians at the hospital, witnessing it. It was signed and witnessed in the presence of Mr. Monges. There was no testimony to show that the authorities of the hospital, except the doctor who witnessed the will, who was but a temporary resident, and is now out of the country, knew anything of its contents. The testator left as his next of kin five cousins, three living in Washington, D. C., and two living in Philadelphia. The will having been admitted to probate, an appeal was taken to this court by Julia M. Edie, one of the cousins living in Washington, on the ground that the testator was of unsound mind, and that he was unduly influenced.

"The testimony in support of the first contention turned almost wholly on testator's condition long anterior to the making of the will; that is, about the time he was confined in the insane asylum. At best, it is exceedingly meager; and, as a commission at that time had found the testator of sound mind, the presumption that might have arisen as to his condition prior thereto on account of his having been in an asylum has been counterbalanced. The only testimony on this point subsequent thereto was that of the lawyer who had represented him at the lunacy proceedings, and he stated that his mind, when he visited him at the hospital, was occasionally clouded as the result of drinking. He had not, however, visited him within three or four years of the making of the will. Against this was the testimony of Mrs. Monges, who visited testator frequently with her husband in the last 11 years of his life, and of the attendants at the hospital, of the physicians there, and of the sergeant of police, who went there in the performance of his duty. All of these witnesses testified that he was a clear-headed man of much information. In addition to that, it was shown that during all these years he paid his bills by checks upon his deposits in banks, which were kept in his name, though the deposits were made for him by Mr. Monges. It was shown that he occasionally got liquor at the hospital, either by order of the doctors or from visitors who came there. It was also shown that within the last 10 years he had sent a letter to Dallas Sanders, Esq., a prominent member of our bar, now deceased, recalling himself to him and requesting him to call about some urgent legal business, and that Mr. Sanders, being busy, sent down an assistant, a Mr. Wilkinson, who was denied admission to the testator on the ground that he was in no condition to be seen; the person in charge also stating that they had had such letters before. It was shown that Mrs. Edie had written to him for assistance, but got no answer from him. She testified also that her son had called on him many times, until he was refused permission to see him | and there is not a scintilia of evidence that

by the sisters. Mrs. Monges explained this refusal, saying that the testator had given positive orders not to admit Mr. Edie, as he wanted to borrow money from him.

"There is, in the opinion of the auditing judge, no evidence sufficient to support a verdict on the ground of mental unsoundness. That the testator had an uncontrollable desire for drink, there is no doubt, and that, when the opportunity came, he became intoxicated, is clearly shown from the evidence; but, being kept from it, as he was in the hospital, it is plain that he was only occasionally so affected, and it is also plain that he was at other times a clear-headed, intelligent man, able to converse sensibly and to attend to his affairs. From the testimony of the witness who subscribed the will it is evident that at the time of its execution he was not under any such influence, but soher and intelligent. Mr. Monges and Mr. Allinson both being dead, and Dr. Greenleaf being out of the country, we are confined to the testimony of Mr. Bright, who was a disinterested witness. Indeed, the character of the lawyer who drew the will, the late Edward P. Allinson, Esq., would of itself rebut any presumption of its being the will of a man unable to intelligently comprehend its provisions. Drunkenness, unless it occurs at the time of the making of a testamentary paper, is no proof of mental unsoundness. Schusler's Estate, 198 Pa. 81, 47 Atl. 966. The issue on the ground of mental unsoundness must be refused.

"Nor is there any proof of undue influence. Such influence must be that which operates on the mind of the testator, forcing him to do the will of the person so exercising it, and must be exercised at or prior to the time of the execution of the paper. There was testimony that the authorities of the hospital did not permit the testator to go out of the grounds; but that was for his benefit alone. There was testimony that they had prevented Mr. Wilkinson from seeing him; but that was some years after the will was executed. There was testimony that they acted under the order of Mr. Monges, who attended to his business affairs outside, and that Mr. Monges was active in having the will executed, and was substitutionary legatee thereunder by the clause put in wills so often for the obvious purpose of overcoming the statute avoiding gifts to charities within a calendar month of the death of the testator: but, as Mr. Monges' interest under the will fell a calendar month after the making of it, and ten years before the testator's death, no question can now be raised as to his reaping a benefit from it, and certainly there is no evidence that either he or the officers of the hospital by any influence, good, or malign induced the testator to make his will in favor of the hospital. As shown by the answer, the testator's lawyer, executor, and witnesses were all of a different religious belief from those who conducted this hospital, they induced the testator to make his will property to be divided between the daughters, the way he did.

"The will, indeed, is a most natural one. This man, for his own good spent the last 16 years of his life at this institution, where he had the constant care and companionship of its personnel; took active interest in its officers and its patients; was always on hand at the reception of new patients; built, at his own expense, a shed for the ambulance; put up awnings for the patients; provided a sterilizer, and in all ways took an active personal interest in its affairs, and, being able to pay, no doubt had every want attended to. He knew the restraint on his actions was a kindly one, and for his benefit, as it was in course with his own conduct years before. His parents, brother, and all his immediate family were dead. His cousins in Philadelphia did not bother about him, his cousins in Washington only when in need of assistance. His friends, the Monges, evidently did not seek his money, and probably did not need it. What more natural than that he should give it to that charity, the needs of which he knew, and the good it did he saw around him day by day? He knew this hospital had grown out of the conception of the good it might do in the mind of a testator; and he, who knew it in its activities, its wants, and necessities, especially the need of enlargement, felt that his money would be best spent and bring its greatest blessing if devoted to the purposes of this benefaction. It might well be that, had he seen the need of his afflicted relative as he saw that of those around him, he would have been more considerate to her in his will; but, however that might be, he made this will when of sound mind, and uninfluenced by the beneficiaries, and, as far as the testimony shows, without undue influence by anybody. The issues prayed for must therefore be refused.

"Issue refused."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

J. Howard Gendell, I. Irwin Jackson, and John C. Grady, for appellant. Theodore F. Jenkins, John G. Johnson, and J. Peter Kinges, for appellee.

PER CURIAM. The order of the orphans' court refusing an issue is affirmed on the opinion of Judge Anderson.

(224 Pa. 37)

In re GIBBONS' ESTATE. (Supreme Court of Pennsylvania. March 8, 1909.)

WILLS (§ 566*)—Construction—"Personal Property."

Testatrix left her surviving two sons and two daughters, and gave by her will articles of jewelry to each of her daughters, and all her household goods, wearing apparel, and personal

property to be divided between the daughters, and directed her executors to sell the remainder of her estate, and divide it "equally among my four children." Held, that the words "personal property" should be limited to articles of a personal character of the same species as those mentioned in the preceding part of the gift to the daughters, and did not include cash in bank.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1238½; Dec. Dig. § 566.*

For other definitions, see Words and Phrases, vol. 6, p. 5356; vol 8, p. 7753.]

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Catharine Gibbons, deceased. From a decree dismissing exceptions to adjudication, Catherine A. Connor appeals. Affirmed.

From the record it appeared that testatrix died December 23, 1903, leaving to survive her two sons and two daughters. At the time of her death she had cash on deposit \$1,750.39, and personal effects such as jewelry and furniture. She also possessed real estate. By her will she directed, inter alia, as follows:

"Fifth.—I give and bequeath by gold watch and chain and piano to my said daughter, Catherine A. Connor, and I give and bequeath my diamond earrings to my daughter Cecilia C. Curran and all my household goods wearing apparel and personal property I give and bequeath equally to my said daughters Catherine A. Connor and Cecilia C. Curran.

"Sixth.—I order and direct my executors hereinafter named to sell the remainder of my estate either at public or private sale for cash and divide and distribute the same equally among my four children, viz.: John J. Gibbons, Catherine A. Connor, Cecilia C. Curran and Charles J. Gibbons."

The auditing judge distributed the cash in the bank amongst the four children, share and share alike. Catherine A. Connor excepted to the adjudication.

Anderson, J., filed the following opinion in the orphans' court:

"Very little can be said in addition to the opinion of the auditing judge. While it is true the words 'personal property' prima facie include all except the real estate, it has been held that, where such general words are used or placed in the same sentence with other words, describing a peculiar kind of property, such as household furniture, articles of jewelry, etc., and in such a connection as to show that the general words convey to the mind not the intent to give them their widest meaning, but simply as comprehending the character of things given in the other part of the sentence, their meaning will be so restricted. Lippincott's App., 173 Pa. 368, 34 Atl. 58, cited by the auditing judge; Rawlings v. Jennings, 13 Vesey, 39; Hotham v. Sutton, 15 Vesey, 319; Bouvier's Law Dict. tit. 'Effects'; Roper on Legacies, 210.

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"Great stress was laid at the argument upon the fact that in the next clause of the will testatrix directed the rest of her property to be sold, and the cash distributed among her four children, and, as the fund in dispute was already cash, it could not have been intended to be carried by this language. To our minds, however, these two items of the will taken together show clearly that it was not the intention of the testatrix, in her gift to her daughter, to include money, as it is evident her thought was to turn into money whatever estate she had, except her personal belongings, and to divide the cash thus produced among her children equally. While it is true a conversion was not necessary where a part of the property was already in money, yet it is not inconsistent with the thought that it should all be divided equally; the general intent being to sell that which was required to be sold, and to add to it the money already on hand. As was said by Judge Gordon, in Appeal of the Boards of Missions, 91 Pa. 507: 'What is this, after all, but a mere direction to sell what is salable? And if part of that estate comes to the executors in the shape of money, what then? It need not be sold; that is all. The testator, for the benefit of his donees, directed that his entire residuary estate should be converted into money; but, if part of it is found in the shape of money, it needs no conversion, and surely not the less does it pass to the legatees.' This case is similar to the present one, in the fact that the fund was realized after the death of the decedent, and is a complete answer to the argument that testatrix could not have intended to include that part of the estate already in cash.

"The exceptions are dismissed."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Daniel C. Donoghue, for appellant. John J. Green and Joseph P. McCullen, for appellee.

PER CURIAM. The decree is affirmed on the opinion of the learned judge of the orphans' court.

(224 Pa. 25)

THEWLIS v. FENTON.

(Supreme Court of Pennsylvania. March 8, 1909.)

Wills (§ 820*) — Devise — Description of Real Estate.

Testator acquired in 1869 two lots of ground—one on A. street and one on B. street. The lots were adjacent. In 1871 he bought another lot on A. street adjoining to the first lot on A. street, but which extended to the B. street lot. Under his will thereafter made, he charged the payment of an annuity on "the two properties on the southwest side of A. street conveyed to me" in 1869 and 1871. He also gave to his wife for life "my two properties

hereinbefore mentioned" subject to the annuity, and gave to his daughter and adopted daughter "my said two before-mentioned properties" on the termination of his wife's life estate. When the will was executed, there was a building on the lot on B. street and two on the A. street lots. The latter buildings adjoined each other, and extended over onto the B. street lot two feet and two inches. Held, that testator intended to charge all of the lots with the annuity, and to devise them as one property to his daughter and adopted daughter.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 820.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Theodosia Thewlis against Eliza Fenton. Judgment for plaintiff, and defendant appeals. Affirmed.

Willson, P. J., filed the following opinion in the common pleas:

"We think it possible, without going into a minute statement of the facts and the dimensions of lots of ground, to set out the essential matters involved in this case so that our reasons for disposing of it as we do will clearly appear. By a conveyance dated March 8, 1869, John W. Thewlis acquired title to two lots of ground, one fronting on Pulaski avenue and the other on Linden street. These taken together inclosed on two sides another piece of ground situated at the corner of those streets, and this belonged to Jane Thewlis, the wife of John W. Thewlis. The Linden street lot of the latter extended about 103 feet in depth, and his Pulaski avenue lot had a depth extending to the line of that on Linden street. Subsequently, by conveyance dated November 8. 1871. John W. Thewlis took title to another lot of ground on Pulaski avenue adjacent to that previously mentioned, and extending in depth to the said Linden street lot.

"In the year 1878 John W. Thewlis made and executed a will, in the second clause of which he bequeathed to his mother for life the sum of \$104 annually, and charged the payment of this annuity upon 'the two properties on the southwest side of Pulaski avenue * * * conveyed to me * * * by deeds dated March 8th, A. D. 1869, and November 8th, A. D. 1871.' In the third clause of the will he gave his wife Jane, for life, 'my two properties hereinbefore mentioned,' subject to the said annuity. By the fourth clause he gave and devised to his daughter, Eliza Fenton, the defendant, and to his 'adopted daughter, Theodosia Thewlis,' the plaintiff, 'my said two before-mentioned properties' and after the termination of the life estate before described. This will, together with a codicil, which, however, does not have any relation to the present case, was admitted to probate in 1904. At the time when the will was made a three-story brick house had been erected on the Linden street lot, and two others of like character, one on each lof the Pulaski avenue lots, had been con-

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

structed. These two buildings last referred to were immediately contiguous to each other, and both of them extended over on the Linden street lot two feet and two inches. The building erected on the Pulaski avenue lot first acquired also extended five feet into the other Pulaski avenue lot.

"After the will was made, and prior also to the making of the codicil in 1904, Thewlis had acquired other real estate. This, with the properties already described, was assessed for the year 1904 for about \$40,000. None of this newly acquired real estate was specifically devised by the terms of the codicil, and the executors named therein were given full power to sell all the testator's real estate. Thewlis died in 1904 after the death of his mother, and leaving to survive him his wife and his daughter and his adopted daughter; the last-named two being the parties to this action.

"The foregoing statement will show how the question at issue arises. It will be observed that by the provisions of the will there was a devise to the plaintiff and defendant as tenants in common of the 'said two before-mentioned properties,' and those properties were previously in the will described as 'situate on the southwest side of Pulaski avenue,' and as having been conveyed by the deeds of the certain dates before stated in this opinion. There is in the will no express mention of the Linden or Penn (as it is now called) street property. Nevertheless the plaintiff claims that the devise to her and to the defendant was intended to cover that property as well as the other two which physically front on Pulaski avenue. The claim of the defendant is that the testator died intestate as to what is called the Linden or Penn street lot. The whole controversy is embraced in the two opposing claims as just stated.

"The question thus raised must be settled by the exercise of a sound judgment, in view of all the circumstances of the case, as to what the testator meant to cover by his description of the property devised. There is no rule of law specially applicable to the case to which we can refer, and say that it should control our disposition of it. The fact that, if the defendant's theory is correct, the testator would have died intestate as to the property in dispute, may help somewhat to a proper solution of the question. Undoubtedly it is natural to suppose that, when Thewlis was engaged in preparing for a disposition of his property after his death, he would have embraced the whole of the property in his directions. In the particular case in hand this circumstance ought perhaps to have considerable weight, for the reason that the testator appears to have bad his whole family in mind, and to have made careful discriminating provisions for their benefit. Apparently, also, he put his daughter and his adopted daughter upon the same

dispute was so physically related to the other lots, about which there is no dispute, that the testator may well have thought that he was disposing of his entire real property by the language employed by him. At the same time, it must be conceded that the inferences to be drawn from the absence of any residuary clause are not inflexible, however much they may aid the mind in reaching a conclusion upon other grounds.

"We must, therefore, look to such other features of the case as are presented to us to see, if possible, whether anything appears of sufficient significance to enable us to arrive at a fair, sound judgment as to just what the testator meant by his description of the property. We find, then, that, while it is true that he acquired the properties on Pulaski avenue and on Linden street as three separate lots, he practically treated them as one piece of property. The fact that in configuration the lot, taken as a whole, resembled the letter 'L' would amount to little one way or the other. There are well-known instances in this city of properties so shaped that are described as situated on one only of the two streets upon which one or the other leg of the lot faces.

"What we ought to try to reach is the thought of the testator-what he regarded the two Pulaski avenue properties as being. What was it that he intended to charge with the payment of the annuity given to his mother? Did he mean to put the burden upon two lots that had buildings upon them, which buildings extended over upon the socalled Linden street lot, and might therefore be very uncertain sources of income, or did he mean to place the charge upon the entire property which, in the erection of buildings, he had made use of as a unit, and which presumably was an open, undivided tract of land to the eye? It seems natural to answer this question in a way that would tend to carry out most effectually the testator's purposes as they appear in his will. It is undoubtedly true that we have no right to make a will for him by a forced interpretation, but we have the right, and it is our duty, if possible, to give such effect to the words used by him as will carry out what we believe to have been his intentions.

"On the whole case, we have reached the conclusion that the testator in his will treated the entire property which he had acquired in 1869 and 1871 as a unit, just as he had dealt with it in the erection of buildings, and that he naturally described it with reference to the frontage on Pulaski avenue, although a portion of the lot faced upon Linden street. This we say, notwithstanding the will, which was evidently drawn by a lawyer, refers to two lots on the former street and to the conveyances under which they were acquired. He might easily have thought of these properties as embracing other contiguous ground that he had consolidated with them. plane of merit. Besides, the property in Any other construction would seem to defeat the manifest, and one of the main, purposes of his will.

"Coupling the circumstances referred to with the absence of a residuary clause, we regard ourselves as justified in holding that the plaintiff and defendant are tenants in common of the property called the Linden or Penn street lot. Such a disposition of the case is not only legal, but it is eminently equitable. The defendant may well be satisfied with the large estate which has come to her under the intestate law.

"Judgment will be entered in favor of the plaintiff."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Joseph H. Taulane and Ernest E. Prevost, for appellant. N. Dubois Miller and H. Alan Dawson, for appellee.

PER CURIAM. The judgment is affirmed on the opinion of the learned president judge of the common pleas.

(224 Pa. 7)

HOWES v. SCOTT.

(Supreme Court of Pennsylvania. March 8, 1909.)

1. CONTBACTS (§ 187*)—PARTIES—CONTBACT FOR BENEFIT OF THIED PERSON.

Where one received money or property on a promise to deliver the same to a third person, the third person had a direct right of action content the promiser at common law. against the promisor at common law.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 798–807; Dec. Dig. § 187.*]

2. CONTRACTS (§ 187*)—PARTIES—RIGHT OF ACTION.

A purchaser of land made a certain pay A purchaser of land made a certain payment on account, and assigned his equitable title to another, who assumed in writing the payment of the money so paid. The purchaser had borrowed such money from a third person, and the assignee, with knowledge of the circumstances, delivered a copy of his agreement to the purchaser, who delivered it to the lender of the money. Held, that the latter had a direct right of action against the assignee.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 798-807; Dec. Dig. § 187.*]

3. Parties (§ 4*)-Right of Action-Use PLAINTIFF. Where the legal plaintiff has a good cause

of action, it is immaterial so far as defendant is concerned whether the use plaintiff has any interest therein or not; that being a matter strictly between the legal and use plaintiffs.

[Ed. Note.—For other cases, see Parties, Dec. Dig. § 4.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by William E. Howes, to the use of William M. McCormick, against John H. Scott. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

John G. Johnson and Henry J. Scott, for appellant. Ellis Ames Ballard and Boyd Lee Spahr, for appellee.

MESTREZAT, J. In November, 1906, Lamotte and Miner entered into a written agreement with Arnold A. Phipps and his wife to purchase from them 69 acres of land at Willow Grove in Montgomery county. The consideration was about \$58,000, of which \$2,000 were to be paid down and \$12,000 on the 1st of the following January, when the deed was to be delivered. The intention of the parties was to lay the property out into lots, and they anticipated realizing large profits from their sale. The \$2,000, hand money, were promptly paid, but the purchasers had difficulty in securing the money for the payment of the \$12,000. While attempting to raise it, Miner met the defendant Scott, to whom he made a proposition to take the place of Lamotte and Miner in the contract with Phipps, assume the indebtedness, take their title to the real estate, and pay the purchase money. Lamotte assented to the arrangement made by Miner with Scott, and he and Miner in April, 1897, assigned to Scott their interests in the real estate purchased of Phipps. Subsequently Phipps conveyed the property to Scott. At the time Lamotte and Miner transferred their interests in the land to Scott, he signed and delivered to Lamotte a paper, of which the following is substantially a copy: "It is hereby understood and agreed that I assume the payment of two thousand dollars, paid on account of the Willow Grove tract, after four months from this date. John H. Scott. April 17, 1897." This paper was duly delivered by Lamotte to Howes, the legal plaintiff.

It appears from the uncontradicted evidence in the case that in November, 1906, Lamotte borrowed from William E. Howes, the legal plaintiff, the \$2,000 hand money, which was paid to Phipps for the Willow Grove real estate, and that Howes borrowed this money from William M. McCormick, the use plaintiff. Lamotte testified and the jury found that Scott was to assume the repayment of the \$2,000 as part of the consideration for the transfer to him of the Phipps real estate, and that the original of the paper signed by Scott was executed and delivered by him as evidence of that fact. In May, 1897, Howes, having learned of the sale and transfer by Lamotte and Miner to Scott of their interest in the Phipps real estate, and his \$2,000 not having been paid, had Lamotte arrested. Scott became his bail before the magistrate in the sum of \$2,000, and, to secure him against loss, Lamotte delivered to him the paper of April 17, 1897. Scott agreed in writing to return this paper to Lamotte, when he, Scott, was relieved of liability as bail for Lamotte's

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

appearance before the magistrate. The criminal proceeding was abandoned, and Lamotte demanded the return of the paper. Scott stated that he could not return it, but gave to Lamotte what he called a duplicate of the original. The plaintiff brought assumpsit on this paper.

The facts stated above are not denied or were found upon sufficient evidence by the jury. The defense set up at the trial was that, while the original paper was given by Scott to Lamotte, yet there was a condition attached that the money was only to be paid if the real estate venture was profitable, and that it was made payable four months after date in order that the parties might ascertain whether the venture was profitable. It was further claimed that the paper was delivered after Lamotte and Miner had transferred their interests in the real estate to Scott, and that the venture proved most unprofitable to Scott. The disputed questions were submitted to the jury, and, upon ample evidence, found against the defendant. The single question, therefore, for consideration is whether under the facts of the case the legal plaintiff has a right of action against Scott on the paper declared upon in the statement.

At common law no one could maintain an action upon a contract to which he was not a party. This rule is well established in this country, and is recognized by both the state and federal courts. There are, however, exceptions to the rule which in this state are as well settled as the rule itself. For nearly three-quarters of a century, since the decision in Blymire v. Boistle, 6 Watts, 182, 31 Am. Dec. 458, the decisions of this court have uniformly recognized and enforced the exceptions whenever the facts of a case required it. In Adams v. Kuehn, 119 Pa. 76, 13 Atl. 184, Mr. Justice Williams, in stating the exceptions to the general rule that no one can sue on a contract to which he is not a party, says (page 85 of 119 Pa., page 186 of 13 Atl.): "Among the exceptions are cases where the promise to pay the debt of a third person rests upon the fact that money or property is placed in the hands of the promisor for that particular purpose. Also where one buys out the stock of a tradesman and undertakes to take the place, fill the contracts, and pay the debts of his vendor, These cases, as well as the case of one who receives money or property on the promise to pay or deliver to a third person, are cases in which the third person, although not a party to the contract, may be fairly said to be a party to the consideration on which it rests. In good conscience the title to the money or thing which is the consideration of the promise passes to the beneficiary, and the promisor is turned in effect into a trustee." This is the settled doctrine of our state, and is recognized in numerous cases decided by this court.

Applying the rule just stated to the facts

of this case, it is clear that the legal plaintiff has a good cause of action against the defendant. The paper signed by Scott and upon which this action was brought shows on its face that he assumed to pay the "two thousand dollars, paid on account of the Willow Grove tract." The assumption of the payment of this money was part of the consideration paid by him to Lamotte and Minerfor transferring to him the title which they held to the real estate, and the paper itself shows that the money assumed to be paid. had been applied to the purchase of the land from Phipps. The paper distinctly says that Scott assumes "the payment of two thousand dollars, paid on account of the Willow Grove tract." There can, therefore, be no doubt under the terms of the paper signed by Scott that he assumed to pay the \$2,000 which had been borrowed and paid to Phipps on the Willow Grove real estate. It is true that he contended at the trial that this assumption was conditional, but that was denied by the plaintiff, and was found against him on sufficient evidence by the jury. It was therefore an unconditional assumption of the payment of the money which had been borrowed by Lamotte and applied by him in paying Phipps the first installment due on the Willow Grove real estate. Scott took the title of Lamotte and Miner, and in payment of part of the consideration due from him assumed the payment of the \$2,000 which was used in paying Phipps.

It does not appear that Scott knew at the time he executed the paper to whom this money was payable, but it does appear that before the obligation matured he knew that the money was payable to Howes, the plaintiff. His contract, as we have seen, is dated April 17, 1897, and is payable four months from that date. In May, 1897, as we have seen, Lamotte was arrested on an information made by Howes. At the hearing before the magistrate the evidence disclosed the fact that Howes had loaned the \$2,000 to Lamotte, and that it had been paid to Phipps as part of the purchase money of the Willow Grove real estate. At the time of this hearing, therefore, Scott knew all the facts relative to the \$2,000 which he had assumed to pay. He then knew, if he did not know before, that the money had been loaned by Howes to Lamotte for the purpose of paying the hand money on the Phipps real estate, and that Lamotte had so applied it. It will be recalled, as stated above, that Scott became Lamotte's security before the magistrate in the prosecution by Howes, and that, as collateral security to secure Scott, Lamotte deposited with him the original paper the duplicate of which is the basis of this suit. When the criminal proceedings were subsequently abandoned and the paper in suit was delivered to Lamotte in place of the original which had been destroyed or mislaid, Scott knew, not only what the paper shows, that the money assumed to be paid by

Grove real estate, but that Howes, the legal plaintiff, was the party to whom the money was payable. It was with the knowledge of all these facts that on Lamotte's demand Scott delivered to him the duplicate of the original paper which assumed the payment of the Howes money. It therefore clearly appears that Scott received Lamotte's and Miner's title to the real estate purchased of Phipps, took their place as vendees in the contract, and as part of consideration for the title conveyed to him assumed to pay the \$2,000 which Howes had furnished to Lamotte and which was paid as part of the purchase money to Phipps. In other words, Lamotte and Miner by their assignment put the title to the Phipps real estate in Scott, and as part of the consideration he promised to pay the Howes debt. It follows under our authorities that he is liable in an action by Howes for the \$2,000 which he assumed to pay by the contract of April 17, 1897. The right to maintain this action does not depend upon the interest which the use plaintiff may have in the result. It depends solely upon whether the legal plaintiff has a cause of action against the defendant. If he cannot maintain the action, the use plaintiff cannot do so. If the legal plaintiff has a good cause of action, it is immaterial, so far as the defendant is concerned, whether the use plaintiff has any interest or not. That is a matter which concerns the legal and the use plaintiffs, and not the defendant. The assignments of error are overruled,

and the judgment is affirmed.

(224 Pa. 174)

McCLAY V. CITY OF PHILADELPHIA (Supreme Court of Pennsylvania. March 22, 1909.)

1. MUNICIPAL CORPORATIONS (§ 806*) — DEFECTIVE STREETS—INJURY TO DRIVER—CON-TRIBUTORY NEGLIGENCE.

A driver in a city street who, because of the care required in managing his horses and avoiding other vehicles, is unable to give entire attention to the roadbed, is not reckless in not seeing defects therein that would have been obvious to a pedestrian.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 806.*]

2. MUNICIPAL CORPORATIONS (§ 819*) — DE-FECTIVE STREETS—INJURIES TO DRIVER.

In an action against a city to recover for death of plaintiff while driving in a city street, thrown from his seat by a hole in the payement, evidence held to sustain verdict for plaintiff.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 819.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Annie McClay against the City of Philadelphia. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and

him had been paid on account of the Willow | FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

> Thomas D. Finletter, Asst. City Sol., Harry T. Kingston, Asst. City Sol., and J. Howard Gendell, City Sol., for appellant. Thomas F. Gain and Alfred Law Cameron, for appellee.

PER CURIAM. The only question argued was that of contributory negligence. The plaintiff's husband was riding on an elevated seat on an open wagon on a wide thoroughfure crowded with heavy teams, on which there were three tracks of a steam railroad. While crossing the tracks he turned his horses to one side to avoid a team crossing in front of him. One of the wheels of his wagon slid on a rail and went into a narrow depression or hole at his side, causing a jolt. that threw him from his seat. Whether, under the circumstances, he should have seen and avoided the danger caused by the defect in the surface of the street was a question for the jury.

While the duty of vigilance is obligatory on every one in the use of city streets, a driver who is unable to give undivided attention to the roadbed, because of the care required in managing his horses and in avoiding other vehicles, cannot be held to have seen, or to have been reckless in not seeing, defects in a roadbed that would have been obvious to a pedestrian.

The judgment is affirmed.

(224 Pa. 86)

ROSS et ux. v. CHESTER TRACTION CO. (Supreme Court of Pennsylvania. March 15, 1909.)

NEGLIGENCE (§ 136*)—QUESTION FOR JURY. In an action against a street railroad com-pany to recover for the death of a girl seven years old, evidence that an employe of defendant

set fire to refuse while a high wind was blowing, and that the flame communicated to the clothing of plaintiff's intestate, authorizes the submission of defendant's negligence to the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*] Elkin, J., dissenting.

Appeal from Court of Common Pleas, Delaware County.

Action by Charles W. Ross and wife against the Chester Traction Company. Verdict for plaintiffs, and defendant appeals. Affirmed.

Argued before FELL, BROWN, MESTRE-ZAT, ELKIN, and STEWART, JJ.

John B. Hannum, for appellant. William I. Schaffer and John B. Hannum, Jr., for appellees.

MESTREZAT, J. There are certain uncontroverted facts in this case. Dougherty was employed by the defendant company at its car barn to clean the barn and cars, and

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

destroy the waste or rubbish. About 4:30 | o'clock on the afternoon of May 25, 1906, he conveyed in a wheelbarrow to a vacant lot near the barn, not owned by the defendant, two armfuls of waste or rubbish, consisting partly of "greasy stuff, waste," but principally of newspapers swept from the cars, which he fired by applying a match to it. The day was very windy, and Dougherty remained with the fire until a few minutes after 5 o'clock, when he left it, the flames having been extinguished, but the embers still smoking. While Mary Ross, a child of seven years, living in the immediate neighborhood, was playing with a companion near the fire in the vacant lot after school hours that afternoon, her clothing caught fire, and sne was badly burned. She died from the effects of the burning, and this action was brought by her parents.

Under proper instructions by the court the jury found that Dougherty was acting within the scope of his employment with the defendant company when he carried the rubbish across the street to the vacant lot and set it afire, and that Mrs. Pennington, with whom Mary Ross was making her home at the time, was not negligent in the care and control of the child. The learned judge also submitted to the jury to determine whether the defendant company through its employé was negligent in burning the rubbish on the vacant lot under the circumstances and in the manner he did, and in leaving the fire in the condition it was in when Dougherty left it. The finding of the jury establishes the defendant's negligence in this respect.

The single cause of complaint on this appeal is that the court erred in not holding. as matter of law, that under the evidence in the case the verdict should have been for the defendant. There is no error assigned to the charge, nor to the manner in which the cause was submitted by the learned court to the jury. The court affirmed the defendant company's point that it "was only bound to foresee the nature and probable consequences of leaving the ash heap in the condition in which it was left by Dougherty, and if the jury believe that the injuries incurred by Mary Ross were not such natural and probable consequence, their verdict should be for the defendant." In his printed brief the counsel says: "We may concede for the sake of the argument that the burning of the sweepings by defendant's workman was the act of the defendant, and that the duty was thereby imposed upon the defendant, through its workman, to safeguard the fire until it became harmless. This obligation was performed. The cause of the child's injury was the fact that the child rebuilt the fire into a dangerous condition, and thereby fired herself." It is claimed by the appellant's counsel that the act of the defendant company in burning its rubbish on the vacant lot was not the proximate cause of the child's injuries,

ing cause which made the company's act remote, thereby relieving it from liability in this action. The argument of the learned counsel for the appellant is based upon an assumption of facts which were not found by the jury to exist in the case. At least from the evidence the jury was justified in finding that the fire was communicated directly to the child's clothing, without the intervention of any act on her part, or by the act of the other child who was with her at the time her clothing was ignited. There was ample evidence for the jury to find that Dougherty was negligent in his control of the fire after he had put a match to the rubbish. He remained with the fire a little more than a half hour, and, according to his own story, the embers were smoking when he left it. It is true he says there was no blaze, but a man of ordinary intelligence, which we must assume him to be, would know that the smoking embers might easily be fanned into a flame by the high wind which he testified was, at the time, sweeping over that vacant lot.

Hager, a witness on the part of the plaintiff, was sitting on his porch directly across the street from the lot where the rubbish was burned. He testified that he saw Dougherty take the rubbish to the lot, burn it, and leave the place. He says that, when Dougherty left there was no blaze, but the embers were still smoking. He saw the two little girls go to the ground, and testifies that "they both of them sat down with little sticks this way, and began to strike in the embers, both of them side by side, and they had not been there not over two or three minutes before little Mary jumped up with this blaze about that far [indicating] behind her dress." He further testified that he was afraid the children would get afire when he saw them at the place, "because it was still smoking, and the wind was blowing so hard I was afraid they would catch fire." He denied that Mary lighted a paper or fanned the embers, and testified that: "In fact they [the two little girls] did not stir from where they sat down until she [Mary] got up to run with the fire." Hager was an eyewitness to the whole affair; and, if his testimony was believed by the jury, they were justified in finding that the wind fanned the smoking embers into a flame, which communicated directly to the child's clothing, or carried a live spark or cinder from the embers against the child's clothing, which ignited it. The facts established by the testimony, taken in connection with the undisputed facts in the case, were sufficient to warrant the jury in convicting the defendant company of negligence in not guarding and protecting the smoldering embers, which was the direct and proximate cause of the ignition of the child's clothing, resulting in her death.

sel that the act of the defendant company in burning its rubbish on the vacant lot was not the proximate cause of the child's injuries, but that there was an independent intervence caught fire. This is the basis for the con-

tention of the appellant's counsel that "the cause of the child's injury was the fact that the child rebuilt the fire into a dangerous condition, and thereby fired herself." But the witnesses who testified to the fire having been communicated to Mary's clothing in this way said that they did not see her skirts get afire, and that they did not know how she did get afire. They confirm Dougherty's testimony that the wind was blowing very hard at the time, and say that it "blew your dress all out." In fact Edith Clineff, Mary's little companion on the occasion, testified that the paper with which she fanned the embers "was not on fire." Johnson, another witness, who testified that Mary "blowed the fire with a piece of paper," said that he did not see her dress on fire until she had run across the street. It is apparent, we think, that there is no evidence in the case which would compel the conclusion that the child set fire to her clothing by a piece of paper in her own hands, and hence the learned counsel for the appellant has based his argument upon the assumption of a material and controlling fact which is not conceded in the case. But if we admit that there was testimony in the case from which the jury could have found that the child did fan the smoldering embers into a flame, which was communicated to her clothing by a piece of paper in her hands, there is also testimony, as we have already pointed out, from which the jury could find that the wind blew live cinders against her clothing, or fanned the embers into a flame, which communicated directly to the child's clothing while she was seated near the fire. Which of the two theories was correct and how the child's dress was set afire were manifestly for the jury. As suggested above, if the jury found, as they could have found under the evidence, that the child's clothing was fired by flames or sparks from the rubbish directly communicated to her dress, then there was manifestly no independent, intervening cause which occasioned her injuries, and the defendant company is responsible in this action for the consequences of Dougherty's negligent act in not guarding the fire until it was in a harmless condition. This would warrant the court in refusing to withdraw the case from the jury. We cannot presume that the jury found that the child's injuries were caused by her own negligent act. Had the defendant's counsel desired to raise the question of whether the facts, as he claimed them to be, constituted an independent, intervening cause he should have submitted a point for instructions, and had a direct ruling by the court. He cannot now raise that question, under the assignments of error filed in the case. Whether the facts, as he alleges them to be, were an independent intervening cause of the child's injuries, cannot be decided on this record. There being sufficient evidence to establish facts disclosing negligence of

injuries, and that evidence having been submitted to the jury, we cannot now sustain an assignment which alleges that the court erred in not setting aside a verdict based upon the evidence.

The testimony in the case was conflicting as to the circumstances and conditions under which the rubbish was burned on the vacant lot, and as to how the girl's dress was set on fire; and hence whether the firing of the child's clothing was the natural and probable consequence of Dougherty's act which he should have foreseen was for the jury. "From the very essence of the thing," says Chief Justice Agnew in Penna. R. R. Co. v. Hope, 80 Pa. 373, 380, 21 Am. Rep. 100, "the natural probability of a consequence, which ought to have been seen, is a matter of fact to be determined upon the evidence. Every cause must depend upon its own circumstances." So, also, was it a question for the jury whether Dougherty exercised the care required of him under the circumstances in starting and guarding the fire. McCully v. Clarke & Thaw, 40 Pa. 399, 406, 80 Am, Dec. 584. That case was trespass for not guarding and extinguishing a fire, whereby the plaintiff's warehouse and its contents were destroyed. Strong, J., delivering the opinion, said: "Whether the defendants had been guilty of the negligence charged was therefore the principal subject of inquiry; in other words, whether they had exercised such care and diligence to prevent injury to the property of the plaintiff as a prudent and a reasonable man, under the circumstances, would exercise. Now, it is plain that what is such a measure of care is a question peculiarly for a jury."

The assignments are everruled, and the judgment is affirmed.

ELKIN, J. (dissenting). If this is a case for the jury at all, I agree that it was properly submitted, and that the judgment should be affirmed. It does not seem to me, however, that appellant was not guilty of any negligence for which it should be made answerable in damages. The standard of care required in order to sustain this action is higher than the law has imposed upon a defendant up to the present time in any similar case. The appellant company is not charged with failure to perform any duty it owed its employés, its passengers, or the public in the operation of its line of street railway. The relation of common carrier and passenger, or of master and servant, did not exist between the parties. The rule adopted in this case must necessarily have general application to the farmer, mechanic, laborer, and every other citizen of the commonwealth who finds it necessary or convenient to occasionally burn brush or rubbish on the highway or upon open lots. I concede that in such cases the duty of reasonable care rests upon the person who starts the fire in order the defendant as the proximate cause of her | that no injury may recklessly or negligently

be inflicted upon the person or property of must assume in consideration of the priviothers. But to my mind this duty has been met when a person, charged with negligence under such circumstances, shows that his servant, while burning some waste paper on an open lot, stood by the little fire until the flames died out, the paper was burned to embers, and only the smouldering ashes remained to mark the spot where the fire was started, and that is this case. To go further and hold that it was his duty to foresee and provide against the possible contingency that a child might stray that way, fan the smouldering ashes into a burning ember sufficient to light a piece of paper held in her hand, from which her clothing took fire and serious injury resulted, is to place upon a property owner, or citizen, a standard of care higher than the law should require in dealing with the customs and usages of people in the practical affairs of everyday life. The custom of burning waste paper, rubbish, brush, or leaves at the roadside or upon open lots is as old as our law, and as widespread as our commonwealth. In my opinion it is error to apply to such cases the rule which requires the very highest standard of care to be exercised by those having the control and supervision of dangerous agencies such as electricity, natural gas, deadly explosives, and other natural or mechanical forces with which the people are not familiar, and from the dangers of which they cannot protect themselves. What everybody has done for a century certainly should come within the rule of usual and ordinary care. Under such a rule there could be no recovery in this case. It is true the open lot did not belong to appellant, but it is equally true that it did not belong to appellees. Both parties stood upon an equality so far as the use of the lot is concerned. The evidence shows it was the customary place to burn waste paper, also that children frequented it. No question is raised by the lot owner as to the right of appellant to burn waste paper upon the premises. It must therefore be assumed for the purposes of this case that appellant had a right to do what was done, and the only question that can arise is whether it was done in a negligent manner, as to which all that has been heretofore said applies. There is an unwholesome tendency to extend the law of negligence in every possible direction, and to all kinds of occurrences, until we have reached the point of applying the doctrine to injuries received from accidents resulting from the practices of everyday life. It may be, and no doubt is, difficult to draw the line of distinction between cases for which there should be responsibility in damages and those in which there should not be. But, in determining the proper rule applicable to such cases, the natural and necessary risks and dangers incident to the affairs of

leges he enjoys by his association and in his dealings with his fellow men, must be an important factor. There are many unfortunate accidents resulting in serious injury to persons, but it will not do to say that some one must be answerable in damages because of sympathy for the injured party, when the evidence shows that the party sought to be charged only did what was usual and customary under the circumstances surrounding the accident. A single verdict against a farmer, or mechanic, or small property owner, might sweep away the frugal earnings of a lifetime, while in point of fact nothing was done, except what had been a general custom in the neighborhood.

As I view this case it was not the duty of appellant, nor would it be the duty of any other owner of property, to foresee and provide against the contingency that did happen, and therefore the injuries complained of were not the result of any negligence for which the law makes the offending party liable.

· I would reverse the judgment.

(224 Pa. 132)

HILLIARD et al. v. STERLINGWORTH RY. SUPPLY CO.

(Supreme Court of Pennsylvania. March 15. 1909.)

APPEAL AND ERROR (§ 71*) - INTERLOCUTORY ORDER.

An order dismissing a petition for an order to suspend a receiver's sale until the receiver files an account is an interlocutory order, from which no appeal lies.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 399; Dec. Dig. § 71.*]

Appeal from Court of Common Pleas, Northampton County.

Action by Clinton Hilliard and others against the Sterlingworth Railway Supply Company. Judgment for plaintiffs. From an order refusing to sustain order of sale, F. W. Coolbaugh, receiver in bankruptcy, appeals. Appeal quashed.

See, also, 221 Pa. 503, 70 Atl. 819.

The facts appear by the opinion of Stewart, P. J., in the court below, which was as follows:

"This is a petition by Frank W. Coolbaugh, receiver appointed by the United States court to restrain W. J. Kuebler, receiver of this court, from executing an order of sale of the defendant's property 'until the filing of a formal account and the audit thereof.' And that the said W. J. Kuebler, receiver, be restrained from making any public or private sale of the property and assets of the defendant company, other than in the usual course, etc. We suppose what is wanted is men in organized society, which every one to stop the sale of defendant's property, ad-

vertised to be sold by the receiver under an order of this court. We yesterday filed our views in a memorandum, which is now made part of this opinion. We are not embarrassed in our previous action by any subsequent reading of the present petition and affidavits. The averments of the present petition relating to the value, extent, and importance of this plant, and the prophecies as to the future, are what we have read and heard from the inception of these proceedings. It is an insult to this court to think that we do not understand this situation, especially after the hearings we have had, which involved every phase of this company, its organization, its internal troubles, its value, its liabilities; everything has been before us in a judicial way, and now under the guise of a new appointment, this matter is seriously treated by counsel as if it was a case of first impression on the part of the court. The only new features are the affidavits which we were asked to consider. One gentleman modestly states that he thinks a sale hereafter will bring more than at present; another one thinks a sale will bring more in six or nine months. Three gentlemen swear that in their opinion 'if sold next spring, would bring double, if not more [The italics are ours] than it would if sold sooner.' And to end the list the last gentleman swears, 'if sold a few months hence would yield three times as much as it would if sold at this time.' It is encouraging to note most of them base their vlews upon the outcome of the recent election. In not one is there the possibility that times may become worse; that they may be mistaken. Such optimism is refreshing. Opinion evidence at the best is most uncertain, but rarely is there occasion to use it upon a matter so unsubstantial as the future condition of business. As to the criticisms upon the order, the terms of this order were settled in open court, in the presence and with the assistance of counsel of all parties. The objections are unfounded. Everything about a receiver's sale is under the control of the court, and no sale will be confirmed if there is any irregularity in the proceedings. It would be improper for us to place on record our views with regard to the value of this plant. Everything has been done to secure a good price. The matter of distribution of proceeds is entirely separate, and no one is concluded by anything set out in the order of sale from making any claim or distribution that is proper.

"Application refused."

Argued before FELL, BROWN, MESTRE-ZAT, ELKIN, and STEWART, JJ.

Charles H. Edmunds, Samuel Scoville, Jr., John Sparhawk, Jr., and Frank Reeder, for appellant. H. J. Steele and F. W. Edgar, for appellee. John G. Johnson, for Sterlingworth Ry. Supply Co.

PER CURIAM. We have concluded after due consideration that this is an appeal from an interlocutory order, and under our decisions must be quashed. The order of sale heretofore made, and from which this appeal was taken, is necessarily expended, and cannot now be executed. If an alias order of sale be applied for, an opportunity will be given by the court in banc for the interested parties to be heard, so that the propriety, as well as the necessity, of renewing the order at this time may be determined. Such order of sale, or other decree, can then be made as will best protect and conserve the interests of all parties concerned under present conditions.

Motion to quash sustained, and appeal quashed.

(224 Pa. 186)

STANDARD LEATHER CO. OF PITTS-BURG v. ALLEMANNIA FIRE INS. CO. OF PITTSBURG.

(Supreme Court of Pennsylvania. March 22, 1909.)

1. PRINCIPAL AND AGENT (§ 170*)—UNAUTHORIZED ACT OF AGENT—RATIFICATION.

Where a principal does not promptly repudiate an unauthorized act which he knows his agent has undertaken to do for him, he cannot thereafter repudiate it.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 642; Dec. Dig. § 170.*]

2. INSURANCE (§ 229*) — FIRE INSURANCE — CANCELLATION OF POLICY — NOTICE TO AGENT.

An agent of the insured had general powers to place insurance in various companies, with power to cancel and replace the policies with others, to keep an expiration book, and to correct the same every six months. Held that, so long as the line of insurance is not completed, an insurance company may serve notice of cancellation of a policy procured by such agent for his principal upon the agent.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 503; Dec. Dig. § 229.*]

Appeal from Court of Common Pleas, Allegheny County.

Action by the Standard Leather Company of Pittsburg against the Allemannia Fire Insurance Company of Pittsburg. Judgment for defendant, and plaintiff appeals. Affirmed.

The following is the opinion of Shafer, J., of the court below:

These three cases were tried without a jury, together with the other insurance cases on the same loss, and present certain features which distinguish them in some respects from the other cases. We find the facts as to the loss and employment of Negley & Clark Company by the plaintiff, the notice and proofs of loss, and the negotiations between the plaintiff and Negley & Clark Company, the making of a binder, and the notice of cancellation of it, to be the same as those found in the case at No.

[•]For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

292, July term, 1905, with the following additions:

"(1) These three companies were represented by C. P. Campbell, who was an insurance broker, having an office in the city of Pittsburg, and having one or more employés or clerks in his office, among whom was a young man named A. C. Stewart. Campbell was authorized to issue policies and sign insurance binders for the several companies, but Stewart was not authorized to sign such papers for him or for the companies.

"(2) When the agent of Negley & Clark Company came to Campbell's office, Campbell was not present, but Stewart was in charge of the office, and, upon the proposition being made to Stewart to sign the binders for these companies, Stewart said to Negley & Clark Company's agent that he would do so, provided they would take the risk of his signature being approved by Campbell. He also said to Negley & Clark's agent that he remembered a loss which some of their companies paid on this same risk some time before, and asked them if patent leather was made there, and was told that it was not. He said that they would not take the risk if patent leather was made there. He thereupon signed the binder in question, signing it 'C. P. Campbell, Agent, A. C. S.'

"(3) Stewart saw Campbell that evening and told him what had taken place, and was directed by Campbell to ascertain whether patent leather was in fact made there or not. Thereupon the next day, and the next two or three days thereafter, Stewart looked up the matter at the board of underwriters and elsewhere, and found that patent leather was made there, of which he informed Campbell, and Campbell thereupon directed him to cancel the risk.

"(4) In the meantime, while Stewart was acquiring this information, forms of policy in accordance with the binder had been written up in the office of Campbell and were given numbers, but were not delivered to any one. Stewart thereupon wrote a notice of cancellation in the usual form, referring, not to the binders, but to the policies which had been so written, and delivered the same day to Negley & Clark Company.

"(5) The defendants, in this case, undertook to prove that it was the custom in the city of Pittsburg and vicinity to give notice of cancellation of a binder to the agent who procured it. They produced a number of witnesses who testified under objection that such was the usual custom, and no evidence was produced to the contrary. We find from the evidence that it is, and for many years has been, the actual practice among the insurance brokers and companies in Pittsburg to give notice of cancellation of insurance effected by binders, to the agent who procured it.

"(6) It is admitted that, if the defendants are liable at all to the plaintiff, the Ben Franklin Company is liable for \$1,500, the Allemannia for \$2,500, and the Monongahela Insurance Company for \$1,000, with interest from October 15, 1904."

"Conclusions of Law.

"1. The first matter to be discussed, which is peculiar to these cases, is the authority of the person who signed the binder. We have found that Stewart had no general authority from Campbell or the companies to sign such a paper, and that the paper was taken by the plaintiff's agents with knowledge of the fact that it would be subject to Campbell's approval. It appears, however, that Campbell knew, shortly after the signature was made, that his agent had undertaken to sign for him, and that he never repudiated the signature in any way on the ground of want of authority in Stewart, but, on the contrary, directed the risks to be canceled under the terms of the agreement. This was an affirmance of the signature of Stewart. One who knows that his agent has undertaken to do for him what he is not authorized to do is bound to repudiate the act promptly, and, if he does not do so, and especially if he does anything by way of affirmance of the act, he cannot afterwards repudiate it.

"2. We do not understand it to be claimed that Campbell, as agent for the defendants, was bound to sign all insurance contracts made by him for them, with his own hand. While he might not, without their authority, delegate a general power to represent him to any of his agents, there can be no doubt that he might sign policies by the hand of an agent, where he himself knew and accepted the risk, either before or after the signature, which was the case here.

"3. As to the proof of the custom or practice of giving notice of cancellation to the broker, instead of the insured, we are of opinion that no such custom was proved as would modify the legal effect of the contract made in this case.

"4. If these conclusions are correct, there is no difference between these cases and the case of No. 292, above mentioned, and we adopt, in addition to the conclusions of law above stated, the conclusions of law heretofore filed in this case.

"It is therefore ordered that judgment be entered for the several defendants."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

J. S. Ferguson, for appellant. Patterson, Sterrett & Acheson, for appellee.

PER CURIAM. The judgment is affirmed on the opinion of Judge Shafer.

(224 Pa. 74)

JOHN HANCOCK ICE CO. V. PERKIOMEN R. CO.

(Supreme Court of Pennsylvania. March 15, 1909.)

1. RAILBOADS (§ 484*)—FIRES SET BY LOCO-MOTIVE—QUESTION FOR JURY.

In an action to recover for loss by fire alleged to have been set by defendant's locomotive, where the plaintiff shows that the sparks from defendant's engine communicated the fire to his building, but also that they were emitted by defendant's negligence, the question of negligence is for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1740; Dec. Dig. § 484.*]

2. Railboads (§ 484*)—Fibes Set by Locomotive—Questions for Juby.

In an action to recover for fire alleged to have been set by sparks from a particular engine, where defendant offered expert witnesses, who testified that the spark arrester was of the most approved form and pattern and was entirely efficient for that purpose, it was reversible error to withdraw from the jury the question whether the spark arrester was of proper form and pattern and leave to the jury only the question whether it was in good repair.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1740; Dec. Dig. § 484.*]

Appeal from Court of Common Pleas, Montgomery County.

Action by the John Hancock Ice Company against the Perklomen Railroad Company. Judgment for defendant, and plaintiff appeals. Reversed.

At the trial the court charged, in part, as follows:

"I charge you, under this evidence, that you cannot find that this spark arrester was not of the proper style or character so as to comply with the requirements of the law. I listened carefully to the arguments of counsel, and to this evidence, and it is my duty to give you the law as I understand it. So far as I recall this testimony—and I have considered it carefully—there is no witness who has condemned this spark arrester as not being of the proper style, or make, or form, or pattern: but the men of knowledge and experience in the business come upon the stand, and they tell you, from their knowledge and experience, they adjudged it in their opinion to be a safe or proper spark arrester. that it is as good as any that could take its place for the fuel that is to be used in the fire box. This spark arrester also has been in use for some years. You have heard the testimony. There is no one here that says it is not a spark arrester of the style or type that is efficient for the purposes for which it is placed into the engine. Therefore I cannot allow you, who are not experienced in this business, to say that the men who have made this a study, or who have examined this style of spark arrester, I cannot allow you to overrule them and say that this is an inefficient spark arrester so far as the design and pattern are concerned; and you will take the law from the court.

"Now we come to the testimony of Mrs. Fleger, the only other testimony upon this question of seeing sparks upon other days. Here, also, I caution you to dismiss from your minds everything that was said about the throwing of sparks, as long as six weeks after this fire, because that is too long a period. You will take the law from the court. The Supreme Court does not allow any such extended period as that. It does allow a reasonable period, at or about the time of the fire, a short time before, or a short time after, because that is the only way perhaps that the plaintiff would have any means of giving evidence as to the character of that engine, or as to the condition of the spark arrester; but the law will not allow us to go six weeks away from the fire. Therefore you will dismiss anything that was said about May 13th.

"Inasmuch as it is alleged that a particular engine caused the injury complained of, the inquiry is limited to the condition of that engine at the time, and evidence as to that particular engine upon another occasion six weeks later, or of other engines, unidentified, is irrelevant and cannot be considered by the jury."

Argued before FELL, BROWN, MESTRE-ZAT, POTTER, and STEWART, JJ.

Nicholas H. Larzelere and Harold B. Beitler, for appellant. Montgomery Evans and John M. Dettra, for appellee.

MESTREZAT, J. The plaintiff owned a large icehouse along Perkiomen creek in Montgomery county, Pa. The defendant company's tracks were located not far from the icehouse in front of and near which the company run a siding. About noon on March 30, 1907, defendant's engine 846 ran into the siding to pull out five loaded cars. The grade of the siding was steep at the starting point, and in starting with its load the engine labored very hard and emitted large volumes of smoke. About 10 or 15 minutes after the engine had pulled out, the roof of the icehouse was discovered on fire, which resulted in the destruction of the house and its contents. The loss was about \$35,000. This action was brought to recover damages for the loss: the plaintiff alleging it was caused by the negligence of the defendant company. There was a verdict for the defendant, and, judgment having been entered thereon, the plaintiff has taken this appeal. The appellant complains in its first and second assignments of error in the charge, and in its third assignment of error in answer to the defendant's second point for charge.

It was claimed on the part of the plaintiff company in support of its allegation of negligence that the house was fired from a spark or sparks emitted from engine 846, that the spark was discharged by reason of an ineffi-

•For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

reason of the arrester being out of repair, or by the improper or negligent operation of the engine. In support of its contention the plaintiff introduced evidence to show: That the engine labored very hard and emitted much smoke when it started with its load on the upgrade siding; that the day was windy, and the smoke blew over the roof where the fire started; that immediately before and after the fire large sparks or pieces of live cinder were emitted from the stack of engine 846; that there was no other source of fire anywhere in that vicinity; and that there was no stove or fire in the building. This evidence was sufficient to send the case to the jury on the question of whether the fire from the engine had been communicated to the house. Philadelphia & Reading Railroad Company v. Hendrickson, 80 Pa. 182, 21 Am. Rep. 97; Henderson v. Philadelphia & Reading R. R. Co., 144 Pa. 461, 22 Atl. 851, 16 L. R. A. 299, 27 Am. St. Rep. 652. And the court properly held that it was also sufficient for submission to the jury on the question of the defendant's negligence. Philadelphia & Reading R. R. Co. v. Schultz, 93 Pa. 341; Van Steuben v. Central R. R. Co., 178 Pa. 367, 35 Atl. 992, 34 L. R. A. 577. The court in its charge said: "When the plaintiff shows facts and circumstances which show that this spark arrester is allowing larger sparks to escape than ought to escape, they having fire or heat or warmth sufficient to burn in them, or throws them out a greater distance and of greater size than it ought to throw them, and has done that at one time or another time, or several times, then there is evidence before you to consider upon the question of negli-The learned judge then points out the evidence produced by the plaintiff which justified the submission of the case to the jury. He also called attention to the evidence on the part of the defendant contradictory of the plaintiff's evidence tending to show negligence on the part of the company. In the charge the court submitted to the jury to determine whether the sparks were emitted from the engine and fire communicated thereby to the building by reason of the spark arrester being out of repair and in an improper condition, or by the improper or negligent operation of the engine. He instructed the jury, however, that there was no evidence to show that the spark arrester was not of the proper style, form, or pattern, and was not efficient for the purpose for which it was placed in the engine, and withdrew that question from the jury. This is the subject of the first assignment, and raises the important and material question in the case.

We agree with the learned judge that the witnesses on the part of the defendant testified that the spark arrester on engine 846 was of the most approved style and pattern in use on freight engines for the fuel used in it. The several witnesses on the part of

cient form or device of spark arrester, or by of that fact, were all men of experience in that line and were skilled in the construction and use of spark arresters. If their testimony is credible, there can be little doubt, in the absence of contradictory evidence. that the spark arrester on engine 846 was of a proper type and pattern, the one in general use, and efficient for the purpose. As the learned judge said: "There is no witness who has condemned the spark arrester as not being of the proper style, or make, or form, or pattern." The engine was constructed for the use of hard coal, and at the time of the fire hard coal was being used in it with a very small proportion of soft coal. The hard coal was what is known as "buckwheat" in the anthracite region, which is a fine coal. Such small percentage of soft coal is mixed with the fine hard coal, as testified by the witnesses, in order to prevent clinkers forming on the grates, which will occur if the fine buckwheat anthracite coal is used exclusively. The evidence shows that the use of the vertical screen is not desirable and is impracticable where the engine is operated exclusively by soft coal. The reason is because the tar in the soft coal thrown against the screen and close to the flues will adhere to the screen and close up the meshes, preventing the draft of the engine, and thereby disabling it. It should be noted, however, that no witness testified that when soft coal is used as a fuel more sparks or larger ones are emitted by a vertical than by a horizontal arrester. On the contrary, the witnesses testified that the vertical screen is just as efficient in preventing the discharge of sparks, both in quantity and size, from the stack of the engine as the horizontal with the deflecting plate. The use of the horizontal instead of the vertical arrester when soft coal is used as the fuel is, as suggested above, to avoid the closing of the interstices by the tar which comes from the soft coal, and which results in disabling the engine by preventing a draft. There was not a particle of evidence in the case to show that a three-eighths inch mesh was the screen in use on engine 846 at the time of the fire. On the other hand, the uncontradicted evidence was that it was a five-sixteenths mesh, and that that is a proper size mesh in a spark arrester used on a freight engine where the fuel is hard coal mixed with a small proportion of soft coal. Without discussing the question further, we are satisfied that the learned judge was entirely correct in declaring that the testimony, on the part of the defendant, if credible, showed that the spark arrester in use on engine 846 was of a proper design and pattern and one in general use on engines of this character.

Conceding the court was correct in its view of the effect of the defendant's testimony, did it commit error in withdrawing from the jury the question whether the spark the defendant, who testified in substantiation arrester on engine 846 was efficient in design and pattern, and "as good as any that could ; take its place for the fuel that is to be used in the fire box?" We think this question must be answered in the affirmative. It is unquestionably true that in certain cases it is the duty of the court to declare as matter of law the establishment of a proposition supported by the uncontradicted and credible testimony in the case; but it is equally true, and we have time and again so held, that where there is conflicting evidence, or where the credibility of the witnesses is involved, the question is one for the jury and not for the court. In withdrawing the question from the jury, the learned judge misapprehended the state of the case as well as the evidence which had been offered and admitted at the time he made the ruling.

The negligence of the defendant could arise in either or all of three different ways: (a) From an inefficient style or pattern of spark arrester; (b) from a proper spark arrester which was out of repair; or (c) from the negligent operation of the engine. Sparks might have been discharged from the stack of the engine from either or all of these three causes. When the learned judge ruled the question, the plaintiff had shown, not by a presumption of law arising from the fact that the building had been fired by sparks from the engine, but by affirmative evidence, that through the negligence of the defendant sparks had been emitted which set fire to the plaintiff's building and caused its destruction. This evidence, as we have seen, consisted, inter alia, in the action of the engine when it started with its load on the heavy grade siding, the direction of the wind, the emission from the stack of the engine just before and after the fire of sparks or live cinders too large to be emitted from an engine stack having a properly equipped spark arrester. The evidence was sufficient in the opinion of the court to send the case to the jury to determine the negligence of the defendant. When the plaintiff company had produced this evidence, it had met the burden imposed upon it, which was to show negligence as the basis of its cause of action without which it could not recover. If the plaintiff's evidence was credible, was believed by the jury, the sparks which fired the plaintiff's building had been emitted by reason of the negligent conduct of the defendant company in one or all of the three ways we have suggested. Had the case then gone to the jury without any testimony on the part of the defendant, it must have found, under the view of the trial court, that the defendant was negligent.

The defense interposed was that the spark arrester was of the most approved form and pattern and of the kind in general use, that it was entirely efficient for the purpose, that it was not out of repair but in good condition; and that the engine was operated in a careful and proper manner. The burden was

propositions by evidence that would satisfy the jury. It assumed the burden and produced evidence from which the jury would have been warranted in finding, not only that the spark arrester was of proper form and design, but that it was not out of repair, and that the engine was carefully operated. The testimony introduced by the defendant to sustain these propositions was equally conclusive as to each of them. The learned judge, however, permitted the jury to consider and determine only two of the three propositions: (a) Whether the spark arrester was out of repair and in an inefficient condition, and (b) whether the company's employés were carefully and properly operating the engine at the time the building was fired. The other question the court withdrew from the jury and declared as matter of law that men of knowledge and experience in the business had testified that the spark arrester was "as good as any that could take its place for the fuel that is to be used in the fire box," and that there was no evidence that it was not of proper form and design. For a like reason, consistency required the learned judge to make a similar ruling on the other two questions and direct a verdict for the defendant. He overlooked the decisive fact that the plaintiff had offered evidence, which he correctly held to be sufficient, to show negligence on the part of the defendant company in not equipping engine 846 with a spark arrester efficient in form and design. If, as testified by the plaintiff's witnesses, the stack emitted sparks that were larger than should come through a properly constructed spark arrester, that of itself was affirmative evidence that the arrester was not of a proper form and design and had not been properly constructed. To meet that evidence the defendant introduced its expert witnesses, and they testified that the appliance was efficient in form and design. Here then was evidence against evidence, and the question was therefore for the jury. If there had been no evidence on the part of the plaintiff from which the jury could have found that the appliance was not of proper design, then the only evidence in the case on the subject would have been that of the defendant's expert witnesses, and had it stood uncontradicted, and the witnesses been credible, the court might have withdrawn the question from the jury; but here there was positive evidence from which a jury could find that the design of the appliance in use was not sufficient, and the evidence to sustain the contrary view was that of witnesses whose credibility was for a jury. It is apparent therefore, we think, that, as the record stood at the close of the trial, the learned judge erred in deciding the question of the efficiency of the design of the spark arrester. We do not agree with the learned counsel for the appellee that the binding instruction "amounted to nothing more in real upon the defendant company to sustain these effect than telling the jury that, where there

matter in the case, it is their duty, if they believe the evidence, to be governed by it." That is frequently done and is what the learned court below should have done in this case. Here there was no witness who testified that the spark arrester was not in proper form, and to that extent the evidence of the defendant's experts was uncontradicted; but there was other evidence in the case. facts, as held by the trial court, which would have warranted the jury in finding against the testimony of the defendant's experts, and that the spark arrester was insufficient in form and design for the purpose for which it was intended.

The learned counsel for the appellee has cited Spaulding v. Railway Company, 33 Wis. 582, and several cases from other jurisdictions to sustain the court below in giving binding instructions in its favor. He evidently fails to distinguish the principle decided in those cases from the one which is applicable and must be enforced in determining the question in the present case. In the several jurisdictions in which the cases cited arose, it is held or is declared by statute that a presumption of negligence arises when property is set on fire by sparks emitted from a locomotive. In the Spaulding and other cases cited by the learned counsel, it is held that such presumption is not one of fact, but one of law, that it is not evidential, and that where there is no conflicting evidence, and the testimony is clear and satisfactory against the presumption, it is the duty of the court to hold, as matter of law, that the presumption is overcome. It is conceded, however, in those cases, that where there is a conflict of testimony the jury must determine what facts are proved. In an extended note to Continental Insurance Company v. Chicago & Northwestern Railway Company, 5 L. R. A. (N. S.) 99, a very recent Minnesota case, this question is discussed, and all the cases on the subject are collected. In this note it is said: "Even those courts that go farthest in holding that, under the circumstances above stated, the question is for the court, and not for the jury, expressly or impliedly concede that, under any of the following conditions, the question is for the jury, and not for the court: (1) When the plaintiff's prima facie case is aided by evidence, circumstantial or otherwise, pointing to negligence on the part of the defendant; (2) when the defendant's evidence does not cover every fact essential to exonerate it from the charge of negligence, e. g., when such evidence, although showing that the engine was properly equipped, does not show that it was properly operated; (3) when the evidence, even though it purports to cover the entire ground, is inclusive in character, and, even if believed, is not necessarily inconsistent with a finding that the defendant was negligent."

In this state, however, the presumption of

is uncontradicted evidence as to a certain negligence does not arise simply from the fact that the defendant's locomotive has communicated fire to the plaintiff's premises. The plaintiff must go further and show by evidence, direct or circumstantial not only that the sparks from the defendant's engine communicated the fire to his building, but that they were emitted by reason of the defendant's negligence. The basis of the ac-! tion in such cases is negligence, and the burden of establishing it is upon the plaintiff. He cannot rely upon a presumption, as in the states already referred to where that doctrine prevails, but he must introduce evidence, direct or circumstantial, from which the jury may find that the defendant company's negligence caused the fire. therefore such evidence is introduced, and the court holds it sufficient to go to the jury for the purpose of showing negligence, it is not a presumption of law that the defendant is called upon to meet, but affirmative evidence showing the defendant's negligence. This can only be met by other evidence, and, when such is introduced for the purpose,. there is a conflict of evidence, and that necessarily sends the case to the jury. Philadelphia & Reading Railroad Company v. Kerst, 2 Walk, 480, was trespass against a railroad company to recover damages for the destruc-tion of the plaintiff's house by fire which' was communicated by sparks from a loco-, motive. The testimony on the part of the plaintiff was simply that when the engine passed the house it was throwing out large. sparks and the wind was blowing towards the house. The testimony of the defendant was that the spark arrester was in proper condition and was of approved pattern. The court charged the jury that they could find for the plaintiff only in case they found that either the engine was not provided with an improved spark arrester, or that it was not in good condition, or that the train was runin such a careless and negligent manner as to cause the sparks to fly out. The court refused to direct a verdict for the defendant, and the jury found for the plaintiff. In affirming the judgment entered on the verdict, this court said (page 481 of 2 Walk.): "If in fact the engine threw out sparks or balls of fire of the great size mentioned by some of the witnesses, it was clearly evidence to justify the jury in finding the engine was carelessly and negligently operated, or that the spark arresters were defectively constructed or out of repair. The apparently irreconcilable evidence was properly submitted to the jury in a correct and clear charge." To the same effect is Van Steuben v. Central R. R. Co., 178 Pa. 367, 376, 35 Atl. 992; 994, 34 L. R. A. 577, where it is said in the opinion: "Such evidence [of the emission of coals or sparks or large size] required the submission of the case to the jury notwithstanding the testimony that the engine was provided with a sufficient spark arrester." The same principle is announced in the similar case of Hagan v. Chicago Railroad Company; 86 Mich. 615, 619, 49 N. W. 509, 510, where it is said by McGrath, J., delivering the opinion of the court: "Testimony cannot be said to be undisputed, when inconsistent with some other fact or circumstance, either established or regarding which testimony has been admitted. The court very properly declined to take the case from the jury, or to pass upon the conclusiveness of the testimony offered by the defendant." Slossen v. Railroad Company, 60 Iowa, 214, 14 N. W. 244, was an action for damages caused by the burning of the plaintiff's property by fire communicated from an engine belonging to the defendant company. In that case an instruction to the effect that if defendant had proved that the locomotive was in good condition, and this testimony is uncontradicted by any witness, the jury should find for the defendant, was held erroneous "because such testimony might be overcome by facts established on the trial, such as the repeated setting out of fires by the same locomotive on the same day, and there was testimony in this case tending to establish such fact."

The first assignment of error must be sustained.

The second point for instructions presented by the plaintiff was substantially a motion to strike out the testimony of Mrs. Fleger, elicited on cross-examinations as to the fire of May 13th, and justified the court in acting upon the question. It is not entirely clear that the answer of Mrs. Fleger was not responsive to the question of the defendant's counsel, or that the answer should be stricken out. Of course, it may be assumed that the counsel was not seeking such information. and we have no doubt that on the next trial he will not give the witness an opportunity to tell the jury of fires which happened at dates so remote from the one giving rise to this litigation.

There is no merit in the third assignment . of error.

For the reasons given, the first assignment of error is sustained, and the judgment is reversed, with a venire facias de novo.

(224 Pa. 66) LLEWELLYN V. SUNNYSIDE COAL CO. (Supreme Court of Pennsylvania. March 15, 1909.)

Equity (§ 47*)-TITLE TO LAND-REMEDY AT

LAW.

Where a grantee in a deed knows that the grantor had previously sold the land to another under articles of agreement, and that such purchaser is in possession, his remedy to determine title and right to possession is by ejectment, and not by a bill in equity.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 153; Dec. Dig. § 47.*]

Eikin and Potter, JJ., dissenting.

Appeal from Court of Common Pleas, Cambria County.

Bill by D. J. Llewellyn against the Sunnyside Coal Company. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

H. W. Storey, for appellant. F. P. Martin. Forest Rose, and Percy Alien Rose, for appellee.

BROWN, J. This controversy in a court of equity is over the title to land. The first averment of the complainant in his bill is that he is the owner of it in fee, under a deed to him from Jane C. Yeagley, dated November 12, 1907. Following this there is an admission that in June, 1905, more than two years before, Mrs. Yeagley, through her representative, accepted the offer of Daniel Cauffiel, under whom the appellee claims, to purchase the property for \$8,000, and, upon the acceptance of the offer that Cauffiel paid \$100 on account of the purchase money, for which a receipt was given to him in the following form: "Johnstown, Pa., June 18, 1905. Received from Daniel Cauffiel one hundred dollars as a payment on land and leases sold to said Danlel Cauffiel as per agreement. Jos. H. Berlin, Attorney in Fact for Mrs. J. C. Yeagley." On June 20, 1905, two days after the receipt was given, Mrs. Yeagley executed and tendered a deed to Caufflel, who refused to accept it for the reason that it did not include all he had purchased. Thereupon the agent of Mrs. Yeagley offered to return to Caufflel what had been paid on account, but the offer was refused. True, there is an averment that Cauffiel attempted to purchase the property from Mrs. Yeagley for the purpose of defrauding plaintiff, but this was immaterial upon the question before the court below as to whether or not Caufflel had purchased the property. On or about May 1, 1906, the appellee took possession of the land; the allegation being that it did so without claim of right, either in law or equity, to possession or the right of possession. It did so, however, as successor to whatever title Cauffiel might have had. This situation, as gathered from the bill itself, is that of one claiming to be the owner of land not in his possession, but in the possession of another, against whom the claimant seeks equitable relief by a mandatory injunction. As thus presented by the bill itself, equity clearly had no jurisdiction. "When the complainant himself avers that his right is denied, and when that denial is the very ground of his complaint, it would be a novelty, indeed, for a court of equity to assume jurisdiction." North Pennsylvania Coal Co. v. Snowden, 42 Pa. 488, 82 Am. Dec. **5**30.

Turning to the answer, there is a distinct averment that on or about June 16, 1905,

Cauffiel, in an honest and legitimate manner, sent his representative to J. H. Berlin, who was acting as the duly authorized attorney in fact of Jane C. Yeagley, and purchased the land in dispute; that the said J. H. Berlin, acting with authority from Jane C. Yeagley, agreed to sell the property on the terms set forth in the articles of agreement, a copy of which the appellant attached to his bill, and received \$100 on account of the purchase money. A further averment is that neither Cauffiel nor his representative committed any act with fraudulent intent to secure possession of the property, that the appellee is the successor to the right vested in Cauffiel to the property, and that in pursuance of said right it entered into possession of the premises and continues in possession of them by virtue of said right. It is too clear to require elaboration that this is a mere ejectment bill, and, as the case hinges upon a disputed legal title, that title must be first settled in an action of Duncan et al. v. Hollidaysburg, etc., Iron Works, 136 Pa. 478, 20 Atl. 647; Saunders v. Racquet Club, 170 Pa. 265, 33 Atl. 79.

When the appellant took title from Mrs. Yeagley in 1907, he knew the appellee was in possession of the land under Cauffiel, who claimed an equitable title to it under an agreement made in June, 1905, with the appellant's grantor. He therefore took title subject to any equitable estate that may have vested in Cauffiel. Riel v. Gannon, 161 Pa. 289, 29 Atl. 55; Brodhead v. Reinbold, 200 Pa. 618, 50 Atl. 229, 86 Am. St. Rep. 735.

In an action of ejectment Caufflel's equitable title may not be established. On the other hand, it may be, and, if so, what could a chancellor then say in justification of a decree now made driving the appellee from the premises and commanding it to remove the improvements which it has erected thereon? The learned court below was compelled to say: "Until the question of title is settled, this court has no jurisdiction to grant the relief for which the complainant prays in his bill."

Nothing said in Llewellyn v. Cauffiel, 215 Pa. 23, 64 Atl. 388, has any application to the fundamental question raised in this proceeding. All that was there decided was that a right of way, which the partnership of Llewellyn & Yeagley acquired from Mrs. Yeagley, one of the partners, was not being interfered with by Cauffiel. That partnership was not in existence when this bill was filed, and the right of way is not in this case. Forty-four assignments of error fail to cloud the real situation. They are all overruled, and the decree below is affirmed, at appellant's costs.

Decree affirmed.

ELKIN, J. (dissenting). For every wrong willfully committed there should be a legal remedy. The records of this and the former case show that grievous wrong has been done appellant, and although for four years he has

stood upon his legal rights, stoutly defending his title and possession on the premises or in the courts, he is now told that equity is not. his remedy; try an action at law. With this view of the case I do not agree. When this litigation started in 1905, appellant and his partner were in the undisputed ownership and possession of a coal lease with mining privileges, a tramway running over a triangular piece of land belonging to the partner, but set apart for the use of the partnership, a tipple for loading coal on the cars, a railroad siding, and were doing a legitimate and profitable business. They had been engaged in this business for about 15 years when Cauffiel, the predecessor in title of the appellee company, having acquired the right to mine coal on an adjoining property lying back of the operation conducted by appellant, undertook to force his way to the railroad siding over the intervening land in the possession of appellant for the partnership and belonging to the partner, without any lawful right to invade that property. Cauffiel began the construction of a trestle or tramway from a point on the hill where the new opening was being made and extending in the direction of the railroad siding and over the intervening land which did not belong to him. When this overhead construction was about to be erected on and over the intervening triangular piece of land without the consent of the owner or those in possession, appellant filed a bill in equity seeking to restrain the unlawful invasion. This bill was filed in the name and for the benefit of the partnership. It averred title and possession and how held: set forth the facts relied on to show the threatened invasion; stated the injuries that would result from such invasion, including interference with the use of tipple, a railroad siding, and triangular, piece of land to such an extent as to cripple and perhaps destroy the operation of the complainant's property. An answer was filed admitting the threatened invasion, but denying any intention to interfere with the tipple or railroad siding or the use of the triangular piece of land by complainant. The right to construct the tramway over the property in question was asserted under a so-called agreement to purchase the triangular piece of ground from the partner of appellant who held the legal title. This agreement in the nature of a receipt for a small amount of money on account of land and leases not described nor defined in any way, and the right to acquire title thereunder having either been voluntarily abandoned, or the purchase having been refused after tender of deed, did not at the time, nor did it at any time since, give to Caufflel or his successor in the coal business any legal right to the title or the possession of the land in question which justified the appropriation by force of a right of way upon which to construct an overhead tramroad. This so-called assertion of title under an attempted purchase never completed, and long

ago abandoned by refusal to accept a deed injunction in order that he might enjoy the merit, but up to this time sufficient to prowas in the partner and not in the partnership. In other words, the partner having the legal title could have enjoined the threatened invasion, but the partnership could not. On appeal to this court the conclusion reached by the court below was sustained, and as the matter then stood that proceeding was at an end.

It must not be overlooked, however, that, both in the court below and here, it was then pointed out that in the answer filed by Cauffiel it was averred that there was no intention to interfere with the tipple or railroad siding or the operation of the plant represented by complainant, and that because the legal title to the land in question was not in the partnership, equity would not interfere to protect against injuries not intended and parties not holding the legal title. In that case Brother MESTREZAT in writing the "The opinion, among other things, said: right of plaintiffs to an injunction does not depend on whether the defendant has title to the land, but whether the plaintiffs have title or the right to the possession of it." Llewellyn v. Cauffiel, 215 Pa. 23, 30, 64 Atl. 390. This can only mean that the decision in that case rested upon the ground not that the defendant had any title to the land or the right to construct a tramway over it, but that plaintiffs had not shown such a clear title, or right of possession as would justify a court of equity to interfere by injunction. Thus the case stood when that litigation ended. Llewellyn subsequently purchased from Mrs. Yeagley, his partner, the title to the triangular piece of ground together with all her interest in the partnership. He then had the absolute title to the land in question and succeeded in his individual right to all the property and assets of the partnership. In the meantime, Cauffiel, or the appellee company, his successor in the coal business, completed the tramway over the triangular piece of land, built a tipple, got possession of a siding, and practically drove appellant out of business. In fact they did all the things which in his answer to the former bill in equity Cauffiel averred he had no intention of doing. On the other hand, all those threatened injuries which appellant averred in the first bill filed have since resulted. Appellant having acquired the legal title to the property filed a second bill, and this is proceeding now under consideration, in which all of these things are averred, including the

when tendered, may very properly be term-use and possession of his own property. ed a fiction of this case without substantial When this case came on for hearing in the court below, appellant offered proof in suptect the wrongdoer. At the first hearing this port of every averment showing title, right of position was practically conceded by the possession, wrongful invasion, supplemented learned court below sitting as a chancellor, by a specific offer to prove that appellee had who put his conclusion upon the ground that no title to the triangular piece of land, that Cauffiel was treated as a stranger to the title, it had abandoned its claim to purchase the but held appellant could not restrain the in-title under the receipt referred to in the opinvasion because the outstanding legal title ion of this court, by refusing to pay the purchase price and accept the deed when tendered, and that subsequently he (appellant) had purchased the legal title to the triangular piece of land and all interests of his partner, and was the sole owner. These offers were refused by the learned court below on the ground that all these questions had been passed on by this court in the former case. and that the ruling in that proceeding was decisive in the one at bar. As I view the case this was clear error.

In the former case appellant was denied equitable relief on the ground that he did not show title in himself but in his partner, Mrs. Yeagley, and therefore had failed to establish that clear legal right which is the foundation of every proceeding in equity. In the present proceeding he supplied what this court said was lacking in the former one; that is, he averred and offered to prove legal title in himself and no title or right of possession in appellee. If he had done so in the first proceeding, no one would seriously question his right to an injunction, and certainly, having supplied in a proper manuer and for a legitimate purpose the missing links in his chain of title, he is now entitled to the protection he could then have demanded except for the technical reason then given but which no longer exists. Of course, he can now bring an action of ejectment to determine his title about which there is not and cannot be any substantial dispute, and when this is determined he can recover the possession of his property violently taken from him as well as damages suffered by the wrongful appropriation thereof by appellee, but to my mind this is placing the burden on the wrong shoulders by requiring a person in the ownership or possession of property for 15 years, during which time a prosperous business had been conducted, to first establish in an action at law all the incidents of title and ownership before equity will relieve against the trespasses of a wrongdoer. As against a trespasser without title, possession alone is sufficient to sustain a bill for injunction. This case is somewhat anomalous. Appellant has the title to the land in question, and did have, and still should have, the right to the use of it, together with the tramway, tipple, and railroad siding now torn up without his consent, for the purpose of operating his plant and conducting his business. The appellee by taking possession of a certain portion of the triangular piece of land, the title averment of title, and asked for a mandatory to which it never acquired, but which is in

appellant, has constructed a tramway and lor property taken, the delay may be considered made a connection between its mines and the railroad siding and for several years has conducted its operation over the property of an entire of the railroad settlement, and defendant has not been described in the railroad settlement, and defendant has not been described in the railroad settlement. ducted its operation over the property of appellant to his great injury, resulting in the partial or total destruction of his business, and, after four years of struggle to maintain his property rights, a court of equity says to him, "You must begin all over again." In other words, possession having been taken by a subterfuge, it can now be maintained by a fiction. I cannot agree that this is either right or just. It is a fundamental principle of government, a sacred right of property, guaranteed by Constitutions, protected by statutes, and declared by courts in every jurisdiction in which the spirit and purpose of the Anglo-Saxon race prevail, that every owner of the soil, no matter how humble or great, has the legal right to the use and enjoyment of his own property, and to the protection of the law in defending his possession against all the world intruding without right.

For these reasons, I would reverse the decree and remit the record for further hearing, with instructions to admit the proof offered in evidence, and, if the averments are sustained by the proofs, the relief prayed for should be granted by compelling the removal of the overhead tramway, and all other obstructions or property, wrongfully constructed by appellee, or its predecessor in title, upon the land of appellant, and would enjoin all interference with the right to use and enjoy his own property in every lawful manner.

POTTER, J., concurs in this dissent.

(224 Pa. 120)

MENGELL'S EX'RS v. MOHNSVILLE WATER CO.

(Supreme Court of Pennsylvania. March 15, 1909.)

1 EVIDENCE (§ 474*)-VALUE OF PROPERTY-COMPETENCY OF WITNESSES.

In proceedings to assess damages for injuries to a mill property, plaintif's witnesses, who were millers or manufacturers and familiar with the property in question and the market values in the vicinity, may testify as to the value.

[Ed. Note.—For other cases, see] Cent. Dig. § 2217; Dec. Dig. § 474.*]

2. EMINENT DOMAIN (§ 148*)-DAMAGES-IN-TEREST.

In condemnation proceedings, the jury may consider the lapse of time between the taking of the property and the time of trial as an element of damages or as compensation for delay in payment of the sum, and, though interest is not allowed, the court on appeal will not reverse because the trial judge may have used the word "interest" in connection with the amount of

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 397; Dec. Dig. § 148.*]

8. EMINENT DOMAIN (§ 148*)-Compensation DELAY.

Where a landowner has not caused a demy in the ascertainment and payment of damages

in fault, he is not entitled thereto.

[Ed. Note.—For other cases, see Eminent Do-main, Dec. Dig. § 148.*]

4. EMINENT DOMAIN (§ 176*)—PARTIES—PROCEEDINGS IN BEHALF OF ESTATE.

In condemnation proceedings, where the estate of testator is entitled to the amount of damages, the proceedings should be instituted in the name of the executors, and not in that of the estate.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 176.*]

Appeal from Court of Common Pleas, Berks County.

Action by the executors of the estate of Matthias Mengell against the Mohnsville Water Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Appeal from report of jury of view. At the trial the court permitted under objection and exception various witnesses for plaintiff to testify as to value.

The trial court charged, in part, as follows: "I want to say further that the jury are not to consider, as any evidence of the market value of the property, the price paid for the property in 1875 as the market value in 1902. Common experience of the world teaches us that the values of property change greatly. What a person would give for a property in 1875 may be totally different from what they would give in 1902. The point the jury is to ascertain is the difference in the market value in 1902 when the water was appropriated. That is the period, not 1875 or 1870, or to-day, but in 1902 when the property was taken, immediately before and immediately after the valuations are to be made, and the difference is the proper measure of damages in this case, with interest."

Verdict and judgment for plaintiffs for \$4,-

On a rule for a new trial Endlich, P. J., of the court below, filed the following opinion:

"This is an issue in a proceeding instituted by the defendant company to assess the damages sustained by plaintiffs by reason of the defendant's appropriation about 1902 of 'part of the water of Kleinginna creek," a tributary of Wyomissing creek; the latter furnishing the power for plaintiffs' mill, connected with which there is farming land and buildings. The issue was tried before the late President Judge Ermentrout.

'Certain reasons assigned in support of the defendant's application for a new trial based upon the alleged action of the fury and of plaintiffs' counsel in its presence during a view of the property are not pressed. Obviously these were matters which, if deemed of sufficient importance, would have been at once brought to the notice of the court as ground for the withdrawal of a

effer other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

least for such instructions by the court as might appear adequate to neutralize their possible undue effect. Upon very familiar principles the failure to take advantage of them in limine constituted a waiver of any objection based upon them. Accordingly the only reasons relied upon are those which allege error in the admission of the testimony of a number of witnesses upon the question of market values over objections made by defendant on the ground that they were not qualified for that purpose. The allegation of error in this particular is based upon what is said concerning the qualifications of witnesses as to market values in Lee v. Water Co., 176 Pa. 223, 35 Atl. 184; Lewis v. Water Co., 176 Pa. 230, 35 Atl. 186; Friday v. Railroad Co., 204 Pa. 405, 54 Atl. 339. It is not to be understood, neither is it contended, that these decisions announce any new doctrine upon the subject. On the contrary, the one last mentioned expressly proceeds upon the rules laid down in Pittsburg, etc., Ry. Co. v. Vance, 115 Pa. 325, 8 Atl. 764, and Michael v. Pipe Line Co., 159 Pa. 99, 28 Atl. 204. Hence, subject to the requirement that the qualifications of a witness to give an opinion must appear and be passed upon by the court before he is permitted to do so (Michael v. Pipe Line Co., 159 Pa. 104, 28 Atl. 2(14). the rule still obtains that, if upon his preliminary examination he is shown to have any pretensions to speak on the matter, his competency to do so rests much in the discretion of the trial judge (Oil Co. v. Gilson, 63 Pa. 146); the value and weight of the opinion expressed being, of course, a matter entirely for the jury (Pittsburg, etc., Ry. Co. v. Vance, 115 Pa. 325, 8 Atl. 764; Lewis v. Water Co., 176 Pa. 230, 35 Atl. 186). The question whether or not there was in this case such error as calls for the setting aside of this verdict in allowing the witnesses referred to to express their opinions is to be judged of in the light of these principles.

"Levi W. Mengel, now a teacher of natural history, has known mill property since his childhood, being the son of its deceased owner. At one time he operated the mill. He had attended for his father to the renting of it. He knew its condition at the time of the appropriation, and the relation of the water power as it then was to the demands made upon it. He knew that after the appropriation there was a diminution of the water power, though he could measure neither the amount of water running through the race before or after by gallons, nor the energy derived from it by horse power. He knew the general market value of properties in the neighborhood about 1902. It would seem that Lee v. Water Co., 176 Pa. 223, 35 Atl. 184, is directly in point as an authority vindicating the admission of this witness' opinion.

juror and continuance of the cause, or at | and had a mill at the time of the trial, besides being a contractor. He had known plaintiffs' mill for 40 years, and was acquainted with the general market value of real estate in the neighborhood about 1902. He knew of no sales of mill properties there about that time, neither could he give the extent of the loss to the plaintiffs' mill by defendant's appropriation in gallons, cubic feet, or horse power; but he knew that previously the water power was good. He was permitted to express his opinion as to the difference in market values upon the assumption that before the appropriation the mill had a water supply sufficient for the capacity of its equipment (with which he was familiar) and thereafter an inadequate onefacts appearing not only by his own deposition, but elsewhere in the evidence. Again the objection to this witness would seem to go to the weight of his evidence, rather than to its competency, under the decision last cited.

> "Albert Thalheimer, a manufacturer living in the city of Reading, but acquainted with plaintiffs' mill for 36 or more years down to the time of trial, and in a general way with the market value of property in the neighborhood before 1902, knew by information that the mill had, before the appropriation, a water power equal to 15 horse power, and had had occasion to inform himself by inquiry as to the value of mill properties during the past 10 years. O'Brien v. Railway Co., 194 Pa. 336, 45 Atl. 89, seems to justify the admission of this witness' opinion.

> "George G. Ruth is the only remaining witness to the reception of whose testimony the reasons assigned in support of this rule object. The objection, however, was not pressed at the argument. Whilst that circumstance might well be regarded as a waiver of the objection, an examination of his testimony leads to the conviction that he was entirely competent to give it under every rule recognized on the subject.

> "Isaac S. Spatz is not one of the witnesses alleged in the reasons filed to have been incompetent to express the opinion he was permitted to give; but he was referred to as such at the argument. He lived at Mohnton, knew plaintiffs' mill for 25 years, including 1902, and had a general knowledge of market values of property in the vicinity at that time. He did not know how much water was taken from the mill or to what in horse power its loss amounted. He did, however, know what effect it had upon the running of the mill. He hesitated about expressing an opinion as to the consequent difference in the market value of the property, but finally gave it. What is said in Railway Co. v. Vance, 115 Pa. 325, 332, 8 Atl. 764, applies to this witness exactly.

"It is perhaps true that all this evidence was lacking in certain elements of precision. "James S. Ammon was raised as a miller In part this may be regarded as attributable



to the indefinite character of the defendant's petition under which the issue was framed, and which in an important sense is to be treated as a pleading underlying the trial. Miller v. Water Co., 148 Pa. 429, 23 Atl. 1132; P. & R. R. Co. v. R. & P. R. Co., 12 Pa. Co. Ct. R. 513. That petition avers simply the appropriation of 'part of the water of' a certain stream, without designating any quantity. Necessarily the issue framed was equally indefinite, and the plaintiffs' testimony went no further than the exigencies of the issue demanded. Had the petition and issue been more precise, it may be that the competency of the witnesses offered to sustain the plaintiffs' side of it would have had to be tested by a more stringent rule in order to make their testimony responsive to the inquiry involved. It is to be observed, however, that more detailed data were furnished by the testimony adduced on behalf of the defendant, whereby the jury was enabled to judge of the accuracy of the evidence submitted on behalf of the plaintiffs and the value of the opinions of their witnesses on the effect of the appropriation upon plaintiffs' property. Nor ought it to be overlooked that the verdict, fixing the depreciation of the same in 1902 at \$3,700, is far below the estimate of plaintiffs' witnesses, averaging about \$9,000.

"Upon the whole, the reasons urged in support of this application do not appear to be sufficient to warrant the granting of it, and therefore the rule to show cause is discharged."

Argued before FELL, BROWN, MESTRE-ZAT, POTTER, and STEWART, JJ.

C. H. Ruhl and Dunn & Schæffer, for ap-John B. Stevens and Garrett B. pellant. Stevens, for appellees.

MESTREZAT, J. The first four assignments allege error in permitting certain witnesses of the plaintiffs to testify. ground of the objection is that they did not sufficiently qualify themselves to testify in the cause. In this opinion, discharging the rule for a new trial, the learned judge of the court below reviewed the testimony affecting their competency and, as he points out, they were clearly admissible under our decisions.

The fifth assignment alleges error in that part of the charge of the court in which it is said that the jury may allow interest on the damages ascertained to be due the plaintiff in 1902. If this part of the charge stood alone, or was all that the court said on the subject, the assignment would have to be sustained. It is now well settled in this jurisdiction that interest, eo nomine, cannot be allowed on damages in condemnation proceedings. It is therefore reversible error for the court to charge the jury that interest, as such, may be allowed on the damages which they find to be due the landowner. This we

should instruct the jury that in ascertaining the amount of their verdict they may consider the lapse of time between the taking of the property and the time of trial as an element of damages, as compensation for the delay in payment of the sum due the plaintiff for the injuries he has sustained. It is wholly within the province of the jury to determine whether the plaintiff is entitled to any additional sum for the delay, and, if so, what amount will compensate him for the delay. They may allow a sum not exceeding 6 per cent., but they can allow a smaller amount, just as they think the circumstances require in order to make the plaintiff whole. It is therefore purely a question for the jury to determine whether any or what sum shall be added to the amount of damages ascertained to be due as of the date of the appropriation of the plaintiff's property.

The correct rule in such cases, as stated, was recognized by the learned judge in his charge, and we have no doubt that the jury fully understood it and acted upon it in determining the amount of the damages due the plaintiffs. Both parties to the litigation agreed that the measure of damages was the difference in the market value of the property immediately before and after the appropriation by the defendant company. In the first part of his charge the learned judge said: "If, after ascertaining this [the difference in the market value of the property before and after the appropriation, in your judgment the plaintiffs will not be made whole by reason of delay or other reasons, you may, as additional damages, allow interest from the time of the appropriation to date. That is a question, however, for the jury." In the concluding part of the charge proper, the court said: "Take the property as it stood before the company appropriated the water and ascertain its fair market value. Take it as it stood after the company appropriated the water, ascertain its market value then, and the difference is the measure of damages, with interest, as I have already indicated, if you see proper to give that." It is clear therefore that the learned judge correctly charged the jury as to allowing additional damages for the delay in compensating the plaintiffs for the injuries they had sustained by the appropriation of their property. The parts of the charge quoted left no doubt in the minds of the jurors as to their duty in passing upon that question. The alleged error occurred when the court answered the defendant's point for instruction. The appropriation of the plaintiffs' property was made in 1902, but there had been evidence as to the value of the property in 1875, and the defendant by its point requested the court to instruct the jury that the price paid for property in 1875 was not evidence of the market value of the plaintiffs' property in have frequently held. The court, however, | 1902. The court affirmed the point, and in

giving his reasons therefor committed the tained. This error runs throughout the proalleged error complained of. What was said, however, was merely to impress upon the jury their duty to eliminate from their consideration the prices of property in that neighborhood in 1875. What the learned .judge said in reference to the allowance of interest was in view of the fact that, as he told the jury, the damages must be assessed as of the year 1902; and it must be considered in connection with the parts of the charge in which the court distinctly told the jury, both at the beginning and conclusion of its remarks, that they might allow interest as additional damages for the detention of the amount due the plaintiff. The language of the court in its supplemental instructions in answer to the defendant's point clearly shows, and the jury would understand, that it was solely within their discretion to allow interest as compensation for the time intervening between 1902 and the date of the trial. The remark of the court complained of was manifestly not regarded as objectionable to the defendant at the time because the court's attention was not called to it, nor subsequently on the application for a new trial, as it was not presented nor urged as a reason for a retrial of the cause. We think it did not mislead the jury or give them a rule for considering the question of interest different from the correct rule laid down in the two parts of the charge quoted above.

It may be well to suggest that in cases of this character the court should be careful in stating the rule upon this subject. As pointed out in our cases, there are many instances in which the plaintiff has caused the delay in the payment of his damages, and where therefore he is not entitled to any additional sum on the amount due him as of the date of the appropriation. In actions ex contractu the plaintiff is entitled as of right to interest on any fixed sum that may be found due him, and the jury, unless clearly and positively instructed, may infer, in actions of tort, that he is also entitled to interest on the damages awarded him. If he has not caused the delay in the ascertainment and payment of the damages, the delay is an element which should be considered by the jury in ascertaining the amount of their verdict; but where his action has unreasonably prevented a settlement for the amount due him, and the defendant company has not been at fault, he should not be compensated for his own wrong. In all such cases therefore the jury should receive explicit instructions by the court as to their duty in disposing of the question.

By inadvertence "an estate" was made the plaintiff in this case, instead of the executors of the testator, to whom the damages are payable, and with whom the petition avers the defendant made an attempt to settle for the compensation due for the damages sus-

ceedings, and manifestly escaped the attention of the court below. We correct the error here.

The assignments of error are overruled, and the judgment is affirmed.

(224 Pa. 199)

In re CASSIDY'S ESTATE.

(Supreme Court of Pennsylvania, March 22, 1909.)

Wills (§ 601*) — Construction — Devise to

WIDOW.
Testator devised all his estate absolutely to his wife and appointed her executrix, but, because of her subsequent mental condition, by a codicil he appointed another as executor and trustee to use the income of the estate for his wife and after her death dispose of it as she might by will direct. *Held*, that on the death of the wife intestate the property went to her heirs, and not to those of the husband.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 601.*]

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Michael J. Cassidy, deceased. From a decree dismissing exceptions to adjudication, Charles G. McCloskey appeals. Affirmed.

Anderson, J., in the court below, filed the following adjudication:

"The testator died March 14, 1900, leaving him surviving his widow, Margaret Cassidy, but no children, and neither father, mother, brother, or sister, and having first made and published his last will and testament, dated December 24, 1880, by which he gave, devised, and bequeathed all his estate to his wife absolutely, and appointed her executrix of his will. The wife having become temporarily, at least, insane, it was necessary for her to be removed to a hospital for patients of that character, and on the same day, being March 5, 1900, the testator, fearing, no doubt, that she was unable properly to manage his estate, or to look after her own affairs, made a codicil to his will, in which he provided as follows: 'As it is my desire that my wife, Margaret Cassidy, shall not have any unnecessary trouble with my affairs, I hereby appoint my friend, George Vaux, Junior, to be the executor of my will in lieu and stead of my said wife; and I further hereby constitute and appoint him trustee for her, and give, devise and bequeath to him the whole of my estate in trust, he to invest the same and keep it invested, and after defraying the necessary expenses of management to pay over the net income derived therefrom unto my said wife, Margaret Cassidy, for her support and maintenance, but so that no part thereof shall be subject to attachment or other legal process. And upon the decease of my said wife I direct my trustee to dispose of my said estate in such manner as she shall by

^{&#}x27; •For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

garet Cassidy, the widow, died October 3, 1907, without exercising the power of appointment, and leaving collateral kindred. At the death of the decedent, his next of kin were unknown to the executor. At the audit, claim was made on the part of certain persons that they were the next of kin, and entitled to the estate under the intestate laws, on the ground that the codicil had so changed the will as to reduce the estate, given to the wife, from an absolute one to a life estate with the superadded power of appointment; and that, in default of such appointment, the testator had died intestate. A question having arisen as to whether or not there were next of kin to the decedent, the audit was postponed for further investigation on this point. Subsequently the next of kin and heirs of the wife, Margaret Cassidy, presented a claim to the auditing judge on their behalf to the whole estate, on the ground that the codicil had not so changed the will as to deprive the wife of her absolute estate. A subsequent hearing was had, at which the testimony of Mr. Vaux, the accountant, was taken as to the facts surrounding the testator at the time of the execution of the will, and the case was ably and elaborately argued.

"In construing this will and codicil we must bear in mind that this is the will of a childless man, whose whole family consisted of his wife. The claim here is that the codicil is so repugnant to the terms of the will as to change its character. While it is true that an absolute gift can be reduced by a subsequent unequivocal direction to a lesser estate, as in Shower's Estate, 211 Pa. 297, 60 Atl. 789, and Sheetz's Appeal, 82 Pa. 213, yet we must bear in mind that this direction must be unequivocal, and, also, that the codicil cannot be construed as revoking the will, but should be read as part of it, modifying, wherever the terms of the codicil are inconsistent with the will, and reaffirming the original will except as it is so modified by the codicil. 'The fundamental distinction between the nature of a codicil and a later will should be borne in mind,' said Mr. Justice Potter, in Sigel's Estate, 213 Pa. 14, 62 Atl. 175, 1 L. R. A. (N. S.) 397, 110 Am. St. Rep. 515. 'The later will works essentially a revocation, while the codicil is a confirmation except as to the express alterations which it may contain; and therefore, while in the case of a later will a revocation may be presumed, this is not true of a It means rather an addition than a revocation.' To the same effect, see opinion of Mr. Justice Williams, in Shalters v. Ladd, 163 Pa. 509, 30 Atl. 283. That is, the two together form one instrument; the codicil being the last expression of the testator, and overriding the will where the two are antagonistic.

her last will and testament direct.' Mar-| find: First, that the testator gave his estate to his wife without any limitation as to time; secondly; he puts it in trust for her benefit, to relieve her of the management and to save her from her incapacity; thirdly, he directs all the income to be paid for her maintenance and support; fourthly, she has a power to devise, and bequeath it generally: and, lastly, the estate given to her is not only without limit as to time, but there is no limitation over on failure to make a will, want of issue, or for any other cause. The sole purpose of the testator in making his will was to provide for his wife, and he gave her the whole of the estate. does the codicil, in the mind of the auditing judge, show any change in that intent. True it is that he takes the legal estate from her, and vests it in the hands of a trustee, which is one of the elements which the Supreme Court held, in Nevins's Estate, 192 Pa. 258, 43 Atl. 996, showed the intent of that testator to reduce an absolute gift to a life estate. But in that case there were other expressions which showed clearly that the testator did intend to reduce the quantity of the estate; and here the testimony of Mr. Vaux-which to the auditing judge should only be considered so far as showing the circumstances surrounding the making of the codicil, being incompetent as to anything in reference to the contents thereof, or the declaration of the testator, or witness, as to the meaning of the language of itshows clearly why this change was made. No sensible man, whose wife had the misfortune to be even temporarily out of her mind, would rest content with a will in which the management of the property was left in her hands. Under these circumstances, the testator naturally would feel that it would be better not to leave his property under the control of the wife; so he states in the codicil, and names a trustee for her, providing some one to guard her interests in the matter—a most natural and wise provision, which, under these circumstances, would not show an intent to reduce her interest in the gift. He, however, gives her still the whole beneficial interest without any gift over, and provides the estate should go under her last will and testament. We have therefore, in reading these two papers together, an absolute gift modified by a trust for the wife's protection, with power in her of a disposal by will. Does this reduce the gift as contended from an absolute to a life estate?

"The auditing judge is of the opinion that the rule of law, as gathered from the authoritles, is to the contrary; that, where there is a devise in a will, the will is only changed so far as necessary by the codicil, and reaffirmed as to the balance. Again, that, where there is a devise or bequest indefinitely, and no gift over, the devisee or "Applying this rule to the present case, we | legatee takes an estate in fee, as in Sheetz's

Appeal, 82 Pa. 213. In Taylor's Estate, 4 Phila. 376, Thompson, P. J., says: 'By the will the bequest is absolute and unqualified, not, restricted to his life, and not limited over. The codicil gives the trustees authority to hold the principal and pay only the interest to the legatee, according to their discretion. Does this alone restrict the bequest to a life interest only? Without a limitation or some further indication of such an intention, we think it does not. In this case there is nothing to show that the testator desired to do more than to enable the trustee to prevent an unwise use of the legacy. It was given to the legatee for his sole benefit. No other beneficiary was thought of. It is not to be supposed that the testator intended to limit the bequest to unknown parties who might by law be entitled to inherit from the legatee, rather than to leave it to be disposed of as the first taker might think proper. The trustees might restrict him to the interest, but his right in the corpus of the legacy remained absolute. It is, of course, vested at his death in his ad-In McAleer's Estate, 4 Pa. ministrators.' Dist. R. 360, Penrose, J., says: 'It is a principle in the interpretation of wills, so well established that it has become text-book law, that under an absolute gift, in the first instance, to children or legatees, followed by a direction that the shares shall be held upon trusts which do not exhaust the whole interest, the legatees take their shares absolutely, subject only to the qualifying trusts. Hawkins on Wills, 267, 268; Theobald on Wills, 245. This is a corollary of the rule that a clear gift will not be cut down by subsequent words except to the extent clearly and necessarily indicated.' In addition to this there is the rule that, where there is a general gift without limitation as to life, with superadded power of appointment, this does not cut down the general gift, but is simply an expression of the testator that the devisee or legatee shall have that power which has already been given. As was said by Penrose, J., in Shallcross's Estate, 13 Phila. 374: "The distinction between a grant for life, with power of appointment by will, and a general grant, with similar power, is well settled. In the latter case the gift is construed as conferring the absolute property, and the power is regarded as nothing more than an anxious expression of the donor that the donee may have an uncontrolled power of disposing of the property.'

"In the present case the inference is so strong that the testator did not intend to limit the absolute gift in the will by the codicil that no other conclusion can be reached. The balance of this fund is therefore awarded to the administrator of the widow.

"The court dismissed exceptions to the ad-

judication."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

James C. Sellers, for appellant. Thomas Earle White, Francis Macomb Gumbes, Ernest E. Prevost, Walter Penn Shipley, and Wm. S. Windle, for appellees.

PER CURIAM. The decree is affirmed for the reasons stated in the adjudication by the learned judge of the orphans' court,

(224 Pa. 193)

DAY v. PENNSYLVANIA R. CO. et al. (Supreme Court of Pennsylvania. March 22, 1909.)

1. MECHANICS' LIENS (§ 124*) — SUBCONTRACTOR—NOTICE OF INTENT TO FILE LIEN.

Where written notice by a subcontractor to the owner of an intent to file a mechanic's lien has attached a copy of the contract between the contractor and the subcontractor under which the work was done, which does not in express terms refer to certain specifications of the con-tract, it is not insufficient, where the specifica-tions themselves were in the possession of the owner.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 124.*]

2. Mechanics' Liens (§ 124*) — Subcontractors—Notice of Intent to File Lien AMENDMENT.

Where notice given by a subcontractor of intent to file lien was insufficient for failing to refer to specifications of the contract, an amendment, after trial and verdict, bringing the specifications into the record, will cure the defect. [Ed. Note.—For other cases, see Mechanics Liens, Dec. Dig. § 124.*]

3. MECHANICS' LIENS (§ 122*) — SUBCONTRACTOR—NOTICE OF LIEN.

Where an article supplied by a subcontractor was a patented device composed of parts of iron, wood, etc., the notice need not contain an itemized statement of the different articles and materials of the device as a whole.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 168; Dec. Dig. § 122.*]

4. MECHANICS' LIENS (§ 288*) - SUBCON-

TRACTOR'S LIEN—QUESTIONS FOR JURY.
Where, on trial of the subcontractor's lien, the evidence is conflicting as to the date when the work was finished, the case is for the jury. [Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 288.*]

Appeal from Superior Court.

Action by H. L. Day against the Pennsylvania Railroad Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Morrison, J., filed the following opinion in the court below:

"This is an appeal by the Pennsylvania Railroad Company, owner, from a judgment on a sci. fa. sur mechanic's lien in favor of the appellee, a subcontractor. Seeley, Son & Co. entered into a contract with the appellant for the erection and construction of a grain elevator. The structure was to be equipped with a certain patented device known as a 'dust collector.' On February 21,

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1903, Seeley, Son & Co. entered into a written | of. Moreover, we understand it to be a concontract with the appellee for the construction and installation of the dust collector complete, for the entire sum of \$2.124. The appellee, averring that he had completed his contract in accordance with its terms and specifications referred to in the contract, furnished by George M. Moulton & Co., and that the contractors had neglected and refused to pay him for his work and materials, gave notice to the appellant, in writing, duly sworn to, and served on October 30, 1908, of his intention to file a mechanic's lien against said grain elevator, etc., to secure a balance alleged to be due appellee of \$940.79. In pursuance of said notice, the appellee filed his lien January 15, 1904. As the claim was filed, appellee claimed the additional sum of \$168, as alleged under a verbal modification of the written contract, and this sum was included in his lien. A rule was taken to strike the lien off, and, on argument and consideration, the court below made the rule absolute as to the \$168, and discharged it as to the balance. In the opinion of the court refusing to strike off the lien as filed, under the written contract, some doubt is expressed in regard to the failure of the written notice to refer to and give information as to the George M. Moulton & Co specifications referred to in said contract. The learned court, however, held the notice sufficient and refused to strike off the lien for that reason.

"While we find several reasons alleged by appellant in the statement of questions involved, assignments of error, argument, etc., for reversing the judgment, they all hinge on the question of the validity of the lien. First, as to the specifications of George M. Moulton & Co., they were in terms made a part of the contract between the appellee and Seeley, Son & Co. The recital in the contract is 'with the dust collecting system according to the specifications of George M. Moulton & Company and the following specifications.' are not fully convinced that the failure to attach to the lien the Moulton & Co. specifications and to set them out in the notice was fatal to the lien; but we need not decide that question, because the learned court below permitted the lien to be amended, and, if said specifications were a material part of the lien, the amendment brought them on the record and cured that defect. That the court had power to grant this amendment, we think, is clear under the fifty-first section of the act of June 4, 1901 (P. L. 454). That this amendment was not made until after trial and verdict, we do not consider material. It was purely technical, and upon the facts we do not think it introduces anything new into the case of which the appellant has cause to complain. It is averred, and not denied, that, during all the time the work was being done and the litigation carried on, the appellant had possession of the Moulton & Co. specifications, and the appellee did not have possesceded fact that the appellee completed the dust collector in accordance with his contract and the specifications, and therefore we cannot see how it would have benefited the defendant a particle if the Moulton specifications had been attached to the lien and referred to in the notice to the defendant of the appellee's purpose to file the lien.

"It is contended that the lien is bad because it fails to comply with paragraphs 4, 6, and 8 of section 11 of the act of June 4. 1901; but when we take into consideration the fact that the appellee agreed to construct and install a complete dust collector, which was a patent device composed of various articles of wood, iron, etc., and that the appellant was fully advised of the appellee's claim by the copy of the contract and specifications attached thereto, and reference to the Moulton specifications contained therein, we are inclined to the opinion that the paragraphs referred to were substantially complied with. We cannot agree with the contention that the appellee was bound to set out an itemized statement of the wood, iron, pipes, nails, and other materials which went into the construction of the completed dust collector.

"We are of the opinion that the notice of the intention to file a lien, dated October 26, 1903, was a substantial compliance with the act of assembly, and under the facts it gave the defendant all the notice required. Section 8, Act June 4, 1901 (P. L. 434). It is admitted that the notice served is in the following form: 'To the Pennsylvania Road: I hereby give you notice that I intend to file a mechanic's lien on the grain elevator and curtilage appurtenant thereto, situate at Germantown Junction, Philadelphia, Pa. The amount due to me is \$940.79. My claim arises out of a written contract with Messrs. Seeley, Son & Co., contractors, a copy whereof is hereto attached and made part hereof; my obligations in said contract having been fully performed by me. The said sum is made up of the contract price therein recited, to wit, \$2,124.00, together with the further sum of \$168.00, the reasonable cost of testing and altering the work done under the aforesaid contract. There has been paid to me by the contractors the sum of \$1,351.21, leaving the aforesaid sum of \$940.79 still due and payable to me. The labor and materials furnished for the said grain elevator by me were such as are necessary in the erection of the patented dust collector which formed the subject-matter of the aforesaid contract. The last work done and materials furnished in and about the erection of the said dust collector were done and furnished August 7, 1903. [Signed] H. L. Day.' This notice was duly sworn to on October 26, 1903, and served on October 30, 1903. When we remember that the appellee's contract was attached to this notice, and that it simply referred to the sion or custody of the same, or a copy there- specifications of George M. Moulton & Co.,

and that they were not made a part of the contract, and that they were at all times in the custody of appellant, we think this notice is sufficient.

"The case was tried on its merit, and the jury found on sufficient evidence all of the essential facts entitling the appellee to recover. We do not understand it to be contended that the amount of the verdict and judgment is not justly due and owing to the appellee, and it is conceded that he could not collect the same from Seeley, Son & Co.

"The most serious question raised at the trial was whether the dust collector was finished and completed prior to July 30, 1903, or was it not so completed until August 7, 1903. If it was completed at and before the former date, then the sworn statement of notice served October 30, 1903, was too late, and the lien was invalid; but if the work done up to August 7, 1903, was a necessary part of the construction of the dust collector. then the notice was in time, and the lien filed in pursuance thereof was valid. question was squarely raised by points presented by defendant's counsel, and the jury was carefully instructed as to the law, and that the lien could not be sustained, and the verdict must be for the defendant if the work done in August 'was not done in and about the erection and construction of the dust collecting system, but was done in changing or altering the work already done and put in so as to make the system operate as a completed work, then your verdict ought to be for the defendant.'

"Under the evidence this question was for the jury. Holden v. Winslow, 18 Pa. 160; Driesbach v. Keller, 2 Pa. 77. We do not consider the alleged insufficiencies of the notice and claim as presenting any substantial dif-'The object of the notice is to inform the owner of the demand and the nature thereof in order that he may require payment of the contract, or, in default thereof, withhold the amount from the contract price.' Thirsk v. Evans, 211 Pa. 239, 60 Atl. 726. All the cases agree that a substantial compliance is sufficient, and this is shown to exist wherever enough appears on the face of the statement to enable the owner to ascertain the amount of the claim, its date and the nature and amount of the labor or material out of which it arises. Este v. Penna. R. R. Co., 27 Pa. Super. Ct. 521. In American Car & Foundry Company v. Alexandria Water Co., 215 Pa. 520, 64 Atl. 683, a lien was filed by a subcontractor, and it was stricken off by the court below. In reversing the judgment and reinstating the lien, much was said by the Supreme Court that applies to the case in hand. 'But all the cases agree that a substantial compliance is sufficient, and this is shown to exist wherever enough appears on the face of the statement to point the way to successful inquiry. Adherence |

to the terms of the statute is indispensable. but the rule must not be pushed into such niceties as serve but to perplex and embarrass a remedy intended to be simple and summary, without, in fact, adding anything to the security of the parties having an interest in the building sought to be incumbered. Certainty to a common intent has theretofore always been held to suffice.' The doctrine of that case and several others, construing the act of 1901, we think upholds the lien in the present case. We are at a loss to see what additional knowledge or benefit the appellant would have derived if the court below had required a strict compliance with all of the extremely technical points raised by counsel for appellant. If the court below had adopted the counsel's views, and struck the lien off, it would, we think, have been error. It is well to note that this is a contest between the subcontractor and owner, and that no lien creditor is questioning the validity of the mechanic's lien.

"We do not find any reversible error raised by the several assignments, and they are all dismissed, and the judgment is affirmed."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

J. Quincy Hunsicker and John Hampton Barnes, for appellants. Harry E. Kohn, for appellee.

PER CURIAM. The judgment is affirmed on the opinion of the Superior Court.

(224 Pa. 190)

PILE v. PRIZER.

(Supreme Court of Pennsylvania. March 22, 1909.)

MORTGAGES (§ 228*)—PURCHASE—CONTRACT—BOND OF GUARANTY.

A purchaser of a mortgage stipulated for a personal guaranty bond of the seller of the mortgage in addition to the ordinary bond of the mortgagor. Held, that the purchaser could not demand that the guaranty bond should contain a warrant to confess judgment not provided for in the agreement.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 223.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Charles H. Pile against Elmer T. Prizer. Judgment for defendant. Plaintiff appeals. Affirmed.

Audenried, J., filed the following opinion in the court below:

"The second reason urged by the plaintiff in support of his motion for a new trial is that the verdict was rendered in favor of the defendant by direction of the trial judge. The essential facts that the plaintiff's evidence tended to establish are as follows:

"The defendant agreed to sell to plaintiff for \$15,500 two second mortgages aggregat-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing in amount \$18,000. In this action the latter asks damages from the former as compensation for an alleged breach of that contract. The mortgage debts in question were to be secured on certain pieces of ground on which the defendant and two other parties, Knox and Patterson, were engaged in erecting sundry houses. The completion of buildings was to be guaranteed to the plaintiff by the West Philadelphia Title & Trust Company, which was also to insure the title of the mortgaged land. The mortgages and bonds thereby secured were executed by a man of straw. When subsequently the financial sufficiency of this obligor was questioned by the plaintiff, it was agreed that he should receive, along with the assignment of mortgages, a bond executed by Prizer, Knox, and Patterson, conditioned for the payment of the mortgage debts. So far as it appears, it was not contemplated that there should be attached to this bond a warrant of attorney authorizing the confession of judgment upon it. At least the testimony does not indicate that such a warrant was referred to in the negotiations of the parties, and there is no evidence to show that the custom of business in Philadelphia requires that a warrant of attorney for the confession of judgment shall accompany a bond of guaranty. the time fixed for settlement in this matter. however, Henry G. Hart, acting for the plaintiff, demanded that Prizer, Knox, and Patterson should execute and deliver with their bond, a warrant for the confession of judgment upon it. To this the representative of the West Philadelphia Title & Trust Company objected, unless the bond and warrant should be left in the possession of the company for delivery to the plaintiff only in the event of a breach of the condition of the His objection was based on the ground that, under the form of a warrant prepared, a judgment might be confessed immediately, even before the mortgage debts matured, and that the completion of the contemplated improvements on the mortgaged land might be rendered impossible through the effect that the entry of a judgment for so large a sum would have upon the credit of the builders. The defendant concurred in this objection, and the settlement was postponed until the plaintiff could be consulted. When the question thus raised was laid before the plaintiff, he flatly refused to consent to the holding of the bond and warrant of Prizer, Knox, and Patterson by the trust company, and declined to take the bond and mortgages that he had agreed to buy, unless the guaranty, with the accompanying warrant of attorney, was placed in his own The defendant thereupon disposed of his second mortgage to another purchaser. Upon these facts we can say without going into a discussion as to whether the contract sued upon is tainted with usury, and without

deciding what might be the rights of the plaintiff, had the performance of the defendant's agreement been rendered impossible by the refusal of the West Philadelphia Title & Trust Company to issue its policy guaranteeing the completion of the proposed buildings, the plaintiff is not entitled to a recovery. His demand for a warrant of attorney from Prizer, Knox, and Patterson was an attempt to interject a new term into his contract with the defendant. The latter was not bound to accede to his request. The plaintiff had no right to predicate the payment of the money that he had agreed to give for the two mortgages on the condition that he should have delivered to him the warrant of attorney that he demanded, and his refusal to carry out his agreement, except on that condition, was a breach of contract on his part that left the defendant free to sell his mortgages where he pleased. Prizer was entitled to have the jury instructed to find in his favor for this reason if for no other."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

E. Spencer Miller, for appellant. Alex. Simpson and Francis Shunk Brown, for appellee.

PER CURIAM. The judgment is affirmed on Judge Audenried's opinion.

(224 Pa. 171)

WIDENER v. PHILADELPHIA RAPID TRANSIT CO.

(Supreme Court of Pennsylvania. March 22, 1909.)

CARRIERS (§ 284*)—STREET RAILWAYS—IN-JURIES TO PASSENGER.

Where a person getting on a street car is injured by a passenger standing on the platform, and the conductor has no opportunity to interfere and prevent the injury, the street railroad company is not liable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1125; Dec. Dig. § 284.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by William F. Widener against the Philadelphia Rapid Transit Company. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

Ferguson, J., filed the following opinion in the court below:

"The negligence alleged in this case was that the conductor of the car permitted the plaintiff to be wantonly assaulted by an unruly passenger, as a consequence of which injuries were received. It is clear from the evidence that a number of men who had been working at the League Island Navy Yard were lined up along the tracks waiting for the approaching car, and as the car passed them they jumped onto the platform. Ac-

car immediately in front of him, and he reached the step in safety and had one foot upon the platform and one foot on the step, when he was pushed by a man whom he called a marine, who was also standing on the step. Plaintiff had his back to this marine and says the marine pushed him against the gate, and as a consequence his knee was injured. The plaintiff saw this man push or jostle the men who preceded him, and what happened with regard to himself happened in a second or two of time. The conductor was upon the platform. The evidence of the other witnesses who boarded the car was to the effect that they, in jumping on the car, were interfered with by this marine. One of the witnesses testified to a remark made by the marine to the effect that he was trying to get off, and his actions were variously describing as pushing and shoving and interfering.

"It is undoubtedly the law that a conductor must police his car and, when he is able, prevent injury to passengers from wanton assaults of unruly passengers, and when the car stops to take on or let off passengers it is his duty to see that the passageways are clear for ingress and egress. In this case the car had not stopped, and we must presume that the marine, being on the car, was a passenger. Whatever happened took place in an exceedingly brief period of time, and in order to measure the conductor's responsibility the circumstances of the case must be considered in order to arrive at a conclusion as to what he could have done to prevent the injury to the plaintiff. With the car in motion and a passenger upon the step and a number of men in rapid succession quickly boarding the car, with jostling and pushing, assuming that it was all done by the one passenger, it is difficult to see how the conductor could have interfered in a way to protect the plaintiff from what happened, assuming he had time to do it. The natural consequences of a physical interference on his part would probably have been to throw some of the persons into the road; but from the evidence we cannot see that sufficient time elapsed after the conductor was cognizant of the conduct of this passenger, assuming him to have been unruly, to have prevented the injury to the plaintiff. The only evidence in the case which has given us any doubt at all upon the propriety of the action of the court in entering a nonsuit was that of the witness Harmon. His testimony was to the effect that the marine was pushing the intended passengers off, and the witness subsequently went back to see the plaintiff, who was 'thrown off' the car. Upon cross-examination this witness said he did not see the plaintiff fall from the car, but that he did see two men shoved off who immediately preceded him. The plaintiff's story being

cording to the plaintiff, two men boarded the that the two men who preceded him boarded the car in safety, though interfered with by the marine, and the witness Harmon testifying that he had seen two men pushed off the car before the plaintiff boarded it, might be said to be one of those inconsistencies which necessarily would take the case to the jury; but assuming it to be true that the two intended passengers who attempted to board the car before the plaintiff were shoved off as this witness testified, instead of getting on, as the plaintiff testified, it does not give us any clearer notion of the time in which the events occurred than we have from the plaintiff's own testimony. The negligence of the conductor in this case, if there was negligence, consisted in his permitting something to be done which he could have prevented; and we fail to find anything in the evidence to warrant an inference that this negligence existed. The events, as described by the plaintiff and his witnesses, were too unexpected to be guarded against by the exercise of reasonable care.

"The burden was upon the plaintiff to show by the evidence the failure on the part of the servant of the defendant to perform his duty. The evidence was sufficient to sustain a finding as to the injury received, but it was wanting in facts to sustain a finding of neglect of duty on the part of the conductor. This latter finding was essential to the plaintiff's case, and, where it could not be found because of an insufficiency in the evidence, the court had no right to permit the case to go to the jury in order to have them fill in the gaps in the evidence by mere guesswork.

"The motion is overruled."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Walter Thos. Fahy and Thomas A. Fahy, for appellant. Thomas Leaming and Owen J. Roberts, for appellee.

PER CURIAM. The judgment is affirmed on the opinion of the learned judge of the common pleas.

(224 Pa. 204)

COMMONWEALTH v. NAZARKO.

(Supreme Court of Pennsylvania. March 22, 1900.)

1. Homicide (§ 308*)-Trial-Requested In-STRUCTIONS.

A requested charge that, if the jury believed that accused did not know the consequences of his act and did not do it in pursuance of a previously formed design, he was not guilty of murder in the first degree, was properly re-fused, for, if given, as requested, it would have been misleading, because the jury might form such a belief without any evidence on which to found it, and it should have directed that the belief must be founded on the evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 647; Dec. Dig. § 308.*]

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

TION.

At common law intoxication was not a defense to murder, nor is it an absolute defense in Pennsylvania, but can only affect the degree of murder and not entirely absolve accused from responsibility.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 45, 46, 133; Dec. Dig. § 28.*]

Appeal from Court of Oyer and Terminer, Luzerne County.

Stanley Nazarko was convicted of murder in the first degree, and he appeals. Affirmed. Argued before FELL, BROWN, MESTRE-ZAT, ELKIN, and STEWART, JJ.

Martin J. Mulhall and John J. O'Donnell, for appellant. Abram Salsburg, Dist. Atty., for the Commonwealth.

ELKIN, J. An examination of this record will show that appellant had a fair trial in the court below, and that the evidence was sufficient to sustain the verdict which found him guilty of murder of the first de-The assignments of error are without merit under the facts established by proof at the trial, except, perhaps, the third assignment, which will be briefly considered. The learned trial judge was requested in a point submitted to charge the jury as follows: "If the jury believe that the defendant at the time of the killing did not know the consequences of his act, and did not uo it in pursuance of a previously formed purpose or design, then the law does not regard him guilty of murder of the first degree." As an abstract proposition, this is a correct statement of the law, but whether it is applicable in a particular case depends upon the nature of the defense set up and the testimony produced at the trial. The point as submitted requested the court to instruct the jury, if they "believe that the defendant at the time of the killing did not know the consequences of his act," he would not be regarded in law as guilty of murder of the first degree. If this instruction had been given as requested, it would have been misleading because a jury might form such a belief without any evidence on which to found it. Under such an instruction a jury might capriciously, or otherwise, without reference to the testimony, form a belief that no one who knew the consequences of his act would commit such a crime, and of course this would be error. The belief of a jury must be founded on the testimony, and the instructions of the court must likewise have reference to it. The point in question should have requested if the jury believe from the evidence that the defendant at the time of the killing by reason of intoxication, which was the only excuse attempted to be given in mitigation of his crime, did not know the consequences of his act, this would affect and another against the Philadelphia Rapid the degree of murder. The point was not so

2. HOMICIDE (§ 28*)—DEFENSES—INTOXICA- | mitted no error in declining to affirm it. The defendant submitted nine points in writing, eight of which were either affirmed without qualification, or with such modification as the facts of the case required. The only point refused was the sixth, and it is apparent that the learned trial judge did not consider this point to be based on the evidence and thought it might mislead the jury. The defendant had all the benefit of his theory of intoxication he was entitled to in the general charge to the jury and in the answer to the points submitted. At common law intoxication was not a defense to a charge of murder, nor is it an absolute defense in our state. In Pennsylvania such a defense can be made for the purpose of affecting the degree of murder, but not to entirely absolve the perpetrator of the crime from responsibility to answer in some degree for his unlawful deed.

> Assignments of error overruled, judgment affirmed, and record remitted to the court below for the purpose of execution.

> > (224 Pa. 135)

SLIGO et al. v. PHILADELPHIA RAPID TRANSIT CO.

(Supreme Court of Pennsylvania. March 16, 1909.)

1. CARRIERS (§ 303*)-CARRIAGE OF PASSEN-GERS-SETTING DOWN PASSENGERS.

Where municipal consent is obtained to lay street railway tracks upon a public road, it becomes the duty of the company to conform its line to the established grade of the highway and to adjust its operation to the conditions existing on the ground, and it is neither the right nor duty of the company to exercise any control over the highway, nor does the burden rest upon it to furnish approaches or places for passengers to alight.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1231; Dec. Dig. § 303.*]

2. Carriers (§ 303*)—Carriage of Passen-GERS-NEGLIGENCE.

Passengers on a street railway could alight on either side of the car, and in alighting step down on a level, macadam road on one side, or on a receding gutter on the other side. A pason a receding gutter on the other side. A passenger in an open summer car with a running board on each side stepped off on the gutter side, and in so doing, the step being a little high, she lost her balance and fell and was injured. The accident occurred in the twilight. The gutter was made by grading the highway under municipal regulation and was of the general character of gutters alongside country words. roads. Held, that such passenger was not entitled to recover for the injuries sustained.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1231; Dec. Dig. § 303.*]

Mestrezat, J., dissenting.

Appeal from Court of Common Pleas, Philadelphia County.

Personal injury action by George D. Sligo Transit Company. Judgment for defendant, submitted, and the learned trial judge com- and plaintiffs appeal. Affirmed.

Argued before MITCHELL, C. J., and was made by grading the roadway under FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Thos. J. Duff and H. B. Painter, for appel-Thomas Leaming and Chester N. lants. Farr, Jr., for appellee.

ELKIN, J. The learned trial judge submitted this case to the jury, which, after long deliberation, reported a disagreement, whereupon a verdict for defendant was directed and judgment entered thereon.

It is clear, as indicated by the course of the trial, that the learned court in the first instance entertained some doubt as to the liability of the defendant, but, after more mature deliberation, concluded that there could be no recovery under the facts and the rules of law applicable thereto. The accident occurred on the Old York road, upon which is laid a street railway line with the consent of the municipality. This road is of the general character of a country highway with the usual ditches, banks, crossings, drains, and cuiverts necessary or convenient to the maintenance of such a highway. At the point where Eckert avenue intersects with York road, a somewhat temporary sort of bridge made of planks had been constructed over the gutter, thus affording a passageway for vehicles and travelers using the highways. The street railway had nothing to do with the construction or maintenance of the highways or the so-called bridge in question. It happened that the avenue was wider than the bridge was long, but the public authorities were responsible for this situation, and it was not either the right or the duty of the street railway company to exercise any control over the highways, nor did the burden rest upon it to furnish a different kind of bridge, or platform or landing place at that point. When municipal consent was obtained to lay the tracks of the street railway upon the public road, it became the duty of the railway company to conform its line to the established grade of the highway and to adjust its operation to the conditions existing on the ground. This eliminates from the case all questions as to the construction of said approaches or places to alight. No such duty rested upon the appellee company at the point of accident.

As to the questions whether the car was stopped at a proper place, and whether notice should have been given the passenger before alighting, we agree that the case at bar is ruled by Mahoney v. Rapid Transit Company, 214 Pa. 180, 63 Atl. 429. The cases are almost parallel in their facts, and to distinguish them in principle would require a refinement too technical to have any force in the practical application of the law. The injured passenger was riding in an open summer car with a running board on either side. On one side of the track was a broad, smooth, level, macadam surface, and on the other side there was a little depression in the nature of a municipal regulation from the traveled part of the highway to the outer side of the same and was of the general character of ditches or gutters alongside of country roads. Passengers on the street railway could alight on either side of the car and in alighting could step down on the level macadam road on one side or on the receding gutter side on the other. In the present case the complaining passenger stepped off on the gutter side, and in so doing, the step being a little high, she lost her balance and fell, thus receiving the injuries for which damages are sought to be recovered in this action. The accident occurred on a May evening, in the twilight. The weight of evidence shows that it occurred from 7 to 7:15 o'clock in the evening, al though the injured lady said it was later. The car had not yet been lighted, and one of the witnesses testified it was light enough to read a newspaper. Under these circumstances, we think this case is squarely ruled by the Mahoney Case above cited.

Judgment affirmed.

MESTREZAT, J. (dissenting). I cannot agree with the disposition made of this case by the majority of the court, and, as it affects every individual in the state who has occasion to use a street railway, I will submit the reasons for my conclusion. The case is disposed of by an opinion which cites a single authority to sustain its conclusion, but which in my judgment, as I shall hereafter point out, is not an authority for the principle which controls the case at bar. I believe the rule announced by the majority is so much at variance with the well-settled doctrine on the subject that it will invite legislation which, in seeking to correct the effects of the decision, may impose too great responsibility upon street railway companies.

The material facts of the case which were sufficient to send it to a jury are not in dispute, or, if in dispute, were sufficiently supported by evidence to require the case to be submitted to the jury. The female plaintiff was a passenger on one of defendant's cars going north on the east side of Old York road. and desired to alight at Eckert avenue. She signaled the conductor, who stopped the car just short of the usual place of stopping at Eckert avenue. The plaintiff, sitting in the third seat from the rear of the car, arose after it had stopped and proceeded to alight by way of the running board at the east side of the car. This was the proper and safe side for passengers to leave the car. She passed the conductor, and as she was stepping from the car fell into a ditch and was injured. The accident occurred between 7:30 and 8 o'clock on May 8, 1905. It was dark, or dusk. She thought she was alighting at the usual place, and testified that before making the step from the car she looked to the ground, and "they all looked the same, the ground roadside ditch used for drainage purposes. It looked the same"; that "I supposed I was stepping on the ground, and I went in the ditch, which was beyond these boards at the south side of Eckert avenue." At the northeast corner of the intersection of Eckert avenue with York road, there is a grocery store, in front of which the ditch on the east side of Old York road is covered, making an entirely safe place for passengers to enter and alight from cars going north on the trolley line and is used for that purpose. The ditch immediately south of this covering is also covered with planks for a short distance. The car stopped south of these planks for the plaintiff to leave it, and she stepped into the unprotected ditch. She stepped a distance of three feet, instead of one foot, which was the distance to the ground. The conductor testified that he knew the condition of the place at which the plaintiff alighted, and that he did not warn her of the danger because "I had spoken to so many people before that and they would turn round and give me the laugh and go on."

The plaintiff, as she testified, did not know of the ditch where the accident occurred. The conductor should have stopped the car in front of the store, which was the usual and safe place for passengers to alight. The place at which she did alight was dangerous, and so known to the conductor, and hence to the defendant company. The majority opinion holds that the public authorities were responsible for the condition of the street at the place the passenger was directed to alight, that no duty rested upon the company to put the place in proper and safe condition, and that whether the car was stopped at a proper place, or whether notice should have been given to the passenger before alighting, is determined adversely to the plaintiff by Mahoney v. Rapid Transit Company, 214 Pa. 180, 63 Atl. 429. These are the reasons assigned by this court for sustaining the action of the trial court in directing a verdict for the defendant company.

It is uniformly held that a street railway company is a common carrier, and that its duties and responsibilities and the degree of care required of it in the carriage of passengers are substantially the same as those of a railroad company. We have time and again held that it is the duty of a carrier of passengers not only to transport the passenger to his destination in safety, but to furnish a safe place for him to alight. In the case of a person alighting from a street car, it is said the relation of carrier and passenger does not cease until he gets a footing upon the street which he can maintain. Nellis on Street Surface Railroads, 449. But the better and more generally accepted doctrine is that the relation continues until the passenger has reasonable opportunity to leave the car and roadway of the company after the car reaches its stopping place. Melton v. Birmingham Ry., Light & Power Co., 153 Ala. 95, 45 South. 151, 16 L. R. A. (N. S.) 467.

be held to as strict accountability in furnishing a place for a passenger to alight as a railroad company. The former must discharge its passengers in the public highway and at places over which it does not have exclusive control, and hence its liability is different from that of a railroad company, which has the exclusive control over its stational facilities. It is well settled, however, that a street railway company must exercise care in the selection of the place at which it discharges passengers. This is the doctrine of all the authorities. 1 Fetter on Carriers of Passengers, \$ 64; Middlesex R. R. Co. v. Wakefield, 103 Mass. 261; Creamer v. Railway Co., 156 Mass. 320, 31 N. E. 391, 16 L. R. A. 490, 32 Am. St. Rep. 456; Mobile Light & R. Co. v. Walsh, 146 Ala. 290, 40 South, 559; Foley v. Brunswick Traction Co., 66 N. J. Law, 637, 50 Atl. 340; Flack v. Nassau Electric R. R. Co., 41 App. Div. 399, 58 N. Y. Supp. 839; Henry v. Grant Street Electric Ry. Co., 24 Wash. 246, 64 Pac. 137; Sweet v. Louisville Ry. Co., 113 Ky. 15, 67 S. W. 4, 23 Ky. Law Rep. 2279. In Mobile Light & R. Co. v. Walsh, 146 Ala. 290, 40 South. 559, the passenger signaled the conductor to stop the car, but it was run beyond the crossing, to a place where there was a depression in the street. The passenger in alighting from the car stepped into the depression and injured herself. The court held the case was for the jury. In Bass v. Concord Street Ry. Co., 70 N. H. 170, 46 Atl. 1056, the passenger requested the conductor to stop, which he did, but it was at a place a few feet beyond the usual stopping place. In leaving the car the passenger stepped into a depression in the highway and was injured. The court held there was sufficient evidence of the company's negligence to go to the jury. In Topp v. United Rys. & Electric Co., 99 Md. 680, 59 Atl. 52, the car was run beyond the point where the passenger signified his desire to alight. In an action by the passenger for injuries received while alighting, it was held that by stopping at the place there was an implied invitation to the passenger to alight, as well as an implied representation that it was a proper place for that purpose, imposing upon the street railway company the duty of exercising the utmost degree of care in selecting a safe place. In our own case of Jagger v. People's Street Ry. Co., 180 Pa. 436, 438, 36 Atl. 867, 868, 38 L. R. A. 786, following Crissey v. Hestonville, Mantua & Fairmount Pass. Ry. Co., 75 Pa. 83, it was said by this court: "It is the duty of a street railway company to stop its cars at suitable places for passengers to leave them, and remain stationary long enough to enable them to do so safely." The same rule applies in the case of an interurban railway company. Indiana Union Traction Co. v. Jacobs, 167 Ind. 85, 78 N. E. 325; Joslyn v. Street Ry. Co., 184 Mass. 65, 67 N. E. 866; Tilden v. Rhode Island Co., 27 Of course, a street railway company cannot R. L. 482, 63 Atl. 675; McGovern v. Interurban Ry. Co., 136 Iowa, 13, 111 N. W. 412, 13 the precise moment of leaving the car."
L. R. A. (N. S.) 476.

It is therefore manifest that the rule announced in the majority opinion is in conflict with the well-settled doctrine throughout the country. It is not a question of who constructed the bridge or platform over the ditch at the place the plaintiff alighted, as contended by the majority, but whether the defendant company stopped its car at a suitable place for the plaintiff to alight. The fact that the municipal authorities had permitted the place of the accident to become unsafe for passengers to alight from the defendant's cars will not excuse the company for stopping its car at that point, known by its conductor to be dangerous, for the purpose of discharging passengers from its cars. Leveret v. Shreveport Belt Ry. Co., 110 La. 399, 34 South. 579; Stewart v. St. Paul City Ry. Co., 78 Minn. 85, 80 N. W. 854. The doctrine announced by the majority of the court as applicable to the admitted facts of this case is a violation of the settled rule of law in every jurisdiction and is supported by no authority, English or American, so far as I know. It is in conflict with the universal doctrine that imposes upon a carrier the highest degree of care in the protection of its passengers until they are discharged from the car at a proper and suitable place. It permits the carrier company to discharge with impunity its passengers at any hour of the night at the most dangerous place. It sustains a conductor of a street railway company, as in this case, who, by stopping his car, impliedly invites a passenger to alight at a place unknown to the passenger but known to the conductor, to be dangerous. Such a doctrine, I submit, is not supported by reason or by any precedent in either the common or civil law.

The majority opinion cites the Mahoney Case to sustain it on "the questions whether the car was stopped at a proper place, or whether notice should have been given to the passenger before alighting." This, I think, is a misapprehension of the decision. That case, like the present, was trespass for injuries sustained by stepping into a ditch when alighting on the right-hand side of a street car operated on Old York road. As here, it was contended that the right-hand side was the "unsafe side" on which to alight. but this court said: "Under ordinary circumstances it is obviously the safe and prudent thing for a passenger to leave the car upon the right-hand side." Again, recognizing what the plaintiffs allege here was the duty of the conductor under the circumstances when he saw Mrs. Sligo about to step from the car, the opinion in the Mahoney Case says (page 184 of 214 Pa., page 430 of 63 Atl.): "If there was any duty upon the defendant company under the circumstances.

the precise moment of leaving the car." This is the opinion of the court as to the duty of a conductor under circumstances such as existed in the present case, the failure in the performance of which would be clear negligence.

The learned trial judge submitted the case at bar to the jury in a charge, a part of which was too favorable to the defendant, but another part of which is clearly within well-established doctrine. Among other things, he said: "Having stopped the car at the place it did stop, you may consider whether or not the employé of the company was negligent, if the car was in a position where a passenger, in stepping off, might step into the ditch and be injured, if the conductor did not warn the passenger against the possible danger. When the car stops any place, there is a tacit invitation to alight. The company does not insure the passenger against a possible accident in getting off a car, but, where a car is on the edge of a ditch, I will leave it to you to say if it was not negligence for the conductor to permit the passenger to step off the car at a point opposite a ditch without a warning against a possible danger." This question properly arose under the evidence submitted, and the jury should have been required to answer it. The law as there stated is correct and was applicable to the facts disclosed by the evidence in the case. The subsequent action of the trial judge, when the jury failed to agree, in directing a verdict for the defendant, was clearly reversible error.

I would reverse the judgment and direct the case to be retried.

(224 Pa. 207)

OSBORNE v. SUNDHEIM et al.

(Supreme Court of Pennsylvania. March 22 1909.)

TORTS (§ 10°)—INTERFERENCE WITH EMPLOY-MENT—CAUSE OF ACTION.

MENT—CAUSE OF ACTION.

Plaintiff had his face slightly scratched by a collision of a street car on which he was a passenger, and at the instance of an acquaintance instructed an attorney to sue the company. Physicians employed by the attorney and by the railroad company reported that there was no evidence of injury. Plaintiff, fearing he would lose his position in a department store because of having brought the action, abandoned it. Thereafter he was dismissed on information given as to the extent of his injuries. He subsequently sued the attorney and the acquaintance who introduced him to the attorney for damages caused by loss of employment. Held, that he had no cause of action.

[Ed. Note.—For other cases, see Torts, Dec. Dig. § 10.*]

Appeal from Court of Common Pleas, Philadelphia County.

Atl.): "If there was any duty upon the defendant company under the circumstances, it would have been that of giving warning at ants, and plaintiff appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Argued before MITCHELL, C. J., and thereafter certified to the common pleas, con-FELL, BROWN, MESTREZAT, POTTER, testants being Seldon G. Brady and others, ELKIN, and STEWART, JJ.

John H. Fow, for appellant. W. Horace Hepburn, for appellees.

PER CURIAM. The plaintiff was a passenger in a car of the Philadelphia Rapid Transit Company that collided with another car, and his face was slightly scratched by a piece of broken glass. He lost no time and incurred no expense because of the injury. At the instance of an acquaintance he went to the office of two attorneys, and instructed them to bring an action against the company. He was examined by a physician employed by the attorneys, who reported to them and to him that there was no evidence of injury. He was subsequently examined by a physician employed by the transit company at the office of the physician who had first examined him. After the second examination, the plaintiff, fearing that he would lose his posltion in a department store in which he was employed because of having brought the action. directed his attorneys to abandon it, and they did so. The head of the department in which he was employed discharged him because of information received when the officers of the traction company were making an investigation as to the extent of his injury. This action is against the attorneys and the acquaintance who introduced the plaintiff to them to recover damages caused by the loss of employment.

This was the whole case presented by the plaintiff, and all that reed be said of it is that there was an entire failure to establish a cause of action, and that a verdict for the defendants was properly directed.

The judgment is affirmed.

(224 Pa. 116)

BRINK v. BRADY et al.

(Supreme Court of Pennsylvania. March 15, 1909.)

1. WILLS (§ 324*)—CONTEST—QUESTIONS FOR JURY.

On an issue of devisavit vel non, the sufficiency of the evidence is always for the court, and it is error to submit the question to the jury if the evidence be insufficient.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 769; Dec. Dig. § 324.*]

2 Wills (§ 166*)—Contest—Sufficiency of EVIDENCE.

Evidence examined, and held insufficient to sustain a finding that the execution of a will was procured by trick, duress, or fraud practiced upon testator.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 166.*]

Appeal from Court of Common Pleas, Lackawanna County.

Application by Jennie E. Brink for the probate of a will. The proceedings were certi-

and from the judgment Brink appeals. Re-

Argued before FELL, BROWN, POTTER, ELKIN, and STEWART, JJ.

I. H. Burns, R. H. Holgate, and William H. Roe, for appellant. John P. Kelly, E. W. Thayer, Joseph O'Brien, and William J. Fitzgerald, for appellees.

ELKIN, J. This is a contest between the beneficiary named in the will of testator and other relatives, who think they should have been the objects of his bounty. The will was prepared at the request of the testator by a competent scrivener, and was executed in due form in the presence of two subscribing witnesses. When it was produced for probate, a caveat was filed by two nephews not named in the will, protesting against its being probated by the register of wills. The execution of the will was duly proven, and no question was raised as to the signature of the testator; the issue being as to this testamentary capacity, undue influence and fraud, artifice or deceit in connection with the making of the instrument. The testimony offered was not sufficient to sustain theallegation of testamentary incapacity, but certain disputable questions arose which it was deemed proper to have determined by the orphans' court, and the proceedings were certified accordingly. After a prolonged hearing in that court, and before a final disposition of the case, demand was made by an heir at law of the decedent for an issue to be certified to the court of common pleas in order to have certain questions of fact determined by a jury. The issue certified contained two questions: (a) Whether the execution of the alleged will was procured by trick, deception, imposition, duress, or fraud practiced on the decedent; and (b) whether the execution of the alleged will was procured by the exercise of undue influence over the decedent. As the case then stood, the execution of the will had been duly proven, the testamentary capacity of the testator established, and only the questions of undue influence and of trick, artifice, duress, and fraud remained to be determined by the jury. At the trial the learned court below very properly held that the evidence was not sufficient to sustain the allegation of undue influence, and a verdict was so directed. This eliminates everything from the case except the first question in the issue certified, and it must now be determined whether the evidence produced at the trial is sufficient to sustain the verdict returned by the jury.

The affirmative of the issue was on the proponent of the will. She met the burden by producing, as witnesses, the counsel who prepared the will at the request of the tesfied to the orphans' court, and an issue was tator, and who retained it in his custody

after its execution; by three other persons who identified the signatures of the subscribing witnesses; by three persons who identified the signature of the testator; by one person, not a witness to the will, but who was present in the room when it was executed and saw the testator sign his name and the two subscribing witnesses attest the same. The will in the handwriting of the scrivener who wrote it, and signed by the testator who made it in the presence of witnesses who attested it, was then offered in evidence. This made out a strong prima facie case in favor of the plaintiff, and placed upon the defendants the burden of establishing by sufficient testimeny that the execution of the will was procured by trick, deception, artifice, imposition, duress, or fraud practiced on the decedent. We have examined with care the testimony covering more than 500 pages of record, without finding a witness who testified to a single fact directly bearing upon the allegation. No one denies that the scrivener wrote the will as he testified, and it is conceded to be in his handwriting. No one says that the two subscribing witnesses did not attest the execution of the will, or that the witness Lisk was not present and saw the testator and the subscribing witnesses sign their names. No one denies that after the execution of the will, it was left with the counsel, who wrote it for safe-keeping, and that it was produced by him for probate after the death of the testator. All of these facts were affirmatively established, and the will itself is the absolute confirmation of them. The testimony of the cloud of witnesses spoken of at the argument does not directly controvert a single fact established by the positive evidence produced by the plaintiff, nor is it sufficient to sustain an inference that the will was not executed in the manner proven. Much of this testimony relates to the question of undue influence, but this is no longer in the case. A large portion of it goes to the improbability of the testator being in the office of the scrivener the day he prepared the will. All of this evidence is negative in character, and in no instance does it approach the standard of clear, precise, indubitable proof required to overcome written instruments. By this testimony it was attempted to be shown that because the testator, several weeks before he went to the office of the scrivener to have his will prepared, had been quite ill, and that this illness had continued for an indefinite period, no witness undertaking to fix the exact date when the testator was able to leave his room, or when he did so, he could not possibly have been in Scranton, a short distance away, on the day the will was prepared. No witness testified to a single fact that made it impossible for the testator to be in the office of the scrivener on the day the will was written. It was an attempt to tiff appeals. Affirmed.

overcome facts established by witnesses who saw and heard with their own eyes and ears, by testimony coming from interested sources, the force and effect of which was that it could not be so, because the testator had been confined to his room some weeks prior to that date, and had not sufficiently recovered to go up to Scranton that day. Not one of these witnesses saw him in his room any considerable part of that day, and most of them no part of it, and they did not attempt to account for his whereabouts. On the other hand, a witness, called by plaintiff, and not connected with the estate, positively testified that he saw testator in the office of the scrivener on the day mentioned, and talked with him on the streets. There is no case in the books in which an instrument in writing, solemnly executed with all the formalities of law, has been set aside upon such flimsy, unsatisfactory, and negative testimony. Clearly the evidence was insufficient to sustain the allegation, and it was the duty of the court to so have instructed the jury. In cases of this character the sufficiency of the evidence is always for the court, and it is error to submit the question to the jury if the evidence be insufficient. Sartwell v. Wilcox, 20 Pa. 117; Lower v. Clement, 25 Pa. 63; Silveus v. Porter, 74 Pa. 448; Cauffman v. Long. 82 Pa. 72. To permit the judgment to stand under the facts of this case would be to substitute the guess of a jury for the solemn act of a testator having testamentary capacity, and without any undue influence having been exercised over him.

Judgment reversed, and issue set aside in order that the will may be admitted to probate.

(224 Pa. 178)

STANDARD LEATHER CO. v. INSURANCE CO. OF NORTH AMERICA et al.

(Supreme Court of Pennsylvania. March 22, 1909.)

INSUBANCE (§ 229*)—CANCELLATION OF POLICY—NOTICE TO AGENT.

The agent of insured had full power to

place a large line of insurance in various companies, with power to cancel the policies and replace them without special authority, and cor-rect the expiration book every six months. *Held*, that he was the proper person on whom the insurance company might serve notice of cancellation of policies procured for his principal.

[Ed. Note.—For other cases, see Cent. Dig. § 503; Dec. Dig. § 229.*] see Insurance,

Appeal from Court of Common Pleas, Allegheny County.

Actions by the Standard Leather Company against the Insurance Company of North America, the Hartford Fire Insurance Company, and the Spring Garden Insurance Company. Judgments for defendants, and plain-

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in the court below.

"This case, with about 16 others, in which the same company is plaintiff against a number of other insurance companies, was tried by the court without a jury; a jury trial having been dispensed with by writing filed. The cases were not all tried together, and the present case, with two others was taken up for trial before a jury and afterwards submitted to the court upon testimony already taken and other testimony to be taken. We find the facts of the case to be as fol-. lows:

"Findings of Facts.

"(1) The Standard Leather Company is a corporation under the laws of this commonwealth, and in and before May 1904, was the owner of a factory at Cheswick, Pa., as well as a factory in Allegheny, Pa. The factory at Cheswick was for the making of patent leather and other leather products, and the plant there constituted a more or less hazardous insurance risk.

"(2) On May 28, 1904, an arrangement was entered into between the plaintiff company and the Negley & Clark Company, a firm of insurance brokers, in the city of Pittsburg, which on May 31, 1904, was confirmed by a letter written by Negley & Clark Company to the plaintiff company, proposing an employment as brokers to procure insurance for the plant, which proposal was accepted verbally by the company.

"(3) The substance of this letter, so far as it concerns the Cheswick plant, is that the Negley & Clark Company have examined the policies already in force on that plant, and find the line of insurance to be in exceedingly poor condition amounting to only about \$33,-000, of which only \$10,000 was good, and they agreed to place \$75,000 on the plant in good companies, and at the end of the letter they say that they will have a special expiration book made for the plant, and agreed that, if they will send it every six months to their office, they will check it over, verifying it with their records; the whole letter being made part thereof.

"(4) The Negley & Clark Company thereupon proceeded to endeavor to place the insurance desired by the plaintiff. For the purpose of doing so, they sent an agent or agents to a large number of insurance offices in the city of Pittsburg, among others to the office of the agent representing the company defendant in this case, and procured, to be signed by it and numerous other companies. a writing commonly called an insurance binder; the form of instrument being as follows: 'Pittsburg, Pa., June 9, 1904. Fire Insurance is hereby made binding for Standard Leather Company on general form, situate Cheswick, Forms to be furnished by Negley & Clark Company. Policies to issue. The in-

The following is the opinion of Shafer, J., | cease (without further hotice) upon issue and delivery of policies at the office of the Negley & Clark Company, or the said insurance may be canceled, at any time during the life of this binding agreement, as provided for in the printed conditions of the form of policy in use by companies hereto. Rate, two per cent. Time, one year from June 10, 1904.' This was signed by J. W. Kennedy, agent of the insurance company, in the amount of \$2, 000, and delivered to Negley & Clark Company.

"(5) On the same day the agent drew up a policy in accordance with the binder, but did not deliver it.

"(6) On June 13, 1904, the company ordered a cancellation, and on June 16, 1904, Kennedy, the agent who signed the binder, sent to Negley & Clark Company a notice of cancellation, which notice was received by Negley & Clark Company without objection, and the binder was marked 'O. C.,' meaning order canceled.

"(7) Neither in this case, nor any of the other cases tried with it, did Negley & Clark Company inform the plaintiff that they had obtained the binder, or that it had been canceled, until after the loss claimed for. large number of other companies which had signed similar binders, or delivered policies to Negley & Clark Company, gave notice of cancellation about the same time to Negley & Clark Company, who, without notifying the principal, proceeded to attempt to procure other insurance, and did procure some other insurance thereafter, not to take the place of any particular policy which was canceled, but in general endeavor to fill up the line of insurance they were attempting to procure.

"(8) The form of policy of insurance referred to in the binder is that commonly called standard form of fire insurance policy of New York or Pennsylvania. The portion of that policy which relates to cancellation is as follows: 'This policy shall be canceled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation,' with a provision as to the disposition of the premium, in case the premium has been actually paid.

"(9) On the night of July 12, 1904, the Cheswick plant of the plaintiff company was destroyed by fire, causing a loss of over \$93,-000.

"(10) Within a day or two after the fire the plaintiff company communicated with Negley & Clark Company, and were informed by them that they had in force about \$39.-000 of insurance, and telling them at the same time that they had had a much larger amount, but that it had been reduced by cancellation, and that a large number of companies had anceled their risks before the

"(11) No objection was made by the plainsurance on this binder shall become void and | tiff company to Negley & Clark Company as to their having received notices of cancella-| and all the other cases tried with it, contion or permitting the cancellation to be made, and the company proceeded to make proofs of loss upon the policies then in possession of Negley & Clark Company, and adjusted the loss upon those policies with the companies, and received payment thereof.

"(12) About a week after the fire, while the adjustment of the loss was proceeding, Negley & Clark Company showed to the president of the plaintiff company the binders in question in this and in the other cases, and pointed out to him which of the policies were canceled and which were not. Some time in the latter part of July thereafter, the plaintiff called on Negley & Clark to furnish them the names of the companies whose policies or binders were claimed to be canceled, and Negley & Clark at first declined to give the information, but afterwards upon formal demand made they did so, and the binders and information as to the numbers and amounts. of the policies, which were claimed to be canceled, were furnished to the plaintiff. The date when the information in question was furnished to the plaintiff by Negley & Clark Company, after a demand by their counsel, does not definitely appear but appears to have been about the first week of August, 1904.

"(13) No notice of the fire was given to the defendant company until proofs of loss were delivered to it August 12, 1904, and no notice was then given, except the proof of loss itself. A form of policy referred to provides that, 'if fire occur, the insured shall give immediate notice of any loss thereby in writing to this company'; and further provides that 'no suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements.' It was admitted that neither in this case nor any other case tried with it was any premium paid.

"(14) On August 12th proofs of loss were furnished to the company, which were returned with the statement in some form or other that the company was not on the list.

"(15) It was admitted on the trial that the amount of loss and the amount of the total insurance was such that, if the defendants are liable, they are liable for the whole amount of the plaintiff's claim, being \$2,000, with interest from October 16, 1904.

"Conclusions of Law.

"(1) The proof by the plaintiff of the execution of the binder by defendants' agent makes a prima facie case for the plaintiff. The defense is, first, that the insurance was canceled; and, second, that, if it was not, the defendants are relieved from liability by the failure of plaintiff to give notice of the fire according to the terms of the policy.

sists of a written or verbal five days' notice under the terms of the policy referred to in the binder, or of the policies themselves, where policies were delivered, and the validity of this cancellation is not in question except in one particular; that is, whether, under all the circumstances of the case, the notice of cancellation to Negley & Clark Company was sufficient. This depends upon the nature of the agency of Negley & Clark Company for the plaintiff.

"(3) It is stated by counsel that, so far as they can find, no case has been decided in this commonwealth, involving the question of the sufficiency of notice of cancellation of a binder or a policy to the agent who procured it, but a number of cases have been cited from other jurisdictions. In some of these cases a notice given to a broker to procure insurance was held insufficient and in others it was held to be good, according to the nature of the broker's employment. There would seem to be no doubt that a broker who was employed to procure a particular policy or policies of insurance would not be a proper person upon whom to serve a notice of cancellation, for the reason that his agency ended with the procurement of a particular policy, and in that case it would seem to make no difference whether he had delivered the policy to the principal, or informed him of his having procured it or not. On the other hand, it was held in some of the cases cited by counsel that a notice of cancellation might properly be given to one who was a general agent to procure insurance for his principal with a general authority to procure insurance up to a certain amount, and entire discretion as to the company's rates of premiums and amounts of policies. Hermann v. Niagara Fire Ins. Co., 100 N. Y. 411, 3 N. E. 341, 53 Am. Rep. 197: Stone v. Franklin Fire Insurance Company, 105 N. Y. 543, 12 N. E. 45. We are of the opinion that the rule indicated in these cases is the correct one.

"(4) It becomes necessary, therefore, to determine what was the nature of the employment of Negley & Clark by the plaintiff company, which is to be gathered from the letter of May 31st, in which Negley & Clark Company undertake to put in writing the agreements and proposals which had been made shortly before between the parties, and which was afterwards accepted by the plaintiff, and this interpreted by the conduct of the parties thereafter. The letter in question states that they have examined the insurance which the plaintiff then has, and find it in very poor condition, and they agree to place \$75,000 on it in good companies at a lower rate and to have a special expiration book made for the plaintiff company, to go over it every six months for the plaintiff, and check it over, verifying it with "(2) The cancellation relied on in this case, | their own records. It is very evident that

this was intended to authorize the agents to cancel such of the existing policies as they thought were not good, and to get other policies which they should deem better, in such companies as they pleased, for such amounts as they pleased, and for such premiums as they could, and that the employment was expected to continue indefinitely is shown by the agreement to check up the expiration book furnished the company with the records kept by the agents every six months thereafter. It is also evidently intended to authorize the agents to procure policies from time to time to take the place of any that should be canceled, at least, until the whole \$75,000 of insurance was procured, and there can be no doubt that, if in the course of this employment the agents procured insurance which they should discover to be undesirable, they would have power to cancel the risk without special authority from their employers. We are of the opinion that under these circumstances Negley & Clark Company were agents of the plaintiff, to whom notice of cancellation of policies of insurance procured by them might properly be given, so long at least, as the matter was in fieri, and they were engaged in the endeavor to procure the amount of insurance agreed upon, and had not communicated to their principal what insurance they had, nor delivered policies or binders to it. If this is not the rule under such circumstances, great inconvenience would result both to the agent and the principal. The principal would receive notice of cancellation of insurance of which he never heard, and would be required to communicate the same to his agent, in order that the gap left in his line of insurance might be filled, and this might result in a loss of the benefit of the five days' clause, or at least a part of it, without any corresponding benefit whatever.

"We are of opinion, therefore, that the contract of insurance sued upon in this case was duly canceled before the loss occurred, and therefore direct that judgment be entered for the defendant."

In another of the opinions filed Shafer, J., held that the rule announced above applied even where Negley & Clark Company represented the insurance company, as well as the insured.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN and STEWART, JJ.

J. S. Ferguson, for appellant. W. K. Jennings and D. C. Jennings, for appellee Insurance Co. of North America. Brown & Stewart, for appellee Spring Garden Ins. Co. of Philadelphia.

PER CURIAM. The judgments in these cases are affirmed on the opinion of Judge Shafer.

(224 Pa. 103) COMMONWEALTH v. CALDWELL et al. (No. 1.)

(Supreme Court of Pennsylvania. March 15, 1909.)

1. Depositaries (§ 7*)—Deposits of Public Moneys-Bonds.

Under Act June 15, 1897 (P. L. 157), and Act Feb. 17, 1906 (P. L. 45), the bonds taken by the State Treasurer from state depositaries are not effective until they are approved by the board of revenue commissioners and the banking commissioner, and the treasurer cannot accept a bond without the approval of the board, and the board cannot surrender a bond without the approval of the treasurer.

[Ed. Note.—For other cases, see Depositaries, Dec. Dig. § 7.*]

2. DEPOSITABLES (§ 7°)—DEPOSITS OF PUBLIC MONEY—LIABILITIES ON BONDS.

A surety on a bond given under Act June 15, 1897 (P. L. 157), to secure deposits made by the State Treasurer, is not discharged thereon by a resolution of the board of revenue commis-sioners and banking commissioner, authorizing such surrender and the acceptance of other bonds without the approval of the State Treasurer.

[Ed. Note.—For other cases, see Depositaries, Dec. Dig. § 7.*]

3. Depositables (§ 7*)—Deposit of Public MONEYS-LIABILITY ON BONDS.

Bonds given by state depositaries to secure the state funds are continuing obligations to protect the state against loss, so long as moneys are deposited in institutions giving the bonds.

[Ed. Note.—For other cases, see Depositaries, Dec. Dig. § 7.*]

Appeal from Court of Common Pleas, Allegheny County

Action by the Commonwealth against John Caldwell, Jr., and others. From an order discharging rule to open judgment, Joshua Rhodes appeals. Affirmed.

Rule to open judgment entered on a warrant of attorney contained in a bond of suretyship given by a state depositary. From the record it appeared that the form of the bond was as follows:

Whereas, James S. Beacom, State Treasurer of the commonwealth of Pennsylvania, has, with the approval of the board of revenue commissioners selected the Allegheny National Bank of Pittsburg, Pa., as a depository of state funds, and has deposited with said bank the sum of two hundred ninety-eight thousand six hundred and sixty-four 67-100 dollars (\$298,664.67), lawful money of the United States of America;

"And whereas, for the security of the commonwealth of Pennsylvania, the board of directors of said the Allegheny National Bank at a regular meeting, held at Pittsburg, Pa., on the 6th day of May, 1898, did authorize the said the Allegheny National Bank to enter into an obligation to the commonwealth of Pennsylvania for the repayment of said money, with interest thereon, in accordance with the act of Assembly in such case made and provided, which obligation was authorized to be signed by the president of said bank, further agrees that execution may issue upon and attested by the cashier thereof, who was also authorized to affix thereto the corporate seal of said bank:

"Now, know all men by these presents, that in pursuance of the foregoing resolution of the board of directors of the Allegheny National Bank of Pittsburg, Pa., in the state of Pennsylvania, is held and firmly bound under the commonwealth of Pennsylvania, in the sum of two million dollars (\$2,000,000.00), lawful money of the United States of America, to be paid to the said commonwealth of Pennsylvania, her certain attorneys or assigns, to which payment, well and truly to be made, the said the Allegheny National Bank doth bind itself firmly by these presents.

"Sealed with the corporate seal of said bank and dated the 14th day of May, the year of our Lord, one thousand eight hundred and ninety-eight.

"The condition of this obligation is such that if the above bounden the Allegheny National Bank shall faithfully and honestly keep and account for such funds, moneys, chattels or other property of the commonwealth of Pennsylvania, which now are or shall hereafter remain on deposit with or be in custody and keeping of the said the Allegheny National Bank and shall pay over, deliver and account for the same, and any and every part thereof, from time to time and at any time when the same shall be demanded. to or upon the order of the said James S. Beacom, State Treasurer, as aforesaid, or of his successor in office, and shall also, from time to time, when the same shall be demanded by the said James S. Beacom, or his successor in office, pay to him or to his order for the use of the commonwealth the whole or any part of such sum or sums of money, deposited as aforesaid, as the said the Allegheny National Bank may owe to the commonwealth of Pennsylvania; and shall also pay over to the said James S. Beacom, State Treasurer, or his successor in office, for the use of the commonwealth, interest on said moneys at the rate of one and one-half per centum per annum on all daily balances, payable semi-annually, then this obligation to be void, otherwise to be and remain in full force and virtue.

"And further, the obligor above named, upon the happening of any default in the payment of principal, or any installment of interest, when the same becomes due and payable according to the terms hereof, hereby authorizes and empowers any attorney of any court of record in Pennsylvania or elsewhere to appear for and confess judgment for the above sum, with or without declaration, with costs of suit, release of errors, without stay of execution and with five per centum added for collection fees and the obligor doth also hereby waive the holding of inquisition on any real estate that may such judgment so confessed for the full amount of money and accrued interest thereon that may be due and owing from it to the said commonwealth of Pennsylvania upon filing a suggestion in writing in the court wherein such judgment shall be entered.

"Sealed and delivered in the presence of "John Caldwell, Jr., President.

"[Seal of the Allegheny National Bank.]

"W. Montgomery, Cashier.

"Signatures to bond must be witnessed. "Attest: William F. Robb.

"For value received, we do hereby jointly and severally bind ourselves and become security to the commonwealth of Pennsylvania for the payment of the foregoing bond, and the faithful performance of the said the Allegheny National Bank of the conditions of the said bond, according to its terms, and in case of a breach of any of the conditions of the foregoing bond, we hold ourselves bound as principals for any debts arising thereunder, and agree to answer for the same without regard to and independently of any action taken against the said the Allegheny National Bank and whether the said bank be first pursued or not.

"And further, we do hereby authorize and empower any attorney of any court of record in Pennsylvania or elsewhere to appear for and confess judgment against us, and each of us for the sum of two million (\$2,000,000.-00) dollars with or without declaration, with costs of suit, released of errors, without stay of execution, and with five per cent. added for collection fees, and we do further hereby waive and release all relief and benefit from any and all appraisement, inquisition, stay or exemption laws of this state or any state now in force or hereafter to be passed. Said collection fee is hereby directed to be added in and constitute a part of said debt and judgment. And we further agree that execution may issue upon such judgment so confessed for the full amount of money and interest that may be due and owing from said bank to the commonwealth with attorney's commission upon filing a suggestion in writing in the county wherein such judgment shall be entered.

"As witness our hands and seals this 14th day of May in the year of our Lord one thousand eight hundred and ninety-eight.

"Signature eđ.

es	of sureties must b	Эе	witnesse
	"John Caldwell, J	r.	[L. S.]
	"Joshua Rhodes		[L. S.]
	"J. McM. King		[L. S.]
	"Walter Chess		[L. S.]
	"Thos. Evans		[L. S.]
	"W. Montgomery		[L. S.]

"Attest: William F. Robb."

Form of resolution required from banks having deposits of state funds:

"I hereby certify that the following resolution was passed the sixth day of May, 1898, be levied on by virtue hereof. The obligor at a regular meeting of the board of directors

of the Allegheny National Bank of Pitts- and is satisfied that the same were proper burg, Pa.:

"Resolved, that the president and cashier be and are hereby authorized to execute a bond in the name of the Allegheny National Bank of Pittsburg, Pa., in the sum of two million (\$2,000,000.00) dollars, to the commonwealth of Pennsylvania, conditioned that this bank shall pay over, deliver and account for the same according to law, with interest at the rate of one and one-half per centum per annum, and with warrant of attorney to confess judgment.

"[Corporate Seal.] W. Montgomery.
"Secretary of Board of Directors of Allegheny National Bank, Pittsburg, Pa."

The following is the opinion of Shafer, J., of the court below:

"The judgment in this case is entered upon warrant of attorney filed by the defendants authorizing the confession of a judgment against them in the penal sum of \$2,000,000, conditioned that the Allegheny National Bank of Pittsburg, as a depository of state funds, shall always keep and account for all the sums then upon deposit, or which shall thereafter be on deposit in the bank; the date of the bond being May 14, 1898. The defendants have presented petitions setting forth that on May 14, 1898, the Allegheny National Bank was designated by the then State Treasurer, with the approval of the board of revenue commissioners, as a depository of state funds, and thereupon gave to the commonwealth the bond in question, known as 'bond No. 21.' They further show that on July 30, 1902, the same bank was selected by the then treasurer, Frank G. Harris, with the approval of the board, as a depository of state funds, and on that date gave a bond of like tenor with the former in the sum of \$2.000,000, having a number of persons as sureties; some of them being sureties also on the bond in suit, and this bond being known as 'No. 249.' The petitioner shows further that on April 24, 1908, the board of revenue commissioners and the banking commissioner, or a majority of them, selected the same bank as a depository of state funds, and on that date approved two bonds, each for the sum of \$250,000, both executed by guaranty companies; these bonds being known as 'Nos. 1.044 and 1.045.' It appears from the answer of plaintiff that these bonds were not in fact presented to the board on that date, but that one of them was actually delivered on May 1, 1908, and the other on May 2, 1908. It also appears that on April 28, 1908, the board of revenue commissioners passed a resolution reciting the selection of the Allegheny National Bank as a depository, the execution by it of bonds Nos. 21 and 249, the fact that the bank had furnished bonds Nos. 1,044 and 1,045 which it desired should be received in lieu of bonds Nos. 21 and 249, and that the board had ex-

protection to the commonwealth for the money so deposited or to be deposited with the bank, and directing that the new bonds be accepted in lieu and place of the bonds theretofore given by the Allegheny National Bank, and that the State Treasurer be instructed to return to the bank bonds Nos. 21 and 249. It also appears that on April 28, 1908, the commonwealth had on deposit at the opening of business for that day \$575,-303.59, and at the close of business, it had on deposit \$534,226.40. It further appears that the State Treasurer did not return the bonds which he was thus instructed to return, but kept them and delivered them to his successor in office, who entered upon his duties on May 1, 1902. It further appears that the bank suspended operations within a few days after the 1st of May, and that there is yet on deposit the sum of \$523,477.18.

"The defendants have cited a number of cases relating to the bonds of treasurers and other officers who are appointed from time to time and give bond at the expiration of each commission, as to the relative liabilities of the sureties, and as to their liabilities for the acts of the officer done while holding office under some other commission than that upon which they gave the bond. We are quite unable to see how any of these cases are applicable to the matter in hand. The bond in suit is not the bond of any particular State Treasurer, but the bond of a depositary of money, and conditioned upon the depositary accounting for and paying over the money when demanded by the State Treasurer or his successor in office, and this applies to moneys which are then on deposit or which shall thereafter remain on deposit or in custody or keeping of the depositary. This has plainly no connection with the term of office of any particular State Treasurer.

"The main contention of the defendants, however, is that the above-stated action of the board of revenue commissioners released them from liability on the bond in question, and further that, even if this were not within the power of the board of revenue commissioners, the state had ratifled their act by retaining the new bonds and threatening to proceed upon them. The substantial question in the case is whether or not the board of revenue commissioners had the power to take the action relied on. The board of revenue commissioners appears to have been created by the act of April 29, 1844 (P. L. 486), which provides for the appointment of one person in each judicial district. This act was repealed, so far as the method of appointment was concerned, by the act of April 30, 1864 (P. L. 218), which vested the power theretofore granted to the board in a board to consist of the Auditor General, the State Treasurer, and Secretary of the Commonwealth. An act of May 24, 1878 (P. L. 126), amined the bonds, each dated April 28, 1908, provided that these officers should constitute

a board of revenue commissioners, to meet | pute, nothing which can be tried by a jury at Harrisburg at such times as they should agree upon at least once in three years. By an act of June 15, 1897 (P. L. 157), entitled 'An act regulating the deposit of moneys belonging to the state in the banking institutions thereof, and providing for the collection of interest thereon' it was provided that the State Treasurer should collect interest from each bank having a deposit of state funds, and that before making such deposit he should require each bank to give a good and sufficient bond with warrant of attorney in double the amount of the contemplated deposit, with surety to be approved by the board of revenue commissioners of the commonwealth of Pennsylvania, and that no deposit should at any time be greater than onehalf of the amount of the bond furnished. The act further provides that the State Treasurer shall not be personally responsible for any money lost by reason of the failure of any bank selected as provided by the act, and the board of revenue commissioners was directed to prepare bonds to carry out the provisions of the act. The bond in suit was given under the provisions of this act. By the act of February 17, 1906 (P. L. 45), in regard to the deposit of state funds, the selection of depositories is placed in the revenue commission and the banking commissioner jointly, and the banks so selected are required to furnish a bond with warrant of attorney with sureties 'to be approved by the revenue commission and banking commissioner, or the majority of them, in double the amount of the deposit to be made,' etc.

"The power of the revenue commission in the matter is to be derived from these acts. We are at a loss to see how anything contained in these acts as above stated can be supposed to authorize the board of revenue commissioners and banking commissioners to surrender any bond held by the commonwealth, or to substitute one bond for another. or to discharge the sureties from liability, and especially could they not do this by accepting a bond or bonds for less than one-half of the amount required by law. The State Treasurer was clearly within his rights in declining or omitting to surrender the bond in question, as his only protection from the failure of the bank depended upon his having bonds more than twice as large as deposits.

"We see no force in the suggestion that the action of the State Treasurer in retaining the new bonds, or that of the Attorney General in threatening to proceed or proceeding on them, in any way amounts to a ratification by the state of the action of the board of revenue commissioners. If the State Treasurer and Attorney General have no authority to surrender bonds or release sureties thereon, as they certainly have not, no action of theirs can amount to a ratification.

if the judgment were opened, and the defense proposed to be set up by the defendants is purely a matter of law and fully set out in the pleadings, we are of the opinion that the judgment ought not to be opened.

"The rule is therefore discharged." Argued before BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Geo. C. Wilson, for appellant. J. E. B. Cunningham, Asst. Deputy Atty. Gen., M. Hampton Todd, Atty. Gen., and A. J. Edwards, for the Commonwealth.

PER CURIAM. The State Treasurer is by law made the custodian of all state funds. It is his duty to receive, disburse, and account for the same. Prior to Act June 15, 1897 (P. L. 157), he had arbitrary power in the selection of depositories and as to the nature and sufficiency of all bonds required by him as a protection against losses. and his bondsmen were responsible to the state for all moneys which came into his hands as treasurer, and he, as a matter of protection to himself and bondsmen, could take whatever indemnity was deemed ample for this purpose. He could require new bonds, surrender old ones, or accept additional ones, just as he chose to do. The commonwealth looked to him and his bondsmen and did not concern itself about the nature and character of the bonds of indemnity taken by him from institutions having state deposits. In 1897 the Legislature passed an act intended to place some limitations upon the arbitrary powers of the treasurer, theretofore existing, and to require other state officers to exercise some supervision over his actions in the selection of depositories and in the taking of bonds. This act did not take away from the treasurer the power to select the depositories and to require proper bonds, but it did provide that the board of revenue commissioners should approve the selection of depositories made by the State Treasurer and the bonds taken by him. The duty of the board was that of approval only. Ιt could not select the depository or require the bond in the first instance. This was the right of the State Treasurer, but the treasurer could not act without the approval of the board. Thus the law stood until 1906, when another act (Act Feb. 17, 1906 [P. L. 45]) was passed dealing with the subject of state deposits. The purpose of this act was to throw around the state treasury additional safeguards as a protection to the public funds. It imposed upon the revenue commissioners and commissioner of banking as a board, the duty of selecting the state depositories, and relieved the State Treasurer from this burden. This act, supplementary in character, is in pari materia with all the other acts relating to the custody and de-"As there are no facts whatever in the dis- posit of state funds. It does not repeal any

other law except when inconsistent with, intention of the parties as gathered from the the same. In section 5, it is provided that the board as above constituted shall approve the bonds taken as security for deposits. It will be observed that while, in the first section, this board is given the absolute right to select the depositories, in the fifth section, it is only clothed with the power to approve the bonds. In other words, the State Treasurer still took the bond, but it could not be accepted as a security until approved by the board. As to the approval of the bonds, the act of 1906 left the law just as it stood before, except the commissioner of banking was added as a member of the approving board. In the taking and approval of bonds, the act required that they should be in double the amount of the deposit to be made, and this is a limitation on the power of the State Treasurer, who acts in the first instance, and on the board that approves, in the second. Nothing in this act gave to the board the right to take the bond in the first instance or to afterward surrender it. This primary duty rested on the State Treasurer after, as well as before, the act of 1906 was passed. As to bonds, the duties of the board were limited to approval. This board does not have the power to take the initiative either in taking or surrendering a bond, which right still remained in the treasurer under the law. The treasurer could not accept a bond without the approval of the board, and the board could not surrender a bond without the consent of the treasurer. These are wholesome checks imposed by law upon the officers clothed with the power to deal with this subject. This understanding of the law simplifies the question raised by this appeal. The resolution of 1908, relied on to defeat a recovery, was adopted by the board constituted as above indicated; but, as we have seen, this board had no power to surrender an old bond or take a new one. As to bonds, it only had the power of approval. State Treasurer did not surrender the bond in suit, and the board had no power to do so.

Again, we cannot agree that there can be no recovery because the bond in question was taken in the name of a particular State Treasurer and was only intended to cover defaults occurring during the term of office of the official in whose name it was taken. The bond in terms negatives this theory. It was taken to secure deposits during the term of the treasurer named or his successor in office, which means any successor in office so long as state funds are deposited in the institution bound by the bond. Nor is there any merit in the contention that the bond was only intended to cover moneys deposited

bond itself, the purpose for which taken, and the course of business dealings between the state and the institutions carrying its balances on deposit. These bonds are continuing obligations to protect the state against loss, so long as moneys are deposited in the institutions giving them. Such bonds may be surrendered, and new or additional ones may be taken in lieu thereof; but when this is done all of the constituted authorities having to deal with the subject must join in the act in the manner provided by law. In the present case, the old bond was not surrendered by the State Treasurer, and it could not be done without his consent, nor could it be done by him alone without the approval of the board. These requirements of the law were not complied with, and the obligation of the bondsmen to answer for the default of the bank still remains.

Judgment affirmed.

(224 Pa. 114)

COMMONWEALTH v. CALDWELL et al. (No. 2.)

(Supreme Court of Pennsylvania. March 16, 1909.)

Appeal from Court of Common Pleas, Alle-

gheny County.

Action by the Commonwealth against John Caldwell, Jr., and others. From an order discharging rule to open judgment, Walter Chess

appeals. Affirmed.
Argued before BROWN, MESTRI
POTTER, ELKIN, and STEWART, JJ. MESTREZAT.

Geo. C. Wilson, for appellant. J. E. B. Cunningham, Asst. Deputy Atty. Gen., M. Hampton Todd, Atty. Gen., and A. J. Edwards, for the Commonwealth.

PER CURIAM. For the reasons given at No. 30, October term, 1909 (224 Pa. 103, 73 Atl. 219), the order of the court below d.scharging the rule to open judgment is affirmed.

(224 Pa. 115)

COMMONWEALTH v. CALDWELL et al. (No. 3.)

(Supreme Court of Penusylvania. March 16, 1909.)

Appeal from Court of Common Pleas, Alle-

gheny County.

Action by the Commonwealth against John Caldwell, Jr., and others. From an order discharging rule to open judgment, Thomas Evans

appeals. Affirmed.
Argued before BROWN, MESTREZAT, POT-TER, ELKIN, and STEWART, JJ.

Geo. C. Wilson, for appellant. J. E. B. Cunningham, Asst. Deputy Atty. Gen., M. Hampton Todd, Atty. Gen., and A. J. Edwards, for the Commonwealth.

at the time it was given or, at most, during the term of the treasurer then in office. Such a construction would do violence to the plain the rule to open judgment is affirmed.

(224 Pa. 114)

COMMONWEALTH v. STEWART et al. (No. 1.)

(Supreme Court of Pennsylvania. March 16, 1909.)

Appeal from Court of Common Pleas, Al-

Appeal from Court of Common riess, Arlegheny County.

Action by the Commonwealth against William Stewart and others. From an order discharging rule to open judgment, W. B. Rhodes and Mary H. Rhodes, executors of Joshua W. Rhodes, deceased, appeal. Affirmed.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Geo. C. Wilson, for appellants. J. E. B. Cunningham, Asst. Deputy Atty. Gen., M. Hampton Todd, Atty. Gen., and A. J. Edwards, for the Commonwealth.

PER CURIAM. The learned counsel for appellant have invoked the doctrine of estoppel to defeat the right of the commonwealth to proceed upon the bond in suit. As we view the facts of this case and the law applicable thereto, the question of estoppel cannot be raised.

For the reasons given in the opinion filed at No. 30. October term, 1909 (224 Pa. 103, 73 Atl. 219), the order of the court below discharging the rule to open judgment is affirmed.

ging the rule to open judgment is affirmed.

(234 Pa. 115)

COMMONWEALTH v. STEWART et al. (No. 2.)

(Supreme Court of Pennsylvania. March 16, 1909.)

Appeal from Court of Common Pleas, Allegheny County.

Action by the Commonwealth against William Stewart and others. From an order discharging rule to open judgment, Walter Chess appeals. Affirmed.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Geo. C. Wilson, for appellant. J. E. B. Cunningham, Asst. Deputy Atty. Gen., M. Hampton Todd, Atty. Gen., and A J. Edwards, for the Commonwealth.

PER CURIAM. For the reasons given at No. 30, October term, 1909 (224 Pa. 103, 73 Atl. 219), the order of the court below discharging the court below discharged the court below dischar ging the rule to open judgment is affirmed.

(224 Pa. 116)

COMMONWEALTH v. STEWART et al. (No. 3.)

(Supreme Court of Pennsylvania. March 16, 1909.)

Appeal from Court of Common Pleas, Allegheny County.

Action by the Commonwealth against William Stewart and others. From an order discharging rule to open judgment, Thomas Evans appeals. Affirmed. Argued before BROWN. MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Geo. C. Wilson for appellant. J. E. B. Cunningham, Asst. Deputy Atty. Gen., M. Hampton Todd, Atty. Gen., and A. J. Edwards, for the Commonwealth.

PER CURIAM. For the reasons given at No. 30, October term, 1909 (224 Pa. 103, 73 Atl. 219), the order of the court below discharging the rule to open judgment is affirmed.

(78 N. J. L. 10)

PATTERSON v. TAYLOR.

(Supreme Court of New Jersey. 1909.) June 14,

1. PROCESS (§ 141*)—SERVICE—RETURN—CON-

CLUSIVENESS.

Under the Nebraska law, a sheriff's return on a summons is not conclusive of the manner of service, but is open to challenge.

[Ed. Note.—For other cases, see Procent. Dig. §§ 189-192; Dec. Dig. § 141.*] Process,

2. JUDGMENT (§ 818*)—FOREIGN JUDGMENTS-

WANT OF JUBISDICTION.

A recital, in a judgment of another state of the adjudication that the summons was served on the defendant personally, instead of by leaving a copy at his place of residence, as stated in the sheriff's return, estat shes the fact that personal service was made, and the judgment is not void because the return fails to how leaving show legal service.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1460-1465; Dec. Dig. § 818.*]

Case Certified from Circuit Court, Essex County, for Advisory Opinion.

Action by Martha B. Patterson against Thomas H. Taylor on a case certified to the Supreme Court for advisory opinion. Judgment for plaintiff.

Argued February term, 1909, before GUM-MERE, C. J., and SWAYZE and PARKER,

Simeon H. Rollinson, for plaintiff. Alfred F. Skinner, Herbert Noble, and Massey Holmes, for defendant.

GUMMERE, C. J. This action is brought to recover the amount alleged to be due upon five several judgments recovered by the Rochester Loan & Banking Company against the defendant and others in one of the county district courts of the state of Nebraska, a court of general jurisdiction. The plaintiff is the holder of these judgments by assignment from the loan and banking company. In each of the Nebraska suits the sheriff's return of the original process showed a service upon the defendant. Taylor, by leaving a true and duly certified copy of the writ at his usual place of residence, but did not show that any effort had been made to serve him personally. The Nebraska statute relating to the service of process provides that "the service shall be by delivering a copy of the summons to the defendant personally, or by leaving one at his usual place of residence, at any time before the return day," and that "In all cases the return must state the time and manner of service." At the trial of the present cause it was contended on the part of the defendant that the Nebraska statute above set forth contemplates and requires a personal service, if the same can be secured by a reasonable effort, and that a substitutionary service can be justified only after such reasonable effort has been made; and, further, that in order for the Nebraska courts

to have obtained jurisdiction over the defendant (he not having voluntarily appeared) it was essential that the return should show that the sheriff made reasonable effort to secure a personal service, and that the failure of his return to show that such reasonable effort was made left the Nebraska court without jurisdiction of the person of the defendant. The trial court, being in doubt as to the soundness of these contentions, has certified them to us for our advisory opinion.

Assuming that by force of the Nebraska statute there must be a personal service of process, if it can be made by reasonable effort, we are of opinion that the existence of jurisdiction in the Nebraska court did not depend upon the exhibition in the sheriff's return of a compliance by him with the statutory requirement, but, rather upon the fact whether or not the service had in truth been made in the manner directed by the statute. We base this conclusion upon the decision of the Supreme Court of Nebraska in the case of Holliday v. Brown, 83 Neb. 657, 50 N. W. 1042. In that case the return of the sheriff showed a personal service upon the defendant. The truth of this return was challenged, and it was shown by the sheriff's own testimony that, instead of making a personal service upon the defendant, he handed the copy of the summons to the defendant's husband, who was engaged at work in the yard in front of her residence, although the defendant herself was at that time in the house, and visible to the sheriff through a window. The Nebraska court held the service void. It is manifest from this decision that, under the Nebraska law, the return of a sheriff indorsed upon a summons is not conclusive of the manner of service, but it is open to challenge, and that the court out of which the writ issues has full power to investigate the truth of the return, and determine from evidence ab extra whether or not it was, in fact, served in such a manner as to confer jurisdiction of the defendant upon the court. In the several cases in which the judgments, which are the foundation of the present action, were rendered, this power would seem to have been exercised by the court, for the judgment record in each case contains the following recital: "This cause coming on to be heard, the court finds that there was due and legal personal service upon Thomas H. Taylor." As we read this excerpt, it contains, by necessary implication, a statement that the actual method of service upon the defendant was made a subject of judicial investigation by the court, and an express adjudication that such service was made upon him personally, and not by leaving a copy of the writ at his usual place of residence, as was stated in the sheriff's return. The effect of this adjudication is to overmanner of service, to establish the fact that ant does not operate to render the judgments personal service was made upon the defend- in suit void. ant, and consequently that he was legally brought into court in the manner prescribed by the Nebraska statute.

It is argued on behalf of the defendant that the view which we have expressed as to the effect of the recital in these judgments is opposed to that expressed by the Supreme Court of the United States in the case of Settlemier v. Sullivan, 97 U.S. 444, 24 L. Ed. 1110. We think not. In the cited case the return indorsed upon the process was that it had been served by "leaving at the usual place of abode." The recital in the judgment (which was that of an Oregon court) was that, "Although duly served with process, the defendant did not come, but made default." By the Oregon statute a substituted service was not permitted, except where, after using ordinary diligence, the sheriff was unable to serve the writ personally; and, when substituted service was made, the sheriff's return was required to disclose his inability to make a personal service by the use of due diligence. It will be perceived that the return before the court did not show inability on the part of the sheriff to make personal service, and the question considered was whether the recital in the judgment that the defendant was duly served with process supplied this omission in the return. The conclusion reached was that the recital must be read in connection with the return, and could only be considered as referring to it. The distinction between that case and the one now before us is this: The recital contained in the judgment in the cited case that the writ was "duly served" is not necessarily contradictory of the return, and, read in connection with it, is an adjudication that the substituted service was due service, without regard to whether personal service had been attempted to be made or not, while in the present case the recital that the court finds there was due and legal personal service upon the defendant is absolutely contradictory of the return, and cannot be construed as an adjudication that a service by leaving a copy of the writ at the defendant's usual residence was "due and legal service," although no attempt at personal service had been made. There is nothing in the Settlemier Case, as we read the opinion, which indicates the view that, where the adjudication of the method of the service of process recited in a foreign judgment negatives the truth of the return of the sheriff as to the manner in which the writ was served, the return of the sheriff is to be accepted as verity, and the adjudication of the court is to be disregarded.

The circuit court is advised that the fail-

throw the return, so far as it relates to the | legal service of summons upon the defend-

(78 N. J. L. 178)

AUSTRIAN v. LAUBHEIM.

(Supreme Court of New Jersey. June 8, 1909.)

1. ABREST (§ 40*)—IN CIVIL ACTION—QUESTION FOR JUDGE—BURDEN OF PROOF.

When a defendant has been held to bail in an action of contract on affidavits showing fraud in the inception of the contract sued on, and on the trial the fraud is inquired into purand on the trial the track is inquired into pur-suant to section 166 of the practice act of April 14, 1903 (P. L. p. 581), the issue of fraud is for the determination of the judge, and the bur-den is on the defendant of proving absence of

[Ed. Note.—For other cases, see Arrest, Dec. Dig. § 40.*]

(Syllabus by the Court.)

2. EVIDENCE (§ 318*)—HEARSAY—BANK PASS-

BOOK.

In an action between a depositor and a third person, the depositor's passbook is not competent to show a deposit at a certain time.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \$\frac{4}{3}\$ 1193, 1195–1198; Dec. Dig. \$\frac{4}{3}\$

3. APPEAL AND ERROR (§ 1058*)-REVIEW-HARMLESS ERROR-RULINGS ON QUESTIONS TO WITNESSES.

Error, if any, in ruling out a question, is cured by the witness immediately answering it without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4206; Dec. Dig. § 1058.*]

A. EVIDENCE (§ 471*)—OPINION EVIDENCE—MATTERS OF FACT OR CONCLUSIONS.

A question asked a witness as to whether a third person had reasonable foundation for supposing that he was worth a stated sum is objectionable as calling for a conclusion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471; Witnesses, Cent. Dig. §§ 838-836.]

APPEAL AND ERROR (\$ 882*)-REVIEW-ESTOPPEL TO ALLEGE ERBOR.

Where a question not proper for the jury to determine is submitted to them at the request of defendant, any error of the court in refusing to charge at defendant's request is of defendant's own making.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. §

Error to Circuit Court, Hudson County.

Action by Harry D. Austrian against Julius Laubheim. Judgment for plaintiff, and defendant brings error. Affirmed.

Argued February term, 1909, before GUM-MERE, C. J., and SWAYZE and PARKER, JJ.

Alexander Simpson, for plaintiff in error.

PARKER, J. The plaintiff in error, defendant below, was held to bail on the ground of fraud in the inception of the contract sued on. There was a judgment for plaintiff and a special finding by the jury that the defendant fraudulently contracted the debt to recover which the suit was brought. The ure of the sheriff to show by his return a assignments of error relate exclusively to

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the inquiry on the trial into the fact of quire the judge, and not the jury, to deterfraud. The first point is that the court excluded as evidence the bank passbook of defendant's firm, which was offered to show a deposit at a certain time. The book was clearly incompetent for that purpose.

The next assignment challenges the refusal of the court to allow a witness to state how often a certain messenger boy had been in defendant's office. This was excluded as immaterial, and we think it was; but, if there was any error in its exclusion, it was cured by the witness immediately afterward stating without objection that the boy had been there "hundreds of times."

It is further assigned for error that the court overruled this question: "Q. Do you know whether or not, on the 24th or 25th of October, Mr. Laubheim had reasonable foundation for supposing that he was worth \$15,-000 or \$20,000?" This was properly overruled: the answer being necessarily a conclusion of the witness. Counsel then said. "Your honor will not allow us to show proof that he was about to let him have the money?" and the court responded, "No." To this last ruling no exception was taken.

Plaintiff's evidence tended to show that a check was handed by plaintiff to defendant in Jersey City at noontime between 12 and 1 o'clock. Other evidence showed that this check was deposited in Jamaica, Long Island, the same day at 1:35. Defendant undertook to show by a witness who made the journey from New York to Jersey City and thence to Jamaica that it could not be done in this time, and asked, "Now, what time did you start? What time did you leave New York side?" This was overruled as immaterial, and properly so, as the journey from New York to Jersey City was not part of that under inquiry, and the time of leaving New York was not of the slightest consequence.

The remaining assignments of error that are ruled on relate to refusals to charge as requested on the question of fraud and can be disposed of on one ground, which is that the submission of the question of fraud to the jury at all was unwarranted in law, and, as this was done at defendant's request, any errors of the court resulting from this action are of defendant's making. The inquiry as to the fraud was held pursuant to section 166 of the practice act of April 14, 1903 (P. L. p. 581), which reads as follows: "If the defendant in an action upon contract has been held to bail upon the ground of fraud in the inception of the contract, it shall be lawful on the trial of the action to inquire into the fact of such fraud; and if the judge on the trial shall determine from the evidence and certify upon the record that there was no such fraud, then the defendant's bail shall be discharged or he shall be released from custody and no capias ad satisfaciendum shall be issued against him." This statute on its face seems to re- shall not issue in said action a body execu-

mine the question of fraud, and to impose the burden of proving absence of fraud on the defendant. The history of the legislation on the subject will confirm this view.

Previous to the act of March 9, 1842 (P. L. 1841-42, p. 130), imprisonment for debt was in force in this state irrespective of fraud. That act was substantially indentical with sections 57 and 189 of our practice act of 1903, except that it omitted the fraudulent contracting of the debt or incurring of the demand as a cause for arrest, and did not include the important provision which we find as section 3 of "an act respecting imprisonment for debt in cases of fraud" (Rev. St. 1847, p. 822), as section 213 of the practice act of March 27, 1874 (Rev. St. 1874, p. 641), and as part of section 189 of the act of 1908, that, when a preliminary order to hold to bail has been made and remains in force, the plaintiff may have his ca. sa. on recovery of judgment without further proof. The Constitution of 1844 (article 1, pl. 17) provided that: "No person shall be imprisoned for debt in any action nor on any judgment founded on contract, unless in case of fraud." And this provision has stood unchanged till the present day, and in 1846 Chief Justice Hornblower, speaking for this court, declared that "it is left, however, for the Legislature to say, what shall be deemed such fraud as shall make a man liable to imprisonment, and how it shall be proved in order to justify the arrest of the debtor." Ex parte Clark, 20 N. J. Law, 648, 650, 45 Am. Dec. 394. The act of 1842 was held applicable except so far as repugnant to the Constitution (Hunt v. Hill, 20 N. J. Law, 476, 478), and was adopted in the Revision of 1846 with the addition of the fourth ground of arrest and the provision for ca. sa. without additional proof already noted. In this form the law has stood unchallenged and unchanged, with one exception, till the present time. Under its provisions and as a matter of practice the right to ca. sa. followed the judgment as of course in all cases of debt where preliminary order of arrest had been made. And it is obvious that on the trial proof of the debt was all that was required; in fact the statute expressly so provided. Revision 1877, p. 881, \$ The exception just noted is the act March 9, 1877 (P. L. p. 112), being a supplement to the practice act of 1874 (Revision 1877, p. 896, \$ 305), and embodied in the act of 1903 as section 166. The act as passed in 1877 provided: "That when any defendant * * * in any action upon contract has been held to bail upon preliminary affidavits upon the ground of fraud in the inception of the contract, it shall be lawful, upon the trial of said cause, to inquire into the fact of said fraud; and if it shall appear on said trial that there was no fraud on the part of the defendant or defendants in the inception of said contract, then there

tion; and the judge or justice presiding at the trial of said cause shall determine from the evidence and certify upon the record whether said fraud was proved or not."

It may well be argued that the language of the last clause imposed on the plaintiff the burden of proving fraud at the trial to entitle him to ca. sa. to enforce his judgment, but the change made in the revised act of 1903 is significant Section 166 of the practice act, the one now in force, omits the last clause altogether, and for the clause, "if it shall appear on said trial that there was no such fraud," etc., the present section says, "and if the judge on the trial shall determine from the evidence and certify upon the record that there was no such fraud, then the defendant's bail shall be discharged or he shall be released from custody and no capias ad satisfaciendum shall issue against him." It is therefore evident that the old rule, if ever broken in upon by the act of 1877, was restored by the revision of 1903; and that a plaintiff who has held a defendant to bail for fraud in the inception of the contract is entitled as of course to a ca. sa. in execution of any judgment he may recover in the action, unless the defendant on the trial sustains the burden of showing absence of fraud; and that this question when raised is for the judge, and not for the jury.

It follows that the submission of the question of fraud to the jury was unwarranted in law; and, this being so, no harm was done to defendant by the manner in which it was We find in the record no resubmitted. quest to the trial judge to adjudicate the issue of fraud. The submission of that issue to the jury was nugatory, and the finding of the jury as returned in the record is mere surplusage.

The judgment will be affirmed.

(75 N. J. E. 545)

SLOSS-SHEFFIELD STEEL & IRON CO. v. ÆTNA LIFE INS. CO.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

REFORMATION OF INSTRUMENTS (\$ 16*)—INSUR-ANCE POLICY.

The Alabama agents of a Connecticut in-The Alabama agents or a Connecticut insurance company proposed, in writing, to the complainant to write employer's liability policies at an annual premium of \$8,725 on a pay roll of \$1.400.000, and this offer was accepted. It was understood that the premium named in the policies to be issued should be at a higher rate fixed by the company being the semigrate. rate fixed by the company, being the same rate at which the company had insured the complainat which the company had insured the complain-ant during the previous year. Policies were issued in accordance with this agreement, and the premiums paid at the discount rate named in the written proposal of the Alabama agents. Held, that under the facts of the case the com-plainant was not entitled either to a reforma-tion or reggission of the contract tion or rescission of the contract.

[Ed. Note.—For other cases, see Reformation of Instruments, Dec. Dig. § 16.*]

(Syllabus by the Court.)

Appeal from Court of Chancery.

Bill by the Sloss-Sheffield Steel & Iron Company against the Ætna Life Insurance Company. Decree (70 Atl. 880) for complainant, and defendant appeals. Reversed, and bill dismissed.

Malcolm G. Buchanan (James Buchanan. on the brief), for appellant. Frederick J. Faulks, for respondent.

SWAYZE, J. The bill in this case was filed to reform certain policies of insurance. called employer's liability policies, and to enjoin a suit at law which had been brought by the insurance company to recover additional premiums arising out of an excess of the actual pay roll over the amount of the pay roll on which the premium originally paid had been based. The vice chancellor advised a decree in favor of the complainants upon their paying the amount which they conceded to be due. The question involved is purely a question of fact, and the view we take of the case is such that it is unnecessary for us to consider whether the powers conferred upon the Alabama agents of the insurance company, a Connecticut corporation, were in fact extensive enough to authorize the contract which the complainants insist was made, or, if not, whether the defendant company had held the Alabama agents out as so authorized in such a way that it cannot now deny the authority. We think the case may be determined upon the simpler question as to the actual contract that was made. Mr. McQueen, the vice president of the complainants, who testified in their behalf, and with whom the contract for the insurance was made, testified that that contract, after some negotiations by parol, was embodied in a letter of June 20, 1905. This letter was rightly regarded by the vice chancellor as constituting the offer on the part of the Alabama agents. The language is therefore of the utmost importance. It is as follows, so far as material:

"We are in receipt of your favor of June 15, also your supplementary letter of June 19, in reference to your company's liability insurance for one year, and in reply thereto we beg to quote you a net price of \$8,725, on a pay roll of \$1,400,000, divided as follows: [Here follows details of pay roll.] If your company will enter into an agreement to carry this insurance with the Ætna Life Insurance Company, for three years, we will allow you a discount of 21/2 per cent. from the price of one year, or \$8,506.88, practically the same figures at which the business was written last year, subject to cancellation at your election after the first year by paying the difference between the price for one year and the price for three years."

In short, this was an agreement that the net price for a pay roll of \$1,400,000 should

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

be \$8,725, subject to the 21/2 per cent. discount if the insurance was carried for three The policies, however, showed a higher rate, amounting in all to \$10,502.10. These policies were duly delivered to the complainants and retained by them for a year without objection and until they desired to cancel them. The amount paid by them for premium was \$8,506.88, and no claim is made on the part of the insurance company for an amount in excess of this so far as concerns the pay roll of \$1,400,000. The controversy is merely as to the rate at which the premium for the pay roll in excess of \$1,400,000 shall be calculated. The complainants' theory is-and that seems to have been adopted by the vice chancellor-that the contract embodied in the letter of June 20, 1905, was a contract to issue a policy at the rate of \$8,725, less the 21/2 per cent. discount, for a pay roll of \$1,400,000, and at the same rate for any excess. The letter, however, says nothing about the rate to be charged for the excess pay roll, and, as far as the case shows, the only contract that the complainants had with the agents as to the rate to be charged for the excess was the contract embodied in their policies. We find nothing in the case which indicates that any definite contract was made with reference to the premium on the excess, except that contained in the policies. The case clearly shows there was no fraud involved, for it is conceded that the agreement of the prior year was that the higher rate should be inserted in the policies, being the rate which actually was inserted, and that the complainants, prior to the issue of the policies now in question, were shown a telegram and letter from the insurance company to their agents authorizing a renewal at the same rate as the previous year; nor is it denied by the complainants that they knew that the amount of premium inserted in the policy was greater than the amount which they were actually to pay to the agents. It is conceded that the actual agreement of the preceding year was that the policies should be issued at the rates fixed by the company; but the Alabama agents agreed to accept a smaller sum in satisfaction of the premium. This they might well do, as the difference was made up out of the commissions to which the Alabama agents were entitled from the company. In other words, the contract was a contract for insurance at regular rates, with a special agreement of the agents to accept a smaller sum in payment; but there is no evidence in the case to indicate that that agreement to accept a smaller sum in payment of a larger sum was the agreement of the defendant company. Quite to the contrary; the amount paid the company was the exact amount which it was entitled to receive at the policy rates. There is some evidence that the agents informed the com-

concession that would add to their compen-; sation; but this the company refused to grant. It never assented to receive less than the full, rates, and never held the agents out as authorized to make a contract different from that contained in the policies. The facts; that the policies were not sent to the agents; executed in blank, but had to be actually; executed by the defendant at the office in ; Connecticut before they were sent to the Ala-, bama agents for delivery, and that when so; executed they showed the higher rate of premium and were so accepted by the complainants, convince us that the complainants were, relying for their discount, not upon an agree-, ment of the company to issue the policies at, a lower rate, for no such agreement was, made, but upon the favor of the Alabama; agents. Under such circumstances, the nat-) ural inference to be drawn by the complainants must have been either that the agents; were deceiving their principal in the belief; that the policies were negotiated at the full; rate as they were written, or were making, the discount at their own cost. If we adopt? the first alternative, the complainants were party to a scheme to deceive the company; if we adopt the second, which corresponds: with the actual facts, the arrangement for a discount was not with the defendant. either event the complainants have no right to relief. They have no right to a reformation, since the policies as issued were in exact accordance with the proposal contained in the letter of June 20, 1905, and the course of practice pursued in 1904, and the payment? required of the complainants for the policies; of 1905, and actually made by them, was exactly in accordance with the proposal in the' letter of June 20th, and the practice of the year before. The complainants have no right to rescind for fraud, since the policies and) the amount paid exactly correspond with the contract. The letter of June 20, 1905, says nothing about the rate to be charged for the excess pay roll, and the testimony is equally silent as to any contract to settle the excess premium at the discount rate.) The complainants apparently took it for granted that a discount would be allowed by the agents upon the excess premium., Such a discount was allowed on the excess? premium of the previous year, but that was not until October 20, 1905, nearly four months after the present policies were issued, and even then the statement rendered to the defendant company showed the excess premiums calculated at the full policy: rates. It was the agents who then allowed the discount, and allowed it at their own; cost. The complainants could not therefore have been misled by anything done by the agents in settling the excess premiums on the first year's policies. The case is even stronger against the complainants, for in, adjusting the excess premiums, in October, pany of their action and begged for some 1905, it turned out that, under one policy,

the actual pay roll had been less than the cense, cannot repudiate it in part and claim estimated pay roll. so that the defendant under it in part. owed the complainants a return premium. This return premium was calculated at the full policy rate, and a receipt therefor at that rate given to the defendant. It is true that in the actual adjustment with the agents this return premium was figured at the discount rate; but the fact that a receipt was given to the defendant company at the full rate is quite conclusive against the complainants upon the question of fraud.

It is suggested that the complainants are entitled to rescind because the contract as written in the policies is not the contract which they intended to make. After what we have said, it is almost superfluous to add that the contract they received is the exact contract they bargained for, that it has been carried out to the letter by the defendant company and by their Alabama agents, and that the complaint now made by the complainants relates to a matter which was not embodied either in the parol contract or in the contract by letter. What has happened is that the complainants have been disappointed in their expectation that they could settle at a price less than they had agreed by the acceptance of the policies to pay. They may have been justified in entertaining this expectation, but to entitle them to relief it was necessary that it should be embodied in their contract.

For these reasons we think the decree should be reversed, and the record remitter to the Court of Chancery, to the end that the bill may be dismissed, with costs.

(76 N. J. E. 1)

FERRY-HALLOCK CO. v. PROGRESSIVE PAPER BOX CO. et al.

(Court of Chancery of New Jersey. May 19, 1909.)

1. JUDGMENT (§ 735*)—RES JUDICATA.
Where an issue was not precisely raised, nor expressly decided by the court, the decision was not conclusive on the issue.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1263; Dec. Dig. § 735.*]

2. PATENTS (\$ 212*)—LICENSES—MISREPRESEN-TATIONS-EFFECT.

A representation by a patentee that a certain thing is covered by his patent, made in good faith while bargaining with another as to a license, is not a representation of a fact on which the laster may rely, so that he cannot, on sub-sequently proving the falsity of the representation, repudiate the license.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 212.*]

8. PATENTS (§ 211*)-LICENSES-RIGHT OF LI-CENSEE-ESTOPPEL.

A licensee who uses a patent is estopped from denying the licensor's title.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 311; Dec. Dig. § 211.*]

4. PATENTS (§ 214*) - LICENSES - REPUDIA-TION.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 214.*]

Suit by the Ferry-Hallock Company against the Progressive Paper Box Company and others. Heard on bill, answer, cross-bill, and replication. Decree for complainant.

Mr. Howe and Mr. Bull, for complainant. P. J. Schotland, for defendants.

EMERY, V. C. At the hearing I gave orally my views to some extent on the rights of the parties, reserving final determination for briefs on the following points: (1) Whether in the Ferry-Waring Company suit, referred to at the hearing, it had been expressly decided that the complainant's patents, or any of them, covered "stays," as well as "rings"; and (2) whether complainant's representation or claim at the time of procuring the license that "stays" were covered by its patents, made to defendant under the circumstances proved, was such a representation of fact on which defendants were entitled to rely in making the contract that defendants, on proving its falsity, were discharged from the obligation to pay royalty under the contract, and were entitled to rescind the contract. Briefs have been submitted on these points; and, on further consideration of the cause, I add the following brief statement to the views expressed at the hearing:

The opinion of Judge Lacombe in the Ferry-Waring Company suit does not expressly decide the issue now raised as to the distinction between "stays" and "rings" under the Ferry patents, nor was that issue precisely raised. It is not therefore conclusive on the question and its bearing on this question is therefore to be considered only in connection with the evidence given at the hearing upon this subject.

As to the second question, further consideration confirms my impressions, indicated at the hearing, that under the circumstances proved complainant's representation or claim that the "stays" in question were covered by its patents was bona fide and honestly made. and was a representation or claim which, in bargaining with defendants as to a license, it committed no fraud in making, and that the defendants, being at that time actually claiming and acting on an adverse title-being the same title which they now set up and seek to establish by evidence-were not entitled to act on this representation or claim of title made by complainant as the assertion of a fact, the falsity of which, subsequently proved, would entitle them to repudiate the contract on this ground. No authorities have been referred to establishing that representations of this character, made un-A licensee under a patent, who for fraud representations of this character, made un-or otherwise has the right to repudiate the li- der these circumstances, are representations

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of fact on which defendant had then the right to rely, but might subsequently disprove, when it so elected, by disputing the license. The general principle is that the licensee, to the extent that he continues to use the license, is estopped from denying the licensor's title. Clark v. Adie (No. 2) 2 L. R. p. 423, App. Cases (1877); Jones v. Burnham, 67 Me. 93, 24 Am. Rep. 10 (1877); Kinsman v. Parkhurst, 18 How. 289, 15 L. Ed. 385. This applies the same principle which estops a tenant from denying the landlord's title to the land occupied under the lease, and is an estoppel implied by law, even in the absence of an express estoppel, such as was made by the agreement here. If the defendants have the right, for fraud or otherwise, to repudiate the license, thus making themselves liable to suit as infringers, the repudiation in such case must be total and of all the privileges granted. They cannot at the same time claim under and against the agreement. In the present case, the agreement granted the right to use the Hallock machines for rings, and fixed the royalties for both rings and stays on a basis which did not depend on the actual making of either stays or rings, and these entire royalties are due, under the agreement, if the defendants use any of the privileges conferred by the license, and do not expressly repudiate them all. Defendants admit the use of these privileges for making rings, and offer to account for these, but the accounting can be only according to the express agreement, and not otherwise, so long as any privilege under it is used.

I will advise decree for accounting under the agreement, to be settled on notice, if necessary, and that the cross-bill be dismissed.

(78 N. J. L. 300)

FISHMAN v. CONSUMERS' BREWING CO. (Supreme Court of New Jersey. June 14, 1909.)

1. NEGLIGENCE (§ 125*)—FIRES—EVIDENCE.

The fact that a fire occurred upon the same premises, seven years prior to the occurrence of the fire in question, is not admissible to prove the existence of negligence upon the part of defendant as the proximate cause of the fire in question, where the testimony showed the conditions to be different.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 241; Dec. Dig. § 125.*] (Syllabus by the Court.)

2. Evidence (§ 99*)-"Relevancy of Testi-

MONT."

"Relevancy of testimony" means that any "Relevancy of testimony" means that any two facts to which it is applied are so related to each other that, according to the common course of events, one, either taken by itself or in connection with other facts, proves or renders possible the past, present, or future existence or nonexistence of the other.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 138; Dec. Dig. § 99.*

For other definitions, see Words and Phrases, vol. 7, p. 6062.1

Appeal from District Court of City of Newark.

Action by Max Fishman against the Consumers' Brewing Company. Judgment for plaintiff, and defendant appeals. Reversed. Argued February term, 1909, before REED. TRENCHARD, and MINTURN, JJ.

Child & Carter (Riker & Riker, of counsel), for appellant. Philip J. Schotland, for appellee.

MINTURN, J. The plaintiff's horse, top buggy, and other chattels incident thereto, were destroyed by a fire, which, as plaintiff alleges, originated in a heap of burnt ashes adjoining the stable of Nicoll & Co., where the property in question was kept. The ash heap was upon defendant's premises close to the stable, and the fire took place about half past 3 o'clock of the morning of February 19, 1908. The plaintiff, over continuous objections, deemed it necessary for the purpose of his case to ask the witness Martin these questions: "Q. To your knowledge was there a fire at the same place before this? A. Yes, sir. Q. When was that? A. On the 14th of December, 1901. Q. And did you make an investigation at that time? A. Yes, sir. Q. What did you find at that time might cause the fire? A. Hot ashes against the weatherboards. Q. What burned at that time? A. Weatherboards. Q. Did you make an investigation of the cause of those weatherboards burning at that time? A. Yes. Q. Where were those weatherboards you speak of? A. About the same location as the last fire." further appeared from the testimony of this witness that after the 1901 fire a sheet iron plate had been placed between the ash heap and the stable, and that, when this witness reached the scene of the fire shortly after it started, that iron plate was not hot, but cool enough, indeed, to enable him to handle it. It will be perceived therefore that the conditions preceding the two fires were essentially different. The only purpose, apparently, which could actuate the plaintiff in introducing this character of testimony as material to his cause is the specious reasoning included in the proposition, propter hoc, the fire of 1901 originated; argo post hoc, the fire in question must have so originated; and it requires no elaboration of argument to expose the fallacy of such a syllogism both in logic and in law. "Relevancy of testimony," as defined by Stephen, is: "That any two facts to which it is applied are so related to each other that, according to the common course of events, one, either taken by itself, or in connection with other facts, proves, or renders possible, the past, present, or future existence or nonexistence of the other. Steph. Dig. Ev. art. 1. The testimony in the case made it quite manifest that since the fire of 1901 conditions had changed, and precautions against fire had been taken by defendant, so that under no reasonable construction of the physical principle of cause and effect could this testimony be applicable. It is inadmissible because of its remoteness in paint of time, during which interim changed conditions resulted; but primarily as is said in one case, "upon grounds of public policy to prevent the multiplication of issues in a case" without apparent connection. Costelo v. Crowell, 139 Mass. 588, 2 N. E. 698; State v Raymond 53 N. J. Law, 260, 21 Atl. 328; Collins v. N. Y. C. R. Co., 109 N. Y. 243, 16 N: E. 50.

.... ...s reason, the judgment is reversed, and a venire de novo is awarded.

(78 N. J. L. 101)

DOBBS v. WEST JERSEY & S. R. CO. (Supreme Court of New Jersey. June 22, 1909.)

RAILROADS (§ 350*)—CROSSING ACCIDENTS—ACTIONS—JURY QUESTION—CONTRIBUTORY NEGLIGENCE.

In an action for injury to plaintiff's horse and buggy by being struck by defendant's train at a street crossing, whether the driver of the buggy was negligent held for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1166; Dec. Dig. § 350.*]

Certiorari to District Court of Camden.

Action by James C. Dobbs against the West Jersey & Seashore Railroad Company. On certiorari by defendant to review a judgment for plaintiff. Affirmed.

Argued February term, 1909, before REED, TRENCHARD, and MINTURN. JJ.

"Wilson, Carr & Stackhouse, for plaintiff. Gaskell & Gaskell, for defendant.

'REED, J. Walter Dobbs and Charles B. Esher were, on April 5, 1908, driving a buggy along Essex street in Gloucester, which street crosses at right angles the tracks of the West Jersey & Seashore Railroad. There are three railroad tracks at the place of crossing. The buggy was struck by a northbound train running upon the middle one of these tracks. The horse and buggy, belonging to the plaintiff, James C. Dobbs, were injured by the collision. Upon the trial in the district court the jury rendered a verdict for the plaintiff.

The reasons assigned for reversing the judgment entered upon this verdict are that the trial court should have directed a nonsuit, or else should have directed a verdict for the defendant, on the grounds, first, that there was no evidence to show negligence of the defendants; and, second, that the drivers of the buggy were guilty of contributory negligence. In respect to the negligence of the defendant there was evidence to show that the statutory signal for this crossing was not given by the defendant's servants.

the buggy, the conditions existing at the crossing were these: To the south, whence the train was coming, there stood a row of houses, the corner one being a three-story brick building. No view could be had to the south until the driver of the buggy had passed this house. From the middle track, upon which the train was approaching, to the front of this house, there seems to have been a space of about 50 feet. In this space was a porch extending 6 feet from the house. then a distance of 33 feet to the nearest track, and then a distance of 13 feet to the middle track. The porch did not obstruct the view south. Had these houses been the only obstruction to the southern view, the driver would have been clearly negligent. But there was a line of telephone poles intervening. The line of these poles ran about 25 feet from, and parallel with, the middle track. These poles were numerous, being erected for the use of three different companies. The poles were large, and the photograph of the locality exhibits an array of these poles entirely unusual, and quite likely to confuse the vision of a person driving along Essex street toward the track between the line of the corner house and the line of these poles. There were other obstructions of less importance. The situation was quite similar to that in the case of Goodenough v. Penna. R. R. Co., 55 N. J. Law, 596, 27 Atl. 931. We are of the opinion that the driver's negligence was a question for the jury.

Judgment is affirmed.

(78 N. J. L. 59)

SILBER v. PUBLIC SERVICE RY. CO. (Supreme Court of New Jersey. June 29, 1909.)

1. TRIAL (§§ 106, 108*)—ARGUMENT OF COUN-BEL—SECOND ADDRESS—REPLY.

The trial court may in its discretion al-low the opening counsel to make a second ad-dress to the jury, although no reply to his first address was made. When such second address address was made. When such second address has been made, it is error to refuse to permit defendant's counsel to reply to it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 267, 269; Dec. Dig. §§ 106, 108.*]

2. FORMER DECISION FOLLOWED.

New York & Long Branch R. R. Co., v.
Garrity, 63 N. J. Law, 50, 42 Atl. 842, followed. (Syllabus by the Court.)

Appeal from District Court of Bayonne. Action by Isaac Silber against the Public Service Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued February term, 1909, before GAR-RISON, BERGEN, and VOORHEES, JJ.

Edwards & Smith, for appellant. A. A. Melniker, for appellee.

GARRISON, J. This appeal presents two Respecting the negligence of the driver of questions touching the rights of counsel in summing up to the jury, or rather it presents two phases of the same question. What happened at the trial thus appears in the state of the case:

"The Court: Counsel may sum up.

"Mr. Morton: We request an opening from the plaintiff.

"The Court: I want to know if you have any further rule on that.

"Mr. Melniker: In order to avoid any question I will open.

"Mr. Melniker opens the case to the jury.
"Mr. Morton (after Mr. Melniker has finished his argument): We have no argument to make. We have written request that the jury bring in a special finding.

"Mr. Melniker: If there is a request for an instruction, I desire to sum up.

"Mr. Morton: We object to his further summing up on the ground that he has already summed up, and the matter has been presented to the jury.

"The Court: You may proceed, Mr. Melniker.

"Mr. Morton: Will your honor allow me an exception to the permission granted to the attorney for the plaintiff to further sum up on the ground that there has been no argument on behalf of the defendant, and therefore nothing for the plaintiff to reply to?

"The Court: The attorney is not to open and reply, but to open and close.

"Mr. Morton: I ask an exception.

"Exception allowed. Let it be sealed, and it is sealed accordingly. Frederic E. Chamberlain, Judge of the District Court of the City of Bayonne. [Seal.]

"Mr. Melniker then addresses the jury at length.

"Mr. Morton (after Mr. Melniker has summed up to the jury): I desire to have the privilege of summing up to the jury for the defendant.

"The Court: You have already stated that you didn't wish to address the jury. I consider this the closing, and therefore you have waived your right,

"Mr. Morton: Does your honor refuse to allow me to address the jury?

"The Court: 'I do."

Counsel for appellant by his specifications complains of the action of the trial court first in allowing plaintiff's counsel to address the jury twice, and, second, in refusing to allow defendant's counsel to reply to the second address to the jury.

The action of the trial court was right in the first respect and wrong in the second, and in both respects is covered by the decision of this court in New York & Long Branch R. R. Co. v. Garrity, 63 N. J. Law, 50, 42 Atl. 842.

The judgment of the district court of Bayonne is reversed.

NATIONAL UNION FIRE INS. CO. OF:
PITTSBURGH, PA., v. EMPIRE
STATE SURETY CO.

(Supreme Court of New Jersey. June 22, 1909.)

INSURANCE (§ 665*)—INDEMNITY INSURANCE—ACTION ON BOND — SUFFICIENCY OF EVI-

In an action on a bond insuring plaintiff against the defalcation of its employes, evidence held insufficient to support a verdict for plaintiff.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 665.*]

Action by the National Union Fire Insurance Company of Pittsburgh, Pa., against the Empire State Surety Company. Verdict for plaintiff. Heard on rule to show cause why a new trial should not be granted, Rule made absolute.

Argued February term, 1909, before REED, TRENCHARD, and MINTURN, JJ.

Edward A. & William T. Day, for plaintiff. Frederick S. Kellogg, for defendant.

REED, J. The rule to show cause is limited by the condition of its allowance to the question whether the verdict is supported by the evidence. The defendant, as its name imports, is a surety company. It insures among other things, the employer against the defalcation of his servants. In the present case it insured the fidelity of one Fowler, who was employed by the plain! tiff as one of its agents in its fire insurance business. The defendant gave the plaintiff its bond dated August 8, 1904, to indemnify the plaintiff against loss through the default or dishonesty of Fowler in connection with his duties pertaining to the position to which Fowler had been appointed by the plaintiff. The bond contained several express conditions; the fourth one providing: "If, at any time after the beginning of the term for which this bond is written, the employer suspects, or if there come to the notice or knowledge of the employer, any act, fact, or information tending to indicate that the employé is or may be unreliable, deceitful, dishonest, or unworthy of confidence, or that he is intemperate, gambling, or indulging in other vices, the employer shall immediately so notify the company in writing; and, if the employer fail or neglect to do so, this company shall not be liable for any act of the employe thereafter committed." This bond was renewed in 1905, 1906. and 1907; so that the bond which covered the period of the employe's defalcation in this case ran from August 8, 1907, to August 8, 1908.

Fowler, the employe, died September 22, 1907. At the time of his death, there was due to the plaintiff over \$3,000, consisting of moneys collected by Fowler for premiums of policies issued through him for the plain-

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tiffs. sists that the verdict for the defendant for this amount should be set aside, because the evidence shows that the plaintiff did not perform its duty to the defendant imposed by the condition of the bond already mentioned, and that the plaintiff did not give notice to the defendant of acts of Fowler's which came to its knowledge, tending to indicate that Fowler was unreliable and unworthy of confidence. The business of Mr. Fowler was to accept business from brokers and issue policies in the plaintiff's company, and for his services he received a percentage upon the amount of premiums received. Fowler had begun his services with the plaintiff in November, 1904, and continued them until his death. In the written contract of employment, there is no mention of the collection of premiums or of their payment by Fowler to the company, and, of course, no mention of the period within which such premiums should be paid over after their receipt by Fowler. It appears, however, from the course of dealing, that Fowler did collect the premiums, and, of course, accounted for them less his percentage for commissions. The premium book and policy register kept by Fowler shows the amount of business done by him as agent of the plaintiff. He collected in June, July, and August \$3,656.15 which belonged to the plaintiff. He remitted none of this money. The usual time for remittance by the agents of the company is testified to have been 60 days, 70 days, and sometimes as long as 120 days, and even 5 months. The amount collected in May he paid over in September. The amount he collected in April he paid over on August 8th, and the amount he collected in March he paid over on July 12th. The president of the plaintiff's company testified that Fowler was one of the valued agents of the company, and that he, like many others, was dilatory in making his collections. He testified that the agent gives credit to his patrons, brokers, and private customers, and the company was compelled, by the competition in business, to allow credit, usually 60 days, extended sometimes to 3, 4, and 5 months, and that letters were written to the agents to stir them up, as well for their benefit as for the benefit of the company.

On cross-examination of Mr. Cole, the president, he admitted his signature to a letter written by him to Fowler on June 8, 1907. In this letter the president said: "My attention is directed to the balances which are delinquent at your agency. February balance of \$1,755.41 is now nearly six weeks past due, and the March balance of \$1,526.83 is due. This matter of delinquent balances has been discussed with you personally by the writer, and we had a very distinct understanding at the time. You must come to recognize the fact that we cannot be annoyed, or put to the necessity of annoy-letter to Fowler contained any misstate-

The counsel for the defendant in- ing you with letters of this kind, and desire to state very positively that, unless some arrangement can be made whereby we are relieved of the continual annoyance of dunning you for balances, we would prefer to terminate the connection with your agency. Sixty days is the limit of credit that we allow our agents. In your case, we have made it seventy-five days, and the balances must be paid within that time. Please be guided accordingly." The defendant relies upon the contents of this letter as such persuasive evidence of the knowledge of the company of a fact tending to indicate that Fowler was unreliable, and therefore that it was its duty to communicate that knowledge to the defendant, which it is admitted it did not do, that this verdict should not be permitted to stand. The letter was competent to qualify and contradict the testimony of the president when on the stand. The letter, however, was put in by the defendant as substantive evidence binding the corporation as an admission. This evidence must be regarded from the point of view which the charge of the trial judge left it to the The judge charged that: "The injury. surance company, the plaintiff, was not to judge as to what fact indicated unreliability in the agent; that it was for the jury to say whether or not the fact, if it was a fact, that Fowler was overdue in making his payments, was a fact or act which tended to show his unreliability." Again the trial judge charged: "If you find that there was a fixed time in which Fowler was to turn over his money to this insurance company, and he did not do so-I do not mean for an hour or for a day or two days-but if for several weeks, and especially if habitually, he was delinquent and derelict in the observance of that contract, that was a fact and a circumstance which indicated his unreliability, and which should have been communicated to the surety company." again: "If it be true that the limit was 75 days, and he was 6 weeks over that time, the insurance company should have notified the surety company, and otherwise they were not liable."

Taking these instructions as the standard by which the jury was bound to consider the case, it is manifest that the jury, in arriving at the verdict for the plaintiff, must have found, either that the time of credit given to Fowler was more than 75 days, or they must have found that Fowler was not delinquent for several weeks over the period of 75 days. While there was evidence that credit was extended to some agents in some instances for 4 and even 5 months, there is no evidence that such credit was extended to Fowler. The testimony in respect to Fowler's credit is contained in the letter of Mr. Cole, who says that his ordinary credit was 75 days. Mr. Cole did not say when on the stand that the contents of his



ment of facts. The testimony respecting | State v. Wines, 65 N. J. Law, at page 35, 46 Fowler's delinquency upon the assumption that his period of credit was 75 days is ample. Not only does his delinquency appear in the letter of Mr. Cole; but, from all the testimony respecting the period intervening between Fowler's collections and payments, it appears that he was delinquent in payment several weeks after his collections.

So assuming, as we must, that the jury found that the period of credit was more than 75 days, or that Fowler was not several weeks delinquent if it was 75 days, we think the verdict cannot stand.

The rule is made absolute.

(77 N. J. L. 685)

STATE v. CALLAHAN.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

CRIMINAL LAW (§ 787*)—FAILURE OF DEFENDANT TO TESTIFY—REMARKS OF COURT.

Upon the trial of an indictment, where the defendant fails to testify in his own behalf to deny inculpatory facts which, if false, he must know to be so, it is proper for the trial judge to call attention to his failure to testify.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1903; Dec. Dig. § 787.*]

(Syllabus by the Court.)

Error to Supreme Court.

James E. Callahan was convicted of crime, and from a judgment of the Supreme Court (69 Atl. 957), affirming the conviction, he brings error. Affirmed.

Robert Adrain, for plaintiff in error. George Berdine, for the State.

SWAYZE, J. A majority of the court think that the judgment in this case should be affirmed for the reasons stated in the opinion of Mr. Justice Bergen in the Supreme Court (69 Atl. 957); but, in view of the difference of opinion in this court, it is thought well to add to what he said. The substantial complaint made by the plaintiff in error is that the learned judge of the quarter sessions, in his charge, called the attention of the jury to the failure of the defendant to go upon the stand as a witness in his own behalf, and charged them as follows, using almost the exact language of the opinion of the Supreme Court in Parker v. State, 61 N. J. Law, 308, at page 313, 39 Atl. 651, at page 653: "When the accused is upon trial, and the evidence tends to establish facts, which, if true, would be conclusive of his guilt of the charge against him, and he can disprove them by his oath as a witness as a fact if it be not true, then his silence would justify a strong inference that he

Atl. 702, the Supreme Court distinctly said that it was proper for the judge to refer to the failure of the defendants to testify and to call witnesses to establish the defense by way of an alibi, as circumstances in the case. The Wines Case was a case of circum-. stantial evidence, and the defendants were called upon to deny only the facts which made against them and of the falsity of which they must have had knowledge. We think that so far the judge was entirely correct. We see no reason why the principle adopted by us in the Twining Case does not justify the judge in commenting upon the failure of the defendant to deny any inculpatory facts which may be within his knowledge. What was condemned by the Supreme Court in the Wines Case was the language of the trial judge in dealing with the force and effect of the failure of the defendants to testify. The force and effect of the failure of the defendant to deny circumstances which tend to prove guilt only by inference is necessarily much less than the effect of his failure to deny direct testimony of a guilty act, as in the Parker Case. The judge in the Wines Case told the jury that the evidence of guilt was irresistible, and that no instruction of the court would prevent the inference from being drawn by honest jurymen. As to that, Chief Justice Depue properly said: "In the present case there was no direct evidence to connect the accused with the crime charged. It was circumstantial evidence to be submitted properly to the jury. We think the learned judge was not, under this evidence, justified in the manner in which the failure of the accused to testify or call witnesses to establish an alibi was urged upon the jury, or in applying the comments of the Chief Justice in Parker v. State to the condition of the evidence in the case in hand." It was not the fact that the judge called attention to the failure of the defendants to testify that was condemned. It was the manner and urgency with which he magnified the importance of the fact. In the present case the trial judge did not urge upon the jury that the failure of the defendant to testify was of any force at all, except so far as they have drawn that inference from the language which he adapted from the opinion in the Parker Case, and which we have already quoted. That language, taken abstractly, correctly states a logical conclusion. No one can doubt that if the evidence tends to establish facts conclusive of the defendant's guilt, which he can disprove by his own oath as a witness, if they are not true, his silence justified a strong inference that he cannot deny the charge. The only question that can be raised could not deny the charge." This rule has as to the propriety of this remark of the been sustained in this court in State v. Twin- | judge is that it had no application to the ing, 73 N. J. Law, 683, 64 Atl. 1073, 1135. In case in hand. Read as a whole, the part of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the charge complained of was that there was , direct evidence of acts from which the jury . could infer prostitution and immoral practices taking place in the defendant's house. That direct evidence consisted of testimony of a witness who entered the lower part of the house, saw the defendant in what is , called the saloon, where there were then two girls and two fellows, and who testified that they had cigars and then went upstairs, where whisky was served by one of the girls, that on one occasion he was solicited by one of the women in the house, and that on another occasion, when several men were there, the girls went about among them, sat on their laps, and danced and waltzed around and had a good time. This was certainly , evidence of direct acts from which the jury , might properly infer prostitution and immoral practices. The acts already recited , were proven to have taken place in 1906. It was further shown: That in April, 1907. the defendant, who was an unmarried man, had four women in his house, at about midnight, when the officers broke in; that the women used profane language; that one man concealed himself in the ice box: that the women were taken before the magistrate; that the defendant gave bail for their subsequent appearance; that gambling machines were found in the house, in which money was found when they were examined by the police officer; that liquor was found in the house under circumstances from which it might be inferred that it was kept for sale, especially since there was proof that liquor had been sold at a previous time. facts, if believed, were conclusive proof that the house was disorderly. In order to con-; vict the defendant, it was necessary to prove in addition his knowledge, and this could be proved only by circumstances. We think that when it is proved that a man is the owner and in control of a house of this character, where acts such as described take place at a time when he is in the house, and he is present in one room when men and women are present and then leave the room and go upstairs, and when it further appears that he is an unmarried man and has four women of the character proven in this case, apparently living in his house, or at any rate there at midnight, a jury could hardly avoid an inference of knowledge on his part. so, his failure to deny knowledge justifies the comment made by the judge in this case. The judgment should be affirmed.

.(77 N. J. L. 527)

OCEAN CITY HOTEL & DEVELOPMENT CO. v. SOOY.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

1. ESTOPPEL (§ 32*)—ESTOPPEL BY DEED.

The conveyance of a lot bounded by a

ence is made in the deed therefor does not estop the grantee to deny the title of the grantor to land embraced within the limits of the street. [Ed. Note.—For other cases, see Estoppel,

Dec. Dig. § 32.*]

Boundaries (§ 20*) Bounded on a Street. 20*) -– Deeds – Lands

Whether a conveyance of land bounded upwhether a conveyance or land bounded up-on a street delineated upon a map, to which reference is made in the deed therefor, includes the land to the center line of the street as de-lineated, is a question of intention, and, if at the time of the conveyance the land covered by the street is in part washed by the ocean, the line of the grantee's land can extend no the line of the grantee's land can extend no further than the middle of the street as it actually exists at the time upon the ground.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 123-130; Dec. Dig. § 20.*]

NAVIGABLE WATERS (§ 39*) - RIPARIAN

RIGHTS—ACCRETIONS.

The Ocean City Association in 1880 and The Ocean City Association in 1889 and 1882 conveyed land to one Mathews, describing it by reference to a map of lots owned by the association, and bounding it upon one of the streets delineated upon the map. Held, that if, at the time of the conveyance, the ordinary high tide of the ocean covered the whole of the land within the hounds of the street Mathe the land within the bounds of the street, Mathews was the riparian owner and entitled to the subsequent accretions; but that, if the or-dinary high tide at that time did not cover the whole of the street, the association remained the riparian owner and entitled to the subsequent accretions.

[Ed. Note.—For other cases, see Navig. Waters, Cent. Dig. § 240; Dec. Dig. § 39.*] see Navigable

(Syllabus by the Court.)

Error to Supreme Court.

Action by the Ocean City Hotel & Development Company against Richard R. Sooy. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Gilbert Collins (Bleakly & Stockwell and John W. Wescott, on the brief), for plaintiff in error. George A. Bourgeois and Albert A. Howell (Bourgeois & Sooy, on the brief), for defendant in error.

SWAYZE, J. This is an action of ejectment for a tract of land in Ocean City bounded by the middle line of Atlantic avenue on the northwest, by the Atlantic Ocean on the southeast, by the middle line of Seventh street on the southwest, and by a line parallel thereto and 330 feet distant on the northeast. Both plaintiff and defendant claim title under grants from the Ocean City Association; the plaintiff under a deed to Iszard dated October 28, 1905, and the defendant under two deeds to Charles Mathews, one dated July 26, 1880, and the other dated September 4, 1882. The deeds to Mathews do not in terms include the locus in quo, and the defendant's title thereto rests upon an alleged right of accretion. His claim is that the land conveyed to Mathews, to whose title he has succeeded, bordered upon the Atlantic Ocean at the time those conveyances were made. The deeds to Mathews described the lands conveyed by reference street delineated upon a map to which refer- to lot numbers on the plan of lots of the

· •For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

northwesterly side of Atlantic avenue. At the time these deeds were made, the only map which had been filed by the Atlantic City Association was the map filed June 9, 1880. Upon that map Atlantic avenue is delineated as extending from First street near the northerly end of the whole tract southerly as far as Fifth street. South of Fifth street the northwesterly line only of the avenue is delineated upon the map. southeasterly line is shown in front of the land conveyed to Mathews. The only lines oceanward are two irregular curved lines. which seem to be intended to indicate the lines of the ocean. These lines are outside of the southeasterly line of Atlantic avenue if extended. The width of Atlantic avenue where both lines of the street are shown is 70 feet. The trial judge charged that if, when the deeds were made to Mathews, the ordinary high-water line of the Atlantic Ocean came up on the lots, was northwesterly of Atlantic avenue, Sooy became the owner of the ripa and would be entitled to the accretion; that the maps were not conclusive, but were to be given such weight as the jury thought their importance and accuracy entitled them to. He also charged as follows: "If you find that the Ocean City Association intended Atlantic avenue to be 70 feet in width southerly of Sixth street, when said avenue should afterwards be laid out, and conveyed lots numbered 985, 987, 989, 991, 993, and 995 in section A by a description calling for Atlantic avenue as a boundary, and the high-water line of the Atlantic Ocean at time of conveying said lots extended to or washed the center of said avenue in front of said respective lots, then and in that case your verdict should be for the defendant." The charge therefore permitted the jury to find a verdict for the defendant in either of two situations: First, if at the time of the conveyances to Mathews the high water washed the lots as described in his deeds; or, second, if it came up as far as the middle line of Atlantic avenue. 35 feet southeast of the boundary line of the lots as described in the deeds. The jury found a verdict for the defendant.

The plaintiff in error argues that the first portion of the charge was erroneous for the reason that both parties are estopped by the map and by the reference in the Mathews deeds to Atlantic avenue as a boundary. That they are estopped to some extent is conceded by the defendant in error, for he argues that the plaintiff in error is estopped to deny that Atlantic avenue existed as a street at that point 70 feet in width. The issue between the parties therefore is the extent to which the estoppel is to be carried. It is essential for the plaintiff in error, who is the plaintiff in ejectment; to establish a title to the locus in quo, and the exact question presented therefore is whether the con-

Ocean City Association, and as lying on the and to Atlantic avenue as a boundary is conclusive proof as between the parties that at that time the plaintiff had title to the soil covered by Atlantic avenue. We think that such a conclusion does not necessarily follow. It may well be that at the time of these conveyances the whole of Atlantic avenue was under the waters of the ocean, and therefore the property of the state. This would not prevent the parties to those conveyances from delineating such a street upon the map and referring to it as a boundary, and, while these facts could not effect a dedication of the state's land, they would operate by way of estoppel as against the parties to the conveyances so that if the ocean receded the parties could not deny the dedication. The principle is the same that was established in Jersey City v. Morris Canal & Banking Company, 12 N. J. Eq. 547, and applied in Hoboken Land & Improvement Company v. Hoboken, 36 N. J. Law, 540. It is obvious that the mere fact that a street is referred to as a boundary and is delineated upon a map indicates nothing as to the title to the land covered by the street, for the title to the street might well be in a third party, and yet the street properly be delineated upon a map and referred to in a conveyance between other parties. Such a case is Dunham v. Williams, 37 N. Y. 251. The possibility was recognized by Justice Magie in his opinion in Ayres v. Pennsylvania R. R. Co., 48 N. J. Law, 44, 49, 50, 3 Atl. 885, 57 Am. Rep. 538. The estoppel does not go as far as claimed by the plaintiff in error, and it was doubtless for this reason that this court in a similar case arising out of this very map did not consider the fact that a lot was bounded upon a street as conclusive upon the question whether the line of high water reached the lot as described by metes and bounds or not. Ocean City Association v. Shriver, 64 N. J. Law, 550, at page 566, 46 Atl. 690, at page 696 (51 L. R. A. 425), Chief Justice Depue said: "If, on the other hand, the line of ordinary high tide in 1884, when the association conveyed this title, was on this lot, then, by force of the conveyance to Howell, he became the riparian owner, and he and his grantee are entitled to the accretions."

The trial judge properly therefore charged in accordance with the rule laid down in the case last cited. We think, however, that he failed to give to the map the force as evidence to which under that case it is entitled. Although the map and the deeds are not conclusive as to the line of the ocean in 1880 and 1882, they are evidence that at the time the map was filed the line of the ocean did not reach the lots conveyed to Mathews, and the lines delineated upon the map of 1883 are evidence that at that time no change had occurred sufficient to bring the ocean within the lines of Atlantic avenue. We said in the Shriver Case, referring to veyance to Mathews by reference to the map the lines upon this map, that it appeared

there was a considerable space of undivided tiff in error is estopped to deny that Atlantic land lying between that portion of the association's property which was then in dispute and the Atlantic Ocean, and that Ocean avenue was delineated on the map as practically parallel with and some distance from the ocean, and we added that the map of 1883 showed a line of high water in 1882 located 250 feet east of the easterly line of Ocean avenue, and that between that line and Ocean avenue appeared a space of This language of Chief unplatted land. Justice Depue's opinion refers to the irregular line which we have already referred to as probably indicating the line of the ocean. and his remarks as to its location with reference to Ocean avenue are applicable mutatis mutandis to Atlantic avenue in front of the lots now in question. We call attention to these facts in order that they may be brought to the attention of the jury upon a retrial of the case.

Such a retrial will be necessary for the reason that the trial judge erred in the second branch of the charge above set forth. The description of the lots conveyed to Mathews bounds them upon the northwesterly line of Atlantic avenue. If those deeds conveyed any land southeast of that line and within the boundaries of Atlantic avenue. it is only by virtue of the rule which extends the bounds of a grant of land abutting upon a public street. The ordinary rule in such a case is that established in Salter v. Jonas, 39 N. J. Law, 469, 23 Am. Rep. 229; but that rule is a rule of construction only. Chief Justice Beasley was careful to say: "The particular words should, in such transactions, be controlled and limited by the manifest intention which is unmistakably displayed in the nature of the affair and the situation of the parties. When the conditions of the case are altered, as if the vendor should, in a given case, have an apparent interest to reserve to himself the parcel of street in question, a different rule of interpretation might become proper." The rule adopted by the trial judge went farther than was justified by the decision in Salter v. Jonas, for he extended the grant beyond the middle line of the actual street as it was in case the highwater line came west of the southeasterly line of the avenue, and he fixed the southeasterly boundary of the Mathews grant as a line 35 feet southeast of the line given by the deed. It has been held in the Supreme Court of the United States that where the street as actually existing is narrower than as delineated upon the map, the grant can only be extended to the center line as actually existing. Banks v. Ogden, 2 Wall. 57, 17 L. Ed. 818. This rule has, in addition to the great weight due to a decision of that court, the support of sound reason, in that, it effectuates the probable intent of the parties. It is argued by the defendant in error that the rule is not applicable to the

avenue was 70 feet in width. If that were so, the defendant in error would be equally estopped, for the estoppel must be mutual, especially in a case like the present, where the deed is actually signed by both grantor and grantee. If Atlantic avenue, then, be held as between the parties hereto by virtue of the estoppel to be 70 feet in width, it follows that the defendant in error is estopped to deny that the Ocean City Association retained a portion of the street itself. In other words, the defendant in error cannot rely upon this mutual estoppel and set up in opposition thereto a claim that the whole of the existing street passed under the Mathews deed. If that were not so, however, the learned trial judge was in error, for, if in fact the line of high water reached as far to the northwest as the middle line of Atlantic avenue, it is quite clear that the Ocean City Association could not have intended to convey the whole of the strip between the line of the Mathews conveyance and the line of high water to Mathews. The very fact that the map shows, as it does, an unoccupied space to the southeast of Atlantic avenue in front of the lots in question, is an indication that the Ocean City Association meant to retain to itself the actual shore. The value of riparian rights was recognized long before 1880, and the vendor, to use the language of Chief Justice Beasley in Salter v. Jonas, had an apparent interest to reserve to himself the parcel of street in question. The very case of riparian rights is referred to in Jones on Real Property in Conveyancing, § 459, citing Brisbine v. St. Paul & S. C. R. Co., 23 Minn. 114. In any aspect of the case, if the ocean did not actually wash the lots conveyed to Mathews as described by metes and bounds in his deeds, at the time of the conveyances, his grantee is not the riparian owner and therefore not entitled to the accretions. The question to be submitted to the jury is that stated in the Shriver Case, and that alone—whether the line of ordinary high tide at the time the association conveyed to Mathews was on his lots; that is, whether it covered the whole of the land within the bounds of Atlantic avenue. If it did, his grantee is entitled to the accretions subject to the dedication of the avenue. If it did not, the plaintiff, as the subsequent grantee of the Ocean City Association, is entitled to those accretions.

Court of the United States that where the street as actually existing is narrower than as delineated upon the map, the grant can only be extended to the center line as actually existing. Banks v. Ogden, 2 Wall. 57, 17 L. Ed. 818. This rule has, in addition to the great weight due to a decision of that court, the support of sound reason, in that, it effectuates the probable intent of the parties. It is argued by the defendant in error that the rule is not applicable to the present case for the reason that the plain-

by the board of proprietors of West Jersey, that the surveyors had the right to extend the surveys, and that it was a custom in making including surveys where the land was bounded by high water to so extend them, and that the board of proprietors has knowledge of such extensions at the time they grant the survey or grant the patent to the land. This evidence was offered, as stated by the brief of the defendant in error, to meet an attack made by the plaintiff upon a return made by one Haines, apparently for the purpose of showing that that return which had been offered in evidence by the defendants themselves was not entirely accurate. We think this evidence was not admissible.

The judgment must be reversed, and the record remitted for a new trial.

(78 N. J. L. 229)

DEATON V. DORSEY.

(Supreme Court of New Jersey. June 23, 1909.)

WILLS (\$ 614*)—EXECUTORS AND ADMINISTRATORS (\$ 431*)—SUIT AGAINST EXECUTOR—CONSTRUCTION OF WILL—LIFE ESTATE—"DURING HER NATURAL LIFE."

A testator in his will provided as follows: "I give * * to my wife during her natural life all the income from my real and personal property after all the taxes and necessary repairs shall have been paid, and after her death then my daughter Martha E. Morris is to become the owner of all that may be remaining of said real or personal property after maining of said real or personal property after my wife's funeral expenses and just debts are paid during her natural life, then after her death the said property is to revert to my daughter's nearest surviving heirs." Held, that daughter's nearest surviving heirs." Held, that the clause "during her natural life" refers to the duration of the estate in testator's daughter, thus limiting the daughter's right to a life es-Held, further, that a suit at law cannot be maintained against the executor of the de-ceased husband to enforce payment of the wife's just debts by virtue of the provision of his will, and that the executors of the husband have the right to require the just debts of the wife to be first established by a suit against the wife's executor.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1393; Dec. Dig. § 614: Executors and Administrators, Dec. Dig. § 431.*

For other definitions, see Words and Phrases, vol. 3, pp. 2278, 2279.

(Syllabus by the Court.)

Appeal from District Court of Camden. Action by Ella Deaton against Benjamin F. Dorsey, administrator c. t. a. of the will of James H. Morris, deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued November term, 1908, before GAR-RISON, PARKER, and VOORHEES, JJ.

Wilbert V. Pike and Raymond R. Donges, for appellant. Francis D. Weaver and John B. Kates, for appellee.

the district court of the city of Camden. The

with reference to a survey and return made | state of the case settled by the judge of that court sets forth:

> "This is an action brought to recover from the estate of James H. Morris, deceased, the sum of \$207, balance claimed by the plaintiff for services rendered to Martha Morris, widow of said James H. Morris, in her lifetime, as housekeeper at wages alleged to have been agreed upon by contract with Mrs. Morris. James H. Morris, of Camden, N. J., died early in 1896, having first made his last will and testament, duly proved before the surrogate of Camden county on March 3, 1896, and of record in said surrogate's office in Book 8 of Wills, p. 50, etc., wherein and whereby he did, among other things, provide:

> "'First. It is my will and I do order all my just debts and funeral expenses to be duly paid as soon as conveniently may be after my death.

> · "'Second. I give devise and bequeath to Martha Morris, my beloved wife, during her natural life, all the income from my real estate and personal property after all the taxes and necessary repairs shall have been paid, and after her death then my daughter Martha E. Morris is to become the owner of all that may be remaining of said real estate or personal property after my wife's funeral expenses and just debts are paid during her natural life then after her death the said property is to revert to my daughter nearest surviving heirs.'"

The executor named having died before the testator and the widow having renounced, letters of administration c. t. a. were, on March 3, 1896, granted to John E. Gumby, and on March 16, 1905, letters were granted to Benjamin F. Dorsey as substituted administrator with the will annexed. The net income of the real and personal property of the testator was paid over by the administrator to testator's widow, Martha Morris, until the latter's death on January 18, 1907. This suit is brought for that, as is alleged, on April 2, 1903. Mrs. Morris engaged the plaintiff, Ella Deaton, as housekeeper, at an agreed weekly wage of \$3; that on August 27, 1905, after Mrs. Morris had been stricken with paralysis, she raised the weekly wage to \$4, and on December 20, 1906, to \$5; that the plaintiff performed the services as agreed, and at Mrs. Morris' request expended for the household, in August, 1906, the sum of \$3, making the total amount accrued to her under the contract \$673, on which she received on account from time to time \$466, leaving a balance claimed by her of \$207. The plaintiff duly presented her claim to the defendant administrator for the said balance as due to her under the terms of James H. Morris' will. The administrator refused payment and notified her to enforce her claim by suit. The case was tried before the court without a ju-VOORHEES, J. This is an appeal from ry. The foregoing facts were established to the satisfaction of the court, in accordance with the statement in the demand filed by testimony on the part of the plaintiff. Witnesses also testified that Mrs. Morris, shortly before her death, told them, separately, that she owed Ella Deaton about \$200 for her services as housekeeper. No testimony was offered to controvert the testimony of these witnesses.

For the defendant the record of the last will and testament of Martha Morris, who died on January 18, 1907, was offered, wherein it was provided:

"Item 1. It is my wish and I order and direct that all my just debts be paid.

"Item 2. In consideration of the faithfulness and constant attention and care of Ella Deaton to me during my recent years and illness, I give and devise to her, the said Ella Deaton, the house and lot known as No. 1807 South Tenth street, Camden, New Jersey, and also lot No. 1809 South Tenth street, Camden, New Jersey."

It is also in evidence: That Martha E. Morris, the daughter named in the will of James H. Morris, died about 18 months after her father's death, by reason whereof his estate goes to a grandniece; that Mrs. Morris was familiar with the terms of her husband's will: but that the plaintiff did not know that Mrs. Morris had made any provision for her in her will. On the ground that the provision made by Martha Morris in her will for the plaintiff was intended and is in satisfaction of any claim for personal attention and care of Martha Morris rendered by Ella Deaton to her in her lifetime, judgment was rendered by the court in favor of the defendant.

The action is brought upon the theory that the second item of the will of James H. Morris confers a right of action against his executors, in favor of the creditors of his widow. It will be observed that no such right is expressly given. The provision concerns the disposition of testator's property. His wife's interest is limited to a life estate, with provision that "after her death then my daughter Martha E. Morris is to become the owner of all that may be remaining * * * after my wife's funeral expenses and just'debts are paid during her natural life." The clause "during her natural life" refers to the duration of the estate in his daughter, thus limiting the daughter's right to a life estate, and does not refer to the period within which such debts shall be paid. The clause in the will is thus essentially a mere disposition of testator's property, with provision that his daughter's remainder shall be diminished by the payment of his wife's funeral expenses and just debts. The will merely provides for an estate in remainder in the daughter after the satisfaction of the just debts of Mrs. Morris so far as the property of the testator may extend, after the ascertainment of those debts. The theory of the plaintiff's case is that, by the provision in Mr. Morris' will now in ques-

tion, he imposed on his executors the duty of determining what claims against the estate of his widow are to be regarded as her "just debts." We are unable to adopt this theory in view of the existing provision of our statute for the ascertainment of the demands against a decedent's estate. The only persons authorized by law to exercise this power are the executors or administrators of the alleged debtor, and in case of dispute, the existence and amount of debt must be settled in suits between the creditors and the debtor's estate. The judgments in such suits will determine the debts and their amounts. Whether a debt was contracted, whether it has been paid, whether there are set-offs to be allowed, whether there is a recoupment or counterclaim, are matters which must be litigated between the debtor's estate and the claimant. Moreover, if the will were so construed as to authorize the husband's executors to audit claims against the wife's estate, this could not prevent presentation of such claims to her personal representatives for allowance in the regular course, and a double presentation might and doubtless would result in the allowance of some claim by the representatives of one decedent and their rejection by those of the other, leading to more or less confusion. In our judgment therefore the will of the deceased husband does not confer power upon his executors to determine these matters, nor to represent the ultimate devisees or legatees in that behalf. Such ultimate devisees and legatees have a right to be heard. No authorities have been adduced to the contrary of these views. Furthermore, as representatives of the deceased, executors and administrators are answerable so far as they have assets only for the testator's or intestate's debts, covenants, or other contracts-not for the debts of other persons. In short, in all cases where the cause of action is money due on a contract to be performed, gain or acquisition of the testator by the work or labor or property of another, or a promise of the testator express or implied, the action survives against the executor; but this case presents no such situation.

Nor does an action at law, in the absence of statute or an express promise by the legal representatives to pay it, lie against an executor for a general legacy; nor for a distributive share of an estate. The statutes in our state upon these subjects are not applicable to the case in hand. The direction, in the will, to distribute the estate after payment of the wife's just debts, is in the nature of a legacy. It is not a contract made by the testator, nor does it furnish the foundation of an action at law to be enforced against the executor. It may be that the claim is enforceable against the husband's estate by a suit in equity, requiring the payment of the just debts when ascertained, in which proceeding the persons entitled to the estate of the husband, whose shares therein would suf-



fer diminution by the payment, should be proper. The minutes of a meeting of the made parties.

The conclusion is that a suit at law cannot be maintained against the executor of the deceased husband to enforce payment of the wife's just debts, by virtue of this provision of his will, but that the executors of the husband have the right to require the just debts to be first established by a suit against the wife's executor, for it is the wife's "just debts" eo nomine which alone can diminish the estates of the subsequent takers.

On this ground the judgment for the defendant should be affirmed.

(78 N. J. L. 126)

GRANT v. MAYOR, ETC., OF BOROUGH OF HAWORTH et al.

(Supreme Court of New Jersey. June 22, 1909.)

MUNICIPAL CORPORATIONS (§ 493*)—ASSESSMENT FOR PUBLIC IMPROVEMENTS—CONFIG MATION.

A borough common council may adopt and confirm an assessment made by commissioners for the benefits resulting to a landowner from a public improvement by a motion made to confirm the said assessment, followed by a vote adopting the motion. The use of the word "resolved" that the assessment be adopted is not essential.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 493.*]

(Syllabus by the Court.)

Certlorari by the State, on the prosecution of Hugh J. Grant, against the Mayor and Council of the Borough of Haworth and others to review an assessment for benefits from the construction of a road in part through his lands. Confirmation of report affirmed.

Argued February term, 1909, before REED, TRENCHARD, and MINTURN. JJ.

Mable & Maidment, for prosecutor. Wendell J. Wright, for defendants.

REED, J. The first point of attack is levied against the manner in which the reports of the commissioners who made the assessment for benefits was adopted and confirmed by the common council of the borough of Haworth. It is insisted that the assessment should have been confirmed by a resolution of the common council, and that it was, in fact, confirmed by the adoption of a motion. The proceeding for the making and confirmation of such an assessment within a borough is controlled by the borough act of April 24, 1897 (P. L. p. 285). Paragraph 58 of that act provides that, after the commissioners of assessment shall certify their assessment to common council, that body shall, at a meeting, notice of which shall have been given in the manner directed by the section, consider the assessment, and that after considering it common council may adopt and confirm the said assessment with or without alteration as to them may seem

common council held on June 13, 1908, show the following: "Motion offered by Dr. Hull that the report be confirmed, and that before taking a vote, the mayor deemed it advisable to throw the meeting open for public discussion." The minutes show that some discussion then followed. Then the minutes proceed: "Council called to order by Mayor McCulloch. Upon vote on motion by Dr. Hull to confirm the report the result was as follows: Aye." Then follows the names of all the members present voting in the affirmative.

The statute, as will be observed, requires an adoption and the confirmation of report of the commissioners. The statute does not prescribe the manner in which the adoption and confirmation shall be expressed. It can therefore be indicated by ordinance or resolution, and the point made is that it was not done even by resolution, which means that the motion and the affirmative vote thereon was not a resolution. But it is obvious that the adoption of the report was the expressed sentiment of the members of the common council. Although the word "resolved" was not employed by the common council, nevertheless, in the language of Mr. Justice Van Syckel in his opinion in Pierson v. Dover, 61 N. J. Law, 404, 39 Atl. 675, it was none the less a proceeding resolved upon by the common council by whatever name it may be called. The point made is untenable.

The only other question is whether the assessment for benefits is for an excessive amount. A careful consideration of the testimony fails to show that any erroneous legal rule was adopted by the commissioners in arriving at the amount assessed. Nor can we say that the discretion with which the commissioners are invested in estimating the degree of benefits to the land of the prosecutor from the opening of the street in question was abused.

The confirmation of the report must be affirmed.

(75 N. J. El. 550)

SPARKS et al. v. ROSS et al.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

June 14, 1909.)

MARRIAGE (§ 51*) — EVIDENCE — SUFFICIENCY
—QUESTION FOR JURY.

Ross was married to Cavanaugh in 1873.
Upon a feigned issue out of chancery, as to the validity of this marriage, there was evidence that Ross had been married in 1862 to Moose, who was still living and testified that she had never been divorced. There was evidence that she and Ross had separated shortly after their marriage, had lived in the same county within a few miles of each other thereafter, and that neither had asserted any rights under the marriage of 1862; that in 1870 Moose had contracted another marriage of which a child was born in 1871; that Ross had lived continuously unin 1871; that Ross had lived continuously til his death with Cavanaugh and had children; that Moose had lived continuously from her

marriage in 1870 with Prehl; that the children of Ross by his second wife had been recognized as legitimate by the executor of his father's will. Held, that the question of the validity of the second marriage was for the jury, and that it was improper to direct a verdict against its validity.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 90; Dec. Dig. § 51.*]

(Syllabus by the Court.)

Appeal from Court of Chancery.

Suit by Amelia R. Sparks and others against Charles S. Ross and others. From an order setting aside a verdict directed for complainants (70 Atl. 679), complainants appeal. Affirmed.

See, also, 69 Atl. 185.

Thomas E. French, for appellants. John J. Crandall (T. J. Middleton, on the brief), for respondents.

SWAYZE, J. After the decision of this court reported in 69 Atl. 185, the case was retried and a verdict again directed for the appellants, which was again set aside by the vice chancellor. This appeal is taken from his order. The reason upon which the vice chancellor and this court relied in setting aside the former verdict seems to have been misunderstood. The situation is this: mund B. Ross was married to Mary Cavanaugh in 1873. If that marriage was valid. the respondents are his lawful issue and are entitled to the property in question under the will of their grandfather Samuel Ross. It is not questioned that Edmund Ross and Mary Cavanaugh went through the form of a marriage ceremony and lived together as husband and wife in Camden for 15 years and until his death. The claim of the appellant is that the marriage was invalid because he had previously been married to Maria Moose in 1862. Some question was raised as to the proof of a ceremonial marriage to Maria Moose; but, in the view we take of the case, that question becomes comparatively unimportant, for we think the evidence is sufficient to establish a valid marriage between Edmund Ross and Maria Moose at that time, provided they were both then free and capable of contracting marriage. It is proved by Maria Moose, who now calls herself Maria Prehl, that she was at that time unmarried and capable of marrying Ross. As to Ross himself, the only evidence is that of his sister, who testified that she does not know of his having been married prior to his marriage to Moose. If the only question in the case were the validity of the first marriage, this testimony would be sufficient to establish capacity on Ross' part at that time; but the case presents the situation of two marriages, each of which is presumptively valid. Neither presumption is so conclusive that the court is justified in taking the case from the jury. The question is one of fact to be decided under all the circumstances of the

case, and, while no doubt it would be the duty of the court to instruct the jury that the first marriage was presumed to be valid at the time, it would be for the jury to decide whether that presumption was overcome by the fact that Ross deserted Maria Moose soon after, leaving her and a child entirely without support, and that no claim was made upon him by his alleged wife, aithough they lived in the same county only nine miles apart, either for the support of herself or her child.

Even if the first marriage was a valid one, it does not follow as a necessary conclusion that-the second marriage was invalid, for the first marriage may have been dissolved by divorce. The testimony of Maria Moose that she did not know, and had never heard. of any proceedings taken against her by Ross for a divorce, and her further testimony that she had never been divorced, is not conclusive, since it must be weighed against the presumption in favor of the validity of the second marriage, which is a presumption in favor of the innocence of Ross of the crime of bigamy, of the innocence of his second wife of the crime of fornication, and of the legitimacy of his children. We need not in the present case decide what would be the effect of the testimony of Maria Moose that she had never been divorced, weighed against the presumption of innocence and of legitimacy, if there were nothing else proved. There are other circumstances of great significance. Marla Moose admits not only that she made no claim upon Ross after he deserted her in 1863, but that in 1870 she herself married one Prehl, by whom she had a child born in 1871, and with whom she lived as his wife undisturbed by Ross. In 1873 therefore, when Ross married Mary Cavanaugh, he had good ground for divorce against Maria Moose for adultery, and had had ample time to procure a decree. No search of the records of our Court of Chancery is proved to have been made, such as was made in Schmisseur v. Beatrie, 147 Ill. 210, 35 N. E. 525; but we are not prepared to say that the absence of any record of such a suit in our Court of Chancery would of itself be so conclusive as to justify the court in withdrawing this case from the jury.

Another important fact is the recognition of the legitimacy of the appellants by the executor of their grandfather's will, the husband of one of the appellants.

The proof of the continuance of the marriage relation between Edmund and Maria rests upon her testimony, and, in view of the facts stated and of the necessary inference from Maria's own testimony that she herself was guilty of bigamy if the marriage of Ross had not been dissolved, we think her credibility also was a question for the jury.

We have thus dealt with the question as a

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

question of fact to be decided in view of the conflicting presumptions and all the circumstances surrounding the case. The authorities are clear that as between a first and second marriage the presumption is in favor of the second marriage, and this for the very obvious reason that the first marriage does not necessarily invalidate the second.

Of the numerous authorities it will be sufficient to cite those which more nearly resemble the present case: Dysart Peerage Case, 6 App. Cas. 489, especially the language of Lord Blackburn, pages 510, 511; United States v. Green (C. C.) 98 Fed. 63; Hunter v. Hunter, 111 Cal. 261, 43 Pac. 756, 31 L. R. A. 411, 52 Am. St. Rep. 180; Pittinger v. Pittinger, 28 Colo. 308, 64 Pac. 195, 89 Am. St. Rep. 193; Erwin v. English, 61 Conn. 502, 23 Atl. 753; Potter v. Clapp, 203 Ill. 592, 68 N. E. 81, 96 Am. St. Rep. 322; Leach v. Hall, 95 Iowa, 611, 64 N. W. 790, with which may be compared a case where the facts were somewhat different (Casley v. Mitchell, 121 Iowa, 96, 96 N. W. 725); Smith v. Fuller (Iowa) 108 N. W. 765; Wenning v. Teeple, 144 Ind. 189, 41 N. E. 600; Scott's Adm'r v. Scott (Ky.) 77 S. W. 1122; Bowman v. Little, 101 Md. 273, 61 Atl. 223 (a dissenting opinion in this case is reported in 101 Md. 273, 61 Atl. 657, and a supplemental one by the Chief Justice in 101 Md. 273, 61 Atl. 1084); Ala. & V. R. Co. v. Beardsley, 79 Miss. 417, 20 South. 660, 89 Am. St. Rep. 660; Rash's Estate, 21 Mont. 170, 53 Pac. 312; Palmer v. Palmer, 162 N. Y. 130, 56 N. E. 501.

Counsel for the complainant contended that, since the feigned issue in form put upon the respondents the burden of proving the affirmative proposition that Edmund B. Ross was capable of contracting a legal and binding marriage in 1873 and was lawfully married to Mary Cavanaugh, the evidence was not sufficient to sustain this burden. No doubt the form of the issue made it incumbent upon the respondents to prove that the marriage to Mary Cavanaugh was a valid marriage. There was a presumption in its favor. Whether this presumption and the evidence in its support was sufficient upon the whole to justify a finding in favor of the validity of that marriage was a question for the jury.

We think therefore that the vice chancellor was quite right in ordering a new trial, and the order is affirmed, with costs.

(76 N. J. E. 29)

ROGERS v. BAILY. (Court of Chancery of New Jersey. May 21, 1909.)

WILLS (§ 597*)—Construction—Estate Cre-

go to her daughter, should the property have been sold or exchanged, the daughter should receive the value to the extent of \$4,000 and "should my daughter not be living at the time of my son's death, then the property or the equivalent to be given to my granddaughter."

Held that the son took the property in fee, subject only to the executory devises, and the granddaughter took a contingent interest in fee. [Ed. Note.—For other cases, see Wills, Dec. Dig. \$ 597.*]

Bill to quiet title by Frederick M. Rogers against Alice Caroline Baily. Bill dismissed.

Frank Benjamin, for complainant. jamin G. Demorest, for defendant.

STEVENS, V. C. This is a bill to quiet title. The complainant who is an uncle of defendant, alleges that under the will of his mother he has an indefeasible title in fee simple in the house and lot known as No. 62 State street, East Orange. His niece, the infant defendant, by her guardian answers and says "that she is entitled to a contingent interest in fee in the above-described premises, contingent upon the death of Frederick M. Rogers [the complainant] after the death of Minnie E. Rogers Baily, and leaving no child or children him surviving." will thus be seen that the issue, and the only issue, raised by the pleadings is whether the defendant has a contingent interest under the will. The will was probated in the District of Columbia. A copy of it, with a certificate by the register of wills, was put in evidence. In this certificate the register says that the will and codicil, after having been duly proven, were admitted to probate and record by order of the probate court, but he does not certify whether a memorandum purporting to have been signed by testatrix, and appearing between the will and the codicil, was admitted to probate as a part of the latter. The memorandum is unwitnessed. The original was not produced, and the signature to it was not proved. The codicil does not in terms refer to it, and there is no direct proof as to where it was written on the original document. By her will Mrs. Rogers gave her house and lot, No. 50 North Eleventh street, Newark, to her son, the complainant. By the memorandum she certifies (if she wrote it) that the house and lot have been sold, and that "the house and lot now refers to No. 62 state street, East Orange, N. J." It is conceded that complainant has no title to this latter house and lot under the will and codicil, unless the memorandum is by implication incorporated into them. Counsel have handed me elaborate briefs on the question whether this memorandum is so incorpor-The proof is as yet insufficient to ated. raise the question. As the document itself has been filed among the records of the pro-By will testatrix gave certain real property to a son, and provided that, on the son's death leaving no children, the property should may be some difficulty in getting the evi-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(N. J.

dence. In the view that I take of the case, however, it is immaterial whether the memorandum is part of the codicil. Whether it is or is not, the bill must be dismissed on the ground that the defendant, Alice, has a contingent interest in the land, and consequently the complainant's insistment that he is sole owner of an indefeasible estate therein cannot be sustained.

estate—an estate that may never take effect—is the only interest so given. Such a gift presupposes a residuum of interest that may, in the event, be entirely undisposed of. Why may not the statute operate upon such residuum? Why should the testator, contragent intent, be held to have died intestate so far as the fee is concerned? It seems difficult to resist the conviction that

I will first consider the case as if the memorandum were incorporated in the will. It will then read as follows: "I give and bequeath to my son Frederick M. Rogers my house and lot • • • (No. 62 State St., East Orange, N. J.). • • • In the event of my son Frederick M. Rogers' death, leaving no children or child, I give and bequeath to the survivor, my daughter, Minnie E. Rogers Baily, the house and lot at 62 State St., East Orange. Should the house and lot have been sold or exchanged, my daughter is to receive the value of said house and lot to the extent of \$4,000. Should my daughter not be living at the time of my son's death, then the house and lot or the equivalent to be given to my granddaughter, Alice Caroline Baily." I am inclined to think that under this will Frederick took a fee simple subject to executory devises to Minnie and Alice, and not a life estate. Act Aug. 26, 1784 (Laws 1703-1800, p. 53), provides that, where there is a devise of land, and the words "heirs and assigns" are omitted, and no expressions are contained in the will whereby it shall appear that such devise was intended to convey only an estate for life, "and [which means 'or'-Morris v. Le Bei (N. J. Ch.) 63 Atl. 501] no further devise thereof being made of the devised premises," all such devises shall be construed to convey an estate in fee simple. In Den v. Allaire, 20 N. J. Law, 10, the judges thought that the act applied, although there was an executory devise over, and so, in one sense, a further devise. In Brooks v. Kip, 54 N. J. Eq. 468, 35 Atl. 658, Chancellor Mc-Gill, without apparently having had his attention called to Den v. Allaire, expressed an opinion to the contrary. If, in the present case, the will does not give Frederick a fee, there is this somewhat singular result, viz., that Frederick would take a life estate, while Minnie and Alice would, on the happening of the contingency, take a fee, although the gift to them, like the gift to Frederick, is without words of inheritance.

In Den v. Snitcher, 14 N. J. Law, 53, testator devised a plantation to S. C., and if he should die without issue, then, at his (S. C.'s) decease, testator gave an undivided half over. He did not devise the other half. It was held that he intended that S. C. should have the whole in fee in case he had issue, and that at all events he was the absolute owner of the half not given over. If the statute may operate where an undivided portion is given over, I do not see why it may not operate where a contingent

fect-is the only interest so given. Such a gift presupposes a residuum of interest that may, in the event, be entirely undisposed of. Why may not the statute operate upon such residuum? Why should the testator, contrary to his evident intent, be held to have died intestate so far as the fee is concerned? It seems difficult to resist the conviction that the statute was passed to meet just such a case. The remedy would not otherwise have met the evil mentioned in the preamble of the act. As I read the decision in Den v. Snitcher, this was the view of Chief Justice Hornblower. But if Frederick takes only a life estate, the result is not substantially different; for the undisposed of fee has descended upon him and his sister Minnie, and Minnie has conveyed to him all her interest. Frederick holds the fee subject only to the contingent gift to Alice. question is whether this devise to her is now subsisting. There can be no doubt that it is.

There are two classes of cases in our reports. In the first testator gives land to A., and, if he die, to B. It is held that B. does not take unless A. die in testator's lifetime. The reason is this: A.'s death is certain. Consequently the contingency expressed by the word "if" must necessarily be the implied contingency of A.'s not being alive at testator's death. There can be no other. In the second class of cases the contingency denoted by the particle "if" is expressed, and not implied. "I give my house and lot to A., and if A. die without children to B." Here it is not necessary to imply contingency for we find it actually expressed. The contingency is not A.'s dying, which is certain, but A.'s dying without children, which is uncertain, and may happen just as well after testator's death as before. To add to this contingency another, viz., that A.'s death without children must occur in testator's lifetime, is to remake testator's will, not to construe it. Consequently, when nothing more appears, it has been held, quite uniformly, that the contingency must have its full effect, and that it terminates only with A.'s death. But provisions of this sort are generally complicated with other provisions. The will may, in the case of personalty, specify a period of payment or distribution, or, in the case of realty, provide for a minority, or interpose an estate for years or life. It may then become matter of doubt whether the expressions "death without children," "death without issue," etc., do not mean death prior to the period of payment or distribution, or during the continuance of the interposed estate. To solve this question we must discover the intention of the testator, not by reading those words as if they stood alone, but by looking into other parts of his will.

If the statute may operate where an undivided portion is given over, I do not see why it may not operate where a contingent down two rules for solving questions of this

sort: "First. If land be devised to A. in | fee, and a subsequent clause in the will limits such land over to designated persons in case A. dies without issue, and A. so dies, and the substituted devisees are in esse at his death, and there is no other event expressed in the will to which the limitation over can fairly be referred, then A. takes a vested fee, which becomes divested at his death, and vests in those to whom the estate is limited over. Second. Where there is an event indicated in the will other than the death of the devisee to which the limitation over is referable (for instance the distribution of the testator's estate, or the postponement of the enjoyment of the property devised until the devisee reaches the age of 21, or until the exhaustion of a prior life estate). such limitation over will be construed to refer to the happening of such event, or to the death of the devisee, according as the court may determine from the context of the will, and the other provisions thereof, that the limitation clause is set in opposition to the event specified, or is connected with the devise itself." In that case it was held that, looking at the context the limitation over stood, not in opposition to the devise itself. but to the event of the devisees coming into possession. The paior case of Pennington v. Van Houten, 8 N. J. Eq. 272, was an instance of the same kind, while Dean v. Nutley, 70 N. J. Law, 218, 57 Atl. 1089, was a case of the opposite sort. There land was given over "if E. die without lawful heirs," and it was held that the devise over took effect upon E.'s dying without leaving issue at any time. These were all cases in the Court of Errors. There are many cases in this court showing how these rules have been applied. They will be found cited in the recent cases of Burdge v. Walling, 45 N. J. Eq. 10, 16 Atl. 51, and McDowell v. Stiger, 58 N. J. Eq. 125, 42 Atl. 575. The case in hand falls under the first of the two rules laid down in Patterson v. Madden. The limitations over are set in opposition to Frederick's death, and to that event only. Minnie is to take if Frederick die without children. That is all. Alice is to take if Frederick so die, and Minnie be not living at the time of his death.

It is further contended that the clause "should my house and lot have been sold or exchange my daughter is to receive the value of the house to the extent of \$4,000" gives to Frederick an implied power of sale, and consequently an absolute power of disposition. Reading the memorandum as part of the codicil (and on this assumption alone does Frederick take anything under the will), it would seem that the only sale that testatrix contemplated was a sale by herself. She had sold the first house given in her will to Frederick, and she thought it possible she might sell the second. In the absence of a duty to be performed courts do not readily

imply powers of sale. Boylan v. Townley, 62 N. J. Eq. 593, 51 Atl. 116; Chandler v. Thompson, 62 N. J. Eq. 724, 48 Atl. 583. Here the testatrix neither expressly directs, nor expressly empowers, a sale, nor does she designate the person to make one. But if testatrix had expressly authorized Frederick to sell, this would not defeat the contingent gift. If he sold he would, if the contingencies happened, be chargeable with the purchase money to the extent of \$4,000 for Alice's benefit. The case would not fall within the reason of Downey v. Borden, 36 N. J. Law, 461, or Wooster v. Cooper, 53 N. J. Eq. 682, 33 Atl. 1050, for he would not be vested with the absolute power of disposal for his own use or benefit.

It is further objected that the devise to Alice is void because uncertain. As the testatrix did not sell the house, it alone, in the event that has happened, is the subject of disposition. There is now no alternative or substituted gift. But even on the assumption that Frederick has power to convert, he will sell, not for himself alone, but for Alice as well. And the proportion of the proceeds that he must hold for her is not doubtful. "The equivalent" for the lot sold is the \$4,000 which testatrix, in terms, gives Minnie. To give effect to her obvious meaning as to Alice, we must read the will as if she had said, "should my daughter not be living • • • then the house and lot or the equivalent specified by me (viz., \$4,000) is to be given to my granddaughter." If the memorandum heretofore adverted to be not incorporated in the will, complainant has no title, except by descent as to the one-half. and by purchase from Minnie as to the other. He takes no title by will. As the executory devise to Alice is well within the law against perpetuities, there can be no question but that it is good. It takes effect upon the happening of the contingencies already dis-

The bill should be dismissed, with costs.

(78 N. J. L. 111)

LINCOLN COUNCIL, NO. 1, J. O. U. A. M. OF CAMDEN v. STATE COUNCIL, J. O. U. A. M. OF STATE OF NEW JERSEY. (Supreme Court of New Jersey. June 24, 1909.)

BENEFICIAL ASSOCIATIONS (§ 18*)—POWERS—RECOURSE BY MEMBERS TO COURTS.

A local council of the Junior Order of United American Mechanics decided that one of its members was not entitled to sick benefits. The member took an appeal from this decision to the State Council, which body redecision to the State Council, which body reversed the decision, and directed the local council to pay the sick benefits. The local council refused to obey, and the State Council proceeded to revoke the charter of the disobedient council for its insubardinate. cil for its insubordination.

The constitution of the order provides that no council or member of a council shall be permitted to apply to the courts of the state for

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

redress until they have first exhausted all the is that no contract could be entered into beresources of the order.

On certiorari to set aside the decision of the State Council thus made, held that, whether or not the decisions of the State Council were or not the decisions of the State Council were final, still an appeal to the State Council was a necessary condition precedent to the taking of a proceeding in a court of law or equity, and so the State Council had the power to decide; and, appeals having been taken and decided regularly in accordance with the rules of the order, they will not be vacated by this court in a direct attack upon them.

[Ed. Note.—For other cases, see Beneficial ssociations, Cent. Dig. §§ 45-47; Dec. Dig. \$ 18.*1

(Syllabus by the Court.)

Certiorari by Lincoln Council, No. 1, of the Junior Order of United American Mechanics of Camden, N. J., against the State Council of the Junior Order of United American Mechanics of the State of New Jersey, to review a decision of the State Council. Writ dismissed.

Argued February term, 1909, before REED, TRENCHARD, and MINTURN, JJ.

George M. Bacon and Carrow & Kraft, for prosecutor. Fergus A. Dennis and A. H. Strong, for defendant.

REED. J. The facts essential to the decision of the questions raised in this case are succinctly stated in the brief of counsel for the prosecutor as follows: Lincoln Council was organized on January 16, 1866, and received its charter from the State Council of Pennsylvania. In 1871 the Lincoln Council affiliated with the State Council of New Jersey, since which time it has of its own volition co-operated with the State Council of this state. On April 28, 1903, one Charles W. Aspden became a member of Lincoln Council, and shortly after became ill. Lincoln Council paid him benefits for some time, and then ceased to do so, claiming that he was no longer entitled to receive benefits. Aspden appealed from this action of Lincoln Council refusing to pay further benefits to the State Council of New Jersey, and that body declared that he was entitled to receive benefits, and ordered Lincoln Council to pay them. Lincoln Council declined to do so, maintaining that Mr. Aspden had not complied with the rules of the order, and insisting that he must prove his right to benefits by suit in the civil courts of this state. Aspden refused to bring suit, but instead preferred charges against Lincoln Council for insubordination, charges were heard, and resulted in the revocation of the charter of Lincoln Council by the State Council. A number of reasons are filed assigning error in the proceedings of the State Council. In the brief, however, of the prosecutor the single point argued is that the decision made by the State Council that Lincoln Council should pay benefits to Aspden was ultra vires. The argument will be vacated by a court of law because

tween the two councils by which judicias powers could be conferred upon the State Council to adjudge a forfeiture of property rights, or to deprive subordinate councils, or their members, of their property, or to take away property from one set of members, and give it to another. The argument in respect to this particular case is that the order to pay money out of the trust fund to Aspden was in derogation of the rights of the other members to the fund, and that, if this order was a nullity, there was no order, the disobedience of which constituted an act of insubordination, for which a decree revoking the charter of the prosecutors could be made. It is not claimed that the appeal taken by Mr. Aspden was not regularly taken and heard by the State Council. The constitution of the order provides that no council, or member of a council, shall be permitted to apply to the courts of the state for any redress, until they have first exhausted all the resources of the order.

In the case of Ocean Castle v. Smith, 58 N. J. Law, 545, 33 Atl. 849, affirmed on error 59 N. J. Law, 198, 35 Atl. 917, a writ of certiorari brought up an act of the castle in stopping the payment of benefits to the prosecutor of that writ. The constitution of that order provided for an appeal to the Supreme Castle from the action of the grand and subordinate castle by the members thereof. There was also a provision that there must be an appeal before a brother could seek redress at law. It was held that the certiorari in that case must be dismissed on the ground that the prosecutor should have first taken his appeal to the Grand Castle. It was not suggested in that decision that the question of payment of benefits was not within the power of the appellate tribunal to hear. It was decided that, whether the order made by the subordinate body was one which affected property, or was merely one affecting discipline, in either instance the provision for an appellate tribunal in the order itself, and the further provision that there should be no resort to the civil courts until the right of appeal to such tribunal had been exhausted, made it essential that, before resorting to the civil courts, a decision of the courts provided by the order should be had. It must follow that a decision by the State Council, whether it has the quality of finality, or is only a step to be taken before a resort to a court of law or equity, is regular. In either case the decision cannot be said to be the subject of attack upon the ground that it was made without authority. It cannot be said that an appeal must be taken before a resort to a legal proceeding, and at the same time be said that a decision upon that appeal

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date. & Reporter Indexes

of the absence of power in the parties who take the appeal, and of power in the court provided by the order to decide the appeal.

The question whether, in an independent legal proceeding to test the rights of the State Council, or Lincoln Council, or of Aspden, the order made by the State Council can be set up as a final determination of the matter is aside from the present question, which is whether the decision made by the State Council can be vacated on a direct legal attack, upon the ground that it was made without any authority.

Again, it may be observed that, so far as the order revoking the charter of Lincoln Council is involved, it being the exertion of a right to sever the relations between the State Council and a local council which ignores the authority of a State Council, such order would seem to be one concerning discipline merely. At the time the order was made. Lincoln Council was in an attitude of disobedience to a decision regularly made by the superior body, and was thus unquestionably in an attitude of insubordi-There appearing to be no irregunation. larity in the decisions of the State Council, and no exercise of an excess of power, we think that this court is not warranted in taking cognizance of these proceedings upon this writ of certiorari.

The writ should be dismissed.

(78 N. J. L. 81)

DE CAMP v. MAYOR, ETC., OF CITY OF NEWARK.

(Supreme Court of New Jersey. June 23, 1909.)

MUNICIPAL CORPORATIONS (§ 220*) — COM-PENSATION OF LABORERS—RIGHT OF ACTION.

A mechanic or day laborer, employed by the superintendent of buildings of the city of Newark to assist in the administration of the police power under section 111 of the Revised Ordinances of that city, may for assistance so rendered maintain an action against the city without regard to whether or not the superintendent had followed the procedure laid down in other sections for the protection of prop-erty owners and for the determination of their rights as between them and the city.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 220.*]

(Syllabus by the Court.)

Appeal from District Court of Newark.

Action by Eliphet De Camp against the Mayor and Common Council of the City of Newark. Judgment for defendant, and plaintiff appeals. Reversed.

Argued February term, 1909, before GARRI-SON, BERGEN, and VOORHEES, JJ.

F. M. P. Pearse, for appellant. Francis Child, Jr., for appellee.

GARRISON, J. The plaintiff in the dis-

appeal. The action was against the city for work ordered by the superintendent of buildings. This official testified at the trial that while in office he employed the plaintiff to do the work for the price of which this action was brought, and, also, that the building on which the work was ordered to be done was dangerous to the public, and that the work was done under his supervision and was properly done. The plaintiff testified to the doing of the work and that an estimate had first been given to the superintendent of buildings, at whose instance at the conclusion of the work a bill therefor had been presented to the owner of the building, who had paid \$50, which plaintiff credited on his bill. The dangerous condition of the building to the public was testified to by the inspector of buildings, who also said that the price charged by the plaintiff was reasonable, in fact was low. A nonsuit was asked for on two grounds: First, that by rendering a bill to the owner and accepting something on account the plaintiff was debarred from recovering the balance from the city. This obviously cannot be so. If the city was liable for the whole bill, the circumstance in question does not discharge it from liability for part of the bill.

The only other ground urged for nonsuit was that the work was unnecessary and was ordered by the superintendent in excess of his authority, which was limited to cases where buildings were dangerous to the public. This ground for nonsuit could not be sustained since it was directly in the face of all of the testimony. These being the sole grounds on which a nonsuit was asked, the court ordered that the plaintiff be nonsuited because the superintendent of buildings had not followed the procedure provided in certain sections of the city ordinances, notably section 99. This section, which is evidently intended for the protection of the rights of the owners of buildings and as a condition precedent to the action against them for reimbursement that the city is authorized to bring, provides for an adjudication of facts by common council and a judgment supported by a two-thirds vote of that body. Whether any such proceeding was had in the present case we are not informed, as the matter was not made the subject of inquiry at the trial or raised on the motion to nonsuit. In the absence of the owner of the building, the pertinence of such proceeding is not apparent. Section 111, which was mentioned on the trial as the section under which the superintendent of buildings proceeded, authorizes that officer, in cases where buildings are dangerous, to enter upon the premises and "with such assistance as may be necessary and cause the said structure to be made secure or taken down at the expense of the owner or party interested." Section 103 provides greattrict court, having been nonsuited, brings this er details for the safeguarding of the rights

der of its superintendent of buildings is a totally different proposition from whether or not the city is liable to workmen employed by that official. The practical situation is that under the city ordinances the superintendent of buildings in the exercise of a police power in certain emergencies is expressly authorized to employ assistance, and where certain steps have been taken the city may recoup itself in an action against the property owner. In the latter case the propriety of the exercise of such authority as between the city and the property owner is made to depend upon a proceeding that is more or less judicial in character; but the right of the superintendent to employ a mechanic to assist him in the administration of an emergency police power is necessarily not of a judicial nature. The city ordinances do not in our opinion lay down a hard and fast rule by which a day laborer or mechanic, when called upon by the proper city official to assist him in an emergency involving the public safety, is required to examine into and pass judgment upon the legal propriety of such administrative act as between the city and the property owner, and, accordingly as he may decide such legal question, either refuse to render the required assistance or to render it at the peril of getting no pay for it. Such a rule would be impracticable and is not imposed by the city ordinances reasonably construed.

The broader question decided in N. J. Car Spring Co. v. Jersey City, 64 N. J. Law, 544, 46 Atl. 6:9, and Jersey City Supply Co. v. Jersey City, 71 N. J. Law, 631, 60 Atl. 381, does not arise here, if the distinction between the right of a property owner and that of an employé as recognized by the city ordinances is valid.

The nonsuit that was ordered being in our opinion erroneous, the judgment of the First district court of the city of Newark must be reversed.

(78 N. J. L. 14)

STATE v. BARRIS.

(Supreme Court of New Jersey. June 14, 1909.)

1. CRIMINAL LAW (§ 404*)—DEMONSTRATIVE EVIDENCE—WRITINGS SUBMITTED FOR COMPARISON.

Under Evidence Act (Gen. St. 1895, p. 1400) § 19, providing that, in all cases where the genuineness of any signature is in dispute, comparison of the disputed signature with any writing proved genuine may be made by witnesses, and such writings and testimony of the witnesses may be submitted as evidence of the genuineness or otherwise of the signature, provided that, where the handwriting of any person is sought to be disproved by comparison with other writings by him not admissible in

of property owners in cases that come within its purview. Whether the city can successfully charge the property owner with the expenses incident to the carrying out of an order of its superintendent of buildings is a totally different proposition from whether or not the city is liable to workmen employed by that official. The practical situation is that under the city ordinances the superintendent of buildings in the exercise of a police power in certain emergencies is expressly authorized to employ assistance, and where certain steps have been taken the city once the city owner. In the latter case the province to the same of the person alleged to the check, may be introduced in evidence, although the writing was made after the forged check had been presented at the bank by accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 892; Dec. Dig. § 404.*]

2. CRIMINAL LAW (§ 1043*)—APPEAL AND EBROB—OBJECTIONS BELOW—NECESSITY OF SPECIFIC OBJECTION.

An appellate court will not review an al-

An appellate court will not review an alleged error in a criminal prosecution involving judicial action except upon grounds which were distinctly and plainly made known in the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2654, 2655; Dec. Dig. § 1043.*]

Error to Court of Quarter Sessions, Essex County.

Antoinette Barris was convicted of forgery, and alleges error. Affirmed.

Argued February term, 1909, before GUM-MERE, C. J., and SWAYZE and TREN-CHARD, JJ.

William L. Edwards, for plaintiff in error. Frederick R. Lehlbach, Asst. Prosecutor, for the State.

GUMMERE, C. J. The plaintiff in error was indicted and convicted of the crime of forging and uttering a check purporting to have been signed by Rose C. Lynch. For the purpose of comparison, a genuine check of Rose C. Lynch, written after the making and uttering of the alleged forged instrument, was offered and admitted in evidence against the objection of the counsel for the plaintiff in error, and its admission is made the basis of the first assignment, which is argued before us. The ground of objection is that the receipt of this genuine check was in violation of the provision of section 19 of our evidence act (Gen. St. 1895, p. 1400). That section provided: "That in all cases where the genuineness of any signature or writing is in dispute, comparison of the disputed signature or writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by witnesses; and such writings and the testimony of the witnesses respecting the same may be submitted to the court or jury as evidence of the gennineness or otherwise of the signature or writing in dispute; provided, nevertneless, that where the handwriting of any person is sought to be disproved by comparison with other writings

•For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

made by him, not admissible in evidence in support his contention that the disputed the cause for any other purpose, such writings, before they can be compared with the signature or writing in dispute, must, if sought to be used before the court or jury by the party in whose handwriting they are, be proved to have been written before any dispute arose as to the genuineness of the signature or writing in controversy." The point of the objection is that the statute prohibits the admission in evidence of writings for the purpose of comparison, unless they are proved to have been written before the dispute arose as to the genuineness of the signature or writing in controversy; but a reading of this statute shows that it has not the sweep contended for on behalf of the plaintiff in error. Such writings are only inadmissible under the language of the statute when they are sought to be used before a court or jury by the party in whose handwriting they are. In the present case the postwritten check was not sought to be used by Miss Lynch, but by the state. In the prosecution of criminal offenses the state does not assert a private right or maintain an individual interest, and there is no legal identity between it and the person who has been the victim or object of the alleged criminal act. State v. Brady, 71 N. J. Law, 360, 59 Atl. 6. The provision of the evidence act which has been invoked therefore had no relevancy on the question of the legality of the testimony, and the assignment is without merit.

The only other assignment of error argued before us which rests upon a proper exception is directed at the ruling of the trial court in admitting a writing made by the plaintiff in error and containing, among other things, "R. Lynch." The purpose of its offer was to show that the plaintiff in error was the person who had written the signature to the forged check. The paper was not written until after the forged check had been presented at the bank by the plaintiff in error, and its admission was objected to on the ground that it was incompetent because of this fact. Whether the paper writing was inadmissible upon any other ground than that stated is not before us for consideration, for it is a settled doctrine of our courts that they will not review nor reverse a judgment because of an alleged error involving judicial action therein, except upon grounds which were distinctly and plainly made known in the court below. Van Alstyne v. Franklin Council, 69 N. J. Law, 672, 58 Atl. 818, and cases cited. The rule which prohibits the use of writings of the person whose signature is alleged to have been forged and made after the date of the forged instrument is enforced because of the liability of such person to depart from his normal characteristics of writing for the

paper is a forgery. The reason of the rule does not exist where the effort is made to show by a comparison of handwriting that the forged signature was written by the person charged with making the forgery. The fact that the writing of such a person did not come into existence until after the making of the forged document is entirely immaterial on the question of its admission in evidence for the purpose of comparison.

The judgment under review will be affirmed.

(75 N. J. E. 555)

AMPARO MINING CO. V. FIDELITY TRUST CO.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

COURTS (§ 19°) — SITUATION OF PROPERTY — JUNISDICTION.

The Court of Chancery has jurisdiction of a suit to establish a trust in shares of stock in a New Jersey corporation, although the trustee resides out of the state, and cannot be served with process, but can only be brought in by the statutory proceedings against absent defendants defendants.

[Ed. Note.—For other cases, see Courta, Cent. Dig. §§ 47-52; Dec. Dig. § 19.*] (Syllabus by the Court.)

Appeal from Court of Chancery.

Bill by the Amparo Mining Company against the Fidelity Trust Company, executor. Decree for complainant (71 Atl. 605), and defendant appeals. Affirmed.

Richard V. Lindabury, for appellant. Samuel H. Richards (French & Richards, on the brief), for respondent.

SWAYZE, J. The bill charges that the complainant is a New Jersey corporation; that Paxson was its president and chairman of the executive committee; that as a result of transactions with Williams and Graham, which need not here be set forth, Paxson advanced \$40,000 to settle their claims against the complainant, and acquired from them 549,504 shares of the capital stock of the complainant; that this stock is the property of the complainant, subject only to the repayment of the advance of \$40,000 with interest, which has been tendered. The important prayers of the bill are that it may be decreed that the stock was held by Paxson in his lifetime, and is now held by the defendant as his executor, as trustee for the complainant, subject to the repayment of the money advanced, and that Paxson had not, and his estate has not, any interest in the stock, except as security for the repayment of the advance. There is a further prayer that the defendant as executor be decreed to assign, transfer, and deliver the stock to the complainant. The defendant pleads to the jurisdiction, averring that it is not a resipurpose of making evidence which would | dent or a citizen of New Jersey, or existing

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

as a body corporate under and by virtue | represented by the shares is held by the comof our laws; that it has no office, agent, or agency, or place of business within the state, and never has had, and is not now engaged in business within the state, and never has been; that it is a body corporate under the laws of Pennsylvania; that the ordinary proceedings against absent defendants have been taken against it, but that no process or other legal notice has been otherwise served. It submits that the Court of Chancery has no jurisdiction, and that no decree can be entered in the suit which is enforceable against the defendant under the Constitution and laws of the United States of America or of the state of New Jersey. The learned vice chancellor advised an order overruling this plea.

It is conceded that, in order to sustain jurisdiction over the defendant, it must appear that the proceeding is a proceeding quasi in rem, and that our statutes authorize the Court of Chancery to entertain jurisdiction of such proceedings as distinguished from proceedings in personam, over which alone a court of equity has jurisdiction in the absence of statute.

The question whether the proceeding can be sustained as a proceeding quasi in rem depends, of course, upon whether there is a res in this state upon which the decree can operate. That involves the question whether the stock of a New Jersey corporation belonging to a resident of another state can be said to have a situs in New Jersey, when it does not appear that the certificates of stock are within the state. Since the question is one which involves the rights of a nonresident, under the fourteenth amendment to the federal Constitution, as construed in Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565, the decisions of the federal courts are of great, if not controlling, weight. The precise question has been decided in Jellenik v. Huron Copper Mining Co., 177 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647. At page 11, 177 U. S., and page 559, 20 Sup. Ct. (44 L. Ed. 647), Mr. Justice Harlan distinctly stated that the question to be determined was whether the stock in question was personal property within the western district of Michigan. The Michigan statute contained provisions very similar to ours, declaring that the stock should be deemed personal property, and should be transferred only on the books of the company; that the company might conduct its business, in whole or in part, in any place in the United States or any foreign country; might have a business office out of the state, and hold any meeting of the stockholders or directors at such office; that the shares might be taken in execution, and attached by process of the Michigan courts. In answer to the argument that the certificates were held outside the state he said: "The certificates are only evidence of the The certificates or other documents, if any,

pany for the benefit of the true owner. As the habitation or domicile of the company is, and must be, in the state that created it, the property represented by its certificates of stock may be deemed to be held by the company within the state whose creature it is, whenever it is sought by suit to determine who is its real owner." In that case two of the defendants, who were held to be indispensable parties, were residents of Massachusetts, and one, also an indispensable party, resided in Michigan, but not in the western district. The company itself was made defendant, and filed the plea to the jurisdiction. The point actually decided was that the court had jurisdiction where the question involved was the title to the stock of a corporation domiciled within the district. That is exactly the present case. If the allegations of the bill are true—and they must be taken as true for the purpose of determining the validity of the plea-the precise question involved is whether Paxson's executor holds the stock of a New Jersey corporation in trust for the complainant. It is not, as contended by appellant, a bill for specific performance of a contract. A similar question was presented in Andrews v. Guayaquil & Quito Railway Co., 69 N. J. Eq. 211, 60 Atl. 568, affirmed on the opinion of Vice Chancellor Stevens, 71 N. J. Eq. 768, 71 Atl. 1133, where we sustained the jurisdiction under the facts of that case.

It is argued by counsel for the appellant that the reasoning of the Jellenik Case does not command assent, and that we are not bound to follow it. We think, however, that, aside from the respect due the tribunal which pronounced that opinion, and the peculiar force which ought to be given to its determination in a matter of that character, the result itself was in accordance with sound principle. The fact is that the property right of a stockholder in a corporation is an intangible thing, which may well be called a "chose in action," and has no actual situs anywhere in the sense that real estate or tangible chattels have. The principle which should guide in such a case is said, by Professor Dicey in his book on Conflict of Laws, to be that choses in action should be held to be situate at the place where they can be effectively dealt with, from which it follows that debts, choses in action, and claims of any kind must be held situate where the debtor or other person against whom a claim exists resides; or, in other words, debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced. And he says: "Foreign stock cannot be fully transferred by the representative of the deceased without doing some act in a foreign country. ownership of the shares, and the interest | held by the owner of such stock may be in

England, but they are mere evidence of a debt due from a foreign government, or, in other words, from a debtor not resident in England, and this debt-i. e., the stockmust apparently be situate out of England." Dicey on Conflict of Laws, 318-320 (1st Am. Ed.). Accordingly it is held that shares of stock for purposes other than taxation, and some similar purposes, are personal property, whose location is in the state where the corporation is created. Cook on Corporations, § 485. These reasons are applicable to the present case. A complete and effectual transfer of the stock can only be had upon the books of the corporation in New Jersey; and, if the stock is ever to be converted into cash otherwise than by mere sale, it must be by a distribution of the assets of the corporation, to be had in New Jersey. In view of the control of New Jersey courts over our corporations, and especially of the necessity of that control being made effectual in case of a winding up, it is, we think, quite as important that the title to the shares should be determined by our courts as that the title to real estate in New Jersey should be so determined. The cases which hold that stock has a situs in the state of the domicile of the owner for purposes of taxation are rested upon a different ground, which is recognized by the cases as peculiar to the question of taxation, and rests upon the legal fiction "mobilia personam sequuntur"—a fiction which is not to be unnecessarily extended.

The right to vote at corporate elections depends upon the ownership of the stock. By the express provisions of our corporation act the determination of a contested election is conferred upon our courts, and such a determination may necessitate an adjudication of the title to the stock. A corporation may also compel two claimants to stock to interplead. Cook, \$ 387. Chancellor Green so held in Mount Holly, etc., Turnpike Co. v. Ferree, 17 N. J. Eq. 117, and dismissed the bill only because the complainant had assumed the responsibility of acting in advance of the order, of the court, and had incurred all the liability they could incur. A bill of interpleader, as he there said, is proper only where the complainants have property or funds in possession, or under control, to which there are two or more claimants. That case is a direct authority in point. complainant has all the possession of which such a chose in action as a share of stock is possible as distinguished from the possession of the certificate, which is only its paper representative. It has, at any rate, the control of the substantial thing which the certificate only represents. It has such possession as is required for the purpose of a levy under execution or attachment, and it is seeking only a judicial ascertainment of the title to its own stock, which involves the determination of the beneficial ownership

poration, and the ultimate title thereto. We think, for such a purpose at least, the stock has a situs in this state.

It is argued, however, that the proceeding is necessarily in personam, for the reason that some personal act will be necessary on the part of the executor in order to vest the title to the stock in the complainant. The case seems to be thought analogous to a bill to remove a cloud from the title to real estate. This analogy fails, however, for the reason, clearly set forth by the learned vice chancellor, that in the case of real estate some form of conveyance is required, unless there is a statute giving the decree the effect of a conveyance. No such necessity exists in the case of a chose in action, to which a certificate of stock is analogous. case a determination that the stock belongs to the complainant becomes effective at once, and the complainant may or may not issue a new certificate therefor. All that the decree need do to effectuate the complainant's title is to decree that the certificates in the hands of the defendant are null and void. We are not now concerned with the possible rights of a bona fide transferee of the present certificates. We are dealing only with the question of jurisdiction of the subjectmatter. Our courts can protect the rights of a bona fide holder, as well as the courts of his own domicile. We think there is a res within this state, and that no personal action of the defendant is necessary which would require a decree in personam.

The question whether our legislation has actually conferred jurisdiction is a question of statutory construction. The provision of our statute is very general, and authorizes proceedings in any case where the defendant is out of the state, or cannot, upon due inquiry, be found therein, or conceals himself within the state. The language is more general than that of the act of Congress which was under consideration in the Jellenik Case, and is similar to the provision of the Nebraska statute which was before the Supreme Court of the United States in Arndt v. Griggs, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. Ed. 918, and to the provision of the Texas statute which was under consideration in Roller v. Holly, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. Ed. 520. The court there said that the provision had no application to suits in personam, and must be restricted to actions in rem, and held that, as it was impossible, in view of the generality of the statute, to say that it contemplated a procedure in one class of cases and not in another, the only reasonable construction was that it applied in all cases where, under recognized principles of law, suits might be instituted against nonresident defendants. The distinction between these last two cases and Hart v. Sansom, 110 U.S. 151, 3 Sup. Ct. 596, 28 L. Ed. 101, is sufficiently pointed out by the opinions of Mr. Justice Brewer and Mr. of the assets, real and personal, of the cor- Justice Brown. It is said, by way of argument on the part of the appellant, that this | lows: The defendant retained possession of rule does not apply, except in cases where the complainant is in possession of the res. We are not prepared to say that the scope of the statute is thus limited. The difficulty in Hart v. Sansom was that the judgment which was there relied upon against Hart's claim was not an adjudication affecting him. As Mr. Justice Brewer said: "As there was no allegation that he was in possession, the judgment for possession did not disturb him; and the decree for cancellation of the deeds referred specifically to the deeds mentioned in the petition, and there was no allegation in the petition that Hart had anything to do with those deeds. There was no general language in the decree quieting the title as against all the defendants, so there was nothing which could be construed as working any adjudication against Hart as to his claim and title to the land. Mr. Justice Gray was careful to call attention to the fact that to deprive Hart of his title some act would, in the state of the existing Texas legislation, be necessary on his part—the delivering up of his deed to be canceled, or the execution of a release—an act which could only be compelled, as the Texas law stood, by a decree in personam. But, even if the statutory proceeding were limited to cases where the complainant is in possession of the res, we think, as we have already said, that the complainant has such possession.

The order is therefore affirmed, with costs.

(78 N. J. L. 1)

GERLI V. NATIONAL MILL SUPPLY CO. (Supreme Court of New Jersey. June 14. 1909) EVIDENCE (§ 441*)—PAROL EVIDENCE TO VARY

WRITTEN INSTRUMENT-NOTES.

The contract embodied in a note, by which an accommodation maker obligates himself to pay a fixed amount of money to the holder at a specified date, cannot be controlled by oral evidence that at the time of the delivery of the note to the holder it was understood that the note was to be paid by the person for whose accommodation it was drawn.

[Ed. Note.—For other cases, see Cent. Dig. § 2044; Dec. Dig. § 441.*]

Error to Circuit Court, Passaic County. Action by Paul Gerli against the National Mill Supply Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Argued February term, 1909, before GUM-MERE, C. J., and SWAYZE and PARKER,

Wayne Dumont, for plaintiff in error. Rayton E. Horton, for defendant in error.

GUMMERE, C. J. This suit is brought to recover the amount due upon a promissory note for \$1,045 made by the defendant to its own order, and indorsed by it, and also by the Acme Throwing Company. The case the note after its indorsement by the Acme Throwing Company, and sent it by one Rothchild, its secretary, to the mill of the plaintiff, where it was delivered by Rothchild to the plaintiff's cashier, who at the same time gave to Rothchild plaintiff's check for \$1,000 in exchange for the note. The defendant deposited this check to its credit in bank, and in due course received the money on it. The note was presented for payment at maturity. and payment thereon was refused. Having proved these facts, the plaintiff rested. The defendant then offered to prove, as a bar to the plaintiff's right to recover, that the note was accommodation paper made by it for the benefit of the Acme Throwing Company, that. the throwing company got the benefit of the cash paid by the plaintiff to the defendant for the note, and that the note was given to the plaintiff upon the understanding between the throwing company, the defendant, and the plaintiff, that it was to be paid to the plaintiff by the throwing company or its president. All testimony offered by the defendant to prove these facts was excluded by the trial court, and this judicial action is now assigned for error.

The question which this assignment presents is whether the contract embodied in a promissory note by which an accommodation maker obligates bimself to pay a fixed amount of money to the holder at a specified date, can be controlled by oral evidence that at the time of the delivery of the note by the maker to the holder it was understood between them that the note was to be paid by the person for whose accommodation it was drawn, and not by the maker. This question is not an open one in this state. In the case of Wright v. Remington, 41 N. J. Law, 49, 82 Am. Rep. 180, the defendant signed two notes as surety. The defense set up was that she signed the notes at the solicitation of one of the payees, and upon a representation by him that he would look to the maker for payment, and that she (the defendant) would not be obliged to pay them. It was held that no such defense was admissible, that the rule which excluded evidence of contemporaneous parol declarations which tended to vary the terms of a written contract was applicable in its entire rigor to promissory notes and bills, and that the effect of the offered proof was to change the terms of the contract evidenced by the note. The case went to the Court of Errors and Appeals (43 N. J. Law. 451), and was there affirmed; the court saying: "It is enough to say that to admit proof of a parol contemporaneous promise on the part of the payees that the defendant should not be called upon to pay the notes would be in violation of the familiar rule of evidence which excludes parol evidence to conmade by the plaintiff at the trial was as fol- | tradict the terms of written instruments."

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ed, and the judgment under review will be affirmed.

(78 N. J. L. 26)

COXON V. INHABITANTS OF CITY OF TRENTON et al.

(Supreme Court of New Jersey. June 24, 1909.)

1. MUNICIPAL CORPORATIONS (\$ 295*)-PUB-LIC IMPROVEMENTS-PRELIMINARY PROCEED-INGS — UNANIMOUS ADOPTION OF RESOLU-TION—"UNANIMOUSLY ADOPTED."

A resolution is "unanimously adopted by a board of health" when it is adopted by a legally constituted board of health; all present voting

and none dissenting.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 295.*]

2. MUNICIPAL COBPORATIONS (\$ 295*)-PUB-

LIC IMPROVEMENTS—OPINION OF BOARD OF HEALTH—NOTICE TO OBJECTORS.

The opinion of the board of health that "the construction of a proposed sewer is necessary to preserve the public health," certi ed under the act of April 3, 1902 (P. L. p. 343), being judicial in character, should be rendered upon notice to the objectors whose section has upon notice to the objectors whose action has led to the certification of such opinion.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 295.*]

(Syllabus by the Court.)

Certiorari by John Coxon, Sr., to review an ordinance of the city of Trenton. Ordinance set aside.

This writ brings up for review an ordinance of the city of Trenton authorizing the construction of a lateral sewer in Tyrell avenue, in that city.

The proceedings of the common council and of the board of health were taken under the authority of an act, entitled "An act to authorize cities to construct sewers and drains and to provide for the payment of the cost thereof," approved March 8, 1882 (1 Gen. St. p. 605), and the supplements thereto.

The stipulated state of facts shows that at a meeting of the common council, held on the 16th day of August, 1904, a petition was received requesting the construction of said sewer and a notice of intention published, in conformity with section 2 of the act above referred to: that within 10 days from the date of the notice of the intention the owners of more than one-half of the lineal frontage of lands along said sewer presented their objections in writing, and that all further proceedings ceased.

The stipulation further shows that no further action was taken in respect to said improvement for more than two years, when another petition was presented to the common council again requesting a construction of said sewer. This petition was received on the 4th day of September, 1906, and notice of intention was again given in conformity with section 2 of the act of 1882.

It is further shown that the owners of more than a half of land along said street opinion of the board, such sewer should be

The offered defense was properly exclud- | again presented their written objections within the time required by law.

> No further action was taken by the municipal authorities of the city of Trenton until the 3d day of August, 1908, at which time the board of health of the city of Trenton, assuming to act under the authority of chapter 108, Laws 1902 (P. L. p. 343), adopted a resolution declaring that, in the opinion of said board, such sewer should be constructed; "the same being necessary for the preservation of the public health.'

> This resolution of the board of health was adopted by the affirmative votes of six of the seven members of the board; one member being absent.

> It further appears that a copy of the resolution adopted by the board was presented to the common council at a meeting of that body on the 4th day of August, 1908.

> The act of April 3, 1902 (P. L. p. 343) being chapter 108, reads as follows: "That in case the persons owning or representing more than a majority of the lineal frontage along the line of the street through which it is proposed to construct a sewer or drain object to the construction of the same in the manner prescribed in said act or supplement, the board having control of the streets of any [such] city may, notwithstanding such objections, proceed and construct said sewer under the act to which this is a supplement; provided, that the board of public health of any city in which it is proposed to construct said sewer or drain shall certify, in writing, to said board having control of the streets of any [such] city, that a resolution has been unanimously adopted by said board of health, that it is the option of the board that the construction of said proposed sewer or drain is necessary to preserve the public health."

This act is a supplement to the act of March 8, 1882, the second section of which provides, among other things, that when "persons owning or representing more than onehalf of the lineal frontage of land along any street, through which it is proposed to construct any lateral sewer or drain, shall present their objections, in writing, then such proceedings shall cease."

On the 20th day of October, 1908, the persons desiring the construction of this sewer presented another petition to the common council requesting its construction, and on that date another notice of the intention of the common council to make the improvement was ordered to be published.

In response to the notice last above mentioned the owners of more than one-half of the lineal frontage of land along said sewer again filed their written objections with the city clerk within the time prescribed by law.

At a meeting of the board of health held on the 14th day of November, 1908, another resolution was adopted, declaring that in the constructed; the same being necessary for the preservation of the public health. This resolution was adopted by the affirmative vote of six of the members of the board; one member again being absent. A copy of the resolution last above referred to was presented to the common council at a meeting held on the 17th day of September, 1908, whereupon the common council assumed jurisdiction, and passed the ordinance authorizing the construction of said sewer on the 15th day of December, 1908.

Among the reasons filed by the prosecutor for setting aside this ordinance are the following: Because neither the resolution passed by the board of health on the 3d day of August, 1908, nor the resolution passed November 14, 1908, was unanimously adopted by said board, and because the board of health of the city of Trenton, in adjudging the necessity of the proposed improvement, was acting judicially, and the prosecutor was entitled to notice and an opportunity to appear before the said board and be heard in respect thereto, which notice was not given, nor was such opportunity afforded.

Argued February term, 1909, before GAR-RISON, BERGEN, and VOORHEES, JJ.

Martin P. Devlin, for prosecutor. William E. Blackman, for defendants.

GARRISON, J. (after stating the facts as above). A unanimous vote of all of the members of the board of health is not required by the statute, but only that the "resolution be unanimously adopted by the said board of health." Granted, therefore, a board of health legally constituted, and the adoption of the resolution, all present voting and none dissenting, and the statute has been complied with. This distinction is pointed out by Mr. Justice Fort in Crickenberger v. Westfield, 71 N. J. Law, 467, 58 Atl. 1097.

The other reason urged for vacating the ordinance is good. The owners of property who, by filing their objections under the statute, had held up the action of city council should have had notice, and an opportunity to appear before the board of health when that tribunal had under consideration the question of fact upon the determination of which the controversy between the city and the property owners depended. Even the written objections that had been filed before council do not appear to have been referred to, or considered by, the board of health. In view of the legislative scheme and the situation of the contending parties the action of the board of health was distinctly judicial in character; i. e., it was the decision of a question of fact affecting directly and financially a known class of citizens. It was not the adoption of a general scheme of legislation. The effect of the determination by the board of health was to settle an existing

controversy, the result of which was to impose a special burden upon one of the contesting parties; i. e., the landowners. The case indeed goes beyond that of Sears v. Atlantic City, 73 N. J. Law, 710, 64 Atl. 1062, 118 Am. St. Rep. 724, in that here two clearly defined parties were lined up on a welldefined issue, made by written objections, filed as part of this statutory proceeding. The opinion that settles such a controversy must, in our judgment, be upon notice to the objectors. By the very act of availing themselves of the statutory right to object the objectors acquired a status that entitled them to notice, just as by filing remonstrances to the granting of a license the remonstrants acquire a status that entitles them to sue out a writ of certiorari.

The ordinance brought up by this writ, being based upon a certified opinion of the board of health that was itself improperly given, must be set aside.

(78 N. J. L. 309)

PARSONS MFG. CO. v. HAMILTON ICE MFG. CO.

(Supreme Court of New Jersey. June 14, 1909.) 1. CORPORATIONS (\$\frac{1}{2}\fra

CATION.

The defendant corporation took over the assets and business of an incorporated company of the same name, with the prefix "The" added. Among the obligations of the old company was an unpaid promissory note, given to plaintiff in final payment of the consideration for the in hial payment of the consideration for the sale of an automatic blower, which defendant had taken upon the sale or transfer of assets, and subsequently sold. The officers and managers of defendant company were the same men who managed and directed the business of the old concern, and caused the name of defendant corporation to be signed to the note in contravers before the defendant company was controversy, before the defendant company was organized, and upon occasions arranged with plaintiff for an extension of time to pay the note in suit. *Held* (1) it was for the jury under the circumstances to conclude whether the note in question was taken over by the defend-ant as an obligation with the old company's assets; (2) either by novation or by ratifica-tion of its managers' acts, as well as by estoppel resulting from the taking over of the entire assets and business, and the promises of its managers, based thereon, to pay, the liability of the defendant can be predicated.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717, 2364; Dec. Dig. §§ 426, 590, 591.*]

(Syllabus by the Court.)

2. Novation (§ 1*)—Nature and Requisites.
"Novation" consists of a hilateral screen "Novation" consists of a bilateral agree-ment for the substitution of one obligation for another, and may take place either by the sub-stitution of a new for an old party, or by the substitution of a new agreement between the parties, or by a change of parties and agreement at the same time.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 5, pp. 4848-4851; vol. 8, p. 7733.]

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Company against the Hamilton Ice Manufacturing Company. Verdict for plaintiff. Rule to show cause denied.

Argued February term, 1909, before REED, TRENCHARD, and MINTURN, JJ.

Wilson, Carr & Stackhouse, for plaintiff. French & Richards, for defendant.

MINTURN, J. The Hamilton Ice Company, of Camden, N. J., and the plaintiff entered into a contract for the conditional sale to the ice company of an automatic blower known as the "Parsons System." The device was intended to regulate the draft upon the equipment of the ice company, and its cost was \$1,300, payable in installments. The contract was signed, on behalf of the ice company, by N. B. Armstrong, manager, and the note in suit for a balance of \$1,030 was given on January 15, 1906, and was signed "Hamilton Ice Manufacturing Company, N. Bruce Armstrong, Treas." The Hamilton Ice Manufacturing Company, the defendant, was duly incorporated under the laws of the state on February 7, 1906, and the incorporated company leased and took over the plant of the former company from one Robert G. McDougall, by an instrument in writing dated the 1st day of March, 1906. The officers of the corporation were Armstrong, McDougall, and one Rose, who controlled all of the stock. The plaintiff seeks in this suit to hold the defendant corporation liable for the note thus given, upon the ground that the payment thereof was assumed by defendant as one of the liabilities of the old company when defendant took over the property and assets of the former company. With this basis of liability in view the plaintiff gave testimony going to show that the ice plant, with the automatic device, just as it stood, was taken over by defendant, that the officers of the new corporation were the same men who had been directing and operating the old plant, and that in such respect no substantial change took place, except in defendant's status as a legal entity, between the old and the new concerns until the summer of 1908, when the defendant sold the machinery of the plant, and presumably possessed itself of the proceeds. Plaintiff contends that both McDougall and Armstrong, as the managers of the old concern, knew of this outstanding obligation, and when they organized defendant corporation, and took the assets of the old company, it was within their contemplation that the new company should assume the indebtedness of the other, and with this in mind they caused the note in suit to be made, not by the old concern, but, omitting the prefix "The," caused the note to be signed by the defendant corporation before it was organized. Upon subsequent occasions, and while managing defendant

Action by the Parsons Manufacturing plaintiff, and pleaded for an extension of time to pay the note, promised to deliver the note of the new company in substitution for the note in suit, and actually paid \$30 interest upon the old obligation, but never delivered the new note.

It appears in the case that the organization meeting was the only meeting ever held of defendant company, and that Armstrong and McDougall controlling the stock managed and dictated the affairs of defendant ab libitum, and without the formalities of corporation routine. Except for the responsibility that the law imposed upon them in the interest of creditors, they were practically the factotum of the corporation, and responsible only to themselves for the propriety and legality of their management. But it is not necessary to uphold the liability of this defendant upon that ground alone, for upon the basis of a novation of this debt, as well as upon grounds of estoppel, this defendant's liability seems clear. "Novation consists of a bilateral agreement for the substitution of one obligation for another, and may take place either by the substitution of a new for an old party, or by the substitution of a new agreement between the same parties, or by a change of parties and agreement at the same time." 29 Cyc. 1134, and cases; Lattimor v. Harsen, 14 Johns. (N. Y.) 330; Munroe v. Perkins, 9 Pick. (Mass.) 298, 20 Am. Dec. 475. Whether or not the novation in fact existed was a question under the testimony, and the circumstances for the jury to pass upon. Bullock v. Tompkins, 125 Mich. 17, 83 N. W. 1029; 29 Cyc. 1140, and cases. And since a formal documentary novation was not essential to plaintiff's right to recover, the formal allegation of the novation in the declaration was not necessary. Mitrovich v. Fresno Fruit Packing Co., 123 Cal. 379, 55 Pac. 1064; 29 Cyc. 1129.

It was also perfectly competent for the corporation, through its agents, to ratify the agreements of those agents; and this ratification, which is substantially another method of estoppel in pais, may be evidenced from the facts and circumstances and the acts of the parties and the nature of the subject-matter involved. Fifth Ward Bank v. First National Bank, 48 N. J. Law, 513, 7 Atl. 318; State v. M. & E. R. R. Co., 23 N. J. Law, 360; Park v. Grant Locomotive Works, 40 N. J. Eq. 114, 3 Atl. 162. While this doctrine of estoppel is equitable in its origin, it is equally available in an action at law in order to subserve the ends of jus-Kirk v. Hamilton, 102 U. S. 68, 26 L. Ed. 79.

There is ample authority also to support the proposition that the defendant, having taken over the assets of the former company for the purpose of carrying on its business, without apparent change in the personnel of the concern, is liable for the paycompany, they met the representative of ment of the debts of the former concern. It is held to take the benefits and advan- the suit being based upon the theory that detages cum onere. 10 Cyc. 1111, and cases; Du Vivier v. Gallice, 149 Fed. 118, 80 C. C. A. 556; Hibernia Fire Ins. Co. v. St. Louis R. Co. (C. C.) 10 Fed. 600.

We conclude, therefore, that it was a question of fact for the jury to determine whether upon the testimony and the circumstances of the case the defendant assumed the payment of this indebtedness as its own obligation; and, the jury having found for the plaintiff, it must be assumed that their verdict was predicated upon that

The application for the rule to show cause will be denied.

(78 N. J. L. 17)

SUTTON v. WEST JERSEY & S. R. CO.

(Supreme Court of New Jersey. June 29, 1909.) 1. RAILROADS (§ 394*)-INJURIES TO PERSON TRACK-PLEADING-CONSTRUCTION.

Under the rule that a pleading is to be taken more strongly against the pleader, where the declaration, which showed that decedent was killed while attempting to cross defendant's right of way, did not allege that he had a legal right to go thereon it will be presumed that he was an intentional trespasser.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 394.*]

2. Negligence (§ 33*)—Use of Land—Care

AS TO TRESPASSERS.

A landowner need not keep his premises in a safe condition for the protection of a trespasser, even though the trespasser is an infant, his sole duty being to refrain from willfully in-juring him, and whether the danger is latent, and its extent and gravity, are immaterial.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 45-47; Dec. Dig. § 33.*]

8. Railboads (§ 362*)—Unprotected Third Bail—Injuries to Trespasser—Liability.

Where decedent was killed by contact with the unprotected third rail which furnished the electric power for the operation of defendant's street cars, while he was crossing its right of way from a meadow, defendant was not liable for his death, since it was under no obligation to him except not to willfully injure him, nor would it he liable under the discumptances on would it be liable, under the circumstances, un-der the rule making a landowner liable for injuries caused by an unguarded excavation upon his land so near to a public highway as to endanger travelers.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 362.*]

Action by Robert Sutton, administrator, against the West Jersey & Seashore Railroad Company. On demurrer to the declaration. Judgment for defendant.

Argued February term, 1909, before GUM-MERE, C. J., and SWAYZE and PARKER,

Clarence Pettit, for plaintiff. Bourgeois & Sooy, for defendant.

GUMMERE, C. J. This action is brought by the administrator of Joseph Sutton, deceased, to recover the pecuniary loss sustain-

cedent's death was caused by the wrongful act or neglect of the defendant. The declaration, in substance, avers: That the defendant maintains and operates an electric railroad to Atlantic City; that the electric current employed in the operation of the road is conducted and conveyed by means of a third rail, which is at all times charged with electricity; that this rail is at all times uncovered and exposed, and no protection whatever from the electrical current is furnished to objects coming in contact therewith; that the defendant's railroad crosses a large area of meadow land which is frequented and traversed by many persons engaged in hunting, fishing, and divers other pursuits; that at the time of decedent's death there were no signs, warnings, signals, fences, or other devices to give notice of the dangerous character and condition of the railroad; that the decedent, a lad of 13 years of age, while traversing this meadow land, came in contact with the third rail by stepping thereon while attempting to cross the railroad near its intersection with the old meadow turnpike; and that by the contact he was immediately killed. The defendant, by its demurrer, asserts that the facts above recited do not exhibit any legal liability resting on it for young Sutton's death.

The averment of the declaration that the decedent met his death in attempting to cross the right of way of the defendant's railroad while traversing the meadows through which it ran is not accompanied with any allegation that he had a legal right to go upon the defendant's land. The absence of any such allegation is important, for, by force of the elementary rule that each party's pleading is to be taken most strongly against himself, and most favorably to his adversary, it raises the presumption that in doing so he was an intentional trespasser. Mathews v. Bensel, 51 N. J. Law. 30. 16 Atl. 195; Taylor v. Haddonfield & C. Turnpike Co., 65 N. J. Law, 102, 46 Atl. 707. The right of the plaintiff therefore depends upon whether the defendant company owes to a trespasser upon its right of way the duty of using care either to safeguard its third rail in such a way as to prevent him from coming in contact with it, or else of giving him notice that such contact is dangerous to life and limb. The rule is settled in this state that a landowner is under no obligation to a trespasser to keep his premises in a nonhazardous state; that, as to him, the landowner's sole duty is to abstain from acts willfully injurious. And this rule is applicable whether the trespasser is an infant or an adult. Delaware, Lackawanna & Western Railroad Co. v. Reich, 61 N. J. Law, 635, 40 Atl. 682, 41 L. R. A. 831, 68 Am. St. Rep. 727, and cases cited. But it is contended that this ed by his next of kin by reason of his death; rule is not universal in its application, that

*For other cases see same topic and section NUMBisR in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

it does not apply where the danger is not pliance for the purpose of inflicting injury only latent, but of so high a degree as to threaten the life of the trespasser, and cases like that of Townsend v. Wathen, 9 East, 277, where the plaintiff's dogs were caught and killed in traps set by the defendant upon his premises, and baited by him for the purpose of enticing his neighbors' dogs to the traps, and Bird v. Holbrook, 4 Bing. 628, where the plaintiff was injured while trespassing upon the defendant's land by the discharge of a spring gun set by the defendant to protect his flower roots from the depredation of thieves, are cited in support of this contention. I do not think that any such exception as that suggested exists. In the Reich Case, and, indeed, in most of the cases where this question has received consideration, the danger was latent, so far as the plaintiff was concerned. It must therefore be considered as settled that the latency of the danger imposes no obligation upon the landowner. Nor can I see upon what ground the extent of the danger to be apprehended can be made the basis of differentiation. Where is the line to be drawn? Can it be said that when the hazard is so extreme as to threaten life the landowner owes to a trespasser the duty of protection, but that when it only threatens bodily harm more or less serious in character he owes no such duty? Or that he is exempt from the duty of protection only when the amount of injury to be apprehended is slight? only am I unable to perceive any reason for such a distinction, but I do not find any suggestion of it in the reported cases. sions like Townsend v. Wathen, and Bird v. Holbrook, instead of being exceptions to the rule, are within it, for the rule does not exempt a landowner from liability to a trespasser for acts which are willfully injurious, but, on the contrary, affirms that liability, and recognizes the soundness of the view expressed in the line of cases just referred to. In the Townsend Case the defendant enticed the dogs of the plaintiff upon his land for the purpose of destroying them. His act in enticing the dogs upon his premises was intentional, i. e., willful. His destruction of them was also intentional, as much so as if he had shot or clubbed the dogs to death. What he did was absolutely illegal from beginning to end. In Bird v. Holbrook the purpose of the defendant to shoot any person who should come upon his land to steal bis flower roots was unlawful, and his act in attempting to carry out that purpose was willfully injurious. The real distinction running through the cases seems to me to be this: Where the landowner in the development of his property, and solely for the purpose of obtaining a more beneficial user therefrom, installs upon it an appliance which will be dangerous to people coming in contact with it, he is under no obligation to trespassers to so guard it that they shall not

upon the persons or property of those who unlawfully come upon his land, he is liable when harm is inflicted by such appliances. Cases like Delaware, Lackawanna & Western Railroad Co. v. Reich, come within the first class; cases like Townsend v. Wathen and Bird v. Holbrook come within the second. In the case in hand the defendant installed the electric third rail system for the more complete beneficial user of its property. In doing so it acted under legislative sanction. It was originally chartered as a steam railroad in 1853, and by the revision of the act concerning railroads in 1903 the power was conferred upon it to substitute for steam any other motive power which it might deem best adapted to the economical operation of its railroad, and to use such devices and appliances for conducting and distributing power as might be required. P. L. 1903, p. 658, \$ 24. Having the lawful right to install this system for the operation of its road, it was within the protection of the rule which we have been discussing, and was under no obligation to the deceased except to abstain from acts willfully injurious to him. That it failed in this obligation is not suggested in the declaration.

This discussion would not be complete without a reference to a line of cases mentioned in the brief of counsel which, it must be admitted, constitute an exception to the rule which we have had under consideration. We refer to those cases which hold that a landowner who permits an unguarded excavation to be upon his land so near to a public highway as to endanger those who pass along the highway in the exercise of ordinary caution is liable for injuries received by a traveler on the highway therefrom. The existence of such liability, although recognized by the decisions of other courts, has not yet been declared by our court of last resort. It was, however, assumed by that court to exist in the case of Daneck v. Pennsylvania Railroad Co., 59 N. J. Law, 415, 37 Atl. 59, 59 Am. St. Rep. 613, for the purpose of disposing of the matter then before it. It is to be gathered from the opinion in that case that the court held the view that, even if the liability existed, it was limited in extent, and could only be invoked by a person traveling on the highway who left it unintentionally, and so was injured, and not then unless the excavation was so near to the highway as to be a threatened danger to those of the public who were using the way. The present case does not come within the excepted class. In the first place, as has already been pointed out, the conclusion to be drawn from the averments of the declaration is that the decedent, when he came in contact with the electrified rail of the defendant's railroad, was an intentional trespasser upon its property; in the second place, the accident did not occur while the decebe injured; but, where he installs the ap- dent was traveling along the public highway,

but while he was traversing the meadows 7. Master and Servant (§ 260°)—Injury to through which the defendant's religiond ren. | Servant—Pleading—"Knowledge." through which the defendant's railroad ran; and, in the third place, the scene of the accident was not adjacent to a public highway.

The conclusion reached by us is that the defendant is entitled to judgment on the demurrer.

(82 Conn. 236)

ELIE v. C. COWLES & CO.

(Supreme Court of Errors of Connecticut. June 10, 1909.)

1. MASTEE AND SERVANT (§ 260*)—INJURIES TO SERVANT—ACTION—COMPLAINT.

If a complaint for injuries to a servant by

an alleged defective machine is objectionable for failure to allege facts showing that plaintiff did not assume the risk, the insufficiency of the complaint would not determine the materiality

of any fact alleged.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 260.*]

2. TRIAL (§ 165*) — NONSUIT — PLEADING —
"MATERIAL FACTS."

During a trial to a jury the legal sufficiency of the "material facts"—i. e., the facts constituting a part of plaintiff's case as he presents it—put in issue by the allegations of the complaint and the denials of the answer, cannot be questioned.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 165.*

For other definitions, see Words and Phrases, vol. 5, pp. 4406, 4407.]

3. Trial (§ 165*)—Nonsuit—Motion—Questions Raised.

The material facts of the case presented by the pleadings having been determined, the ques-tion on a motion for judgment of nonsuit is whether there is substantial evidence in support of all the material facts.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 165.*]

4. MASTER AND SERVANT (§§ 101, 208*)—IN-JURIES TO SERVANT—MACHINERY—DUTY OF MASTER.

A master is bound to exercise reasonable care to provide for a servant a reasonably safe instrument for his work, unless the servant has assumed the risk of using a defective instrument provided.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 173, 178, 551; Dec. Dig. §§ 101, 208.*]

5. MASTER AND SERVANT (§ 217*)—INJURIES TO SERVANT—DEFECTIVE INSTRUMENTS—AS-SUMED RISK.

A servant assumes the risk of using a defective instrument when he knows its defective condition, appreciates the danger, and voluntarily encounters such risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*1

6. MASTEE AND SERVANT (§ 260*)—INJURIES TO SERVANT—ASSUMED RISK—PLEADING.

An allegation that a servant was ignorant of the unsafe condition of a machine by which he was injured was a sufficient allegation that he did not assume the risk if he relied on his ignorance to show nonassumption, but, if he relies on other facts, he must plead them.

[Ed Note—For other cases see Master and

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 844-848; Dec. Dig. § 260.*1

Where, in an action for injuries to a servant by defective machinery, plaintiff knew of the defective condition of the press, but claimed that he did not know of the danger, an allegation that plaintiff did not have equal means of knowledge with the defendant, using the term "knowledge" to include actual or constructive knowledge was meterial. knowledge, was material.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 844-848; Dec. Dig. §

For other definitions, see Words and Phrases, vol. 5, pp. 3940-3942.]

8. MASTER AND SERVANT (§ 221*)—INJUBIES TO SERVANT—DEFECTIVE MACHINE—PROM-ISE TO REPAIR.

An assumption of risk implied from a serv-An assumption of risk implied from a servant's knowledge that a machine he is required to operate is defective and dangerous is generally suspended by the master's promise to repair, made in response to the servant's complaint, if the servant is induced by such promise to continue his work, provided the injury occurs before a reasonable time has elapsed in which to make the repairs, unless the defect renders the machine so imminently and obviously dangerous that a person of ordinary prudence ly dangerous that a person of ordinary prudence would decline to use it until repaired.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 638-647; Dec. Dig. §

9. Masteb and Servant (§ 289*)—Injubies to Servant — Defective Machine — Con-TRIBUTORY NEGLIGENCE - QUESTION FOR JURY.

In an action for injuries to a servant by a defective machine which the master had promised to repair, and the continued use of which was not obviously dangerous, evidence held to require submission of plaintiff's contributory negligence in continuing to use the machine to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

10. MASTER AND SERVANT (\$ 280°)—INJURIES TO SERVANT—ASSUMED RISK—EVIDENCE. Where, in an action for injuries to a servant by a defective machine, plaintiff's allegation that he had not equal knowledge with defendant concerning the defect was the only al-legation to negative assumed risk, such allega-tion was disproved by evidence that he knew of the defect and had complained of it on several occasions, and had been promised repairs or a new machine.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 981-986; Dec. Dig. § 280.*1

1. Appeal and Error (§ 1177*)—Review— Disposition of Cause — Order for New TRIAL.

Where a judgment of nonsuit was affirmed on appeal because of a failure of proof to con-form to the allegations of the complaint, a court was not required to send the case back for a new trial, plaintiff being entitled to sue over, if he had a cause of action both at common law and under Gen. St. 1902, § 1127.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1177.*]

Appeal from Superior Court, New Haven County; Ralph Wheeler, Judge.

Action by George Elie against C. Cowles & Co. Judgment for defendant, and plaintiff appeals. Affirmed.

[•]For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tory to operate a machine known as an "automatic drop-lifter," sometimes called a "cold power drop." The machine consisted in part of a heavy drop or hammer, which was raised to a considerable height by the operation of a crank by the application of power, and, when so faised, the hammer was held in place by a dog falling into and catching the cogs of a wheel or ratchet. On the dog being released, the hammer would fall with great force, and its impact accomplished the work intended. The lifter was defective, in that the gears were worn and insufficient, so that the dog did not at all times properly and adequately catch in the cogs and hold the lifter in proper position. It was also defective, in that the crank did not properly revolve and perform its full function as part of the lifter, and the drop did not securely hold the hammer in place during the operation of the machine. As a consequence of these defects, plaintiff lost the use of his right hand, and was permanently disabled by the hammer unexpectedly falling upon it as he was operating the machine on certain key metal. Plaintiff alleged negligence, in that defendant failed to provide a reasonably safe appliance and instrumentalities for his work, in failing to provide a safe and perfect machine, in failing to inspect the machine, and in failing to properly repair the lifter, etc. It also charged that all of the defects were known or should have been known to defendant, and that plaintiff "had At the not equal means of knowledge." close of plaintiff's case its motion for a nonsuit was granted, and, plaintiff's motion to set the same aside being denied, he appealed.

Philip Pond, for appellant. William H. Ely and William B. Ely, for appellee.

CURTIS, J. The motion for a nonsuit presented two questions for the consideration of the trial court: First. What facts alleged in the complaint were material to the plaintiff's case as he presented it in the complaint? Second. Has the plaintiff made out a prima facie case by producing substantial evidence in support of his cause as he presented it?

If the complaint is demurrable because it does not contain an allegation that the plaintiff did not know the defective condition of the drop press and the danger of its use, or an allegation of other facts sufficient to show that the plaintiff did not assume the risk, the insufficiency of the complaint would not determine the materiality of any fact alleged. "During a trial to the jury the legal sufficiency of the material facts put in issue by the allegations of the complaint and denials of the answer cannot be questioned; and by 'material facts' in this connection is meant facts constituting a part of the plaintiff's case as he presents it." Cook v. Mor- 115, 58 Atl. 762.

Plaintiff was employed in defendant's fac- | ris, 66 Conn. 201, 202, 33 Atl. 994; Adams v. Way, 32 Conn. 167. When it is determined by the court what are the material facts of the case presented by the pleadings, then, on a motion for a judgment of nonsuit, the court has before it the question whether or not there is substantial evidence in support of all the material facts. Foskett & Bishop Co. v. Swayne, 70 Conn. 75, 38 Atl. 893. In the seventh paragraph of the complaint as amended the defective and unsafe condition of the drop press is described, and it is alleged that this condition was "known or should have been known to the defendant, and of which the plaintiff had not equal means of knowledge." Was this allegation that the plaintiff did not have means of knowledge of the defective and unsafe condition of the drop press equal to that of the defendant a material one under the pleadings? The plaintiff was attempting to allege a cause of action by a servant against a master for injury received from a defective and unsafe drop press. He must allege facts which show a breach of the master's duty. The duty of the master as to instruments is to exercise reasonable care to provide for his servant a reasonably safe instrument for his work, unless the servant has assumed the risk in the use of the instrument. A servant assumes the risk when he knows the defective condition of an instrument, appreciates the danger from its use, and voluntarily encounters the risk. In a complaint in such an action it is therefore necessary to allege facts which show that the risk or danger was not assumed, otherwise it would not appear from the complaint that the master owed any duty to the servant. The usual allegation is that the plaintiff was ignorant of the unsafe condition of the instrument. That is a sufficient allegation if the plaintiff relies upon his ignorance to show his nonassumption of the risk, but, if he relies upon other facts, he should plead them. Hayden v. Smithville Mfg. Co., 29 Conn. 548; O'Keefe v. National Folding Box & Paper Co., 66 Conn. 38, 33 Atl. 587; Cleveland, C., C. & St. L. R. Co. v. Parker, 154 Ind. 153, 56 N. E. 86; Griffiths v. St. Catherine Docks, 13 Q. B. Div. 685; Thomas v. Quartermaine, 18 Q. B. Div. 685; Bigelow on Torts (7th Ed.) p. 754; Coal & Car Co. v. Norman, 49 Ohio St. 598, 32 N. E. 857. It is apparent that the allegation of lack of equal means of knowledge in this complaint was inserted to meet this requirement, and was a material allegation in the case the plaintiff presented. His position, as disclosed by the claim of his counsel, is that, although his testimony shows that he knew the defective condition of the press, it does not show that he knew the danger from the condition, or that he had means of knowledge equal to that of the defendant. Knowledge in this connection means either actual or constructive knowledge. Curelli v. Jackson, 77 Conn.

effect that he had used this press for four or five years, and that it had always troubled him more or less, because the hammer failed at times to go up to its proper place; it being in some way held fast below its proper place until he pushed a crank over with a stick and started it again. He testified that he had noticed during his whole employment that the teeth on the gear into which a dog or clutch fell, by which operation the hammer was held up in its proper position until the pedal was touched by his foot, was worn, and that three of the teeth on this gear were much worn and loose, and he testified that this defective condition caused his injury. It was obvious that the gear and dog in this condition might fail to hold the hammer up and cause it to fall before the pedal was touched if the dog came against these particular teeth. The knowledge of this condition was necessarily knowledge of the danger to any person using due care. It appears therefore, from the testimony that there was no substantial evidence that the plaintiff's means of knowledge of the condition of the drop press and the danger was not equal to that of the defendant. The plaintiff testified on the trial that about one week before the accident he complained to the master mechanic, as he had done many times before, of trouble the drop press was giving him because the hammer did not at all times lift up into its proper place, but held or stuck part way up, and that this made it necessary for him to push the crank over with a stick in order to carry the hammer to its position ready to fall at the touch of his foot on the pedal, and that the master mechanic stated that he would repair the drop press or get a new one. The plaintiff claims that this is substantial evidence that he did not assume the risk from the known defective and unsafe condition of the gear and dog of the machine during the week between the promise and the accident. It is undoubtedly the general rule that the assumption of risk implied from a servant's knowledge that an instrument is defective and dangerous is suspended by the master's promise to repair, made in response to the servant's complaint, if the servant is induced by such promise to continue at work, because in such case he does not voluntarily encounter the risk. And in such case he may recover for an injury which he sustained by reason of such defect within a reasonable time after the making of the promise, provided he exercises due care in using the instrument, unless the defect renders the instrument so imminently and obviously dangerous that a person of ordinary prudence would decline to use it at all until it was repaired, in which latter case the use of the machine would be contributory negligence. Andrecsik v. New Jersey T. Co., 73 N. J. Law, 664, 63 Atl. 719, 4 L. R. A. (N. S.) 913, 9 Am. & Eng. Ann. Cas. 1011, note; fall.

The testimony of the plaintiff was to the | Foster v. Chicago, R. I. & P. R. Co., 127 Iowa, 84, 102 N. W. 422; 4 Am. & Eng. Ann. Cas. 153, note; Roy v. Hodge, 74 N. H. 190, 66 Atl. 123. There was substantial evidence to go to the jury tending to prove that the drop press was not so imminently and obviously dangerous that a person of ordinary prudence would decime to use it at all until it was repaired. The defective condition of the drop press was shown to have existed for several years, but the falling of the hammer in the way the plaintiff claimed it fell when he was injured had occurred but few times during that period. The evidence as to the unsafe condition of the machine was not such that all reasonable men would agree that a person of ordinary prodence would decline to use it at all until repaired. The question of contributory negligence in that respect was therefore a question for the jury.

The only fact alleged in the complaint by the plaintiff to show that he had not assumed the risk arising from the use of a machine which he knew was defective was, as stated above, that he did not have means of knowledge of the defect and danger equal to that of the defendant. The fact that the plaintiff knew the defect and danger and complained of the condition, and that a promise to repair was made by the master, which induced him to continue to use the machine. does not tend to prove the allegation of unequal means of knowledge. When the plaintiff relies upon the fact that he knew the defect in the machine and the danger, and was induced to continue to operate the machine by a promise to repair it, to show that he was not assuming the risk when the accident occurred, he should plead such fact. Malm v. Thelin, 47 Neb. 686, 66 N. W. 650; Coal & Car Co. v. Norman, 49 Ohio St. 598, 32 N. E. 857; Stephenson v. Duncan, 73 Wis. 404, 41 N. W. 337, 9 Am. St. Rep. 806. In this case, therefore, there was no substantial evidence of a material fact in the case. as presented by the plaintiff in his complaint. namely, that his means of knowledge of the defective and unsafe condition of the drop press was not equal to that of the defendant. Furthermore, if evidence in support of the claim of the plaintiff that he knew the defective and unsafe condition of the machine and was induced to continue to operate it by a promise to repair it made by the defendant, and that a reasonable time for the execution of that promise had not transpired before the accident, was relevant under the issues, we are of the opinion that the evidence of the plaintiff as to the condition of the machine of which he complained and which the defendant promised to repair only related to the retarding of the hammer described above, and that there was no substantial evidence that the repairs which would remedy that defect would remedy the conditions as to the gear and dog, which caused the hammer to

The evidence presented, therefore, leaves it altogether too vague and uncertain whether the promised repairs had any relation to the accident that occurred or induced the plaintiff to continue to encounter the danger from the defective gear and dog, for those questions to be submitted to the jury if they were relevant under the pleadings. plaintiff suggests in his brief that, if the nonsuit were properly granted because the allegations of the complaint and the case sought to be presented by the evidence did not correspond, this court should send the case back to the trial court for a new trial. The common law and statutes (Gen. St. 1902, 1127) provide the plaintiff protection if he has a cause of action.

There is no error. In this opinion the other Judges concurred.

(110 Md. 636)

WEYLER, Warden, v. GIBSON et al. (Court of Appeals of Maryland. June 1, 1909.)

1. MUNICIPAL COBPOBATIONS 671+)

1. MUNICIPAL CORPORATIONS (§ 671*) — STREETS—RIGHTS OF ABUTTING OWNERS. The owner of the fee in land, subject to the easement of a public street, may maintain ejectment to recover possession, where the state has taken possession of the street, and built an addition to its state penitentiary thereon, but the judgment obtained in the action will be subject to the easement, and the owner cannot maintain ejectment against the municipality or other lawful public authority. Which is ty, or other lawful public authority, which is occupying the street within the limits of the public right.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 671.*]

2. STATES (§ 191*) -LIABILITY OF STATE TO BE

2. STATES (§ 191*)—LIABILITY OF STATE TO BE SUED—ACTION AGAINST PUBLIC OFFICES.

Declaration of Rights, art. 19, declares that every man, for any injury done to him in his property, ought to have a remedy by law. Article 23 provides that no man ought to be deprived of his property but by the judgment of his peers, or by the law of the land. Const. art. 3, § 40, prohibits the passing of any law authorizing private property to be taken for public use without just compensation being first paid or tendered, and prohibits the state from depriving any person of his property without due process of law. Const. U. S. amend. 14, § 1, provides that no state shall deprive any person of property without due process of law. Land, the fee to which was owned by plaintiff, and in which the public had an easement for a street, was taken by the state, and an addition to the state penitentiary built thereon without paying or tendering any compensation to out paying or tendering any compensation to plaintiff, or condemning the property. Held that, while the state could not be sued without its consent, plaintiff under the foregoing constitutional provisions might maintain ejectment against the warden of the state penitentiary to recover possession of the property.

[Ed. Note.-For other cases, see States, Dec. Dig. § 191.*]

Appeal from Superior Court of Baltimore City; Alfred S. Niles, Judge.

Action by Frank T. Gibson and others against John F. Weyler, Warden of the State Penitentiary. Judgment for plaintiffs, and defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, 1 PEARCE, SCHMUCKER, BURKE, and . THOMAS, JJ.

William S. Bryan, Jr., and Isaac Lobe Straus, for appellant. Randolph Barton, Jr., and Frederick H. Fletcher, for appellees.

BURKE, J. The appellees on this record, as the heirs at law of Thomas King Carroll and wife, are the owners in fee of the land sued for in this case. It comprises the bed 4 of what was formerly Constitution street; in the city of Baltimore. This street was ; dedicated to public use by Mr. Carroll and, his wife in 1831 by certain grants of lots. abutting thereon, but by the terms of the: conveyances the title to the street itself remained in the grantors, and that title is; now vested in the appellees. The state, find-. ing it necessary to enlarge and extend the. Maryland Penitentiary, provided by Act (1890, p. 217, c. 200, that the directors of the; Maryland Penitentiary should have power; to contract for, purchase, and hold in fee; simple or for a term of years, all the several. lots of ground and their improvements in, Baltimore city lying between Eager street: on the north, Concord street on the west, Truxton street on the south, and Forrest; street on the east. The land described in: the declaration lies within these bounds. In case the said directors could not agree with , the owner, or owners, of any of the land, or; of any interest in the same, they were given, power to condemn. In pursuance of the power conferred by the act the directors acquired title to all the lots abutting on Con-, stitution street, but did not acquire from the appellees, or either of them, title to the bed of that street. They secured the passage, by the mayor and city council in October,, 1892, of an ordinance providing for the clos-, ing of Constitution street, but nothing further; was done, and the street was never legally. closed. It became necessary in the enlargement of the penitentiary to occupy the bed; of Constitution street. The directors, without authority of law, simply took possession: of the street and erected a part of the buildings of the Maryland Penitentiary across it;

What was done is thus described by Mr. ; Weyler: "The bed of Constitution street is a covered by the west wing of the main building; the Eager street wing. This was begun after the appropriation of 1896, and as near as I can remember in the year 1896. The, buildings were completed and moved intowe occupied them on December 10, 1899. After the beginning of this wing in 1896; Constitution street was not at any time open : or used as a street. When the construction . of this wing began, we had to commence with , the foundations of the west wing. That involved building across Constitution street, . and after that Constitution street could not : be used for purposes of public travel by the :

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1997 to date, & Reporter Indexes

public. As near as I can remember, this may have been in 1895, but I am almost positive it was in 1896, because we could not do anything to the property until after we had got the \$500,000 appropriation. The exterior part of the walls of the Eager street wing are of granite and the interior of brick. It goes right across the bed of Constitution street. No part of the bed of Constitution street is open between Eager and Truxton It is not entirely covered by the building. Part of it is vacant ground inside of the institution. The outer walls are on Eager street, crossing Constitution street. The building on this wing is about 50 or 55 feet high. The wing is used for cells for housing the prisoners. These walls at the base are 3 feet wide, running up to about 2 feet. The entire buildings, including steel cells, equipment of buildings, cost in the neighborhood of \$913,000, without the ground; that is, the wing on Forrest street, the Administration Building, the wing on Eager street, the power house, and the long building for the dining room and kitchen. The administration part of the building fronts on Forrest and Eager streets, and is 86 feet square. The part of the building over the bed of Constitution street is absolutely essential to the rest of the building. There was paid for property taken for the penitentiary on both sides of Constitution street less than \$30,000." On the 24th of March, 1904, the appellees brought an action of ejectment in the superior court of Baltimore city against the directors of the Maryland Penitentiary and John F. Weyler, its warden, for the recovery of the bed of Constitution street described in the declaration, and on the 26th of March, 1907, an amended narr. was filed. The defendants appeared, and pleaded they did not commit the wrong alleged, and also two pleas of limitation. An additional plea was subsequently filed, in which it was averred that the premises in controversy are covered in part by the Maryland Penitentiary building. The plaintiffs joined issue upon the first plea, and the court held the rest bad on demurrer. In disposing of the demurrer the court held that the directors of the Maryland Penitentiary being a quasi corporation or governmental agency upon which liability to suit had not been imposed by statute, the suit against it could not be maintained.

Mr. Weyler, the warden, then filed four additional pleas: (1) That the land described in the declaration in this case is covered by a portion of the building of the Maryland Penitentiary, a prison of the state of Maryland, and that this defendant is warden of the said penitentiary, with the duties prescribed by law and by the by-laws of the said penitentiary, a copy of which by-laws is herewith filed, marked "Exhibit Warden," and prayed to be taken as part of this plea; and this defendant further says that other than performing his duties as warden of the said Maryland Penitentiary, this defend-

ant has not title to, or interest in, or connection with, the land described in the declaration. (2) And for a second additional plea-leave of court to file the same having been first had and obtained—the said John F. Weyler says that the land as described in the declaration is a part of the bed of Constitution street, one of the public highways of Baltimore city, and that an ordinance was duly and regularly passed by the mayor and city council of Baltimore providing for closing said Constitution street, but that the proceedings for closing said street had not been completed by the commissioners for opening streets and filed in the office of the city registrar up to the time of filing this (3) And, for a third additional plea to the declaration in said cause, says that he is an employé of the directors of the penitentiary, and holds his employment under and at the will of said directors, and subject to the rules and regulations adopted by said directors. (4) And, for a fourth additional plea, he says that he is an employe of the directors of the Maryland Penitentiary, and hold his employment under and at the will of said directors, and subject to the rules and regulations adopted by them, and that neither by virtue of his said employment, nor of the rules and regulations adopted by said directors, is he in possession or charge of the property mentioned in the declaration in this cause or of the management thereof. He filed with these pleas, and prayed that it might be taken as a part thereof, a copy of the by-laws of the Maryland Penitentiary. This is certainly a most unusual method of pleading in a law case, and we are not to be understood as approving or sanctioning it. The plaintiffs demurred to the additional pleas, and also amended the declaration by eliminating therefrom, as a party defendant, the directors of the Maryland Penitentiary, and by changing the words "its warden" and inserting after the name of the defendant, John F. Weyler, the words "warden of the Maryland State Penitentiary." The demurrer to the four additional pleas was sustained, and the case was tried before Judge Niles, without a jury, upon a joinder of issue on the plea of not guilty, and resulted in a verdict and judgment for the plaintiffs for the property described in the declaration, and 1 cent damages and costs. From this judgment the defendant has prosecuted this appeal. No question is made as to the ruling upon the pleas of limitation. It is admitted that the defendant was not thereby injured, and that the correctness of the court's action upon these pleas need not be considered. The case has been ably argued by counsel on both sides, and they have given the court in their carefully prepared briefs the benefit of a clear statement of their respective contentions, and a full citation of authorities bearing on the questions involved.

Assuming the existence of the public ease-

ment in Constitution street created by Mr. | to recover the possession of property in the Carroll and wife as herein stated, does the fact of that existing easement prevent the plaintiffs from maintaining this suit? The adjudged cases are so numerous in support of the right to maintain an action against a wrongdoer, who has taken possession of the property, and is using it for purposes utterly inconsistent with its use as a street, that the right of the plaintiffs to prosecute the suit ought not to be seriously questioned. The rule that the owner of the fee in land, subject to the easement of a public highway, street, or common, may maintain ejectment against a person who has wrongfully seized and appropriated such land exclusively to his own use is supported by the overwheiming weight of authority. A great many authorities were cited in the brief of the appellees establishing this rule, and in the note to the case of Bork & Wife v. United New Jersey Railroad & Canal Co., 70 N. J. Law, 208, 57 Atl. 412, 64 L. R. A. 836, 103 Am. St. Rep. 808, 1 Am. & Eng. Ann. Cas. 861, will be found a full collection of cases on the subject. In this case, upon the assumption we have made as to the existing easement, the property of the street is in the appellees as the owners of the soil, subject to the easement for the benefit of the public, and the mere fact that such an easement may exist is no reason why the suit may not be maintained; but the judgment is necessarily subject to the easement, if any exists.

The owner of the fee in the land, subject to the easement of the highway or street, cannot of course maintain an ejectment against the municipality, or other lawful public authority, which is occupying the street within the limits of the public right. This was the real question decided in City of Cincinnati v. Lessee of White, 6 Pet. 431, 8 L. Ed. 452, and Lansburgh v. District of Columbia, 8 App. D. C. 10. In Lansburgh's Case, supra, the suit was against the District of Columbia to recover a portion of the land used as a street, and the court recognized in its opinion the clear and obvious distinction between a case of that character and one by the owner of the fee to eject a trespasser from property subject to an easement. "This is not," said the court, "the case of a suit by the owner of land, with a highway upon it, against a trespasser holding adversely to the owner, as well as to the public right. In such case it may be that the owner of the fee could recover possession in ejectment, subject to the public easement, and there is much authority in support of his right to do so."

A separate discussion of the other pleas, which were held bad on demurrer, is unnecessary, as the two propositions which they assert are: First, that the suit cannot be maintained under any circumstances, be-

actual use by the state for police and state purposes; and, second, because the possession of John F. Weyler as warden is not such a possession as would authorize his being made a defendant in the action of ejectment. Judge Dillon, in his work on the Laws and Jurisprudence of Eng. & Am. 207. said "that all of the original states in their first constitutions and charters provided for the security of private property, as well as life and liberty. This they did either by adopting, in terms, the famous thirty-ninth article of Magna Charta, which secures the people from arbitrary imprisonment and arbitrary spoliation, or by claiming for themselves, compendiously, all of the liberties and rights set forth in the great charter." Our declaration of rights (article 19) declares that every man, for any injury done him in his person or his property, ought to have remedy by the course of the law of the land, and (article 23) that no man ought to be deprived of his property but by the judgment of his peers, or by the law of the land, and section 40, art. 8, of the Constitution prohibits the passing of any law authorizing private property to be taken for public use without just compensation, as agreed between the parties or awarded by a jury, being first paid or tendered to the party entitled to such compensation. Nor shall any state deprive any person of his property without due process of law. Const. U. S. Amend. 14, § 1. Speaking of this amendment, Judge Dillon says: "It was of set purpose that its prohibitions were directed to any and every form and mode of state action-whether in the shape of constitutions, statutes, or judicial judgments-that deprived any person, white or black, natural or corporate, of life, liberty, or property, or of the equal protection of the laws. Its value consists in the great fundamental principles of right and justice which it embodies and makes part of the organic law of the nation."

It is conceded that no suit can be brought against the state without its consent. This immunity of the state from suit rests upon grounds of public policy, and is too firmly fixed in our law to be questioned. But it would be strange indeed, in the face of the solemn constitutional guaranties, which place private property among the fundamental and indestructible rights of the citizen, if this principle could be extended and applied so as to preclude him from prosecuting an action of ejectment against a state official. unjustly and wrongfully withholding property, by the mere fact that he was holding it for the state and for state uses. It is easy to see the abuses to which a doctrine like that would lead. That such is not the law has been conclusively settled by United States v. Lee, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. cause it is, in effect, a suit against the state Ed. 171; Tindal v. Wesley, 167 U. S. 204,

17 Sup. Ct. 770, 42 L. Ed. 137; Smith v. | Reeyes, 178 U. S. 438, 20 Sup. Ct. 919, 44 L. Ed. 1140; 10 Am. & Eng. Ency. of Law, 528.

The only other question to be considered is this: Is the character of the appellant's possession such that he can properly be made a defendant in this suit? We think it is. The general rule upon this subject is thus stated in 7 Ency. Pl. & Prac. 308: "Where a mere servant or employé of the beneficial occupier of the premises, who claims for himself no interest therein, or no right to their possession, is in temporary possession thereof, he cannot be made a defendant in ejectment, unless he assumes the character of a tenant. And where the employer is in possession of premises through a mere servant, and is not himself amenable to process, the rule in such case cannot be applied, and the employé becomes the proper party defendant." The latter branch of this rule applies directly to the appellant's contention. But we cannot treat Mr. Weyler as a mere servant or employé. He holds his position, it is true, at the pleasare of the directors, but he is an important state official, charged with duties and responsibilities of a very grave and serious nature. He is in the actual, personal occupation of the premises. He resides upon them, and in addition to his salary receives an allowance "of subsistence and fuel, and occupancy as a dwelling of such parts of the front building as are not used for prison purposes, also all necessary out buildings, yards and grounds not within the walls of the prison proper." Code 1904, art. 27, 556.

. The judgment will be affirmed; and, if the directors cannot agree with the owners of the land sued for, they may condemn the same under the act mentioned, or take such other action as they may be advised is proper. · Judgment affirmed, with costs above and below.

(110 Md. 539)

JUNKINS v. SULLIVAN,

(Court of Appeals of Maryland. June 1, 1909.)

1. Appeal and Errob (§ 713*)—Demurber— Effect of Unnecessary Inclusion in Bill of Exceptions.

Though it is unnecessary to include a demurrer to the declaration overruled by the court in the bill of exceptions, if it is presented by the record, it can be passed upon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2957; Dec. Dig. § 713.*]

2. Pleading (§ 204*) - Demurrer-Several COUNTS.

A demurrer to a declaration containing more than one count, addressed to the declaration as a whole, must be overruled if any one of the counts is sufficient.

'[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 486. 487: Dec. Dig. § 204.*]

3. EXECUTORS AND ADMINISTRATORS (§ 443*)-ACTION ON WRITTEN INSTRUMENTS BATION—ALLEGING NONPAYMENT.

In a suit against an administrator on a written instrument for the payment of money, a declaration is defective which alleges that deceased did not pay the same, but does not al-lege that the administrator did not pay the same.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1804; Dec. Dig. § 443.*]

4. PLEADING (§ 204*) — DEMURRER — TECHNI-

OAL RULES.

Where a plaintiff in an action on a written instrument for the payment of money insists on the technical rule that, if any count in the declaration is good, a demurrer thereto must be overruled, he will be held to the technical rules of pleading in construing the counts.

[Ed. Note.—For other cases, see Plead Cent. Dig. §§ 486, 487; Dec. Dig. § 204.*] see Pleading,

5. CONTRACTS (\$ 337*)—PLEADING—ALLEGING BREACH.

A count in a declaration on a written contract for the payment of money which does not allege any breach is defective.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1682; Dec. Dig. § 337.*]

6. Bills and Notes (§ 45°) - Instrument

PAYABLE AFTER DEATH—EFFECT.
An instrument: "\$600.00. Daisy, Howard
Co. Md. September 2nd. 1899. To my Executor or Administrator. Pay to the order of Florence E. Sullivan, six hundred dollars without intrust * * * nonnegotiable. Emily M. Junking [Seel] It hair for the part of the pa intrust in the monegotiable. Emily M. Junkins. [Seal.] It being for work in house and for manual labor on my farm. Emily M. Junkins. [Seal.]"—creates a debt in præsenti, by reason of the last phrase, payment to be deferred until after death, and is sufficient to authorize arcount to grips the melecular against the melecular agai

ize a recovery against the maker's estate.
[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 53; Dec. Dig. § 45.*]

7. Contbacts (§ 338*) — Pleading—Instru-ments Under Seal—Pleas.

A plea of never indebted and never promised as alleged is manifestly bad when addressed to an instrument for the payment of money which is under seal.

[Ed. Note.—For other cases, see Co Cent. Dig. § 1691; Dec. Dig. § 338.*]

8. Pleading (\$ 227*)-Written Instruments -PLEA-FAILURE TO DEMUB.

Where a plea defective in form to a written instrument is not demurred to, it will be considered regardless of its form.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 402; Dec. Dig. § 227.*]

9. EXECUTORS AND ADMINISTRATORS (§ 443*) -Pleading-Sufficiency-Evidence.

In an action against an administrator on a nonnegotiable written instrument under seal, payment of which was to be made by the administrator after the maker's death, a plea alleging that the instrument was executed by the maker for fraudulent purposes, and the payee and administrator knew of the fraudulent intention when the writing was executed, is a good plea.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1823; Dec. Dig. § 443.*1

10. Exceptions, Bill of (§ 8*) — Form — QUESTIONS TO WITNESS—SEPARATE STATEMENT OF EXCEPTIONS.

A bill of exceptions embracing several distinct questions to a witness, and showing by note, after each question, that it was objected

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to, objections sustained and exception noted, and at the conclusion of the bill recites: "And to the ruling of the court on the objections to the questions asked said witness, in sustaining the objections and refusing to permit the witness to answer them or any of them, the defendant duje excepted and prays the court to sign," etc.—is insufficient, since the ruling on each question should form the subject of a separate exception.

[Ed.] Note—For other cases see Exceptions.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 10; Dec. Dig. § 8.*]

11. PLEADING (§ 129*) — WRITTEN INSTRU-MENTS—NECESSITY OF DENIAL OF EXECU-TION.

Under Code Pub. Gen. Laws 1904, art. 75, 24, subsec. 108, providing that the execution of written instruments pleaded will be regarded as admitted if the opposite party shall not deny the same in the next succeeding pleading, pleas of never indebted and never promised as alleged, addressed to a pleaded written instrument, are insufficient to deny the execution of the same.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 270; Dec. Dig. § 129.*]

12. APPEAL AND ERROR (§ 263*)—FAILURE TO

EXCEPT-EFFECT.

Where, in an action on a written instrument under seal, there is no exception to the court's charge that the possession of the single bill by the plaintiff's intestate is prima facie evidence of the sealing and delivery of the same by the obligor to the plaintiff's intestate, no question can arise as to whether there was evidence of the delivery of the single bill.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \$ 1528; Dec. Dig. \$ 263.*]

13. APPEAL AND ERROR (\$ 1064*)—REVLEW—

13. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTION.

Where, in a suit on a written instrument for the payment of money under seal, the court charges that the possession of the single bill by plaintiff's intestate is prima facie evidence of the sealing and delivery of the same by the obligor to plaintiff's intestate, and that, if the jury found from the evidence the delivery of the single bill by the defendant's intestate to the plaintiff's intestate, then plaintiff is entitled to recover "notwithstanding the other facts ourered in evidence by defendant," the charge, though too general, by the use of the quoted phrase, is not harmful to defendant; all the material evidence offered by defendant on that issue having been rejected.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. § 1064.*]

Appeal from Circuit Court, Howard County; Jas. R. Brashears and Wm. Henry Forsythe, Jr., Judges.

Action by Basil J. Sullivan, administrator, against James Benton Junkins, administrator, on a written instrument for the payment of money. From a judgment for plaintiff, defendant appeals. Reversed, and a new trial awarded.

Argued before BOYD, C. J., and BRIS-COE, SCHMUCKER, WORTHINGTON, THOMAS, and HENRY, JJ.

Joseph L. Donovan, for appellant. John G. Rogers, for appellee.

BOYD, C. J. This is an appeal from a judgment obtained by the appellee against the appellant on the following instrument:

\$600.00. Daisy. Howard Co. Md. September

Traised by the instruction granted by the judgment obtained by the court, we will consider that. The case of the appellant on the following instrument:

\$600.00. Daisy. Howard Co. Md. September

St. Rep. 406, is relied on by the appellant

Pay to the order of Florence E. Sullivan, six hundred dollars without intrust * * * nonnegotiable. Emily M. Junkins. [Seal.] It being for work in house and for manual labor on my farm. Emily M. Junkins. [Seal]" There are two counts in the declaration. The first alleges that "Emily M. Junkins in her lifetime by her writing obligatory, dated December 2, 1899, promised to pay to Florence E. Sullivan the sum of \$600, and hath not paid the same or any part thereof": and the second alleges that "the said Emily M. Junkins in her lifetime by her writing obligatory, dated September 2, 1899, promised to pay to said Florence E. Sullivan \$600 in these words"; the above instrument being then set out in full. A demurrer was filed to the declaration and overruled by the court. The demurrer is included in a bill of exceptions, and although that was wholly unnecessary, and as stated in Blake v. Pitcher, 46 Md. 453, "an anomaly in the practice in this state," it is presented by the record, and therefore can be passed

The mere fact that it was embraced in a bill of exceptions would not prevent us from reviewing it, but the ruling on the demurrer is also shown by the docket entries. It was not to each count, but to the whole declaration, and therefore could not prevail, if either count is sufficient. The first follows for the most part the form given in the Code, but, as this is a suit against an administrator, it is technically defective, in that it does not allege that neither the decedent nor the defendant had paid the writing obligatory, but confines that allegation to the decedent. It might well be that the obligor had not paid any part of it, but that her administrator had, and hence, to show such a breach as would entitle the plaintiff to recover against the administrator, it should have been alleged that neither had paid it. 1 Chitty on Pleading, p. 344. That omission alone may not have prejudiced the defendant, as it was not claimed that either had paid the writing obligatory, but, as the appellee seeks to apply the technical rule that where there is one good count a general demurrer to the declaration must be overruled, he cannot consistently complain of being held to a technical compliance with the rules of pleading, at least in so far as will enable the appellant to have the demurrer to the second count passed on. That count is also technically defective, as it does not allege that the instrument set out in it had not been paid. It merely sets out the instrument, and there is no breach whatever alleged in the count. But, as the question whether there can be a recovery on the instrument sued on is also raised by the instruction granted by the court, we will consider that. The case of Cover v. Stem, 67 Md. 449, 10 Atl. 231, 1 Am.

[•]For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

opinion, however, that there is a marked difference between this instrument and the one in that case, which was: "Md. September 4th, 1884. At my death, my estate or my executor pay to July Ann Cover the sum of three thousand dollars." It was held that that was a testamentary paper, and not an obligation for the payment of money, and that no recovery could be had thereon. was said: "It would seem to be clear that the relation of debtor and creditor must be created and subsist in the lifetime of the parties to the instrument, though the time of payment may be deferred until after the death of one of the parties." Chief Judge Alvey, who delivered the opinion, went on to say that there were no words in that instrument which created a debitum in præsenti, or that created the relation of debtor and creditor in the lifetime of the parties, "but the words simply import a posthumous disposition of a part of the estate of the maker of the instrument, and nothing more." Again it was said: "Whether the instrument shall be declared a valid obligation or to have a testamentary character only must be determined from the terms and provisions of the instrument itself." In the instrument now before us there were added the words, "It being for work in house and for manual labor on my farm," to which Emily M. Junkins affixed her seal and signed her name. It is true those words were not inserted above the signature and seal which immediately followed the direction to her executor or administrator to pay the sum of money, but they were on the instrument itself, and were followed by her signature and seal. The mere fact that she signed and sealed it twice could make no difference, and it was in effect one instrument. We are of opinion, therefore, that the terms and provisions of this instrument are sufficient to show a debitum in præsenti, the time of payment of which was to be deferred until after the death of Emily M. Junkins. Without deeming it necessary to repeat what we said in Feeser v. Feeser, 93 Md. 716, 50 Atl. 406, that decision sustains the conclusion we have reached, and the case of Carey v. Dennis. 13 Md. 1, which is also relied on by the appellant, in no wise conflicts with it.

After the demurrer was overruled, the defendant filed three pleas. The first is as follows: "That the paper writing set out in the narr. filed in the above case was executed by the said Emily M. Junkins for a fraudulent purpose, and the said Florence Sullivan and Basil J. Sullivan were aware of said fraudulent intention when the said paper writing was accepted." The second was a plea of never indebted, and the third of never promised as alleged. The second and third pleas were manifestly bad in answer to an instrument under seal, but issue was joined on them, and what was intended as a trav-

as conclusive of the question. We are of erse to the first plea was filed and issue joined. It will be observed that the first plea not only alleges that the paper writing was executed for a fraudulent purpose, but that the plaintiff and his intestate were aware of the fraudulent intention when the paper writing was accepted. Without meaning to hold that the plea was in proper form, it was not demurred to, and therefore can be considered regardless of its form. can well understand that an instrument might be executed for such a fraudulent purpose as would preclude a recovery thereon if the obligee and holder were parties to the fraud or were aware of it. For example, it might be so executed for the purpose of defrauding creditors, or of excluding some one from participation in the distribution of the estate of the obligor who would by law be entitled to participate therein. If there was, in fact, no existing relation of debtor and creditor between the obligor and obligee, and the instrument was executed for such purpose as suggested above, a party to such fraud should not be permitted to recover on it. As the plaintiff did not object to the form of the plea but joined issue thereon, any evidence which was relevant to that issue was properly admissible, but here again we are met by peculiar conditions which abound in this rec-

The second bill of exceptions embraces 19 separate and distinct questions which were propounded to a witness, and a note after each one made as follows: "Objected to, objection sustained, and exception noted." the conclusion of the bill of exceptions it is said: "And to the ruling of the court on the objections to the questions asked said witness, in sustaining the objections and refusing to permit the witness to answer them or any of them, the defendant duly excepted and prays the court to sign this, his second bill of exceptions." In the third bill of exceptions there are five questions, in the fifth three, and in the sixth three presented in the same way. This method of bringing up exceptions to this court was condemned as early as Ellicott v. Martin, 6 Md. 509, 61 Am, Dec. 327, and in Tall v. Steam Packet Co., 90 Md. 248, 44 Atl. 1007, 47 L. R. A. 120. Chief Judge McSherry, in speaking of a bill of exceptions which embraced several rulings on the admissibility of evidence and one in regard to an instruction, said: "This is an unusual and an erroneous way to present such essentially distinct propositions. The ruling on each question should form the subject of a separate exception. 'We . . are,' says this court in the case of Ellicott v. Martin, etc., 6 Md. 517, 61 Am. Dec. 327, 'of opinion that each distinct exception which embraces an independent proposition of law should be signed and sealed by the court below before it can be regarded as a valid exception. This remark does not apply to a series of consecutive prayers offered by the



counsel. In such a case the ruling of the court, in either granting, rejecting, or modifying the prayers, may be regarded as a single act, and one exception, if properly taken and executed, may embrace the whole." Judge McSherry then added. "Passing by this irregularity, though by no means intending thereby to establish a precedent which will be followed hereafter, we come to the case as we find it." He then considered the merits of the case, affirming the judgment. After that recent warning and statement of the law on the subject, we do not feel called upon to review the rulings thus improperly presented to us by those exceptions. As the case must be reversed for other reasons, we will add that evidence tending to show a fraudulent purpose in the execution of the instrument is admissible under a proper plea.

It is impossible for us to say whether the folio of the equity docket referred to in the fourth bill of exceptions was relevant or ma-It ought to have been included in terial. the record. This is not like the refusal to allow a witness to answer a relevant question, which we have said can be reviewed, for the docket entries offered could have been inserted in the bill of exceptions so that we could determine whether they were relevant or material. We do not understand upon what ground the letter from Nelson I. Sullivan to Benton Junkins was offered, or how it could have been admitted.

The eighth bill of exceptions includes the prayers. As the court rejected the two offered by the plaintiff, they are not before us. The court's own instruction was as follows: "The court instructs the jury that the possession of the single bill in suit by the plaintiff's intestate is prima facie evidence of the sealing and delivery of the same by the obligor to the plaintiff's intestate, and that, if the jury find from the evidence the delivery of the single bill by the defendant's intestate to the plaintiff's intestate, then the plaintiff is entitled to recover, notwithstanding the other facts offered in evidence by the defendant, the amount of said single bill, but without interest." As the execution of this instrument was not denied by the next succeeding pleading of the defendant, it must be taken as admitted for the purpose of this action. Section 24, subsec. 108, art. 75, Code Pub. Gen. Laws 1904. Whatever effect may be given the pleas of never indebted as alleged and never promised as alleged erroneously filed to this declaration, but on which issue was joined, they cannot be said to be a denial of the execution of the instrument sued on as required by that statute. Banks v. McCosker, 82 Md. 525, 34 Atl. 539, 51 Am. St. Rep. 478. And, as there was no special exception to the prayer, no question can arise as to whether there was evidence of the delivery of the single bill by the de-

fendant's intestate to the plaintiff's intestate. The conclusion that the plaintiff was entitled to recover "notwithstanding the other facts offered in evidence by the defendant" is very general, and would be erroneous if there was any evidence in the record offered by the defendant which reflected on the issue, but, as the court seems to have rejected all of the material evidence of the defendant, we do not see how the defendant was injured by granting that instruction. If there had been a plea of non est factum, the former part of the instruction would have been erroneous, for, although it is in in effect the same language as that used in the fifth prayer in Edelin v. Sanders, 8 Md. 121, this court in Keedy v. Moats, 72 Md. 330, 19 Atl. 965, overruled what was said in that case about that prayer.

Although we would hesitate to reverse a judgment for such errors in the declaration as we have pointed out, if the defendant had been permitted to present his defense, and we were sure the defendant had not been injured by the ruling, we feel constrained to do so under the circumstances of this case.

Judgment reversed, and new trial awarded, the appellee to pay the costs above and below.

(110 Md. 554)

WESTERN MARYLAND R. CO. v. MALL-

(Court of Appeals of Maryland. June 1, 1909.)

1. WATERS AND WATER COURSES (\$ 171*)-FLOWING LANDS-CULVERTS-INSUFFICIEN-CY-LIABILITY.

A railroad company, constructing an embankment and culvert across a stream, must exercise ordinary care in constructing a culvert with sufficient capacity to carry off water which might reasonably be anticipated, and must exercise such care in properly locating the culvert, and is liable for injuries to lands flowed by reason of failure to coronic state. son of failure to exercise such care.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 216-222; Dec. Dig. § 171.*]

TRIAL (§ 216*)—INSTRUCTIONS—AMOUNT OF RECOVERY.

In an action for damages, the court must instruct the jury as to what elements, and within what limits, damages may be estimated.

[Ed. Note.—For other cases, and Dig. § 484; Dec. Dig. § 216.*] see Trial, Cent.

3. Damages (§ 113*)—Injusy to Personalty

DAMAGES (§ 113')—INJURY TO PERSONALTY
—MEASURE OF DAMAGES.

In an action against a railroad for negligently constructing its track and injuring household furniture, the measure of damages for so much as was entirely destroyed is its value at the time of the destruction, and for so much as was merely damaged the measure is the cost of repairing it.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 279, 280; Dec. Dig. § 113.*]

4. Landlord and Tenant (§ 55*)—Flooding Lands—Damages—Rights of Landlord.

In an action against a railroad company for damages to the reversionary interest to real estate in possession of a tenant, occasioned by

the negligent construction of an embankment, causing the land to become flooded, the measure of damages for the injury to the land and buildings thereon, in so far as it is permanent, is the depreciation in value of the reversionary interest, and in so far as it affects the mere occupation of the land, and not extending beyond the tenant's term, the owner of the reversionary interest cannot recover damages in the absence of proof of a provision in the lease requiring him to make good to his tenant injuries of that character, or proof that rent was to be paid by a share of the crops.

' [Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 147; Dec. Dig. § 55.*]

5. LANDLOBD AND TENANT (§ 55*)—FLOODING LANDS—ACTION BY LANDLOBD—DAMAGES—INSTRUCTIONS.

Where, in an action for injuries to the reversionary interest in real estate, caused by flooding the same because of the negligent construction of an embankment, the evidence showed that at the time both of the injury and of the trial, a tenant was in possession of the land, but did not disclose the arrangement under which he was in possession, an instruction, authorizing the jury in estimating the damages to consider any injury plaintiff had sustained by the ponding back of the water over his property, and allow plaintiff such sum as they believed, was erroneous for failing to confine the jury to the proper elements of damage.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 55.*]

6. Waters and Water Courses (\$ 101*)-Subterranean Waters.

The rights incident to streams of water on the surface, and of those flowing underneath, when the latter move in known and well-defined channels, are the same, but percolating waters not flowing in known and well-defined channels do not ordinarily affect the owner with the same right and duties as those incident to definite streams.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 110, 111; Dec. Dig. § 101.*]

7. WATERS AND WATER COURSES (§ 105*)-DIVERSION OF UNDERGROUND WATER.

To hold one liable for an alleged diversion of underground water, the fact that such water before its diversion was accustomed to flow, if not in a fixed channel, at least in a uniform direction, must clearly appear; and, where it does not appear that a spring was supplied by a well-defined flowing stream, it would be presumed that it was formed by the ordinary percolation of water in the soil, and the diversion thereof was not actionable.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 113; Dec. Dig. § 105.*]

8. WATERS AND WATER COURSES (\$ 105*)DIVERSION OF UNDERGROUND WATER.

Where one suing for the negligently stopping up of a spring only showed that thereafter water appeared in another part of the land, and came up in spots over an area of more than 10 acres, and that there was a similarity in the temperature and appearance of such water and that which had appeared in the spring, the court could not conclude that the appearance of water in the other land was the result of the stoppage of the spring, and no damages could be awarded therefor.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 113; Dec. Dig. § 105.*]

the negligent construction of an embankment, 9. EVIDENCE (§ 880°)—PHOTOGRAPHS—ADMISCAUSING the land to become flooded, the measure | SIBILITY.

A photograph of a railroad crossing over a stream as it existed before the erection of an embankment was improperly admitted in evidence, where the party offering it testified that he had gotten it from a neighbor, but did not know by whom, or from what position, or how many years ago, it had been taken, though he stated that it represented the conditions before the embankment according to his way of looking at them.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1657; Dec. Dig. § 380.*]

Appeal from Circuit Court, Frederick County; John C. Motter and James B. Henderson, Judges.

Action by John B. Martin against the Western Maryland Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Argued before BOYD, C. J., and BRIS-COE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, THOMAS, and HENRY, IJ.

Milton G. Urner and Benj. F. Crouse, for appellant. A. C. Strite and Charles D. Wagaman, for appellee.

SCHMUCKER, J. This is an appeal from a judgment of the circuit court for Frederick county for damages in an action on the case for nuisance. The suit was brought in Washington county, and removed for trial to Frederick county, where the judgment appealed from was obtained. The cause of action was an alleged injury to a farm and buildings owned by the appellee, arising from the ponding back of water thereon, caused by the construction, across a stream and ravine, by the appellant railroad company of an embankment with a culvert of insufficient size for the passage of the waters of the stream and ravine in times of ordinary freshets. The farm was rented to a tenant, and was in his possession at the time of the injury complained of and at the trial of the case, and the cause of action set out in the declaration is distinctly declared to be the injury to the plaintiff's "reversionary interest" in the property. The immediate injury to the property was done during a freshet occurring on the afternoon of June 17, 1906. The declaration contains two counts, in each of which the injury for which damages are claimed is alleged to have been that "the plaintiff's dwelling houses were flooded and ruined; the household furniture therein greatly damaged; fences washed away; fruit trees, orchard products, and growing crops destroyed; wells and cisterns filled with mud and débris, meadow lands along said stream made miry and untillable; buildings washed away and destroyed, and other damages to the plaintiff then and there," etc. The nuisance, to the existence of which the alleged injuries are attributed, is differently described in the

.-For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

count alleges that the "culvert is entirely too small for the free passage of the waters of said stream and the surface waters flowing in said ravine, so that the said stream and ravine now become dammed and choked up, and the waters thereof are ponded back upon the plaintiff's land, to the great nuisance of the plaintiff." The second count alleges that the railroad company "negligently constructed, and improperly placed, a culvert under its said track for the passage of the waters of said stream, and that in times of freshets, such as are wont to occur in said ravine, the said culvert is entirely too small for the free passage of the waters of said stream, and the surface waters flowing in said ravine, and fence rails, brush, loose timber, and such other débris as said stream and such surface water usually carry with them, so that the said stream and ravine now becomes dammed and choked up, and the waters thereof are ponded back upon the plaintiff's land, to the great nuisance of the plaintiff," etc. The railroad company, as defendant below, pleaded the general issue, and, after the removal of the case to the circuit court for Frederick county, its trial before a jury resulted in a judgment for the plaintiff of \$3,254.

The record contains 13 bills of exceptions, of which 11 relate to rulings on evidence, and 2 to the court's action on the prayers. There is evidence in the record tending to show that the Western Maryland Railroad Company's line crossed a creek, in Washington county, known as "Camp Spring creek," at a point a short distance south of and below the appellee's farm. Prior to the year 1906 the railroad tracks crossed this creek, and the depression or valley through which it runs, on a trestle about 175 feet long at the bottom. and about 43 feet high where it crossed the creek. In the spring of 1906 this trestle was replaced by a solid fill or embankment, under which a culvert was constructed at the crossing of the creek. The normal current of water in the creek through the appellee's farm was only about 6 feet wide and 6 inches deep, but, as the valley ran along the base of a mountain, it was liable to rapidly increase in volume in times of sudden rains or freshets. The culvert was 9 feet wide at its base, 10 feet wide at the springing of the arch, and 11 feet high, giving an opening of 96 square feet to receive the water. There is technical testimony of engineers in the record tending to show that, considering the topography of the vicinity, the dimensions of the culvert are larger than necessary to provide for the watershed drained by the creek for the passage of which it was built, and other testimony tending to show that, even if its capacity be adequate to permit the passage of all of the waters of the stream and ravine, its location and shape are such as to cause the flooding of the appellee's farm and buildings before its full capacity can be utilized.

two counts of the declaration. The first pro and con, upon the question whether the freshet of June 17, 1906, during which the appellee's land and buildings were injured, was such as, by the exercise of ordinary care and prudence, might have been anticipated, or was an unusual and extraordinary one. We refrain from further reference to the testimony upon these controverted issues, as they are plainly questions of fact for the jury, as is also the question, as to which the testimony is conflicting, whether the railroad company had been negligent in closing up the embankment before the sheet piling used in constructing the culvert had been removed from its interior.

The testimony as to the nature and extent of the injury done by the freshet of June 17, 1906, much of which was admitted, over objections to be hereafter noticed, tends to show that, upon that occasion, the north end of the culvert, into which the water flows, became jammed with débris of various kinds, including brush, rails, hay, the fragments of a bridge which had been washed away from higher up the stream, portions of the roof of a building, all of which had come down on the swollen stream. A piece of timber became wedged across the mouth of the culvert, and held this jammed débris in position for several hours, causing the water to back up upon and over portions of the appellee's farm until it rose to a depth of 5 or 6 feet in the two dwellings erected thereon, one of which was occupied by him, and the other by his tenant, and damaged the carpets and furniture in the rooms which it entered. The water thus ponded back submerged about one-half of the 14 acres of meadow land belonging to the farm, and about 3 acres of its upper fields, destroying the corn and grass crops growing thereon. The houses stood near the bed of the creek, at an elevation of 4 or 5 feet above its ordinary level. The house occupied by the appellee was 800 feet from the culvert. A large spring, known as "Big spring," lying between the plaintiff's farm and the railroad embankment, was also flooded, and a deposit of mud several feet deep was left in the spring when the flood water receded from it. This deposit almost entirely stopped the flow of water into the spring from its usual sources of supply. When the mud was drained off from the spring, the normal flow of water into it gradually returned. It was testified by different witnesses, subject to exception, that, several weeks after the freshet of June 17, 1906, but before the flow of water into the Big spring had been fully restored, wet places and springs of water appeared all over the meadow land of the appellee, only one-half of which had been flooded by the freshet. About 10 acres of the meadow was thus turned into a marsh, and rendered untillable, and it had not fully dried out at the time of the trial. This meadow land is about 700 or 800 feet distant from the Big spring, and upon a The record also contains much evidence, both higher grade. There is also testimony, taken

subject to exception, tending to show that; fendant, in addition to its general exception the water which thus appeared in the meadow was of the same temperature as that of Big spring, and similar to it in appearance, and that, as the flow of water in the spring increased, the flow in the meadows decreased, and that, if a pool of water, which appeared near the appellee's barn when the springs appeared in the meadow, was made muddy, the water in the Big spring became cloudy. There is also testimony tending to show that upon the occurrence of another heavy rain on August 27, 1906, the water in the creek again backed up, until it was almost on a level with the first floor of the appellee's house, and that it had never done so before the erection of the railroad embankment. At the close of the testimony in the trial below the plaintiff offered three prayers, and the defendant offered 16. The court granted all of the plaintiff's prayers, and the eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteeuth, and sixteenth of the defendant's, and rejected its other prayers.

The plaintiff's first prayer, in substance, instructed the jury that, if they found that prior to the construction of the embankment and culvert, the waters of the creek, including storm and freshet waters, were accustomed to run unobstructed in their flow, and that the culvert is of insufficient capacity to carry off the water, which the defendant, by the exercise of ordinary care and prudence, might reasonably have anticipated and expected to be in the creek and the depression through which it ran, and further found that by reason thereof in the summer of 1906 the said waters were ponded back and overflowed the plaintiff's property, and that he was injured thereby, and that but for the embankment and the insufficient capacity of the culvert the injuries would not have occurred, then the plaintiff was entitled to recover. The second prayer was similar to the first, except that it predicated the plaintiff's right to recover upon the finding by the jury that the injury to the plaintiff's property by the ponding back of the water was the result, not only of the insufficient capacity of the culvert, but also of its improper location. The plaintiff's third prayer, which defined the measure of damages, was as follows: "If the jury find for the plaintiff, then in estimating the damages to be given by their verdict they may take into consideration any loss and injury they may find from the evidence the plaintiff has sustained by reason of the ponding back of the water over the plaintiff's property which the plaintiff sustained from the time of such ponding back until the time of the trial of this case, and allow the plaintiff such sum as they believe from the evidence will compensate him for the damage and injury they may believe he has suffered from such cause, including compensation for injury to his land (if they and there was any injury) naturally and

to the granting of the plaintiff's prayers, specially excepted to the granting of the first and second prayers, for want of legally sufficient evidence of the insufficiency or improper location of the culvert, or that the plaintiff suffered any injury, except from the overflow of June 17, 1906. The general principle of a defendant's liability in cases like this upon which the plaintiff's first and second prayers were founded is correct, as it is in accord with the rulings of this court in the cases of P. W. & B. Ry. Co. v. Davis, 68 Md. 281, 11 Atl. 822, 6 Am. St. Rep. 440; Pied. & Cumb. Ry. v. McKenzie, 75 Md. 458, 24 Atl. 157; Sentman v. B. & O. R. R. Co., 78 Md. 222, 27 Atl. 1074; Balto. & Sparrows Pt. R. R. Co. v. Hackett, 87 Md. 224, 39 Atl. 510; New York, etc., R. R. Co. v. Jones, 94 Md. 24, 50 Atl. 423.

The plaintiff's prayers, however, were all defective in not confining his right to recover, in respect to the alleged injury to the land and the houses thereon, to the damage to his reversionary interest therein. The declaration distinctly averred that he was only the owner of the "reversion" in the farm, which was alleged to have been "in the possession of John Luther Rhodes as tenant thereof" at the time of the injury complained of. The undisputed evidence shows that at the time of the trial the tenant was still in possession of it, although the plaintiff resided in the smaller of the two houses, but under what arrangement he did so was not disclosed by the testimony. If the third prayer had properly directed the jury as to the precise elements of damage for which the plaintiff was entitled to recover in case they found in his favor, we would not have regarded the granting of the first and second prayers as reversible error, because we cannot say that there was no legally sufficient evidence of injury to the plaintiff's reversionary interest in the farm by the flood of June 17, 1906. The plaintiff's third prayer, upon the measure of damages, was so general and indefinite that there was reversible error in granting it. This court has repeatedly held that, while the simple question whether damages have been sustained by the breach of duty or the violation of right and the extent of damages sustained as the direct consequences thereof are matters within the province of the jury, "the court must decide and instruct the jury in respect to what elements and within what limits, damages may be estimated in the particular action." B. & O. R. R. v. Carr, 71 Md. 143, 17 Atl. 1052; Baltimore Belt R. R. Co. v. Sattler, 102 Md. 605, 62 Atl. 1125, 64 Atl. 507; W. U. Tel. Co. v. Lehman, 105 Md. 450, 66 Atl. 266.

In B. & O. R. R. Co. v. Carr the suit was by the holder of a railway ticket for the refusal of a gatekeeper at a station to permit him to pass to a train on which he desired ssarily from such ponding." The de- to take passage. The court instructed the jury that, if they found for the plaintiff for the refusal to pass him through the gate, he was entitled to such damages as they might find would, under all the circumstances, compensate him for such refusal. In holding this instruction to be bad the court, speaking through the late Chief Judge Alvey, said: "This left the whole question of damages at large, without definition by the court, to the discretion of the jury, and without any criterion to guide them. * * * is not justified by well-established rules of law. In Knight v. Egerton, 7 Exch. 407, where, in effect, such an instruction was given, the Court of Exchequer held it to be wholly insufficient, 'and that it was the duty of the judge to inform the jury what was the true measure of damages on the issue, whether the point was taken or not' and the court directed a new trial because of the indefinite instruction as to the true measure of damages. * * * Indeed it is of the utmost importance that juries should be explicitly instructed as to the rules by which they are to be governed in estimating damages; for, as was justly observed in Hadley v. Baxendale, 'if the jury are left without definite rules to guide them, it will in most cases lead to the greatest injustice." In Baltimore Belt R. R. Co. v. Sattler the plaintiff sued for damages sustained by him for injuries from smoke, noise, and vibration, caused by defendant's passing trains, and from cinders, noxious vapors and gases thrown by its locomotives upon his residence and premises, of which he owned a portion and his wife owned the residue. The court instructed the jury that, if they found for the plaintiff, they might "allow him such damages as they may find from the evidence to have been directly caused to his interest in the premises by reason of the said smoke, gas, vapors, noise, and vibration from the time said effect was first produced down to the institution of this suit." That prayer was held to be too general and indefinite, because "it failed to direct the jury as to the precise elements or items of damage for which the plaintiff was entitled to recover in case the jury should find the facts recited in the prayer." In that case, as in the present, the plaintiff had offered evidence of a variety of facts tending to show an interference with the use and enjoyment of the property, and the fruits and products grown thereon, but had offered no evidence of actual loss by diminution in the market value of the property. In the case before us the record contains evidence tending to show injury to the plaintiff's household furniture, for which the measure of damages for so much thereof, if any, as was entirely destroyed would be its value at the time of destruction, and for so much thereof as was merely damaged would be the cost of repairing it. There is also evidence of injury to the land and the two houses, the measure of

was permanent, would be the depreciation, if any, in value of the plaintiff's reversionary interest therein, caused by the construction of the embankment, and, in so far as it affected the mere use and occupation of the farm, and did not extend beyond the tenant's term, the plaintiff, as owner of the reversion, would be entitled to no damage at all in the absence of proof of a provision in his lease requiring him to make good to his tenant injuries of that character. For the injury shown to have been done to the crops on the submerged land the tenant, if any one, and not the plaintiff, would be entitled to recover damages, in the absence of proof that, under the lease of the land, rent was to be paid by a share of the crops. Under these circumstances the prayer in question, throwing open, as it did, to the jury all of the various elements of damage to which we have referred upon which to speculate without restraint in arriving at the amount of their verdict, was manifestly too general and indefinite.

What we have already said renders it unnecessary for us to notice in detail all of the 8 rejected prayers of the appellant. The first 2 of them instruct the jury to find for the defendant for want of any legally sufficient evidence to entitle the plaintiff to recover. The next 5 of them hold that there was no legally sufficient evidence to support some one or more of the several facts of which we have said that there was evidence. There was no error in rejecting those 7 prayers.

The defendant's fifteenth prayer prohibits the jury, in the event of their finding for the plaintiff, from taking into consideration in estimating damages any injury from the appearance of springs or water after the freshet of June 17, 1906, in that part of the plaintiff's land that was not actually submerged by the flooded stream. This prayer deals with the element of subterranean waters. The authorities agree that there is no difference in principle between the rights incident to streams of water upon the surface of the ground and those flowing underneath it, when the latter move in known and welldefined channels. The difficulty in reference to underground streams arises from the absence of definite and reliable evidence as to their existence, location, and course. Collins v. Chartiers Valley Co., 131 Pa. 143, 18 Atl. 1012, 6 L. R. A. 290, 17 Am. St. Rep. 791; Harwood v. Benton, 32 Vt. 736. authorities generally agree that the presence under land of mere percolating water, not flowing in known and well-defined channels, does not ordinarily affect the owners of the land with the same rights and duties as those incident to definite streams. 30 A. & E. Encycl. 210-212; Wheelock v. Jacobs, 70 Vt. 162, 40 Atl. 41, 43 L. R. A. 105, 67 Am. St. Rep. 659; Huber v. Merkel, 117 Wis. 355, 94 N. W. 354, 62 L. R. A. 589, damage for which, in so far, if at all, as it | 98 Am. St. Rep. 933; Tampa Waterwork's

v. Cline, 37 Fla. 586, 20 South. 780, 33 L. R. A. 376, 53 Am. St. Rep. 262; Washington Co. Water Co. v. Garver, 91 Md. 398, 46 Atl. 979; South. Pac. R. R. Co. v. Dufour, 95 Cal. 615, 30 Pac. 783, 19 L. R. A. 92, and notes. The decided weight of English and early American authorities supported the doctrine that percolating water was as much part of the land in which it existed as the soil, stones, and minerals therein, and was the absolute property of the owner of the land, who might use or deal with it as he pleased, without reference to the effect of his action upon adjacent or other lands. Acton v. Blundell, 12 Mees. & W. 324; Ghasemore v. Richards, 7 H. L. Cas. 349; Goodale v. Tuttle, 29 N. Y. 459; Ocean Grove v. Asbury Park, 40 N. J. Eq. 447, 3 Atl. 168; Huber v. Merkel, supra; South. Pac. R. R. v. Dufour, 95 Cal. 615, 30 Pac. 783, 19 L. R. A. 92; Stillwater Co. v. Farmer, 89 Minn. 58, 93 N. W. 907, 60 L. R. A. 875, 99 Am. St. Rep. 541. The recent American cases show a decided tendency to recede from the earlier view, which accorded to the owner of land the unrestrained right of use and disposition of the percolating water contained in it, and to so far modify that doctrine as may be requisite to do substantial justice between the owners of adjacent lands whose peculiarities of location, climate, soil, or products are such as to render the application of the earlier rule inequitable. The cases exhibiting the origin and growth of this tendency are collected in 64 L. R. A. 236, in an instructive footnote to the case of Katz v. Walkinshaw, and in the notes to Erickson v. Crookstown Waterworks Co., 10 Am. & Eng. Ann. Cas. 843.

Admitting that the correlative rights of adjacent landowners to the use of percolating waters should be exercised in subordination to the maxim "sic utere tuo," etc., the fact remains, as stated in Chatfield v. Wilson, 28 Vt. 49, that "the secret, changable, and uncontrollable character of underground water in its operation is so diverse and uncertain that we cannot well subject it to the regulations of law, nor build upon it a system of rules, as is done in the case of surface streams." We think that, in order to hold a defendant, in a case like the one now before us, liable for an alleged diversion of underground water, the fact that such water before its diversion was accustomed to flow, if not in a fixed channel, at least in a uniform direction, should be made plainly to appear. In view of the nature of subterranean water the cases hold with great uniformity that, where it does not appear from the evidence that a spring is supplied by any well-defined flowing stream, it will be presumed that it is formed by the ordinary percolation of the water in the soil. 30 A. & E. Encycl. 311; Gould on Water Courses. \$ 281; Pence v. Carney, 58 W. Va. 296, 52 S. E. 702, 6 L. R. A. (N. S.) 266, 112 Am. St. Rep. 963; Ocean Grove v. Asbury Park, a new trial.

40 N. J. Eq. 447, 3 Atl. 163; Barclay v. Abraham, 121 Iowa, 619, 96 N. W. 1080, 64 L. R. A. 255, 100 Am. St. Rep. 365: Harwood v. Benton, supra; Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; Tampa Waterworks v. Cline, supra. Applying by analogy these principles to the case before us, we are of opinion that the plaintiff failed to produce any evidence legally sufficient to show that the Big spring was supplied by underground water, flowing either in a fixed channel or a uniform direction. There was some evidence tending to prove a similarity in the temperature and appearance of the water which appeared in the meadow and that in the spring, and tending perhaps to prove a common source of the water in the two places, or possibly some indirect underground communication between them. view, however, of the great uncertainty as to the laws and causes of the movement of underground waters, and the fact that the water did not appear in the meadow until two or three weeks after the flow into the spring was stopped by the mud, and that when the water did appear in the meadow it came up in spots over an area of more than 10 acres, instead of forcing its way to the surface in one place as a stream might be expected to do, the evidence was too indefinite and uncertain to justify a reasonable mind in reaching the conclusion that the appearance of the water in the unflooded portion of the meadow was the result of the stoppage The defendant's fifteenth of the spring. prayer should therefore have been granted.

Turning now to the exceptions to the admission of evidence. There was error in admitting in evidence the small photograph, referred to in the first exception, of the railroad crossing as it existed before the erection of the embankment. It was offered in evidence by the plaintiff, who testified that he had gotten it from a neighbor, and did not know by whom, or from what position, or how many years ago, it had been taken, but was only able to say that it represented the conditions before the fill according to his way of looking at them. The evidence was unimportant, and its admission would not of itself have constituted reversible error.

Without reviewing in detail the rulings brought up by the second, third, fourth, fifth, and sixth exceptions, which concern testimony touching the appearance of the water in the meadow land of the plaintiff some time after the freshet of June, 1906, we content ourselves with saying that the testimony, in so far as it related to the portion of the land which was not submerged by the flooded waters of the freshet, should have been excluded. We find no error in the rulings presented by the other exceptions.

The judgment appealed from must be reversed, and the case remanded for a new trial.

Judgment reversed, and case remanded for a new trial. (111 Md. 810)

CADWALADER v. PRICE.

(Court of Appeals of Maryland. June 1, 1909.) 1. EJECTMENT (§ 90*)—DEEDS—ADMISSIBILITY

AS EVIDENCE

Under Code Pub. Gen. Laws 1904, art. 75, 22, providing that in ejectment it is not necessary to state in the declaration the name by which the land may have been patented, but it where the leastion of the land can be presented. But it may be described by any description certain enough to identify it, a deed describing land claimed by defendant as the part of a tract of land called "King's Hill," situate in a designated county known as the landing on King's creek, is on its face admissible in evidence, and, where the leastion of the land can be presented. where the location of the land can be proved by reference to it, it is sufficient.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 255; Dec. Dig. § 90.*]

2. EVIDENCE (§ 274*)—DECLARATIONS AS TO BOUNDABLES—Admissibility.

Declarations of a deceased person having peculiar means of information and no interest in the matter, and made ante litem motam, are admissible to prove private boundaries

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1130; Dec. Dig. § 274.*]

8. Evidence (\$ 274*)-Declarations as to

BOUNDARIES-ADMISSIBILITY.

Declarations of the former owner and oc-Declarations of the former owner and occupant of land as to the boundaries of a part thereof conveyed by him, made after conveying the land and before any controversy as to the location of the boundary, are, after his death, admissible to establish the boundary. [Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1133; Dec. Dig. § 274.*]

EVIDENOE (\$ 274*)—DECLARATIONS AS TO BOUNDARIES—ADMISSIBILITY.

Where a grantor expressly excepted from the deed a landing and subsequently conveyed the landing to another, declarations thereafter made by him as to the boundary of the landing were not. after his death, inadmissible as impairing the rights of the first grantee.

[Ed. Note.—For other cases, see Evidence Cent. Dig. §§ 1133, 1134; Dec. Dig. § 274.*] 5. DEEDS (\$ 110*)-CONSTRUCTION-QUESTION

FOR COURT.

The construction of a deed is for the court. [Ed. Note.—For other cases, see Deeds, Cent. Dig. § 255; Dec. Dig. § 110.*]

6. Appeal and Error (§ 251*)—Questions Reviewable—Exceptions.

Where the construction placed on a deed by the trial court is not satisfactory to a party, he must bring the rulings to the court of appeals for review by exception to the ruling.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1476-1484; Dec. Dig. § 251.*]

7. EJECTMENT (§ 94°) - EVIDENCE - SUFFI-CIENCY.

In ejectment evidence held to show the location of a parcel of land claimed by defendant under a deed conveying land to him.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 279; Dec. Dig. § 94.*]

8. Adverse Possession (§ 85*)—Evidence SUFFICIENCY.

Evidence held to show adverse possession of land under a deed giving color of title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 503; Dec. Dig. § 85.*]

9. Adverse Possession (\$ 104*)-Operation -PRESUMPTION OF GRANT.

Where one has had possession of land in | in a deed from Ja such a way and for such time as to make the | George Hartman

possession adverse, a deed is presumed, which presumption may exist, though the jury may disbelieve the actual execution of such a grant.

[Ed. Note.-For other cases, see Adverse Possession, Cent. Dig. § 595; Dec. Dig. § 104.*]

10. APPEAL AND ERROR (§ 175*)—QUESTIONS
PRIVIEWABLE—QUESTIONS NOT RAISED IN
TRIAL COURT.

Where no question was raised about the right of defendant in ejectment to prove adverse possession because he had not taken defense on warrant, the court on appeal need not pass on the question.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1139; Dec. Dig. § 175.*] 11. EJECTMENT (§ 24*)—DEFENSE ON WAR-

BANT Where, in ejectment, adverse possession is claimed of a part only of the lands sued for, the proper defense is on warrant.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 24.*]

Appeal from Superior Court of Baltimore City; Henry D. Harlan, Judge.

Action by John Cadwalader against Henry A. Price. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRIS-COE, SCHMUCKER, BURKE, WORTHING-TON, THOMAS, and HENRY, JJ.

Thomas F. Cadwalader and Horace S. Whitman, for appellant. John S. Young and S. S. Field, for appellee.

BOYD, C. J. This is an appeal from a judgment rendered in favor of the defendant (appellee) in an action of ejectment instituted in Harford county, and removed for trial to the superior court of Baltimore city. The land sued for is described in the declaration by courses and distances, and contains onehalf acre, more or less. A plea of not guilty was entered short on the docket, but defense on warrant was not taken.

Thomas Dorney, by his last will and testament, which was probated February 6, 1844. devised to Jackson Dorney, his son, a plantation called "King's Hill," and a tract called "Savory's Farm." By deed dated September 10, 1852, Jackson Dorney and wife conveyed to George Hartman all that tract known by the name of "King's Hill," "excepting and reserving to him the said Jackson Dorney and his heirs and assigns forever the landing and the free use and privilege of the same situated at the head of King's creek, with the right of way to and from the same through, along and over the said land hereby conveyed at and along such convenient road or way as may be deemed reasonable and proper to approach the said landing." On March 24, 1856, George Hartman conveyed to Thomas J. Cochran all that part of a tract or parcel of land called "King's Hill" contained within the metes and bounds, courses, and distances therein set forth, "being the same lands described in a deed from Jackson Dorney and wife to and subject to

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the exceptions and reservations therein made." Thomas J. Cochran and wife conveyed by deed dated December 5, 1864, to Gen. George Cadwalader two tracts, including that conveyed by the last-mentioned deed, "except and subject to the landing and right of way reserved in and by the deed for the same lands from Jackson Dorney to George Hartman dated," etc. It is admitted that the plaintiff became entitled to all the property conveyed to George Cadwalader by the deeds in evidence.

The real controversy in the case arises from the exception and reservation in the deed from Jackson Dorney and wife to George Hartman above set out, but involved in it is a deed from Jackson Dorney and wife to John Price, father of the defendant, and Salathiel Legoe, dated September 11, 1860, which was admitted by the court below. That deed grants "all that part of a tract of land called 'King's Hill' situate in Gunpowder Neck in Harford county, known as the landing on King's creek, which was excepted and reserved by us, the said Jackson Dorney and Hannah J., his wife, in a deed from us * * * to George Hartman together with the right of way to and from said landing and all other rights, privileges and immunities reserved by us," etc. The record shows that four-sixths interest in whatever property was thereby conveyed was in the defendant, and that the remaining two-sixths were vested in one of the heirs of said Legoe and in William T. Price. The appellant claims under the deed to Hartman, and the appellee under the exception and reservation, and also by adverse possession, as well as through the deed to John Price and Salathiel Legoe.

Although a number of prayers were granted, at the instance of both sides, no exceptions were taken to the rulings on the prayers, but there are 10 bills of exception presenting rulings as to the evidence. first and third can be considered together. The first was to the admission of the deed from Dorney to Price and Legoe above referred to, and the third was to overruling a motion to exclude that deed, which was made at the end of the case. Without discussing other grounds for its admissibility, we are of the opinion that it was admissible to show color of title. It grants "all that part of a tract of land called 'King's Hill' situate in Gunpowder Neck in Harford County, known as the landing on King's Creek," etc. There is abundant evidence to show that there was a parcel of land known as "King's creek landing" by some, and as "the landing on King's creek" by other witnesses. William F. Stevens testified he had known King's creek landing 30 or 35 years, although he did not know the boundaries until Jackson Dorney pointed them out in 1883, the effect of which we will consider later. Martin Gallion, who was 51 years

not know the boundaries until 1883. Boyd Preston said he had known King's creek landing for many years, but he did not seem to know the boundaries until Mr. Dorney pointed them out. John S. Price, who was 45 years of age, had known "the landing on King's creek" since he could remember. He spoke of two stones on the western boundary, but the record is not clear that he knew the boundaries before 1883. Daniel Sullivan, who lived on the Savory farm from 1861 to 1882 and then moved on King's Hill farm, where he lived for three years, spoke of it as King's creek landing. Joseph A. Price, a brother of the defendant, testified that he was 71 years of age, and had lived about six or seven miles from King's creek landing nearly all his life; that he had known the landing at the head of King's creek since 1850, had been on it before his father purchased it, and it was called King's creek landing; that there was no other place, so far as he knew, that went by the name of King's creek landing or the landing on King's creek: that he knew the stones referred to by the witnesses (claimed to be the western boundary) long before his father purchased the property, remembers having seen them as early as 1852 and saw them from time to time until 1888; that, when he first went there, Jackson Dorney was in possession of King's creek landing, and that his father paid taxes to him on King's creek landing while he was tax collector in 1884, 1883, 1886, 1887, and 1888. He also said that the road to the landing was not in the same place that it now is, but was changed about 1864, when Mr. Cochran owned King's creek farm, and had been in the same place ever since. W. E. Somervuie, county surveyor of Harford county, testifled that he made the survey of King's creek landing shown on the plat filed in this case, that he fixed the western boundary by drawing a line from a point at the head of a marsh making up from King's creek, pointed out as the place where a boundary stone formerly stood near a gum tree through another point near the bank of the southwestern branch of King's creek, pointed out as the spot where formerly stood a boundary stone under a white oak tree, and that the remaining boundaries of King's creek landing consist of following King's creek around to the marsh first mentioned and up to the point of beginning. That is the description of King's creek landing as claimed by the defendant.

"King's creek landing" by some, and as "the landing on King's creek" by other witnesses. William F. Stevens testified he had known King's creek landing 30 or 35 tyears, although he did not know the boundaries of it except as pointed out in 1883, the effect of which we will consider later. Martin Gallion, who was 51 years of age, testified he had known King's creek. If



as definite as the description of land in the deed from Dorney to Hartman under which the plaintiff claims-"King's Hill." By section 22, art. 75, Code Pub. Gen. Laws 1904, it is provided that "it shall not be necessary to state the name by which land may have been patented in declarations in actions of ejectment, dower, trespass or case, but the same may be described by abuttals, course and distance, by any name it may have acquired by reputation, or by any other description certain enough to identify the same." See, also, Jay v. Michael, 82 Md. 12, 33 Atl. 322; Winter v. White, 70 Md. 305, 17 Atl. 84; Huddleson v. Reynolds' Lessee, 8 Gill, 332, 50 Am. Dec. 702. In the latter case a tract patented as "Western Route" was sometimes called "West Route." The court said: "The conclusion seems to be warranted that the tract which, when taken up, was called by the name of 'Western Route' was in a later time sometimes called 'West,' and sometimes 'Western Route.' If so, a conveyance by the name which it had acquired by reputation would have passed the title to the patented tract." It would seem clear, therefore, that the deed on its face was admissible; and it only remains in that connection to determine whether the evidence sufficiently shows that there was such a tract capable of definite location. In addition to the evidence we have already referred to, we will now consider the fourth bill of exceptions, which presents for review the action of the lower court in overruling the motion to strike out the testimony of the witnesses in reference to the declarations and acts of Jackson Dorney.

He went upon the land in 1883, and pointed out to a number of persons who were witnesses in this case the lines of King's creek landing-telling them that a line between two stones which were then there (and the places where they stood were located on the plat by the surveyor) was the western boundary, and a marsh from the north stone to King's creek was the northern boundary, and King's creek was the eastern and southern boundaries. There ought no longer to be any question in Maryland about the right to prove private boundaries by the declarations of deceased persons, subject, of course, to certain well-recognized limitations. If such evi- | lic and private boundary lines, provided they dence were excluded on the ground that it was hearsay, it would be impossible in portions of the state where there is still controversy over boundary lines to establish the corners and lines of ancient tracts. It is said in Dorsey on Ejectment, 57, 58: "It to boundaries is admissible when there has may be asked: How can a witness be called been so great a lapse of time as to render to identify a boundary made in 1680? The it difficult to prove the original boundary law does not require this. It is generally lines by the existence of the primitive landtrue that hearsay is not evidence; yet from marks:" And on page 957 it is said: "Repuvecessity there are certain exceptions. The tation or tradition is very generally held to inquiries of a jury are directed to identify be admissible in evidence to prove an ancient a boundary, and it may be proved by tradi-boundary, whether public or private, al-

ence to it in this deed was sufficient. It is i mit a witness to refer to the declarations of a deceased person who was on the survey. As in consanguinity, so boundaries may be proved by hearsay evidence; but the declarations of living witnesses cannot be received, nor the declarations of a person interested in establishing the fact." It was held by the provincial court in Howell's Lessee v. Tilden, 1 Har. & McH. 84, that: "Traditional evidence of what an ancestor of the plaintiff, who was seised of the lands in question 50 years ago, at that time did say concerning the bounds of those lands, might be given in evidence to the jury, and the weight of it left to the jury." Redding's Lessee v. Mc-Cubbin, 1 Har. & McH. 368, is to same effect. In Ridgely's Lessee v. Ogle, 4 Har. & McH. 123, it was held that "a plat returned in an ancient ejectment is admissible in evidence upon the same principle that hearsay evidence is allowed to prove boundaries." See, also, Scott's Lessee v. Ollabaugh, 3 Har. & McH. 511, and Snavely v. McPherson, 5 Har. & J. 150. In Hall v. Gittings' Lessee, 2 Har. & J. 121, the declarations of a former holder of the adjoining lands as to the bounds of the land in dispute were held competent and admissible in evidence; it not appearing to the court by the plots that he was interested in establishing the truth of the facts related by him to the witnesses. See, also, Bladen's Lessee v. Cockey, 1 Har. & McH. 232; Weems' Lessee v. Disney, 4 Har. & McH. 156. Other cases might be cited, but they can be found either in the notes in Dorsey on Ejectment or in Mr. Brantley's annotated edition of the early cases. Although in the later decisions of this court the question may not have been passed on, it is because the rule has been too generally recognized to admit of controversy. An examination of the records in some of the later cases will doubtless show that such testimony has been received, and the writer of this opinion knows that in the many actions of ejectment and trespass quare clausum fregit which have arisen in western Maryland it has been the unquestioned practice to prove boundaries by traditional evidence. The general rule in this country is thus stated in 4 Am. & Eng. Ency. of L. 851: "Declarations of deceased persons are admissible in evidence in questions relating both to pubwere made ante litem motam and by a person who had peculiar means of information, and who had no interest in the matter at issue at the time they were made." In 5 Cyc. 956, it is said: "Hearsay evidence as tional evidence. The rules of evidence per- | though in England and a few of the United

States its admissibility to prove a private boundary is limited to cases where it is shown that such boundary is co-incident with a public or quasi public one. Such reputation or tradition must, however, be ascertained as to the subject-matter as direct evidence would be, and is not admissible to contradict evidence of record; and in all cases proof of ancient boundaries by common reputation must have reference to a time ante litem motam."

In this case the declarations of Jackson Dorney were made at a time he had no interest in making them, before any controversy about the land in question had arisen, when he was pointing out the boundaries, and he had died some years before the trial. He was the former owner and occupant of the farm and landing, and hence was familiar with the facts. It is said, however, by the appellant that the evidence as to Dorney's declarations and acts comes within the prohibition that a vendor of land cannot impair the rights of a vendee after he has parted with the property. But he was not only vendor of the farm, but also of the landing. If he had been still living at the time of the trial, there could have been no question about the right of the defendant to call him as a witness to show that the landing on King's creek was a well-defined tract of land, and to point out the boundaries. It is not an attempt to impeach the deed to Hartman, but that deed itself expressly excepted from its effect the landing situated at the head of King's creek, and the question which became material at the trial. as is well shown by the plaintiff's prayer A, as modified, and by the defendant's third prayer, as modified, was whether there was a parcel of land answering that description, "with boundaries on all sides either well known or capable of definite location by visible objects." The construction of the deed was for the court, and the lower court did construe it. If that construction was not satisfactory to the appellant, he should have brought the rulings of the lower court here for review, but, as we have seen, there are no exceptions to the prayers in the record. If the court was right in its construction of the deed, then it was necessary to submit to the jury the question of fact whether there was such a definite tract. In order to determine that, it was admissible to prove the boundaries, and, in doing so, it was competent to prove that Dorney had pointed them out to the witnesses who were called at the trial. It is not necessary to determine whether it was admissible to offer such statements as "that is what he reserved," and similar declarations which some of the witnesses testified he used, for the motion to exclude was not confined to them. but we can see no reason why Jackson Dorney could not, at the time he did, point out the corners and lines of the parcel of land

dence of Joseph A. Price, the stones were there at least as early as October or November, 1852—only a month or two after the deed from Dorney to Hartman—and he had known the landing at the head of King's creek since 1850. That there was some kind of landing there is shown by the deed to Hartman.

With this and other testimony in the record, there was ample evidence tending to show that there was a well-defined parcel of land known as "the landing on King's creek," or as "King's creek landing," as most of the witnesses spoke of it, which was not only capable of being located, but was, in fact, located by the county surveyor. The defendant testified that his father claimed to these lines and always paid the taxes on the landing until his death in 1893, and that he (the defendant) had paid them ever since. It might be said parenthetically it is not probable that he was paying taxes on a mere easement. The evidence is also ample to show adverse possession, under a deed which we have already said gave color of title. The father of the defendant and his co-tenant used the land for the purposes it was capable of being used and best adapted to. As early as 1870, Mr. Price built a shanty on it, he paid taxes on it, rented it for some time, and did all that could be required to show such acts of ownership as could be exercised over property of that character and locality. Then the record states: "Besides, all the testimony set out in both the aforegoing bills of exception, which is by reference made a part hereof, further testimony was taken, and the defendant offered testimony tending to prove adverse possession of the land in controversy by defendant and those in privity with him and under whom he claims from the date of the deed from Dorney to Price and Legoe in 1860 down to the death of John Price, and down to the institution of this suit." In that connection we might add as a further answer to the argument of appellant that there was no evidence of any deed ever having been in existence, which had such a description as that relied on to show that the landing on King's creek was a parcel of land known by that name, that, when a party has had possession of property in such way and for such time as to make it adverse within the meaning of the law, a deed is presumed, and "the presumption of a grant is an inference of law arising out of a particular state of facts, and may exist although the jury in their consciences may disbelieve the actual execution of such a grant." Casey's Lessee v. Inloes, 1 Gill, 430, 39 Am. Dec. 658. So, if there had been any necessity for a deed prior to the one of 1860, which described the parcel of land, it could be presumed from the adverse possession.

ney could not, at the time he did, point out the corners and lines of the parcel of land cussing the other questions raised. The known as the landing. According to the evibrief of the appellant presents his theory



of the case with marked ability, and contains an interesting review of the law on easements and other subjects, but the salient points in the case are those we have referred to. We would add that, in a case of this character, there ought always to be a survey made under a warrant issued by the court. No question was raised about the right of defendant to prove adverse possession because he had not taken defense on warrant, and we are therefore not called upon to pass on it. But, when adverse possession is claimed of a part only of the lands sued for, that is unquestionably the proper practice. Hackett v. Webster, 97 Md. 405, 55 Atl. 480, and cases there cited. The record does not satisfactorily show whether the proper entry was made for the land for which there seems to have been a disclaimer, but that is not included in the exceptions before us. So far as we can determine from the exceptions in the record, there is no ground for reversal and the judgment must be affirmed.

Judgment affirmed, the appellant to pay the costs above and below.

(110 Md. 568)

BUCK V. BRADY.

(Court of Appeals of Maryland. June 1, 1909.)

1. EVIDENCE (§ 222*)—DECLARATIONS AGAINST INTEREST—PROOF OF SCIENTES AS TO MAD Dog.

In an action for being bitten by defend-ant's dog, based on his negligence in setting it at large after being warned not to do so, and when he had good reasons to suspect that it was suffering with rabies, his declaration, sub-sequent to the injury complained of, that his hired man did not want the dog turned out be-cause he thought it was mad, and so informed the defendant, was admissible, as it tended to prove scienter, and was therefore a declaration against interest. against interest.

[Ed. Note.—For other cases, see Evid Cent. Dig. \$ 768-808; Dec. Dig. \$ 222.*]

APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—Admission of Evidence.

In an action for being bitten by defendant's dog, his expression of regret at the occurrence, admitted in evidence, did credit as to his humane instincts, and its communication to the jury was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4153; Dec. Dig. § 1050.*]

APPEAL AND ERROR (§ 1053*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action for being bitten by defendant's dog, no injury was done by the admission of testimony that he said that he thought afterwards himself that the dog had hydrophobia; the court having properly instructed that he was only responsible, if at all, for the want of proper care and caution in setting the dog free in disregard of previous advice and warning.

[Ed. Note.—For other cases, see Appeal ar Error, Cent. Dig. § 4180; Dec. Dig. § 1053.*]

4. Animals (§ 74°)-74°)—Action for Being Bit-Relevancy of Evidence as TEN BY DOG-RELEVANCY OF TO FEAR OF HYDROPHOBIA.

In an action for being bitten by a dog, evidence are dence on the part of plaintiff as to her fear at matters for the consideration of the jury; but

the time and at the trial as to her acquiring hydrophobia was relevant.

[Ed. Note.—For other cases, see Animals. Dec. Dig. § 74.*]

5. Appeal and Error (§ 206*)—Objection Not Made Below—Leading Questions to Witness.

If questions are deemed objectionable as leading, objection thereto should be made at the time they are asked of the witness, to be made a basis for exception on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1287; Dec. Dig. § 206.*]

APPEAL AND EBBOB (§ 1053*)—REVIEW OF EXCEPTION TO ANSWER SUBSEQUENTLY EXCEPTION TO STRUCK OUT.

An exception to an answer is disposed of by subsequently granting a motion to strike it ont.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4178; Dec. Dig. § 1053.*]

Animals (§ 74*)—Action for Being Bit-ten by Dog—Admissibility of Evidence.

In an action for being bitten by defendant's dog which he set at large after being warned not to do so, and when he had reason to susnot to do so, and when he had reason to suspect that it was suffering from rabies, defendant's hired man who had charge of the dog in defendant's absence, and had opportunity to observe its behavior, testified that, having expressed some fear for his children, defendant said not to be so fearful, and that, if they got bitten, they could go to the city for treatment, and be well in a short time. Held, that this testimony was not objectionable, as it tendthis testimony was not objectionable, as it tended to show that the witness apprehended danger from the dog and communicated his fears to defendant, whose answer was evidence from which the jury could form an opinion as to whether or not he treated his servant's warnings more lightly than a prudent man should have done under the circumstances.

[Ed. Note.—For other cases, see Animals, Dec. Dig. § 74.*]

8. Animals (§ 74*)—Action for Being Bitten by Dog—Admissibility of Evidence—Behavior of Dog on Particular Occa-BION.

In an action for being bitten by a dog, testimony of defendant's hired man that the dog took hold of a stick which he thrust at it when took hold of a stick which he thrust at it when it was confined, and seemed to be cross and angry, though its general disposition previously seemed to have been good, was properly ad-mitted, though it did not clearly appear whether this particular incident was communicated to defendant, the witness having been given charge of the dog, and having told defendant on more than one occasion that it was acting strangely, and that he thought it was developing rahies. and that he thought it was developing rabies.

[Ed. Note.—For other cases, see Animals, Dec. Dig. § 74.*]

9. Animals (§ 70*)—Behavior of Vicious Dog—Knowledge of Servant as Knowledge of Owner.

Where defendant had been told by his servant in charge of the dog which bit plaintiff on more than one occasion that the dog was acting strangely, and from his observation of it he thought it was developing rabies, knowledge of the servant as to its behavior at a particular time was under the circumstances knowledge of defendant.

[Ed. Note.—For other cases, se Cent. Dig. § 230; Dec. Dig. § 70.*] see Animals,

10. TRIAL (§ 189*)—PROVINCE OF COURT AND JURY—QUESTIONS RELATING TO EVIDENCE.

The weight and sufficiency of evidence are

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

whether there be any evidence or not is for the

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.*]

11. Evidence (§ 314*) — Opinion Evidence BASED ON HEARSAY

In an action for being bitten by a dog, an investigation whether it had rables seemed to have been scientifically made according to the established system in vogue at a Pasteur Insti-tute, and all the physicians who took part in it testified as to their respective parts, making a complete chain of investigation, and the entries in the record books and on a card in r lating thereto were admitted in connection with their testimony. Held, that the testimony as to the result of the experiments was admissible as against an objection that the opinions of the witnesses were based on hearsay because all the work of making experiments at the insti-tute was not done by one person, but different parts of the process of investigation were per-formed by different members of the staff.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1168-1173; Dec. Dig. § 314.*]

2. Appeal and Ebbob (§ 242*)—Review— Question Not Plainly Appeabing to be Decided Below.

Objection was made in appellant's brief to the evidence of a medical witness because some of his testimony was based in part on the evi-dence of two witnesses whom he heard testify dence of two witnesses whom he heard testify at the trial below, and not on a hypothetical statement of facts, but no objection on this ground appeared to have been made at the time the evidence was given, and the motion to exclude it was based on other grounds entirely. Held that, as the question did not plainly appear to have been decided in the court helow, it could not be raised on appeal in view of Code Pub. Gen. Laws 1904, art. 5, § 9. providing that in no cause shall the Court of Appeals decide any question which does not plainly appear to have been tried and decided by the court below. by the court below.

[Ed. Note.—For other cases, see Appeal and rror, Cent. Dig. §§ 1417-1425; Dec. Dig. § Error, 242.*]

18. Negligence (§ 3*)-What Constitutes DUE CARE.

Care should be commensurate with the serious consequence of a miscarriage.

Cent. Dig. § 5; Dec. Dig. § 3.*]

14. Animals (§ 68*)—Dog Suspected of Hy-Drophobia—Duty of Owner to Prevent

INJURIES.

Whenever there is any reason to suspect that a dog has hydrophobia, the gravity of the disease makes it incumbent on the owner or keeper to be very careful and use every precaution to prevent its inflicting an injury on

[Ed. Note.—For other cases, see Anii Cent. Dig. §§ 225-226; Dec. Dig. § 68.*]

15. Animals (§ 68*)—Dog Suspected of Hy-Drophobia — Sufficiency of Caution to PREVENT INJURY.

When defendant was informed by his hired man in charge of his dog that it was acting strangely and that he thought something un-usual was the matter, defendant directed its confinement, but made light of his servant's sug-

a mile away from defendant's house. Held, that the precautions taken were insufficient, and the court properly refused to direct a ver-dict for defendant.

[Ed. Note.—For other cases, see Anii Cent. Dig. §§ 225-226; Dec. Dig. § 68.*] see Animals,

Appeal from Circuit Court, Baltimore County; Geo. L. Van Bibber, Judge.

Action by Marcia E. Brady against Walter H. Buck. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRIS-COE, SCHMUCKER, BURKE, WORTH-INGTON, THOMAS, and HENRY, JJ.

C. Baker Clotworthy, for appellant. Howard Isaac, for appellee.

WORTHINGTON, J. This action was brought by the appellee against the appellant to recover damages for injuries sustained by the plaintiff from the bite of a dog belonging to defendant. The gravamen of the action is negligence on the part of the defendant in setting the dog at large after being warned not to do so, and when he had good reason to suspect that the animal was suffering with rables or hydrophobia.

It appears that Mr. Buck is an attorney at law, practicing his profession in Baltimore city, but having his residence in Baltimore county. At his country place was a handsome young collie dog belonging to him, which was proven to have been naturally of a quiet and gentle disposition, and there also in his employ was a man of all work by the name of Amos Triplett. The defendant usually went to his office in the city early in the morning and returned to his home in the evening. On Wednesday evening November 20, 1907, as the defendant and his hired man were on their way home from the railroad station, Triplett informed his master that the dog had been acting strangely, that it was restless, running about the place and barking, and that he thought there was something unusual the matter with the dog. Thereupon the defendant, as a precaution, directed Triplett to confine the dog. Other conversations took place between the defendant and Triplett concerning the animal, in which Triplett stated that the dog was acting suspiciously, and expressed his apprehension that the dog was developing hydrophobia, but the defendant made light of the suggestion, and told the man not to be so fearful. On Saturday afternoon, November 23d, the defendant, being at home and hearing the dog barking in the stall where it was confined, went to look at it. He says in his testimony that the dog apgestion that it was developing hydrophobia, and a few days thereafter turned it loose with instructions to the servant to shoot it if it acted suspiciously. The dog then appeared to be all right, except the was barking in the stall where it was confined. About an hour later it bit plaintiff in the wrist about a quarter of fendant got an old shotgun, loaded it, and peared to be all right, except he was bark-

Wor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

gave it to Triplett with instructions to shoot the jury could not therefore prejudice him. the dog as it came out if it acted suspiciously. The dog was then set free. It went first to its master, who patted it, and then to the house, where Mrs. Buck says she saw it eating, that she patted it, and that the dog acted as he naturally did at any time. About an hour later the plaintiff was bitten in the wrist by the dog near her home, about a quarter of a mile distant from Mr. Buck's house, while getting a piece of wood along the roadside. Triplett testified: That on Wednesday he observed the dog acting in an unusual manner. It was restless, running about the lot and showing unusual symptoms. That by Mr. Buck's direction he confined the dog. That all the while it was confined the dog was barking and yelping. That he tried to attract the dog's attention, but it would not respond. That, when Mr. Buck suggested on Saturday turning the dog loose, he told him he did not think the dog was safe to be turned out; that he thought the dog was getting hydrophobia. The subsequent history of the dog is, in effect, that it traveled with its head down, snapping at the ground; that its tail was hanging low between its hind legs; and that it made a peculiar snorting noise. It traveled several miles from its home, and at about 5 o'clock the same evening was killed by a young man for biting his pet pig. Several witnesses who saw it meanwhile as it traveled the road testified that it acted quite naturally so far as their observation went. A few days after being killed, its head was taken to the Pasteur Institute, where certain tests were made to discover if the dog was afflicted with rables or not. By advice of physicians there, Miss Brady attended the city hospital, and for 21 days took the Pasteur treatment for the prevention of hydrophobia. The verdict of the jury was for \$1.000, upon which judgment was entered, and the defendant has appealed.

There are 14 bills of exception in the rec-.ord, 13 to the testimony, and 1 to the prayers, all of which we will now proceed to consider in their order.

The first and second exceptions relate to a conversation that took place between the plaintiff and defendant subsequent to the injury complained of. At the trial of the case in the court below Miss Brady, in answer to questions, stated that Mr. Buck in that conversation expressed his regret at the occurrence, and said that his man did not want him to turn the dog out, because he thought the dog was mad, and that he himself afterwards thought the dog had hydrophobia. The declaration that Triplett did not want the dog turned out because he thought it was mad was certainly admissible, as it tended to prove scienter on defendant's part, and was therefore a declaration against interest. The expression of his regret at the occurrence did credit to his hu-

The testimony to the effect that the defendant said he thought afterwards himself that the dog had hydrophobia could do him no injury, as under the very proper instructions of the court he was only responsible, if at all, for the want of proper care and caution in setting the dog free in disregard of the previous advice and warning given him by Amos Triplett.

The third and fourth exceptions were to the following questions put to Miss Brady: "Q. Did you have any fear? Q. Have you any fear now?" To the first question the witness answered: "Well, I didn't know. I thought I might get the hydrophobia. didn't know this was a sure cure or not." To the second question she answered: "Yes, sir; I still worry about it." We think the lower court rightly permitted these questions to be answered. In Godeau v. Blood, 52 Vt. 251, 36 Am. Rep. 751, the court said: "The apprehension of poison from the bite of the dog, and the fear and solicitude as to evil results therefrom-all pain, anguish, solicitude, occasioned by the bite-were proper matters for consideration by the jury in estimating the damages." In Friedmann v. McGowan, 1 Pennewill (Del.) 439, 42 Atl. 723, the court held that the following question was relevant, though objectionable, because leading: "Have you or not been afraid of hydrophobia ever since you were bitten by the dog?" In neither of these cases was there any evidence that the dog was rabid. In this case there was evidence tending to show that the dog was afflicted with hydrophobia, and we think the evidence was relevant. If the form of the questions was deemed objectionable on the ground that they were leading, such objection should have been made at the time they were asked of the witness. Jones v. Jones, 36 Md. 447.

The fifth exception was disposed of by the granting subsequently of a motion to strike out the answer excepted to.

The sixth and seventh exceptions were taken to the following questions and answers: "Q. What, if anything, was said by Mr. Buck of the treatment of hydrophobia at the time you let the dog loose? A. Well, I expressed some fear for my children, and he said not to be so fearful. He said, if they got bitten, they could just go to the city and have the juice inserted into them, and they would be well in a short time. Q. Just tell his exact words? A. Well, he said: 'Don't be so fearful. If they do get bitten, you can go to town to that Dutchman and have the juice squirted into them, and they will be well before night.' That is the bestof my judgment his words." We see no objection to this testimony. It tended to show that Triplett seriously apprehended danger from the dog, and that he communicated his fears to the defendant. The defendant in his testimony said "that Triplett was a reamane instincts, and its communication to sonably intelligent man, though a little apgood man, and told everything in a straight way." As Triplett was given charge of the dog in Mr. Buck's absence from home, and had ample opportunity to observe the dog's behavior, the answer complained of was evidence from which the jury could form an opinion as to whether or not the defendant treated Triplett's warnings more lightly than a prudent man should have done under the circumstances.

The eighth exception was to the admissibility of evidence concerning the dog's vehavior on an occasion when Triplett thrust a stick at it while it was confined. Triplett testified that the dog took hold of the stick, and seemed to be cross and angry, though its general disposition previously had been good. It does not clearly appear from the evidence whether this particular incident was communicated to Mr. Buck or not, but Triplett did tell the defendant on more than one occasion that the dog was acting strangely, and from his observation of it he thought the animal was developing rabies. Besides this, Triplett was given charge of the dog, and under such circumstances knowledge of the servant is the knowledge of the master. In the case of Baldwin v. Casella, L. R. 7 Exch. 325, an ordinary carriage dog was kept in a stable of the defendant, and was under the care and control of the defendant's coachman, who lived there. The dog was known to the coachman to be cross and to have knocked down a child and scratched it. The defendant, however, supposed the dog to be harmless, and allowed it to play with his children. In an action by an infant for a bite inflicted by the dog, a verdict was found for the plaintiff. In that case Sir Samuel Martin said: "The dog was kept in defendant's stable and the defendant's coachman was appointed to keep it. The coachman knew the dog was mischievous, and it is immaterial whether he communicated that fact to the master or not. His knowledge was the knowledge of the master." We find no error in the ruling of the court on the eighth exception.

The ninth, tenth, and eleventh exceptions relate to substantially the same kind of evidence that we considered under the first and second exceptions, and what we there said disposes of these also.

The twelfth and thirteenth exceptions were taken to the refusal of the trial court to strike out the opinion evidence of Drs. Keirle and Haines, two physicians from the Pasteur Institute in Baltimore, both of whom testified that from their investigation of the dog's head the animal had hydrophobia. ground for the motion to strike out was that all the work of making the experiments at the institute was not done by one person, but that different parts of the process of investi-

prehensive and nervous. That he was a very on hearsay. The testimony of all three of the persons who took part in the tests was admitted subject to exception. Dr. Herbert H. Haines testified that he had been Dr. Keirle's assistant at the city hospital for four years; that he made the preliminary test, and that it was positive, indicating hydrophobia; that he was in the courtroom and heard the testimony of Miss Brady and of Amos Triplett, and that, if the facts stated by them were true, the history of the dog was typical of a mad dog; that his opinion based on his examination and the history was that the dog had hydrophobia, but he would not swear to it as a fact. Dr. C. H. McClean testified that he had been assistant to Dr. Keirle in the Pasteur Institute for two years; that his work in November, 1907, was done immediately under Dr. Haines, who was his senior at the time in charge of the laboratory; that he took out the medulla from the dog's head, and put it in a tube with glycerin, and labeled the tube; that subsequently he inoculated two rabbits with virus from this tube, and put them in a box; that the box was labeled with a card label; that he made the entries in the record book and on the card label. The record book and card label were then offered in evidence, without objection. Both the card and the record book contained the following entries among others: "No. 674. Brady. Box E." Both the rabbits appear to have been gray in color, as that word appears twice in the record book and twice on the card label. One rabbit died prematurely, and the letters "P. D." were written before the word "Gray" on the card label. Before the other word "Gray" on the card was an "O," in red ink, put there by Dr. Keirle, to indicate that that rabbit developed rabies. The witness was then asked what opportunity there was for mistake in making the experi-"There was no ments, and replied that: more liability of error than there was in any other scientific work." Dr. Keirle testified that from the books and records the dog had hydrophobia. The defendant's motion to strike out testimony was directed only against that of Drs. Keirle and Haines. Dr. McClean's was not objected to. In Owen's Case, 67 Md. 313, 10 Atl. 210, 212, 302, this court said, quoting from Ætna Ins. Co. v. Weide, 9 Wall. 677, 19 L. Ed. 810: "There can be no doubt but the day books and ledger. the entries in which were testified to be correct by the persons who made them, were properly admitted. They would not have been evidence per se, but with the testimony of the witnesses accompanying them all objection was removed." Dr. McClean testified that he did the work of inoculating the rabbits and made the entries, and that Dr. Keirle made the "O" in red ink to indicate that one of the rabbits inoculated by him died of gation were performed by different members rabies. The weight and sufficiency of eviof the staff employed there, and that, there- dence are, of course, matters for the confore, the witnesses' opinions were based up-sideration of the jury, but whether there be

any evidence or not is a question for the | may be afflicted with hydrophobia, it becomes court. In this case the investigation to discover whether the dog had rables or not seems to have been scientifically and carefully made according to the established system in vogue at the Pasteur Institute. All the physicians who took part in the experiments testified as to the part performed by them, respectively, thus making a complete chain of investigation, and the entries in the record books and on the card were admitted in connection with the testimony of the wit-We think that, under the circumstances, the testimony as to the result of the experiments was admissible.

Objection is also made in the brief of the appellants to the evidence of Dr. Haines, because some of his testimony was based in part upon the evidence of two witnesses whom he heard testify at the trial of the case below, and not upon a hypothetical statement of facts. Edelin v. Sanders, 8 Md. 118. But no objection on this ground appears to have been made to this evidence at the time it was given, and the motion to exclude is based on other grounds entirely. As the question does not plainly appear to have been decided by the court below, it cannot be raised on appeal. Code Pub. Gen. Laws 1904, art. 5, § 9. No question was asked Dr. Haines based upon evidence in the case, and, if the point now raised was deemed important, objection to the doctor's statement should have been made at the time in the court below.

The fourteenth exception is to the ruling of the trial court upon the prayers. The defendant's first prayer, which was rejected, asked the court to instruct the jury that their verdict must be for the defendant. In defense of this prayer, the learned counsel for the defendant says in his brief that hydrophobia was not proved, and, "if the dog did not have hydrophobia, there was no negligence to be imputed to the defendant, because the dog was conceded to be of an affectionate and gentle disposition." But it could not be declared as a matter of law that in turning the dog loose with the knowledge he possessed at the time of its behavior under the observation of his man Triplett the defendant acted with that degree of caution which is required of a reasonably prudent man under such circumstances. Whether the dog was mad or not may be matter of suspicion, and yet it was not enough for defendant to say: "I did use a certain precaution." He ought from the grave nature of the disease suggested to him to have put it out of the animal's power to do harm. Addison on Torts, § 264; Jones v. Perry, 2 Espinasse, 482. The care should have been commensurate with the serious consequences of a miscarriage. Bishop on Noncontract Law, § 1235. Whenever the owner of a dog has reason to even suspect that the animal

his duty to be very circumspect, and to use every precaution to prevent the animal from inflicting an injury on any creature. We cannot say the precaution here was sufficient, and think the court below was right in rejecting this prayer.

We have examined the other rejected prayers of the defendant, and, without discussing them in detail, we think they were properly rejected. An examination of all the instructions actually granted, taken together, convinces us that the case was fairly and properly submitted to the jury.

Finding no reversible error in any of the rulings of the lower court, the judgment will be affirmed.

Judgment affirmed, with costs.

(110 Md. 468)

POPE et al. v. WHITRIDGE et al.

(Court of Appeals of Maryland. May 20, 1909.)

1. APPEAL AND ERBOR (§ 917*) — PRESUMP-TIONS—DECISION ON DEMURRER.

Where a demurrer was filed to a petition for mandamus and does not appear to have been directly passed upon, it will be deemed up-on appeal to have been overruled, where the case proceeded to trial on its merits.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3707; Dec. Dig. § 917.*]

2. MANDAMUS (§ 187*)-APPEAL-SCOPE OF REVIEW.

On appeal in mandamus proceedings tried by the court, the whole record will be reviewed, and, while formal bills of exception are not necessary, rulings complained of by either party must be distinctly presented by written objections filed or by proper notations made in the record.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 432; Dec. Dig. § 187.*]

3. Animals (§ 39*)—Society for Prevention of Cruelty—Election of Directors—Qualification of Voters—Statutory PROVISIONS.

PROVISIONS.

After an election of directors by a society for the prevention of cruelty to animals, Laws 1908, p. 1210, c. 77, was enacted, providing for a special election of directors for the society on April 10th of the same year, and providing that members of the society could vote who had actually become members on or before March 7, 1908, and who had paid their membership dues for 1907 or 1908. Held, that new members elected after the first election and before March 7, 1908, who had paid their dues between March 7th and April 10th, and members who were such before the former election and had not resigned and had paid their dues for 1907 or 1908 prior to the beginning of the special election, were entitled to vote thereat.

[Ed. Note.—For other cases, see Animals, Cent. Dig. § 99; Dec. Dig. § 39.*]

4. Animals (§ 39*) — Society for Prevention of Cruelty—Election of Directors—Qualification of Voters.

A member of the society, who had not resigned or withdrawn, but had failed or neglected to pay his annual dues in some one or more years, but who was still carried on the society's books as a member, was qualified to vote at the special election, provided his dues were paid or lawfully tendered for the year

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1907 or 1908, where the allowance of such a practice was customary by the society.

[Ed. Note.—For other cases, se Cent. Dig. § 99; Dec. Dig. § 39.*] see Animals,

5. Animals (§ 39*)—Society for Prevention of Cruelty—Election of Directors

QUALIFICATION OF VOTERS.

Persons who on one or more occasions gave a donation to the society for some specific purpose, but not for the purpose of becoming mem-bers, and who were not carried on the books as such, were not in fact members, and were not entitled to vote.

[Ed. Note.—For other cases, see Animals, Cent. Dig. § 99; Dec. Dig. § 89.*]

6. Animals (§ 39*)—Society for Prevention of Cruelty — Election of Directors —

OF CRUELTY — ELECTION OF LIBERATURE QUALIFICATION OF VOTERS.

The notation by the society's bookkeeper on the membership book after the name of a member for any year that he "declined to pay," "refused to pay," "resigned," or "asked name to "" chould be presumed to have been "refused to pay," "resigned," or "asked name to be taken off," should be presumed to have been done by the authority of the society and to have terminated the membership of such person, so that he could not vote at the special election, unless clearly shown to have been done in error, or unless the member had been duly reinstated according to the custom and practice of the society.

[Ed. Note.—For other cases, see Animals, Cent. Dig. § 99; Dec. Dig. § 39.*]

7. Animals (§ 39*)—Society for Prevention of Cruelty — Election of Directors —

RIGHT TO VOTE.

While ordinarily honorary members of a society have no share in its management, a person who had been a member in the society for over 20 years and an honorary member since 1901 had always attended its meetings and 1901, had always attended its meetings and voted without objection, and had made large donations to the society, was a member entitled to vote at the special election.

[Ed. Note.—For other cases, see Cent. Dig. § 99; Dec. Dig. § 39.*] see Animals.

8. Animals (§ 39*) — Society for Prevention of Cruelty—Election of Directors

QUALIFICATION OF VOTERS.
The by-laws of the Maryland Society for 'the by-laws of the Maryland Society for the Prevention of Cruelty to Animals of Baltimore City provided that active members should be entitled to vote for directors, and that members paying annually \$5 or more should be considered active members. Laws 1908, p. 1210, c. 77, providing for a special election of directors of the society, omits the word "active" before the word "members" in the provision that members who had joined before a specified time and had paid their dues should be entitled time and had paid their dues should be entitled to vote at the special election. Held, that members who ordinarily were not considered active members and had contributed annually less than \$5 were entitled to vote at the special election.

[Ed. Note.-For other cases, see Animals, Cent. Dig. § 99; Dec. Dig. § 39.4]

9. Animals (\$ 39*)—Society for Prevention of Cruelty — Payment of Dues — Acceptance—Specific Amount.

CEPTANCE—SPECIFIC AMOUNT.

On the day of such election of directors, the cashier of a bank handed the society treasurer a sum of money and a list of names of persons supposed to be members of the society, with the understanding that the dues of such of them as should be allowed to vote should be taken out of the sum and the residue returned to the bank. The treasurer took the money, but immediately handed it back to the cashier, who turned it over to the teller. The money was not put to the treasurer's credit either as treasurer or in his private capacity. The day

after the election, the president of the bank handed the society treasurer a sum as dues of nanded the society treasurer a sum as dues or eight of the persons whose names had been on the list and who had been allowed to vote. Held, that the transaction did not amount to a valid payment on the day of election of the dues of the eight persons, and they were not entitled to vote, since there was no acceptance of any appealing sum by the transverse of the soof any specific sum by the treasurer of the society and no appropriation of any certain sum to the dues of any member.

[Ed. Note.—For other cases, se Cent. Dig. § 99; Dec. Dig. § 39.*] see Animals,

10. Animals (§ 39*)—Society for Prevention of Cruelty — Right of Members to TION OF CRUELTY — RIG VOTE—TENDER OF DUES.

The transaction did not constitute a good tender of payment, because it was made to depend on a contingency that could not happen until the election had actually taken place, while to effectuate a tender it must be absolute and unconditional.

[Ed. Note.—For other cases, see Animals, Cent. Dig. § 99; Dec. Dig. § 39.*]

11. ANIMALS (§ 39*)—SOCIETY FOR PREVEN-TION OF CRUELTY — DUES OF MEMBERS — SUFFICIENCY OF TENDER.

Where the headquarters of the society was

Where the headquarters of the society was located at a place where a bookkeeper was in charge of the books and duly bonded and authorized to receive membership dues, keeping the books of account, and the dues of members had been invariably paid to the bookkeeper there for a long period, she making the proper entries on the books and depositing the money to the treasurer's account, a tender of members' dues made there was good, though the president of the society had shortly before directed the bookkeeper to receive no more dues and ordered them to be paid to the treasurer at his private office at another location, in the absence of any good reason for the change of place of payment. place of payment.

[Ed. Note.—For other cases, se Cent. Dig. § 99; Dec. Dig. § 39.*] see Animals,

12. Corporations (§ 283*)—Election of Di-Bectors — Proxies of Members — Deter-MINATION OF QUESTIONS ON ACCOUNT OF

If a member of a corporation gave proxies to each of two factions at an election for directors, the proxy last given should be deemed a revocation of all former proxies; but if, where two such proxies with the ballots attached were two such proxies with the ballots attached were presented, it could not be determined, from an inspection of the proxies themselves, which was last given, they should both be rejected, unless the member giving them were present to declare which was the latest, in the absence of fraud or mistake, and the election should not be delayed to determine the question by witnesses. delayed to determine the question by witnesses.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1212; Dec. Dig. § 283.*]

13. CORPORATIONS (§ 283*)—ELECTION OF DI-RECTORS—CONTEST—VOTE CAST UNDER RE-VOKED PROXY.

If the revocation of a proxy to vote at an election of corporate directors was duly presented to the judges of election, or was in the hands of the person holding the proxy, or known to him, the ballot attached thereto should not be counted upon a contest of the election.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1217; Dec. Dig. § 283.*]

14. Corporations (§ 283*)—Election of Di-Bectors—Contest—Counting Proxies.

Upon a contest of the election of directors of a corporation, proxies to which no ballots were attached should not be counted, especially

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs, 1907 to date, & Reporter Indexes

where two ballots were in the same envelope act of assembly, twelve directors were to be with no proxies attached.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1217; Dec. Dig. § 283.*]

15. CORPORATIONS (§ 283*)—ELECTION OF DI-RECTORS—CONTEST—QUESTION FOR JURY. Whether a person had tendered his ballot

and proxy to judges of election at an election for directors of an incorporated society, and whether another had paid a sum as a membership fee, entitling him to vote, or had paid it as a mere donation, were questions of fact to be determined by the trial court in a contest of the election.

-For other cases, see Corporations, [Ed. Note.-Cent. Dig. 1230; Dec. Dig. 283.*]

6. Appral and Error (§ 1047*)—Review Harmless Error.

The refusal of the court, in a contest of the election of corporate directors, to permit the ballots and proxies cast to be brought into court for inspection, was not prejudicial, where they were subsequently brought in and inspected.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4133; Dec. Dig. § 1047.*] 17. Mandamus (§ 187*)-Mandamus Iner-FECTUAL-EXPIRATION OF TERM OF OFFICE

REMAND FOR AMENDMENT.

Where, in mandamus to compel installation of candidates for directors in a corporation alleged to have been elected, the terms of cer-tain of them had expired when the right to the writ was decided by the Court of Appeals, the writ will not be refused; but the cause will be remanded for further proceedings, so that the pleadings may be amended; the right of any of the directors held elected to be at present in-stalled determined and the writ issued in fastalled, determined, and the writ issued in favor of those so found entitled.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 437; Dec. Dig. § 187.*]

Appeal from Baltimore Court of Common Pleas; John J. Dobler, Judge.

Mandamus by Micajah W. Pope and others against William Whitridge and others. Judgment of dismissal, and plaintiffs appeal. Reversed and remanded.

Argued before BOYD, C. J., and BRIS-COE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, THOMAS, and HEN-RY, JJ.

William L. Rawls and Isaac Lobe Straus, for appellants. Armstrong Thomas and John P. Poe, for appellees.

WORTHINGTON, J. The litigation in this case grew out of a contest over the selection of directors to manage the affairs of the Maryland Society for the Prevention of Cruelty to Animals of Baltimore City, a body corporate. The election for this purpose was held in pursuance of Acts 1908, p. 1210, c. 77, at the headquarters of the soclety, 612 N. Calvert street, in Baltimore City, on Friday, April 10, 1908, at 3 o'clock in the afternoon, and it was to review the proceedings at this election, and to have the court determine which candidates received a majority of the legal votes then and there tendered to the judges of election, that this action was instituted.

elected at this election, four to serve for one year, four for two years, and four for three years, and thereafter four directors were to be elected in every year to serve for three This act was approved March 10, 1908. Some weeks prior to its passage—that is to say, on February 13, 1908—an election had been held by the society, and, although the original charter of the society provided for a board of but five directors, twelve directors were chosen at that time to serve for the term of one year. Two tickets were in the field to be voted for at that election, one known as the "Shearer ticket," and the other as the "Whitridge ticket." The contest resulted in the election of the candidates on the so-called "Whitridge ticket." On February 22, 1908, a bill was introduced in the Legislature, then in session, by the friends of the newly elected directors, according to the provisions of which the society was thereafter to be managed by a board of twelve directors, and the term of four of the twelve already elected for one year was extended to the annual meeting of the society to be held in January, 1910, and the term of four others to the annual meeting to be held in 1911, and thereafter four were to be elected annually to serve for three years. The friends of the opposing, or Shearer, faction, having learned of the introduction of this bill in the Legislature, were able to so amend its provisions as to require, instead of extending the term of some of the directors already elected, a special election for twelve directors to be held on April 10. 1908, and as amended the bill passed and became Acts 1908, p. 1210, c. 77, above mentioned. When it became known that a special election was to be held, the contest between the opposing factions was renewed. It appears that about 327 ballots were cast or tendered at this election, of which number 151 straight ballots were cast for the Whitridge candidates and 131 for the Shearer candidates, with four more ballots cast for a majority of the Shearer candidates, but containing also the names of one or more candidates on the Whitridge ticket. result therefore was, as to a majority of the candidates, 151 for the Whitridge ticket and 135 for the Shearer ticket, with some 39 or 40 rejected or disputed ballots, not counted for either side.

On April 25, 1908, the petition in this case was filed in the court of common pleas of Baltimore City by certain adherents of the Shearer ticket, against the appellees, candidates on the Whitridge ticket, and the corporation itself, alleging: That the election 'took place during great and continued confusion, contention, and clamor, and in a densely crowded room at the headquarters of the society, on North Calvert street, in Balti-By the provisions of the above-mentioned more City"; that the defendants took "un-

conscionable advantage of their absolute and the court without the intervention of a jury. exclusive control of the books of the society," and called out the names of persons who were not members of the society whose proxies were wrongfully and illegally received and counted for the defendants, while the ballots and proxies of many qualified members, which were duly tendered to the judges of election, in favor of the candidates on the Shearer ticket, were unlawfully rejected and not counted for that ticket, and, in fact, that the candidates on the Shearer ticket were duly elected directors of said society on said 10th day of April, 1908; and praying that a mandamus might issue ordering the admission, induction, and installation of such directors so elected into office, etc. On May 13, 1908, a motion by the defendants to dismiss the plaintiffs' petition was filed, and on May 19, 1908, a demurrer to the petition was filed. Subsequently the motion to dismiss was withdrawn, and, while the demurrer does not appear to have been directly passed upon by the lower court, it must be deemed to have been overruled, as the case proceeded to trial on its merits. On May 23, 1908, the answer of the defendants was filed, protesting that the court had no jurisdiction to try the case, denying all the material allegations of the petition, and averring in conclusion that the court could not lawfully go behind the return and question and annul the action of the judges of election. A replication was duly filed, and the case proceeded to trial before the learned judge of the lower court without the aid of a jury. The trial lasted for several weeks, and a great mass of testimony was taken; the record consisting of nearly 600 printed pages, and containing 41 bills of exceptions, 15 prayers, a motion to exclude the testimony, 4 special exceptions, and a separate opinion by the learned judge, who sat in the case below. As the result of the trial, 14 ballots, which had originally been counted for the Whitridge ticket, were rejected by the court, and one ballot rejected by the judges of election was counted for that ticket, thus making the net result as to a majority of the Whitridge candidates 138 votes. trial court also rejected 6 ballots that had been counted for the Shearer ticket by the judges of election, but allowed that ticket 7 votes that had been so rejected, thus making the total vote 136, as to a majority of the Shearer candidates. Thereupon the lower court passed the following order: dered this 27th day of October, 1908, that the petition for mandamus in the above-entitled cause be and the same is hereby dismissed, with costs." From this final order the petitioners have appealed.

Although this appeal is brought here by the petitioners, we shall not confine ourselves to an examination of the exceptions reserved by them alone. Indeed, formal bills of exception are not necessary in a mandamus

In such a case, the question is not merely whether the rulings to which exceptions have been formally taken are right or wrong, but whether from the whole record the final order of the lower court should be sustained or not. As was said by this court in the case of Manger v. Board of Examiners, 90 Md. 659, 45 Atl. 891: "It is the final order granting or refusing a mandamus which an appeal to this court assails, when the case has been tried by the judge alone." While mandamus is a legal remedy, yet it has become more and more nearly assimilated to a proceeding in equity (Creager v. Hooper, 83 Md. 502, 35 Atl. 159), and especially is this true where the cause is tried before the court without the intervention of a jury. We shall therefore consider, as well as rulings of the court in favor of the appellants, as those against them, wherever such rulings are plainly brought to our attention for review, for while no formal bills of exception are required in such a case as this. yet it is necessary that there be either written objections filed, or proper notations made in the record, clearly indicating the rulings excepted to on both sides, and the ground of such exception, so that such rulings may be distinctly presented to this court for its consideration. Benson v. Atwood, 13 Md. 20, 71 Am. Dec. 611. With these observations upon the practice in such cases, we will proceed to consider this case upon the whole record and to review all the rulings of the lower court, so far as fairly presented to us for our consideration. We shall not attempt, however, to discuss separately all the different rulings of the lower court, but shall endeavor to declare as briefly as possible what we regard as the rules of law applicable to the several points or questions involved, and then, applying these rules to the facts as presented by the record, ascertain the result.

1. We think the lower court was right in ruling that new members elected after February 13, and before March 7, 1909, who paid their dues between March 7th, and April 10th, were entitled to vote. There is some ambiguity in the language of the act in regard to the time limit for the payment of the dues of such members; but, after the most careful consideration that we have been able to give the matter, we are of the opinion that the learned judge in the court below construed the law aright.

2. It follows as of course that members of the society who were such before February 13, 1908, and who had not resigned, and whose dues for 1907 or 1908 were paid prior to the beginning of the special election held on April 10, 1908, were entitled to vote at said election.

3. We think that under the provisions of Acts 1908, p. 1210, c. 77, regulating the special election, members contributing anproceeding, where the case is tried before nually less than \$5 were entitled to vote at



said election. The by-laws contain the word | the votes of 5 of these 8 persons were reject-"active" before the word "members" in prescribing who shall be entitled to vote, and only members paying annually \$5 or more were considered active members; but the word "active" is omitted from the statute, although the bill as originally introduced contained that adjective. It is clear therefore that the adjective was purposely stricken out of the bill, upon amendment, and the effect was to permit members, who ordinarily were not considered active members, to vote at the special election provided for in this act. The persons who amended the bill were obviously dissatisfied with the election held on February 18th, and desired that it should be abrogated, and the Legislature must be presumed to have known of the object and purpose of the amended bill, and to have enacted the special provisions governing the special election to be held on April 10, 1908, so that a larger number of members could give expression of their preferences for directors than was allowed by the by-laws of the society.

4. It appears that at the Merchants' Bank on April 10, 1908, at about noon, the sum of \$300 was handed to Mr. Charles T. Matthews, the treasurer of the society, by Mr. Ingle, the cashier of the bank, and a list of about 27 names given him of persons who were supposed to be members of the society, and whose proxies the Whitridge people held, with the understanding that the dues of such of them as should be allowed to vote at the election should be taken out of that sum and the residue returned to the bank. Mr. Matthews took the money, but immediately handed it back to Mr. Ingle, who took charge of it and turned it over to the teller of the bank. The money was not put to the credit of Mr. Matthews, either as treasurer or in his private capacity. In fact, he kept no account at the bank, either in his own right or as treasurer of the society. The day after the special election, Mr. Douglass H. Thomas, the president of the Merchants' National Bank, and one of the candidates on the Whitridge ticket, handed Mr. Matthews \$55 as the dues of 8 of the 27 persons whose names were on the list above mentioned. The votes of these 8 persons had been accepted by the judges of the election, and the votes of the other 19 had been rejected. We do not think this transaction amounted either to a valid payment, on April 10, 1908, of the dues of the 8 persons, or to a lawful tender of payment of their dues. It was not a good payment, because there had been no acceptance of any specific sum of money by the treasurer on behalf of the society, and no appropriation of any certain sum to the dues of any member; and it was not a good tender, because it was made to depend on a contingency that could not happen until the election had ac-

ed by the lower court, upon other grounds, this ruling affects only the votes of three of such persons, and as the dues on 1 of these were duly tendered by Miss Braithwaite, it in fact only controls the votes of 2, as presented by the plaintiffs' fourteenth and thirty-fourth bills of exception. We think the votes of these 2 members should not have been counted.

5. It appears: That the office of the society was located at 612 North Calvert street; that Miss Keech was the bookkeeper, in charge of the books there, duly bonded and authorized to receive membership dues; that she kept the books of account and drew the checks which were signed by Mr. Matthews, the treasurer, whose private office was located at 117 West Pratt street. For a long period the dues of members had been invariably paid at the office to Miss Keech, who made the proper entries in the books of the society and deposited the money in the bank to the treasurer's credit. A few days before April 1, 1908, the president of the society telephoned to the office of the society and gave directions that no more dues should be received there, but that they must be paid to Mr. Matthews at his private office, 117 West Pratt street. A day or two after this direction had been given, Miss Braithwaite, a young lady in the office of Dr. Thomas Shearer, at his request, went to the office of the society, 612 North Calvert street, and tendered to Miss Keech \$75, as the annual dues for 1907 of each of 15 persons, members of the society, whose names were plainly written on the outside of the 15 envelopes which she carried in her hand; each containing the sum of \$5. Miss Keech refused to accept the money, and informed Miss Braithwaite that she had been instructed by the president of the society not to receive any more dues there, and that she should go to the office of Mr. Matthews, 117 West Pratt street, for the purpose of making payment. Miss Braithwaite, accordingly, went to the office of Mr. Matthews, and offered him the dues; but he declined to receive the money, saying that the names were not familiar to him as members, but he would look the matter up and advise her the next day. The following day Mr. Matthews stated. to Miss Braithwaite, over the phone, that the persons whose names she had given him the day before were on the books of the society, but that they would not be entitled to vote at the election on April 10th, because their dues had not been paid. Mr. Matthews testified that tender was made to him of but 8 envelopes, and that the other 12 names were given him over the phone; but we think the tender made to Miss Keech at the headquarters of the society was a valid and effective tender without regard to the offer tually taken place. To be effectual, a ten- of the money to Mr. Matthews. The office der must be absolute and unconditional. As of the society where the books were kept,

and where the dues had always theretofore been paid, was the proper place to pay them, and no member should be required to go from place to place in search of the nominal treasurer, unless for some very good reason, which does not appear in the record of this case. Hoyt v. Byrnes, 11 Me. 475; Moffet v. Parsons, 5 Taunt. 307.

- 6. For the same reason we think the tenders made by Mr. Dallet H. Wilson and by Mr. Matthew S. Tyson were valid and effective tenders.
- 7. Whatever effect the withdrawal of the dues from the court in the injunction case may have had upon the injunction proceedings, such withdrawal did not affect the validity of the tenders previously made by Mr. Dallet H. Wilson, for himself, and by Miss Braithwaite, for Mrs. Bernard N. Baker, at the headquarters of the society.
- 8. We think that a member of the society who had not resigned or withdrawn, but had failed or neglected to pay his annual dues in some one or more years, but who was still carried on the books of the society as a member, was qualified to vote at the special election, provided his dues were paid, or lawfully tendered, for the year 1907, or the year 1908. This was shown to have been the practice of the society, and it was testified to that some prominent members sometimes neglected to pay their annual dues for several years.
- 9. We think that, when any member gave proxies to both sides, the proxy last given should be deemed a revocation of all former proxies given by such member, but that where two such proxies, with the ballots thereto attached, were presented to the judges of election, one for each side, and it could not be determined, from an inspection of the proxies themselves, which of the two was the latest or last given by such member, neither of the ballots attached to such proxies should have been received or counted; but both should have been rejected. course, if the member giving the several proxies had been present at the election, he should have been allowed to cast his personal ballot or to declare which proxy was his last intention; but the election ought not to be delayed so that witnesses could be brought in and testimony taken in order to determine which proxy represented such intention. Where the question of fraud or mistake is involved, of course, this rule should be relaxed.
- 10. If the revocation of a proxy was duly presented to the judges of election, or was shown at the trial to have been in the hands of the person holding the proxy, or known to him, the ballot attached to such proxy should not have been counted.
- 11. We think the lower court correctly held that the two proxies to which no ballot was attached, found in the envelope, should not be counted. The court could only count ballots, and not merely proxies. Besides, it

- appears that there were two ballots found in the same envelope with no proxies attached, and the learned judge very properly appropriated these two ballots to the two proxies above mentioned.
- 12. The ballot of the Adams Express Company and of the Standard Oil Company, on one side, and of the Acker, Merrill & Condit Company and of the Schwing Quarry Company, on the other side, were rejected for substantially the same reason, to wit, that the proxies were not properly executed. Both sides appear to have acquiesced in this ruling, and it will not be disturbed.
- 13. We hold that persons who on one or more occasions gave a donation for any specific purpose, but not for the purpose of becoming a member of the society, and who were not carried on the books as such, were not in fact numbers and were not entitled to vote.
- 14. We think that the notation by the book-keeper, on the membership book, after the name of a member, for any year, that he "declined to pay," "refused to pay," "resigned," or "asked name to be taken off," should be presumed to have been done by the authority of the board, and terminated the membership of such person, unless clearly shown to have been done in error, or unless the member had been duly reinstated according to the custom and practice of the society.
- 15. Ordinarily honorary members of a society have no share in its management; but in this case, as we find from the record, Mrs. Augusta H. Laughlin has been a member of the society for more than 20 years, and an honorary member since 1901, and when in the city she always attended the meetings of the society and voted. She attended the meeting of 1906, and voted, and the meeting of 1907, and voted; no objection being made at any time to her vote. She gave the society the fountain at Mt. Royal Station, which cost about \$300. As we are dealing with a humane society, so conspicuous an act of mercy toward animals should entitle her to vote at its elections for directors, and the language of Acts 1908, p. 1210, c. 77, is manifestly broad enough to include her as a member, qualified to vote at this special election.
- 16. Whether the ballot of Charles'H. Boone should be counted depends on whether his proxy and ballot were tendered to the judges of election or not. This is a question of fact to be determined from the evidence, and we are not disposed to disturb the ruling of the lower court in regard thereto.
- 17. The same is true of the finding of the court on the question of the right of Dr. Wm. H. Martinet to vote. Such right depended on whether his payment of \$5 on August 16, 1907, was intended and treated as a mere donation or as the payment of membership dues. It was a question of fact to be determined from all the circumstances, and we shall not disturb the court's ruling thereon.
 - 18. We are of the opinion that the aver-

ments of the petition are sufficient to give the final tabulation, as we ascertain it to be, is as court jurisdiction of the case, and we do not follows: think the petition should have been dismissed, because of the nonjoinder of Theodore Marburg, and the resignation of Thomas J. Shryock before the trial of the case in the court below.

19. The defendant's motion to exclude the testimony offered by the petitioners to show that certain proxies and ballots tendered for candidates on the Shearer ticket had been rejected at the election was properly overruled.

20. The plaintiff's first bill of exceptions was taken to the action of the court in overruling and rejecting the petition and motion of the plaintiffs to have the ballots and proxies cast to the election brought into court for inspection, by the parties or their counsel under the supervision of the trial court; but, as the ballots and proxies were subsequently brought in and inspected, this ruling furnished no question for review by this court.

21. The petitioner's second and third bills of exception relate to the admissibility of certain evidence, and we find no error in the ruling of the lower court thereon.

The views already expressed render it unnecessary to pass separately upon the defendants' several prayers. From what we have said it follows that certain ballots counted for the Whitridge ticket should have been rejected, to wit: The ballots of Mrs. J. M. Thompson and Mrs. Howard Lloyd, because the transaction at the Merchants' Bank did not constitute a payment or valid tender of dues so as to entitle them to vote; the ballot of Rice Bros., because a revocation of the proxy was obtained and presented to the judges of election; the ballot of Robert Kinnier, because he gave several proxies, and testified that the last was to Miss Shearer, as it could not be determined from the proxies themselves which was the latest, the ballot should not have been counted for either side. We, think, however, that the vote of Mrs. Howard Munnickhuysen should have been counted for the Whitridge ticket, as it seems to have been rejected solely on the ground that she paid less than \$5 membership dues. For the reasons assigned it also follows that the following rejected ballots should have been counted for the Shearer ticket, to wit, the ballots of (1) Dallet H. Wilson, (2) Mrs. T. Edward Hamilton, (3) Mrs. Bernard N. Baker, (4) Mrs. Catherine M. French, (5) Mrs. Charles G. Baldwin, (6) Mrs. J. L. Blackwell, (7) Mary Leigh Brown, (8) Mary E. Evans, (9) Miss Elizabeth B. Flemming, (10) Alexander Kerr & Bro., (11) Matthew G. Tyson, and (12) Mrs. A. L. Laughlin.

After several times reviewing the many rulings of the trial court respecting the count of the ballots, we find no other reversible error therein. The result of these corrections is to deduct four votes from the Whitridge score, and to add one vote thereto, and to add twelve votes to the Shearer score, so that the

' prestet ponta
Conway W. Sams148
Genl. Thomas J. Shry-
ock148
Theodore Marburg148
Micajah W. Pope148
Charles A. King148
Mrs. E. A. Jenkins148
Miss Mary B. Shear-
er148
Mrs. Wilson Patter-
son147
Mrs. F. W. Lovering147
Miss Dollie Fulton146
Mrs. J. H. Carroll145
Isaac Lobe Straus145

Whitridge Score
H. F. Baker137
Douglass H. Thomas137
Charles T. Matthews136
Rev. A. C. Powell136
Mrs. Louis Feder-
licht136
Levi Gottschalk136
Miss Elizabeth L.
Clarke136
Mrs. Enoch P. Cal-
low136
Dr. Wm. Whitridge185
J. Spencer Clarke135
Charles F. Macklin135
Mrs. Walter P.
Smith135

According to this tabulation the lowest vote for a candidate on the Shearer ticket is 145, and the highest vote for a candidate on the Whitridge ticket is 137, thus making a majority of 8 votes for the lowest candidate on the Shearer ticket over the highest on the Whitridge ticket, and an average majority of about 12 votes for all the candidates on that ticket. We therefore ascertain from an inspection of the whole record that all of the candidates on the Shearer ticket were duly elected directors of the society at the election held on April 10, 1908.

The defendants contend, however, that as the terms of office of four of the directors so elected have expired, and as, in accordance with the provisions of Acts 1908, p.1210, c. 77, an election was held on January 28, 1909, to fill the places of the four directors whose terms had so expired, that the prayer of the petition must be denied, because the writ if granted would now be nugatory, and that therefore, without regard to what the conclusions of this court may be as to the result of the election, the order of the lower court dismissing the petition must be affirmed; but we cannot agree that the order appealed from should be affirmed on such grounds. It is true that, as the allegations and prayers of the petition now stand, no writ of mandamus in exact conformity therewith would be effective; but the act requires the directors elected on the 10th day of April, 1908, to decide before the next annual meeting of the society thereafter which of their number shall serve for the respective terms of one, two, and three years, and we were informed at the argument of the case that the directors on the Shearer ticket claiming to have been lawfully elected had met. organized, and decided which four of their number should serve for one year, which four for two years, and which four for three years, in accordance with the above-mentioned provision of the act of Assembly, and therefore, if the case be remanded for further proceedings, leave to amend the petition may be obtained so as to present the case to the trial court in the status it now is, and relief be prayed accordingly.

In the cases relied on by the learned coun-

have rendered an amendment wholly unavailing. In those cases the time within which the thing desired to be done could be done had wholly passed, and no relief could be granted under any form of amendment of the petition. Duvall v. Swann, 94 Md. 608, 51 Atl. 617; Wells v. Hyattsville, 77 Md. 125, 26 Atl. 357, 20 L. R. A. 89. But it would be wholly improper to refuse the writ if a simple amendment setting out the facts, affecting the status of the parties, that have occurred since the filing of the petition and praying relief according to these changed conditions, will effectually remedy the defect. In Manger's Case, 90 Md. 659, 45 Atl. 891, this court, speaking through Mc-Sherry, C. J., said: "For the reasons we have assigned, the order dismissing the petition will be reversed, and the cause will be remanded for such further proceedings in accord with the views expressed in this opinion as may be deemed desirable."

In the present case, after a careful consideration of all the rulings of the lower court that were objected to by either side, and the points or questions thereby raised fairly presented to this court for review, we have reached the conclusion that the order dismissing the petition must be reversed; but as the terms of four of the persons whom we ascertain to have been elected directors on April 10, 1908, have expired, no effective mandamus in the present state of the pleadings can be issued. We will therefore remand the case for further proceedings, so that, if desired, the pleadings may be amended, the right of any of the directors so elected, to be now installed, determined, and the writ issued in favor of such of them as may be found entitled.

Order reversed, with costs, and cause remanded.

(110 Md. 486)

WHITRIDGE et al. v. POPE et al. (Court of Appeals of Maryland. May 20, 1909.)

1. MANDAMUS (§ 187*)—APPEAL—SCOPE OF REVIEW.

On appeal in mandamus, where the issues of fact have been determined by the lower court without a jury, the Court of Appeals is not restricted to a review of the rulings of the lower court, but may determine upon the whole record whether the order appealed from is correct.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 187.*]

2. APPEAL AND ERROR (§ 659*)—RECORD—CORRECTION—WRIT OF DIMINUTION.

Under Court of Appeals rule 17 and Code Pub. Gen. Laws 1904, art. 5, § 42, both expressly providing that in case of cross-appeals, or of more than one appeal in the same case from a judgment, order, etc., there shall be but one transcript of the record transmitted to the Court of Appeals, which shall be used upon the hear-

sel for the defendants in support of their contention that the writ would now be nugatory, the circumstances were such as would have rendered an amendment wholly unavailing. In those cases the time within which the thing desired to be done could be done could be and writely record and writely reco

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2834; Dec. Dig. § 659.*]

3. APPEAL AND ERROR (§ 151*)—RIGHT OF REVIEW—PARTIES AGGRIEVED.

A requisite of an appeal is that appellant be aggrieved by the judgment or order complained of, and, where in mandamus proceedings plaintiffs' petition was dismissed with costs at defendants' request, defendants could not appeal from the order.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 151.*]

Cross-Appeal from Baltimore Court of Common Pleas; John J. Doblen, Judge.

Mandamus by Micajah W. Pope and others against William Whitridge and others. Judgment of dismissal, and defendants prosecute a cross-appeal. Dismissed.

Argued before BOYD, C. J., and BRIS-COE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and HENRY, JJ.

Armstrong Thomas and John P. Poe, for appellants. William L. Rawls and Isaac Lobe Straus, for appellees.

WORTHINGTON, J. This purports to be a cross-appeal on behalf of the defendants in the case of Pope v. Whitridge, 73 Atl. 281, which was argued here at the January term, 1909. As will be seen by reference to the opinion filed in that case, this court dld not confine itself to a review merely of the rulings of the lower court which were against the appellants in that appeal, but considered also those which were against the appellees, so far as such rulings were distinctly presented to the court for its consideration and The authority for so doing, we think, is not only well established, but founded upon reason. In that part of the excellent work of Mr. John Prentiss Poe, on Pleading and Practice in Courts of Common Law, devoted to the subject of mandamus, it is said: "The right of appeal is especially granted by the Code in all cases of mandamus where the issues of fact have been determined by the court below, and the Court of Appeals is not restricted to a review of the rulings of the court below, but determines upon the whole record whether the order appealed from is correct or not." 2 Poe's Practice, § 713. And in Manger's Case, 90 Md. 659, 45 Atl. 891, this court said: "But in an appeal from an order granting a mandamus, when the issues of fact have been determined by the court below without the aid of a jury, we are not, as in ordinary appeals from a court of law, confined to a review of the rulings on questions of law presented by exceptions. In such instances the appellate court must inquire whether the writ was

•For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

properly granted or properly refused after | cross-appeals are prayed, the clerk makes an inspection of the whole record, and is not restricted to an instruction or limited to determining whether that instruction was right or wrong; particularly as no instruction is needed as a basis to bring up for revision the final order when the case is heard below without the intervention of a jury."

If this court must in such cases review the whole record, there is no occasion for an appeal on the part of the appellee. All that is required is that the ruling, to which objection is made, should be clearly made to appear in the record, together with the ground of such objection, so that the points or questions in controversy may be distinctly presented to this court for review. While we look to the whole record in order to determine whether the writ was properly granted or properly refused, yet it is necessary that the points or questions in controversy be clearly presented for our consideration, as it cannot be expected of this court to go through the record unaided and to discover from their own examination what those points or questions are. As we shall presently see, the defendants, having obtained by the final order of the trial court all that they claimed, had no right of appeal; but they had the right of course to reserve exceptions during the progress of the trial and to have those exceptions certified by the trial judge to this court. It seems that such exceptions were reserved, and, if the defendants desired to have those exceptions before us, they should have been included in the record of the former appeal. If for any good reason these exceptions were not ready when the record in that appeal was made up, whereby such exceptions were omitted therefrom, a writ of diminution, seasonably applied for, would have enabled the appellees in that appeal to remedy the defect. As we have said, we did consider all the rulings of the lower court distinctly presented to us for our consideration, whether embraced in any exception or not; but the method of bringing up the rulings by formal exceptions is one to be commended, as thereby every point or question in controversy is officially certified to this court and clearly defined: but all the exceptions on both sides should have been embraced in one record. Such is the rule even where cross-appeals are allowed.

Rule 17 of this court provides: "In all cases of cross-appeals or of more than one appeal being entered in the same case from any judgment, decree or order, there shall be but one transcript of the record transmitted to the Court of Appeals, and that shall be used upon the hearing of all such appeals." Code Pub. Gen. Laws, 1904, art. 5, This ruling contemplates that there should be but one transcript of the record and one hearing. In his treatise on Pleading and Practice, Mr. Poe says: "Where

out but one record; and the costs are awarded to the respective parties, or apportioned as the Court of Appeals may deem just." 2 Poe, Pl. & Pr. § 833. If there could be two transcripts of the record and two hearings at two different terms of this court, we might, on the first appeal, reverse the order of the lower court, and then at a subsequent term reverse that reversal without there being any inconsistency in the principles of law announced in the two opinions. To obviate any such result, the above-mentioned rule was no doubt adopted.

Aside from all this, it is well settled that a party who is not injured by the final judgment of the trial court has no right of appeal. 2 Poe's Practice, § 825. One requisite of a valid appeal is that the appellant should have been aggrieved by the judgment, order, or decree complained of. 2 Cyc. 631; Baylies on New Trials & Appeals (2d Ed.) p. 134. In this case the order of the trial court, dismissing the plaintiff's petition with costs, was passed at the defendants' request and gave them all they claimed. They could therefore have no standing in this court, on an appeal from such an order.

For these very obvious reasons, we think the appeal should be dismissed. We have, however, examined the record and briefs filed in this appeal, and find that very many of the questions thereby presented have been passed upon and determined by the opinion of this court in the appeal brought here by the petitioners, and, as to other points or questions not directly decided on the other appeal, we find no sufficient error to change the result therein declared.

This appeal must, for the reasons above stated, be dismissed.

Appeal dismissed, with costs.

(110 Md. 520)

BRINSFIELD v. HOWETH.

(Court of Appeals of Maryland. May 20, 1909.)

APPEAL AND ERROR (§ 984*)—REVIEW-STAY OF PROCEEDINGS UNTIL PAYMENT-

STAY OF PROCEEDINGS UNTIL PAYMENT—DISCRETION OF COURT.

Under Code Pub. Gen. Laws 1904, art. 75, \$ 70, providing that the court, after a new trial has been ordered by the Court of Appeals, shall have power to stay all further proceedings in the action until the costs have been paid by the party adjudged to pay the same, the granting of a motion to stay proceedings being in the sound discretion of the court, it will not be reviewed in the absence of an abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 984.*]

2. Costs (§ 276*)—STAY OF PROCEEDINGS UNTIL PAYMENT—DISCRETION OF COURT.

Where, on a new trial ordered on appeal,

the court was aware that defendant was a man of substantial means, and that plaintiff was comparatively poor, so that requiring her to pay the costs would have imposed on her a great hardship and might have resulted in depriving her

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the sbility to try her case, the refusal of reputation for chastity questioned er doubted defendant's motion for a stay of proceedings until the institution of the suit. defendant's motion for a stay of proceedings until payment of costs was not an abuse of the discretion conferred on the court by Code Pub. Gen. Laws 1904, art. 75, § 70.

[Ed. Note.—For other cases, see Costs, Cent. Dig. \$\$ 1045-1047, 1058-1060; Dec. Dig. \$ 276.*]

3. LIBEL AND SLANDER (\$ 81*)—WORDS ACTIONABLE PER SE — COMPLAINT — SUFFI-CIENCY.

In an action for slander, a count, alleging that defendant said of plaintiff that she was a girl of loose character and not fit to teach school, and averring that defendant used the words "a girl of loose character" for the purpose of ex-pressing and meaning, and that the words were, by the persons in whose hearing they were spoken, understood to mean, that plaintiff was unchaste, set forth per se an actionable slander.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §\$ 187-197, 209, 210; Dec. Dig. § 81.*]

4. EVIDENCE (§ 536*)—OPINION EVIDENCE-

EXPERTS.

In an action for slander, wherein defendant was charged with saying that plaintiff was a girl of "loose character" and not fit to teach school, a witness well acquainted with the neighborhood in which the words were used, and who had heard them applied to females a great many times, was competent to testify that the words mean that a woman is not virtuous.

[Ed. Note. -For other cases, see Evidence, Dec. Dig. \$ 536.*]

5. LIBEL AND SLANDER (\$ 100*)—Action—Is-SUES AND PROOF.

Where, in an action by a school teacher for slander, the declaration alleged that plaintiff lost her situation at a certain place and was also prevented from obtaining other situations because of the alleged slander, plaintiff's sister was properly asked if she knew why plaintiff did not get any of the schools in her neighborhood.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 100.*]

6. TRIAL (§ 90*)—STRIKING OUT TESTIMONY. Where an answer is not responsive or contains irrelevant matter, it is the duty of the party objecting thereto to move to strike it out.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 238; Dec. Dig. § 90.*]

7. LIBEL AND SLANDER (§ 103*)—EVIDENCE-IMMATERIAL EVIDENCE.

In an action for slander, it was immaterial who first informed plaintiff of the speaking by defendant of the alleged slanderous words.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 103.*]

TRIAL (§ 76*)—RECEPTION OF EVIDENCE-TIME FOR OBJECTION.

Where a question gave distinct notice to defendant that it was proposed to introduce certain character of testimony of which he later complained, it was his duty to object to the question at the time and secure an exception in case of an adverse ruling.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 183-190, 237; Dec. Dig. § 76.*]

9. LIBEL AND SLANDER (§ 110*)-ACTION-EVIDENCE.

Where, in an action for slander, defendwhere, in an action for stander, desend-ant offered evidence that the general reputation of plaintiff for chastity in the community in which she lived was bad, plaintiff was prop-erly permitted to show in rebuttal by a wit-ness that he had not heard plaintiff's general

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 314; Dec. Dig. § 110.*]

10. LIBEL AND SLANDER (\$ 124*)-ACTION-INSTRUCTIONS.

In an action for slander for charging plaintiff with being a girl of loose character and not thit to teach school, an instruction that, even though defendant spoke the words concerning plaintiff, the jury could not find for plaintiff unless they further found that the words proceeded from express malice on defendant's part, was bad as not requiring the jury to find the facts which in law would amount to a qualified privilege.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 124.*]

1. APPEAL AND ERROR (\$ 110°)—DECIRIONS
REVIEWABLE—REFUSAL OF New TRIAL.
The general rule is that no appeal will lie

from the refusal of the court to grant a new trial.

|Ed. Note.—For other cases, see Appeal and error, Cent. Dig. §§ 740-748; Dec. Dig. § Error, 110.*]

12. New Trial (§ 143*)—Verdict—Affidaviz of Jurors to Impeach Verdict.

The affidavit of a juror is not admissible, on motion for new trial, to impeach the verdict. [Ed. Note.—For other cases, see New 7 Cent. Dig. §§ 290-296; Dec. Dig. § 143.*] see New Trial.

Appeal from Circuit Court, Wicomico County: Chas. F. Holland and Robley D. Jones, Judges.

Action by Nannie B. Howeth against Zora H. Brinsfield. Judgment for plaintiff, and defendant appeals. Affirmed.

The prayers referred to in the opinion of the court are as follows:

"Plaintiff's First Prayer. (Granted.) The court instructs the jury that inasmuch as the defendant has not pleaded that the charges set out in the declaration and offered in evidence are true, either in whole or part, he admits that the plaintiff is not guilty of any of said charges, and the jury must deal with the case upon that admission.

"Second Prayer. (Granted.) The plaintiff prays the court to instruct the jury that if they shall find from the evidence that the defendant, in the town of Cambridge, Md., in or about the month of April, 1905, in the presence and concerning the plaintiff, spoke the words charged in the second count of the declaration, and meaning and imputing thereby a want of chastity in the plaintiff, and was so understood by said hearers, and if they shall further find from the evidence that the words spoken proceeded from express malice or ill will to the plaintiff, then their verdict must be for the plaintiff; and, if they so find for the plaintiff, they may award such damages as they in their judgment shall think justified by all of the facts and circumstances of the case, not only for the purpose of giving compensation for the injury done to the feelings and character of the plaintiff, but also for the purpose of adequately punishing the conduct of the defendant, and in

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

assessing such damages they may consider dence that the defendant spoke of and conthe means and wealth of the defendant." cerning the plaintiff the words set out in the

"Fourth Prayer. (Granted.) The plaintiff prays the court to instruct the jury that if they shall find from the evidence that the defendant, in or about the month of February, 1906, in the county of Dorchester, state of Maryland, in the presence and hearing of the witness, Benjamin F. Johnson, spoke of and concerning the plaintiff the words charged in the third count of the deciaration, then their verdict must be for the plaintiff, and, if they so find for the plaintiff, they may award such damages as they in their judgment shall think justified by all of the facts and circumstances of the case, not only for the purpose of giving compensation for the injury done to the feelings and character of the plaintiff, but also for the purpose of adequately punishing the conduct of the defendant, and in assessing such damages they may consider the means and wealth of the defendant.

"Fifth Prayer. (Granted.) The plaintiff prays the court to instruct the jury that the word 'malice,' as used in this form of action is not to be considered in the sense of spite or hatred against a person, but as meaning that the party is actuated by improper and indirect motives, other than the mere purpose of vindicating public justice."

"Third Prayer. (Rejected.) The plaintiff prays the court to instruct the jury that if they shall believe from the evidence that the defendant, in the county of Dorchester, state of Maryland, in or about the month of February or March, 1906, in the presence and hearing of John Stanton, the witness, spoke of and concerning the plaintiff the words charged in the fourth count of the declaration, and meaning and imputing thereby a want of chastity in the plaintiff, and was so understood by said hearers, then their verdict must be for the plaintiff, and if they shall so find for the plaintiff they may award such damages as they in their judgment shall think justified by all the facts and circumstances of the case, not only for the purpose of giving compensation for the injury done to the feelings and character of the plaintiff, but also for the purpose of adequately punishing the conduct of the defendant, and in assessing such damages they may consider the means and wealth of the defendant."

"Defendant's First Prayer. (Granted.) The jury are instructed that the burden of proof is upon the plaintiff to show by a preponderance of evidence that the defendant spoke of and concerning the plaintiff the words charged in the third count of her declaration, and, unless the jury find by a preponderance of evidence that the defendant did speak of and concerning the plaintiff the words used in said count, their verdict must be for the defendant upon said count.

"Second Prayer. (Granted.) The jury are less the jury so find their verdict must instructed that if they believe from the evi-

cerning the plaintiff the words set out in the second count of the declaration, to wit, 'She is a girl of loose character and not fit to teach school,' and shall further find that the words were spoken to Wm. N. Andrews, state's attorney of Dorchester county, in response to an inquiry made by the said William N. Andrews in his official capacity in the examination or investigation of a case then pending in the circuit court of Dorchester county, wherein the said plaintiff was charged with an assault, then their verdict must be for the defendant upon said count, unless they further find that the said words were spoken with express or actual malice on the part of the defendant, and the burden of proving such express or actual malice is upon the plaintiff.

"Third Prayer. (Conceded.) The jury are instructed that, before they can find for the plaintiff on the third count of her declaration in this case, they must find from the evidence that the words alleged therein to have been spoken by the defendant, if they find from the evidence that they were spoken by him, were spoken by him concerning the plaintiff, Nannie B. Howeth, and no one else; and the burden of proof that said words were so spoken by the defendant of and concerning the plaintiff is upon the plaintiff."

"Fifth Prayer. (Conceded.) The defendant prays the court to instruct the jury that there is no legally sufficient evidence to entitle plaintiff to recover under first count of her declaration.

"Sixth Prayer. (Granted.) The defendant prays the court to instruct the jury that there is no legally sufficient evidence to entitle plaintiff to recover under the fourth count of her declaration.

"Seventh Prayer. (Granted.) If the jury find a verdict for the plaintiff, and if they further find that any of the words charged in the declaration, which they may believe the defendant spoke of and concerning the plaintiff, did not proceed from malice on the part of the defendant toward the plaintiff, in estimating damages the jury may take into consideration the circumstances under which said words were spoken, the reputation of the plaintiff for chastity at the time of the speaking of said words, and all the other facts and circumstances of the case, and may in the exercise of their discretion award to the plaintiff nominal damages only."

"Fourth Prayer. (Rejected.) The jury are instructed that, even though they find from the evidence that the defendant spoke of and concerning the plaintiff the words charged in the second count of the declaration, they cannot find for the plaintiff on said count, unless they further find that said words proceeded from express malice on the part of the defendant toward the plaintiff, and unless the jury so find their verdict must be for the defendant on said second count."

Argued before BOYD, C. J., and BRIS-COE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and THOMAS, JJ.

Alonzo L. Miles, for appellant. Frederick H. Fletcher, for appellee.

BURKE, J. This record brings up for review the propriety of 10 rulings of the circuit court for Wicomico county. In the former appeal of the appellant herein, which is reported in 107 Md. 278, 68 Atl. 566, the legal principles to be applied to the case were stated, the judgment was reversed, and the case was remanded for a new trial, and it was adjudged that the plaintiff pay the Upon the new trial a verdict and judgment were entered for the plaintiff for \$4,500, and the defendant has again appealed.

This case, which is an action for slander, has been three times tried in the same court. In the first trial the plaintiff submitted to a judgment of non pros., and in the subsequent trials she recovered judgments against the appellant. The court therefore in which the case was tried was familiar with the facts, and with the financial condition of the parties, and no doubt knew whether the plaintiff was financially able to pay the costs adjudged against her on the former appeal. It certainly was in a position to know whether, under the circumstances within its knowledge, it was proper to say that the trial should be stayed until those costs had been paid by the plaintiff. The refusal of the court to grant this stay constitutes the appellant's first bill of exception. The question presented by this exception was considered in the former appeal, and we there said that an application to grant a temporary stay of proceedings was addressed to the discretion of the court, and that the refusal of the court to grant it would not be reviewed, in the absence of an abuse of discretion by the lower court. A motion to stay proceedings, based upon section 70, art. 75, Code 1904, is to be dealt with in precisely the same way. Knee v. City Passenger Railway Company, 87 Md, 623, 40 Atl. 890, 42 L. R. A. 363. At the time the motion for a stay was made, it had been decided by this court that the plaintiff had a good cause of action against the defendant. The lower court was aware that the defendant was a man of substantial means, and that the plaintiff was comparatively poor, and the court may have well thought that to require her to pay the costs would have imposed upon her a great hardship, and that such an order might have resulted in depriving her of the ability to try her case. We therefore think the court acted clearly within its judicial discretion in refusing the motion, and that its action is not the subject of an appeal.

The declaration contains four counts. At the conclusion of the whole case the court,

the jury that there could be no recovery upon the first and fourth counts, and therefore those counts will not be considered. At the time of the publication of the alleged slanderous words, the plaintiff was, and still is, an unmarried female teacher in the public schools of Dorchester county. The words declared on in the second count are these: "She [the plaintiff] is a girl of loose character and not fit to teach school." On the former appeal we decided that these words, in the absence of a proper averment of extrinsic facts showing that the defendant meant to traduce the character of the plaintiff for chastity, were not actionable per se; but in the second count of the present narr. the plaintiff has introduced a prefatory inducement by which the defect found to exist in the former narr. has been cured. It is averred that he used the words "a girl of loose character" for the purpose of expressing and meaning, and that the words were by the persons in whose hearing they were spoken understood to mean, that the plaintiff was unchaste. Under the authorities cited in the former case, the count, as amended, sets forth per se an actionable slander. words declared on in the third count reflect upon the plaintiff's chastity, and under sections 1 and 2 of article 89 of the Code are per se slanderous. Cairnes v. Pelton, 103 Md. 40, 63 Atl. 105.

The second exception was taken under the following circumstances: S. Spry Andrews, a witness produced on behalf of the plaintiff, testified, among other things, that in October, 1905, at Cambridge, he heard the defendant say to William N. Andrews, the state's attorney for Dorchester county, that the plaintiff was a girl of loose character and not fit to teach school. This witness lived about 18 miles from Cambridge, and went to that place 20 to 25 times a year, and was well acquainted with the people there. He was asked if he had ever heard "in this neighborhood, in your neighborhood, in Mr. Brinsfield's neighborhood, and in Cambridge, the words 'loose character' as applied to a female." He answered that he had heard it applied to females a good many times. He was further asked to state what was the peculiar meaning of the word used on this occasion in the neighborhood described by him. To this question the defendant objected; but the court overruled the objection, and the witness said: "It means that a woman has not virtue." The exception to this evidence is based upon the ground that the witness was not qualified to speak as to the local or unusual meaning of the words used in the neighborhood. It is true, so far as the record shows, that the counsel in eliciting this evidence did not pursue the formal method stated in Newbold & Sons v. Bradstreet, 57 Md. 50, 40 Am. Rep. 426; but it does not therefore follow that the testimony should at the instance of the defendant, instructed have been excluded. He was well acquainted with the neighborhood in which the words were used, he had heard them applied to females a great many times, and his evidence shows in the neighborhood about which he was interrogated they had a slanderous meaning. He had stated the means and extent of his knowledge upon the subject of the peculiar meaning of the words with sufficient fullness to permit him to testify. In a subsequent part of his testimony he was asked what he understood by the words used on the occasion of the conversation between Mr. Brinsfield and William N. Andrews, and he answered: "Same as before. I understood it to mean that Mr. Brinsfield had said she was not virtuous."

The third exception was abandoned. The defendant in the former case offered to introduce the same character of evidence as that embraced in the fourth exception, and we held that it was properly excluded. The plaintiff in the years 1904 and 1905 was teaching in Galestown school in the neighborhood of her home. She was appointed by the school trustees as teacher in that school for the ensuing year; but her appointment was not confirmed by the school commissioners. The schools at Toddsville and Hooper's Island which she secured were 25 and 40 miles, respectively, from her home. The declaration alleged that she lost her situation at Galestown, and was also prevented from obtaining other desirable situations, because of the alleged slanders of the defendant. To prove these averments her sister, Geneva Howeth, was asked if she knew why the plaintiff did not get any of the schools in her neighborhood in the year she taught in the Toddsville and Hooper Island schools. The defendant objected, and the ruling of the court permitting the witness to answer constitutes the fifth exception. The question was a proper one, and asked for information upon a material point, and if her answer was not responsive, or contained irrelevant matter, it was the duty of the defendant to have moved to strike it out; but this was not done. It was said in Brashears v. Orme, 93 Md. 451, 49 Atl. 623, that: "The proper practice is when a question is asked that may call for an answer which is relevant and material, but the answer given is irrelevant and improper, to then ask the court to strike out the question and answer, and, if it be calculated to do him harm, the court should instruct the jury not to consider it." But aside from this, which is sufficient to sustain the ruling of the lower court, the answer of the witness embraced substantially the same facts contained in the sixteenth bill of exception on the former appeal, which facts, we held, were proper to be considered by the jury.

There was no error in the sixth exception. The defendant sought to obtain from the plaintiff the name of the person who first her with being a girl of loose character. It the case upon the question of the plaintiff's

was of no consequence who first gave her. the information. The witness Jacob N. Wilson, called in rebuttal by the plaintiff, was asked this question: "State whether or not you have heard her general reputation for, chastity questioned or doubted until the institution of this suit in 1905." To this ques-; tion he answered, "No, sir." After the question had been propounded and answered, the defendant objected; but the court overruled the objection and permitted the answer to. go to the jury, and this ruling is the subject, of the seventh exception. There was no er-, ror in this ruling, for at least three reasons: First, the objection came too late; secondly, it was proper evidence in rebuttal; and, thirdly, the testimony, under the circumstan-, ces, cannot fairly be said to have injured. the defendant. In Dent v. Hancock, 5 Gill,, 127, it is said that: "It is the duty of counsel, if aware of the objection to its admis-; sibility, to object to the testimony at the, time it is offered to be given, or if unapprised of such objections at the time the evidence had gone to the jury, he must raise, the objection within a reasonable time there. after." The question propounded gave distinct notice to the defendant that it was proposed to introduce the very character of testimony of which he here complains, and it. was his duty then to object to the question,; and secure an exception, in case of an ad-, verse ruling by the court. The rule statedin Dent v. Hancock has been approved and. applied in many cases in this court. Baugher v. Duphorn, 9 Gill, 325; Groshon v. Thomas, 20 Md. 242; Marsh v. Hand, 35 Md. 127; Bell v. State, 57 Md. 120. The defendant must be held to have waived all objections, to this testimony; but the evidence was ad-, missible in rebuttal. The defendant had offered evidence of witnesses tending to prove that the general reputation of the plaintiff for chastity in the community in which she; lived was bad. A number of witnesses testified in rebuttal that her general reputation; in that respect was good. Jacob N. Wilson, whose evidence is excepted to, was the last witness produced by the plaintiff. It is to be observed that he was not called to estab-: lish her general reputation for chastity. Had such been the object of the testimony, it would bave been, under all the authorities, inadmissible in the form in which it was, offered. It was offered, not to prove her general reputation for chastity, but to rebut; the testimony by which that reputation was a attempted to be discredited by the defendant's. witnesses. There is a clear distinction between the two classes of evidence and the principle controlling its production. distinction is stated in Sloan v. Edwards, 61. Md. 90, and in that case the principle upon . which evidence of the character given by. Wilson is held to be admissible was discussed and approved; but, in view of the great. told her that the defendant had charged amount of testimony pro and con offered in

general reputation for chastity, it is hardly probable that the evidence of Wilson affected the jury to any appreciable extent.

This brings us to the eighth exception, which relates to the ruling on the prayers. The court granted four prayers on behalf of the plaintiff, and six on the part of the defendant. It refused the defendant's fourth prayer. As the amended declaration states a case of actionable slander per se, the action of the court upon the prayers, which the reporter will set out in the report of the case, need not be discussed. It will be seen upon examination of those prayers that the court correctly applied the rules of law stated in the former case. The defendant's fourth prayer was bad, in that it did not require the jury to find the facts which in law would amount to a qualified privilege. That question, however, was correctly submitted by the plaintiff's second prayer, which contains a statement of all the facts essential to a recovery on the second count.

The ninth and tenth exceptions may be considered together. The defendant filed a motion for a new trial. In support of this motion he offered an affidavit of John W. Jones, one of the jurors who tried the case, to the effect: That, after the jury had retired to the jury room to consider the case, he was in favor of a verdict for the defendant; that he held out for several hours for that finding; that several of the jurors became very angry and swore at him; that there were violent oaths used, and certain of the jurors intimated that he had been bought; that they told him that he would be a ruined man around the courthouse if he did not agree to a verdict for the plaintiff; that they said that Brinsfield had bought the witnesses; that but for these threats and representations made to him he would never have agreed to a verdict for the plaintiff; and that in his judgment the verdict was not warranted by the evidence. The court refused to receive this affidavit in evidence at the hearing of the motion, and this refusal constitutes the ninth exception. The tenth exception is to the denial of the motion for a new trial. It must be admitted that the tenth exception must fail if the court was right in rejecting the affidavit, as the general rule is that no appeal will lie from the refusal of the court to grant a new trial. The rule, which obtains in nearly all the states, is that a juror will not be permitted to impeach his verdict. It prevails both in England and in the federal courts. The reason for the rule is thus stated in 14 Ency. Pleading & Practice, 906: "Such evidence is forbidden by public policy, since it would disclose the secrets of the jury room, and afford an opportunity for fraud and perjury. It would open such a door for tampering with weak and indiscreet men that it would render all verdie's ingoours and therefore

the law has wisely guarded against all such testimony and has considered it unworthy of notice. It would be a most pernicious practice, and in its consequences dangerous to this much-valued mode of trial, to permit a verdict, openly and solemnly declared in the court, to be subverted by going behind it and inquiring into the secrets of the jury room." This is also the Maryland rule (Bosley v. Chesapeake Insurance Company, 3 Gill & J. 473, 22 Am. Dec. 337, and Browne v. Browne, 22 Md. 104), and we are not aware of a single instance in this state in which it has not been followed. Such affidavits, if admitted, are entitled to very little consideration, and would not be sufficient in themselves to disturb the verdict.

Finding no error in any of the rulings of the lower court, the judgment will be af-

Judgment affirmed, with costs above and below.

(110 Md. 579)

STATE ex rel. BAUM v. WARDEN OF BAL-TIMORE CITY JAIL.

(Court of Appeals of Maryland. June 1, 1909.)

1. Jury (§ 31*)-RIGHT TO JURY TRIAL-IN-

1. JURY (§ 31*)—RIGHT TO JURY TRIAL—IN-FRINGEMENT OF RIGHT.

Baltimore City Charter (Laws 1898, p. 482, c. 123) § 632, conferring on justices of the peace summary jurisdiction to hear, try, and determine cases of assault and battery, on condition that a jury trial be waived, is within the legislative power, and not unconstitutional as violating the right to a jury trial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 216; Dec. Dig. § 31.*]

2. JUBY (§ 29*)—WAIVER OF JUBY TRIAL—ACIS CONSTITUTING.

Where accused was arrested late at night and imprisoned, and the next morning brought from his cell before the magistrate, who read to him the charge appearing on the docket, and asked him whether he wanted to be tried there or in court with a jury, and, upon accused pro-testing his innocence, the magistrate said that it was not a question then as to his guilt or innocence, but where he wanted his case to be tried, and, accused having replied, "It might as well be tried here," the magistrate at once proceeded to try accused, without inquiring whether he wished to have witnesses summoned whether he wished to have witnesses summoned in his behalf, or to procure counsel, and accused was convicted and sentenced on the same day to two years' confinement in jail, there was not a sufficient waiver of a jury trial to give the magistrate jurisdiction, within Raltimore City Charter (Laws 1898, p. 482, c. 123) § 632, conferring on justices of the peace summary jurisdiction to hear, try, and determine cases of assault and battery, but providing that it shall be the duty of the justice, before proceeding to hear, try, and determine the charge, to inform accused of his right to a jury trial.

[Ed. Note.—For other cases, see Jury. Cent. [Ed. Note.—For other cases, see Jury, Cent. Dig. § 202; Dec. Dig. § 29.*]

Appeal from Baltimore Court of Common Pleas; Thos. Ireland Elliott, Judge.

Habeas corpus and certiorari by the State. on the relation of John Baum, against the Warden of Baltimore City Jail to secure his

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 150/ to date, & Reporter Indexes

his release, the state appeals. Affirmed.

Argued before BOYD, C. J., and BRIS-COE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, THOMAS, and HENRY,

Eugene O'Dunne and Isaac Lobe Straus. Atty. Gen., for the State. William C. Smith, for appellee.

SCHMUCKER, J. The appeal in this case is from an order of the court of common pleas of Baltimore city, passed upon a writ of certiorari, directing the release of John Baum from the Baltimore city jail. It appears from the record that Baum, a man 61 years of age, was arrested on January 3, 1909, between 10 and 11 o'clock at night, while at work in the engine room of the exhaust fan of the Philadelphia, Baltimore & Wilmington railroad tunnel on North avenue in Baltimore city. He was taken to the Northwestern Police Station and put in a cell. On the next morning he was taken out of the cell, and summarily tried by the magistrate, whose duty it was to sit at that station, for an alleged assault and battery in December, 1908, on Dorothy Bowers, a female child 11 years old, and was convicted and sentenced to 2 years' confinement in the city jail. On January 9th Baum applied to Hon. Thomas I. Elliott, sitting in the court of common pleas, for a writ of habeas corpus, and also for a certiorari requiring a return into that court of the assault and battery proceedings had before the magistrate. Both writs having been granted, and return made in response thereto, the hearing under the two writs was had at the same time in the court of common pleas. The case having been heard upon the returns to the writs and the testimony of witnesses, the learned judge below, being of the opinion that the magistrate had not lawfully acquired jurisdiction of Baum and of the offense for which he was tried, passed the order, as upon the writ of certiorari, for his release. From that order the present appeal was taken by .the state.

It also appears from the record that, when Baum was brought to the station house, a charge was entered against him on the station house blotter of violation of article 27, § 369, Code Pub. Gen. Laws 1904, which makes the carnal knowledge of a female child under 14 years of age a felony, punishable at the discretion of the court by death or imprisonment in the penitentiary for life, or for a period of not less than 18 months; that entry was made by the lieutenant in charge of the station during the night when Baum was brought in, but, upon ascertaining from Dr. Caspari, who had examined the girl, that there had been no penetration of her person, the entry was stricken out, and in lieu of it was entered "Assaulting Dorothy Bowers aged 11 years." The formal en-

release from jail. From an order directing try upon the magistrate's docket of the charge upon which Baum was tried was "Assaulting and beating Dorothy Bowers age 11 yrs. on or about the month of Dec. 1908 in Baltimore city, state of Maryland." The magistrate testified that Baum was in fact tried upon that charge, after having first been informed what it was. According to the magistrate's testimony, when he arrived at the station house on the morning after the arrest, the sergeant in charge told him of the arrest, and of the request to Dr. Caspari to make a physical examination of the girl. He then went into his room, where he met Dr. Caspari, who informed him that he had examined the girl, and wanted to testify; that he was very busy, and wanted to get away. Baum was at once brought out of his cell, and the magistrate, after reading to him the charge of assault and battery, said to him: "You have a right to a court or jury trial, or to be tried here. Which do you want?" Baum replied: might as well be tried here, I have not done anything. I am innocent." The magistrate replied "that it was not a question then as to whether he was innocent or guilty, but the question was where he wanted his case tried," whether before him or at the criminal court, and Baum replied that he wanted it tried there before him. Baum was not asked whether he wished to have counsel, or to have any witnesses summoned in his own behalf, or informed of his rights in that respect. The magistrate thereupon proceeded at once with the trial, calling Dr. Caspari as a witness for the state, who testified that he had examined the girl, and found no evidence of any entry or penetration of her person. Baum was then put back in his cell, where he was kept for about a half an hour, until the other witnesses for the state had arrived at the station house, when he was brought out again, and his trial concluded. The evidence appearing in the record was taken before the court under the habeas corpus and certiorari proceedings, but it is said to be that of the witnesses who testifled before the magistrate; he not having reduced their testimony to writing. The only direct evidence touching the commission of the offense, was that of Dorothy Bowers, who testified that, when she visited Baum's room one day in December, he had improperly handled her person in the presence of another girl, whose name she mentioned. The other girl was not called as a witness, and Baum positively denied the commission of the alleged offense. Baum further testified that he knew nothing about law, and supposed, when he consented to have his case heard before the "squire," that the squire would then send it to the court for trial. We forhear any expression of opinion upon the guilt or innocence of the petitioner, Baum, as the only issue raised by the certiorari is that of the jurisdiction of the magistrate to try the case. Lancaster v. State, 90 Md. 215, 44 Atl. 1039; Kane v. State, 70 Md. the right of the accused to trial by fury, by re-552, 17 Atl. 557; Gaither v. Watkins, 68 Md. 582, 8 Ati. 464; Williamson v. Carnan, 1 Gill & J. 196.

The counsel for the respective parties to this appeal have united in the request that, in passing upon the question of the magistrate's jurisdiction, we express our views upon the constitutionality of section 632 of the Baltimore city charter in so far as it professes to confer jurisdiction upon justices of the peace to hear, try, and determine cases of assault and battery. Another jurisdictional question arising upon the record is the sufficiency vel non of the alleged waiver of a jury trial by Baum, such a waiver being made, by the express terms of the statute, a condition precedent to the vesting of jurisdiction in the magistrate over the offense of assault and battery. Taking up these two duestions in their natural order, we will consider first the constitutionality of the portion of section 632 involved in the present case.

That section enumerates and defines the powers and duties of the justices of the peace, selected to sit at the several station houses in Baltimore city, in respect to charges made against persons for criminal offenses. It confers summary jurisdiction upon such justices to hear, try, and determine charges of certain offenses, including assault and battery, but provides that "it shall be the duty of the said justice before proceeding to hear, try and determine any of the charges aforesaid, to inform the party or parties charged therewith of his or their respective right to a jury trial." It further provides that, if a jury trial be prayed by the party charged with the offense or by the state's attorney, the justice shall commit the accused party or hold him to bail for trial in the criminal court.

In State v. Glenn, 54 Md. 572, our predecessors considered very fully the constitutionality of Acts 1878, p. 651, c. 415, § 10, conferring jurisdiction apon justices of the peace to try, convict, and commit to the house of correction vagrant and habitually disorderly persons. That act was there held to be constitutional because, under the wellestablished modes of procedure in England and in Maryland, notwithstanding the provisions of the Magna Charta and the several Declarations of Rights of the state, summary jurisdiction had long been exercised, under various statutes, by magistrates over vicious, idle, vagrant, and disorderly persons without the intervention of a jury. The court based the determination arrived at in that case mainly upon the proposition that the right to trial by jury did not exist in reference to the petty offenses of vagrancy and habitually disorderly conduct. Glenn's Case, therefore, cannot, of itself, be regarded as conclusive of the summary jurisdiction of magistrates over the offense of assault and battery, be-

quiring him to waive the right as a condition precedent to the magistrate's power to try the case.

In the later case of Danner v. State, 89 Md. 220, 42 Atl. 965, this court held to be unconstitutional so much of Acts 1896, p. 207, c. 128, as attempted to confer upon justices of the peace in certain counties concurrent jurisdiction with circuit courts for the trial of the offense of petit larceny, provided that, when the accused is brought before the justice, neither he nor the state's attorney prayed a jury trial. It was conceded in that case that sundry minor offenses, such as the one involved in State v. Glenn, supra, could always be reached by summary proceedings, but petit larceny was held not to be included in that class of offenses, because under section 157, art. 27, Code Pub. Gen. Laws 1904, it was punishable by confinement in the penitentiary. We also held in Danner's Case that offenses so punishable did not fall within the operation of the principle, which had in several instances been applied by us to civil cases and prosecutions for minor offenses, that the right to appeal from the magistrate to the circuit court and there obtain a jury trial afforded a sufficient guaranty of the right of the accused to trial by jury. In that case we said, speaking through Judge Page, that the general scope and purpose of Acts 1896, p. 207, c. 128, "was to confer jurisdiction on the magistrate to hear and finally determine only in such minor offenses as were punishable by imprisonment in the jail or house of correction or by pecuniary fine." sault with which Baum was charged in the present case, although not felonious under our laws, was indecent in character, and one generally regarded as aggravated, and in some jurisdictions severely punishable by statute. It is certainly of a more serious character than vagrancy or habitually disorderly conduct.

In the still more recent case of Lancaster v. State, supra, we held, upon the authority of State v. Glenn and Danner v. State, that Acts 1894, p. 373, c. 281, of which section * 632 of the Baltimore city charter (Laws 1898, p. 482, c. 123) is a codification, was a valid exercise of legislative power, and that it conferred on police justices in Baltimore city jurisdiction to hear, try, and determine cases of persons charged with assault and battery, not punishable by confinement in the penitentiary, when they waive their right to a jury trial. The question of jurisdiction now under consideration falls directly within the operation of the principle announced in the Lancaster Case.

As the jurisdiction of the magistrate to entertain the charge of assault and battery against Baum in the present case depended also upon the condition precedent of a waiver by him of his right to a jury trial, we will cause as to that offense section 632 recognizes | now inquire whether he appears by the rec-

ord to have made such a waiver within the tice would seem to require that a waiver obmeaning of the statute. We have already stated the circumstances under which his aileged waiver was made. He was arrested and imprisoned late at night, and early the next morning he was brought from his cell into the presence of the magistrate, who read to him the charge against him appearing upon the docket, and asked him at once, before he had any opportunity to consult counsel, ascertain his defense, or collect his witnesses, whether he would be tried there, or in court with a jury. Upon his protesting his innocence the magistrate, according to his own testimony, "said to him that it was not a question then as to his guilt or innocence, but the question was where he Baum having rewanted his case tried." plied, "It might as well be tried here," the magistraté proceeded then and there to try the question of his guilt or innocence, without inquiring whether he wished to have witnesses summoned in his behalf, or to procure counsel. Within 12 hours of his arrest. the greater portion of which was nighttime. he was tried, convicted, and sentenced to 2 years' confinement in jail. He was not a vagrant, or an idle or vicious or habitually disorderly person, but an industrious man of advanced age, in a humble station in life, who had just been arrested and charged with an offense which, if proven to the satisfaction of the magistrate, might cause his incarceration in jail for several years. He was certainly entitled to some reasonable opportunity to ascertain his real situation and rights, so that he might act intelligently and with deliberation when surrendering so important a constitutional right as a jury

What was said by us, in the opinion in Danner's Case of an alleged waiver of jury trial, made in a police station under less trying circumstances than those presented by the present record, may be repeated here. We there said: "The situation, therefore, with which the accused in this case was confronted when brought before the justice was this: He was compelled either to forego his constitutional right to a trial by an impartial jury, or else submit to be committed to await the convening of a court that might not hold its next session for weeks or months thereafter. Being put to this distressing alternative, he may have felt compelled to elect a trial before the justice rather than be held for a considerable period subject to the charge, and without an opportunity of vindicating himself if he could. To call that a waiver on the part of one who has a constitutional right to a jury in

tained under such conditions ought not to be so applied as that valuable constitutional rights shall, by reason thereof, be lost or impaired." In our opinion the alleged waiver by Baum of his right to a jury trial in the case before us cannot, in view of the circumstances under which it was made, be regarded as such an intelligent and deliberate surrender of that right as is intended by the provisions in that respect of section 632 of the charter of Baltimore city (Laws 1898, p. 482, c. 123).

It follows therefore that the magistrate before whom he was tried, and by whom he was sentenced, never acquired jurisdiction over his case, and the order for his discharge must be affirmed.

Order affirmed, with costs.

(110 Md. 510)

MARYLAND & P. R. CO. v. SILVER. (Court of Appeals of Maryland. May 20, 1909,)

1. EASEMENTS (§ 1*)-"PRIVATE EASEMENT." A "private easement" imposes, as an essential quality thereof, two distinct tenements: The dominant, to which the right belongs, and the servient, on which the obligation rests.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 6, p. 5573.]

2. COVENANTS (§§ 53, 59*)—COVENANTS RUN-NING WITH LAND.

A covenant in a deed must, to run with the land, concern the land, so that the thing re-quired to be done will tend to enhance its value, or render it more convenient or beneficial to the owner; and, where the covenant extends to something not then in esse, the covenant must be to one, his heirs and assigns, by express words, or the assignee will not take the benefit of it, and this is true notwithstanding Code Pub. Gen. Laws 1904, art. 21, § 11, providing that no words of inheritance shall be necessary to create an estate in fee simple, etc.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 52, 56; Dec. Dig. §§ 53, 59.*]

3. RAILBOADS (§ 72*)—COVENANTS RUNNING WITH LAND.

A deed of land to a railroad for railroad purposes, stipulating that the conveyance is made subject to the conditions that the railroad shall maintain on the land a passenger and freight station, where local trains shall stop to receive and deliver passengers and freight, and that the grantor shall perform the duties of station agent if he desires, etc., does not create a covenant running with the land, since the covenant extends to something not in existence and does not use the words "heirs and assigns."

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 168-178; Dec. Dig. § 72.*]

4. RAILEOADS (§ 72*)—COVENANTS RUNNING WITH LAND.

Code Pub. Gen. Laws 1904, art. 21, \$ 70, providing that when in a deed conveying real estate the words "the said covenants" are used, the first court in which he is put on trial is a misuse of terms. His action under such circumstances is not the prompting of an unfettered will, but is more nearly the result of a species of legal duress. Common jus-

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

shall maintain on the land a passenger and the loss of certain rents of a warehouse freight station, etc.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 168-178; Dec. Dig. § 72.*]

5. STATUTES (§ 239*)-CONSTRUCTION-STAT-UTES IN DEROGATION OF COMMON LAW.
Statutes in derogation of the common law

must be strictly construed.

[Ed. Note.—For other cases, see Cent. Dig. § 320; Dec. Dig. § 239.*]

6. RAILBOADS (§ 72*)—LOCATION OF STATIONS

AGREEMENTS—PERFORMANCE.

The rule that a covenant of a railroad to erect and maintain a public station at a certain place on its line is fairly complied with by the erection and maintenance of such a station for a period of years, and until the exigencies of the sublic and the business, the convenience of the public, and the welfare of the railroad demand its removal, does not mean that a railroad may willfully and arbitrarily refuse to establish or maintain a public station at any certain place, when it has legally obligated itself so to do.

[Ed. Note.—For other cases, see Cent. Dig. § 171; Dec. Dig. § 72.*] Railroads,

7. RAILROADS (§ 58*)—AGREEMENTS TO ESTAB-LISH STATIONS—VIOLATIONS—REMEDY.

While courts do not usually specifically enforce contracts binding railroads to establish and maintain a public station at certain places. damages for their willful breach are frequently recoverable.

[Ed. Note.—For other cases, see Cent. Dig. § 1:3; Dec. Dig. § 58.*] see Railroads,

8. CONTRACTS (§ 176*)—CONSTRUCTION—QUES-TION FOR ('OURT.

The proper interpretation of any written instrument is a question of law for the court, and it is error to submit the question to the

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §\$ 767-770, 1097; Dec. Dig. § 176.*]

9. RAILBOADS (§ 72*)—AGREEMENTS TO ESTAB-LISH STATIONS-BREACH-LIABILITY.

A railroad acquired land for railroad purposes, agreeing to maintain a station thereon, where local trains should stop to receive and deliver passengers and freight. It maintained a station agent there for 17 years, for several years at a loss. The grantor constructed a warehouse. For two years or more before the removal of the agent the warehouse had been used merely for storage purposes. Held, that the railroad was justified in no longer keeping an agent at the place, and an assignee of the grantor co: ld not recover damages based on a hypothetical loss of rents of the warehouse. hypothetical loss of rents of the warehouse.

[Ed. Note.—For other cases, see Cent. Dig. § 171; Dec. Dig. § 72.*] Railroads,

Appeal from Circuit Court, marford County; George L. Van Bibber, Judge.

Action by Anna W. Silver against the Maryland & Pennsylvania Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial

This action was brought by the appellee, Anna W. Silver, against the appellant, Maryland & Pennsylvania Railroad Company, to recover damages for the depreciation in value of certain lands of the appellee, located in Harford county, at a station on the line of defendant's road about one mile south of the southern boundary of Pennsylvania, known

erected thereon, close to the right of way of the appellee.

The material facts of the case, so far as important to be considered, are, briefly stated, as follows:

On March 21, 1884, James R. Whiteford of Harford county, being then seised in fee of about 13 acres of land on the Stafford public road in that county, conveyed by deed of that date a strip thereof, containing something more than an acre and a haif, to the Maryland Central Railroad Company, its successors and assigns, for railroad purposes only. The consideration named in the deed was the sum of "five dollars and divers other good causes and considerations, them thereunto moving." In the premises the grant was absolute for the purposes aforesaid, but the habendum contained, inter alia, the following: "Subject nevertheless to the following conditions and stipulations, namely: First. The said railroad company shall at once make and maintain on said land herein conveyed a passenger and freight station, where all local trains shall stop when flagged by those properly in charge thereof, the passenger trains to receive and deliver passengers, and the freight trains to receive and deliver freight." "Fifth. That, so long as the said James R. Whiteford and said company can agree, the said Whiteford shall perform the duties of station agent, if he desires so to do, at the station herein provided to be maintained on the premises above granted." "And the said party of the second part recognizes the full, free and binding effect of the conditions herein contained upon which the aforegoing grant is made, and agrees to accept said grant of land upon the terms set forth above and to comply with all the conditions and obligations imposed by this deed." The deed was executed by the grantor and his wife, and also by the grantee.

At the date of the deed there were no improvements on the 13 acres of land; it being described by one of the witnesses as "an old common." During the same year, or shortly thereafter, the railroad company constructed a railroad on its newly acquired right of way, and about the same time the grantor erected on his own land, contiguous to the strip conveyed to the railroad company, a large warehouse. Mr. Whiteford also built a dwelling house near the station, for the use of himself and family, also a tenant house, stable, wagon house, corn house, and other necessary outbuildings. He also fenced the property and otherwise improved it. Shortly thereafter the railroad company built a station on its right of way, and Mr. Whiteford was put in charge as agent for the company. The new station was called Cambria, and Mr. Whiteford continued to serve as resident agent there until 1893, when the position as Cambria, and also to recover damages for was given to his son William, who served un-

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

til December, 1894. Several other persons the appellee in this case. In 1896 James R. subsequently served as agents at Cambria for different periods of time, until March 1, 1901, when the resident agent was removed, and the business of the station thereafter handled by the agent at Cardiff, a station on the defendant's road about one mile north of Cambria, near the Pennsylvania line.

The Maryland Central Railroad Company was a Maryland corporation, originally incorporated by chapter 121, p. 174, Acts 1867, and was authorized to construct, equip, and operate a railroad within the state of Maryland, to run from Baltimore northerly through Baltimore and Harford counties to the southern boundary of Pennsylvania. As originally constructed, it was a narrow gauge road, and for several years after the making of the deed first above mentioned, of date March 21, 1884, its most northerly station was Cambria. Subsequently, in 1894, the line was extended northward about a mile to within a few yards of the state line and the above-mentioned station of Cardiff established there, with a resident agent in charge. At the same time the York Southern Railroad, a Pennsylvania corporation, had its southern terminus at South Delta, a small place a few yards north of the state line, in York county, Pa. About January 1, 1901, these two intrastate railroads were consolidated under the name of the Maryland & Pennsylvania Railroad Company, and it is conceded that the new corporation became entitled to "all the franchises, rights, privileges and properties of the Maryland Central Company and subject to all its duties, obligations and liabilities." After the consolidation of the two roads as above mentioned, the Maryland end was broad gauged to correspond with the Pennsylvania road, and there were then four stations on the line within a distance of two miles of Cambria, to wit, Cambria and Cardiff in Harford county, Md., and South Delta and North Delta in York county, Pa., each station having a resident agent. The business of the road did not justify so many agency stations so near together, and therefore, on March 1, 1901, a central station was established, and the agents at all the other stations mentioned were removed, including the agent at Cambria, though the station itself was maintained, and local trains stopped there to receive and deliver passengers and freight as hefore.

From 1884 to 1896 Mr. James R. Whiteford carried on a warehouse business at Cambria in the warehouse built by him near the railroad at that place; his business consisting of the purchase and sale of fertilizer, hay, grain, coal, and perhaps of some lumber. On March 11, 1897, James R. Whiteford and wife conveyed by deed the 12 acres of land remaining to him of the original 13 adjoining the railroad right of way at Cambria to his two sons, William and Marshall, and on March 13, 1899, these two brothers conveyed the property to their sister Anna W. Silver, where to show that it was to be made and

Whiteford moved away from Cambria, and the warehouse was rented to a man named Robinson. William Whiteford conducted the business there for Robinson for about two years, but in 1898 or 1899 the business was abandoned, and the warehouse used only for the storage of goods and chattels of different kinds. There is evidence in the record, adduced on the part of the plaintiff, to the effect that the property of the plaintiff has greatly depreciated in value by reason of the removal of the resident agent at Cambria, and also that since such removal the warehouse cannot be rented, though with a resident agent there Cambria would be a good business point, and the warehouse could easily be rented for \$40 or \$50 per month. The defendant, on the other hand, offered evidence tending to show that as a matter of fact the warehouse business at Cambria had never prospered; that at least 2 years before the resident agent was removed, the business at the warehouse had been abandoned, and even the railroad's business at that place had dwindled to such small proportions that the cost of maintaining a resident agent there was equal to 30 per cent, of the total receipts at that station, whereas 5 per cent. was the usual allowance. The trial court refused the plaintiff's claim for damages as to the alleged depreciation in value of the land, and restricted recovery to the loss of rents for the warehouse to the time of the trial, caused by the failure of the defendant to keep a resident agent at Cambria station. The jury found for the plaintiff in the sum of \$2,000, upon which judgment was entered, and the defendant has brought this appeal.

Argued before BOYD, C. J. and BRISCOE, SCHMUCKER, WORTHINGTON, HENRY, and THOMAS, JJ.

Fred. R. Williams and Stevenson A. Williams, for appellant. James J. Archer, for appellee.

WORTHINGTON, J. The theory of the plaintiff's case is that the first stipulation in the habendum of the deed of date March 21, 1884, being the one relied on by the plaintiff to sustain the action, created an easement in the land conveyed for the benefit of the land retained by the grantor, or at least that it is a covenant that runs with such land in favor of the plaintiff as assignee of the original grantor. We cannot agree, however, that a fair interpretation of the language of the stipulation in the deed warrants the inference that it was the intention of the parties to create or reserve a right in the nature of an easement in the property granted for the especial benefit of the land retained. The station covenanted to be erected and maintained on the railroad's right of way was manifestly intended as a public station for the use of the public generally. There are no words in the deed any-

maintained for the especial benefit of the tion, but by way of a covenant, which, grantor, or of the land retained by him. There was, of course, incidental benefit to the · grantor, and also to his remaining land, but a similar benefit, less only in degree, was also conferred upon other adjoining property. A private easement implies, as an essential quality thereof, two distinct tenements, namely, the dominant, to which the right belongs, and the servient, upon which the obligation rests. Wolfe v. Frost, 4 Sandf. Ch. (N. Y.) 89. Here the public were to have the use and benefit of the station, and it could not with propriety be said that there was any dominant estate to which such right belonged. The right created by the stipulation in the deed cannot therefore be deemed an easement appurtenant to the land reserved so as to pass as part thereof to the assignee of the grantor, but rather it should be treated as a covenant by the railroad company to do and perform something on the granted land that, while incidentally intended to benefit the grantor, was also . manifestly intended for the use and benefit of the community generally. Assuming, for the present, therefore, without deciding, that the original grantor bore such contractual · relation to the railroad company as to entitle him now, were he a party to these proceedings, to maintain an action on the covenant, does the covenant so run with the land retained by the grantor as to inure to the benefit of the plaintiff in this case?

A covenant in a deed, whether to be performed on or off the land, must, in order to run with the land, touch and concern the land so that the thing required to be done will tend to enhance its value, or render it more convenient or beneficial to the owner; and, if the covenant extends to something not then in esse, the covenant must be to one, "his heirs and assigns," by express words, else the assignee shall take no benefit of it. Spencer's Case, 1 Smith's Leading Cases (9th Ed.) p. 174; Whalen's Case, 108 Md. 11, 69 Atl. 390. In the case at bar the covenant was made with reference to something not then in esse, and there are no words of limitation to the heirs and assigns of the grantor. It is contended, however, that since Acts 1856, p. 253, c. 154 (Code Pub. Gen. Laws 1904, art. 21, § 11), as words of inheritance are unnecessary to create a fee, the covenant in this case being in the nature of a reconveyance of an interest in the lands conveyed, such words are unnecessary here. In the case of Ross v. McGee. 98 Md. 389, 56 Atl. 1128, this court held that the act in question "was never intended to apply to reservations of privileges and the granting of an easement," such as was claimed in that case. There the reservation was of the right to use the water from a spring located on the land conveyed, and the court held that the right did not inure to the benefit of an assignee of the grantor. Here the

though it may be said, in a sense, to touch and concern the land retained by the grantor, yet extended to something not in existence at the date of the deed, and the words "heirs and assigns" are not expressed. Under the circumstances we do not think the act of 1856 does away with the necessity for the use of these words, in order to pass the right created by the covenant in question to an assignee of the grantor. Neither do we think Acts 1864, p. 341, c. 252 (Code Pub. Gen. Laws 1904, art. 21, \$ 70), applicable to this case. Statutes in derogation of the common law are to be strictly construed, and the covenant now under consideration appears to be beyond the immediate scope and object of that enactment.

2. But, aside from the aforegoing considerations, it has been held in a number of well-reasoned cases that the covenant on the part of a railroad company to erect and maintain a public station at a certain place on its line, even if originally valid, is fairly complied with by the erection and maintenance of such a station for a period of years, and until the exigencies of business, the convenience of the public, and the welfare of the railroad demand its removal (Texas v. Scott, 77 Fed. 726, 23 C. C. A. 424, 37 L. R. A. 94; Mobile v. People, 132 Ill. 559, 24 N. E. 643, 22 Am. St. Rep. 556; Camp's Case [1908] 130 Ga. 1, 60 S. E. 177, 15 L. B. A. [N. S.] 594, 124 Am. St. Rep. 151; Jeffersonville v. Barbour, 89 Ind. 375); the reason for the rule being that, as the number and location of a railroad's depots and public stations must depend upon the conditions of population and amount of business at the different places along its line, and as changes take place in these conditions from time to time, the determination of such questions is appropriately committed to the directors or managers of the railroad company. This does not mean, of course, that a railroad company may willfully and arbitrarily refuse to establish or maintain a public station at any certain place on its line when it has legally obligated itself so to do; and, while the courts do not usually specifically enforce such contracts, damages are frequently recoverable for their willful breach. Chicago & E. I. R. Co. v. People, 222 Ill. 403, 78 N. E. 784; Marsh v. Fairburg R. Co., 64 Ill. 414, 16 Am. Rep. 564; Willson v. Winchester R. Co., 99 Fed. 642, 41 C. C. A. 215; Rockford, etc., v. Beckemeier, 72 Ill. 267; Elliott on Railroads, §§ 386, 387; People v. Board of Ry. Com'rs, 158 N. Y. 421, 53 N. E. 163. In some jurisdictions contracts for the location of public stations are held to be absolutely illegal (Burney v. Ludeling, 47 La. Ann. 73, 16 South. 507; Florida Cent. v. State, 31 Fla. 482, 13 South. 103, 20 L. R. A. 419, 34 Am. St. Rep. 30; Greenhood on Public Policy, § 149, pp. 316-321); while in others, as we have just seen, the contract is held to right was not created by way of a reserva- have been performed after a reasonable

time, when changed conditions warrant a removal or relocation.

What we have said renders it unnecessary to consider the several prayers of the respective parties seriatim. The plaintiff's first prayer we consider objectionable, because it fails to correctly instruct the jury as to the rights of the plaintiff as assignee of James R. Whiteford, but rather submits to the jury to find what those rights are. The plaintiff's rights depend upon the proper construction of the deed of date March 21, 1884, and of the subsequent deeds, by virtue of which she obtained title to the property. The proper interpretation of any written instrument is a question of law for the court, and it was error to have submitted such question to the jury. Whiteford v. Munroe, 17 Md. 135.

As the evidence in the case disclosed the fact that the resident agent at Cambria had been kept there a period of 17 years, and for several years of that period at a loss to the company, and also as it appears that the warehouse, for 2 years or more before the removal of the agent, had been used merely for storage purposes, we think the railroad was justified in no longer keeping an agent at that place, and that the defendant's ninth prayer should have been granted.

We think this case is clearly distinguishable from that of R. R. v. Compton, 2 Gill, 20. In that case the benefits to the landowner were deemed by the jury of condemnation equivalent to the value of the land, and only one cent damages was awarded. Subsequently the railroad was removed to a distance that no longer rendered it a benefit to Compton's land, and it was held that, inasmuch as the land had been ruined for agriculture purposes by deep cuts and embankments, the owners could recover its value from the railroad company. This is not a suit to recover the value of the land, but, as presented by this appeal, for alleged incidental damages, based upon a hypothetical loss of rents, and we do not think it can be maintained.

As we do not think the plaintiff entitled to recover, we will reverse the judgment, without awarding a new trial.

Judgment reversed, with costs.

(75 N. H. 593)

CONCORD IRON & METAL CO. v. COUCH. (Supreme Court of New Hampshire. Hillsborough. June 1, 1909.)

BANKRUPTCY (§ 295*)-JURISDICTION-ACTION AGAINST TRUSTEE IN BANKRUPTCY

The state courts have no jurisdiction of an action of replevin against a trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 414, 417; Dec. Dig. § 295.*]

Transferred from Superior Court, Hillsborough County; Wallace, Chief Judge.

Action by the Concord Iron & Metal Company against Benjamin W. Couch, trustee in bankruptcy. Cause transferred from the superior court. Action dismissed.

Martin & Howe, for plaintiff. Albin & Sawyer and Edward G. Leach, for defendant.

PER CURIAM. The state courts have no jurisdiction of an action of replevin against a trustee in bankruptcy. Weeks v. Fowler. 71 N. H. 221, 51 Atl. 624.

Action dismissed.

(75 N. H. 281)

CHALOUX V. INTERNATIONAL PAPER സ

(Supreme Court of New Hampshire. Coos. May 4, 1909.)

MAY 4, 1909.)

1. PARENT AND CHILD (§ 5*)—Services and EARNINGS OF CHILD.

A parent's right to the services and earnings of his minor child is contingent on his actually providing support for the child and of his retaining parental control over him, and when he ceases to provide support, or voluntarily or by operation of law releases his parental authority, his right to the child's services and earnings ceases.

[Ed Note—For other cases, see Parent and

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 70-73; Dec. Dig. § 5.*]

2. PARENT AND CHILD (§ 7*)—ACTIONS FOR LOSS OF SERVICES DURING MINORITY.

A parent whose minor son was instantly killed through the negligence of another cannot, in the absence of statute, sue for the loss of the son's services during minority.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. § 86; Dec. Dig. § 7.*]

Transferred from Superior Court, Coos County; Pike, Judge.

Action by Theodore Chaloux against the International Paper Company. There was a demurrer to the declaration, and the cause was transferred from the superior court. Demurrer sustained.

The declaration alleged that the plaintiff's minor son on December 17, 1907, during his employment by the defendants, and while in the exercise of due care, was instantly killed by the defendants' negligence.

Henry F. Hollis, for plaintiff. Rich & Marble and Sullivan & Daley, for defendant.

BINGHAM, J. The question here presented is whether the plaintiff, whose son was instantly killed through the negligence of the defendants, can maintain an action for damages for the loss of the son's services from the time of his death until he would have attained his majority. It is conceded that there is no statute giving a right of action in such case. The plaintiff's contention is: That recent decisions in this state recognize the existence of a right of action for damages for loss of service between death and majority; that at common law a father has an absolute legal right to the services and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

earnings of his minor son; that by reason of | the defendants' negligence the plaintiff has been deprived of this right; that, as the party possessing the right and the one who has infringed upon it are both in existence, the question of the survival of actions, urged as a reason for the conclusion reached in Wyatt v. Williams, 43 N. H. 102, does not arise; and that what is there said inconsistent with this contention is obiter dicta and not material to the decision of the case.

The recent cases upon which the plaintiff relies are Carney v. Railway, 72 N. H. 364, 57 Atl. 218, and Warren v. Railway, 70 N. H. 362, 47 Atl. 735; but neither of them can be said to support the plaintiff's contention. In the former the court was considering the question of damages recoverable under our statute (Pub. St. 1901, c. 191, § 12) by an administrator of an estate of a minor child killed through the defendants' negligence, and it was held that the administrator could not recover for the child's "earning capacity" from the time of his death until he attained his majority, although he might from that time on, for the reason that under the statute "damages are to be assessed on the basis of the loss suffered by the deceased party and his estate," and that, if the son had lived, his earnings during minority, unless emancipated, would have belonged to his father, or in case of the father's death to the mother. It cannot be inferred from this holding that the court understood, or undertook to intimate, that the father could have maintained a suit for the loss of the son's services from the time of his death until he reached his majority. In the latter case the death of the child was not shown to have been instantaneous. This appears from the charge of the court to the jury. 209 Briefs and Cases, 609, 611. The statement in the opin-"Had the child survived, the action would have been brought in its own name. The father's cause of action would have been what it is now, case for the loss of the child's services"-must be read with this fact in view, and, when so read, it has reference to the father's right of action for loss of services prior to death. In Wyatt v. Williams, supra, the court said: "At common law, for the killing of a human being, no civil action could be maintained against the person who caused it, * * * by a person standing in the relation of * * * father or master to the person killed, and the law was the same, whether the act which caused the death was felonious or not." And after discussing the various reasons assigned for the holding, it says that the rule is founded upon public policy, and if the reasons assigned "are various and not altogether consistent, yet the rule has been too long established, and too generally recognized as a settled principle of the common law, to be now shaken by anything short of a legislative act." This case was decided in 1861, and from that day to his minor child ceases at the father's death.

this no action has been brought in which the parent has been allowed damages for loss of services after the child's death-a fact reasonally conclusive as to the law in this state and of the understanding of the profession upon the subject. State v. Railroad, 52 N. H. 528, 548; Bedore v. Newton, 54 N. H. 117; Whitaker v. Warren, 60 N. H. 20, 49 Am. Rep. 302; Poff v. Telephone Co., 72 N. H. 164, 55 Atl. 891.

But there seem to be other substantial reasons why this action cannot be maintained. In Campbell v. Cooper, 34 N. H. 49, 62, 63, the subject was discussed at length, and it was there said: "At common law the father is entitled to the services and earnings of his minor children because he is bound to support and educate them. The right grows out of the obligation and is correlative to it. When one ceases, the other ceases also. The helplessness of the infant, demanding the tutelage and support of the father, in contemplation of law terminates in ordinary cases at 21, and the child becomes emancipated from parental control and entitled to his own earnings. If, by reason of continued helplessness, arising from physical or mental infirmity, the emancipation does not then take place, and the burthen of the support continues, the corresponding right to the services continues with it. If, anticipating the period of emancipation, fixed by law at the age of 21, the father surrenders to the son the right to his earnings at an earlier age, and permits him to go into the business of life as his own master, while he thus continues independent of parental control the obligation to support him remains suspended. So, too, if the father drives his minor son from his home, and refuses to contribute to his support, the right to his earnings is also suspended so long as this dereliction of duty continues; but this obligation to support the child continues only during the lifetime of the father." He cannot, at common law, bind his infant children "to service after his decease," for the law "imposes upon the father no obligation to make provision for the support or education of his infant children after his decease. * * * The father is not to be considered as having an absolute right of property in the labor and services of his offspring until 21. Whatever right he has, it is but a qualified and contingent interest, depending on their living with him and being maintained by him, and arising out of the personal trust under which he holds them for their protection and tutelage. While he continues to furnish them support, he may appropriate their earnings to his own use; but he has no present property in their future earnings, except as coupled with the condition that he shall be burdened with their support when the earnings accrue." And it was held that all power on the part of the father over the labor and services of

"except so far as such power may be conferred by statute."

In Jenness v. Emerson, 15 N. H. 486, a minor son was allowed to recover wages due for his labor and services; his father being dead and his mother insane and a pauper. It was there said: "As a general rule, parents are under obligation to support their minor children, and in some degree liable for their education and entitled to their earnings." That the "right to the services arises directly out of the duty and liability for support." And it was held that, inasmuch as the plaintiff's mother was a pauper at the time of his employment with the defendants, he was in no sense under her control and could be considered as emancipated, that parents are not entitled to the earnings of their emancipated children, and that they may be emancipated by misfortune as well as by the assent of the parents.

In Kelley v. Davis, 49 N. H. 187, 6 Am. Rep. 499, the plaintiffs sought to recover from the defendant for necessaries sold to his minor son, and it was held that at common law a father was under no legal obligation to support his minor child, and that under our statute no action could be maintained against him for necessaries so furnished, "except by the town, and after notice to the person chargeable."

In Hammond v. Corbett, 50 N. H. 501, 9 Am. Rep. 288, the defendant, a widow, was indebted to the plaintiff, and the plaintiff sought to hold in payment of the debt funds in the hands of the trustee and earned by the widow's minor son, who was not shown to have been emancipated or under guardianship. And the court said: That they "failed to discover any sensible ground for a distinction between the rights of a father and those of a widowed mother" to the earnings of a minor child; that neither of them at common law were under any legal obligation to support such child; but that the court thought, "as a compensation * * * for the support, nurture, care, protection, and education actually afforded and furnished to the child, the parent has a right to control and appropriate its earnings during minority," and were "inclined to hold that, in whatever principle this right is founded, whether it result from the very nature of maternal duties or from that of authority which, upon the husband's death, devolves upon her by reason of the guardianship for nurture, technically speaking, the mother is entitled to the child's services until her rights are suspended by the appointment of another guardian, or the arrival of the child at years of majority," or he is otherwise emancipated.

In Aldrich v. Bennett, 63 N. H. 415, 56 Am. Rep. 529, it was held: That "the right of a parent to the earnings of his minor child, upon whatever principle it is founded (Ham-

mond v. Corbett, 50 N. H. 501, 9 Am. Rep. 288), is commensurate with the right of custody. * * * Whatever therefore operates as a release from parental control necessarily terminates parental right of service; and the emancipation of the minor from legal parental authority, either by the voluntary act of the parent or by operation of law, puts an end to legal claims of the parent to the minor's earnings." That the marriage of the daughter, she being above the statutory age of consent, though entered into in defiance of the plaintiff's wishes and authority, was valid, and, being inconsistent with the enforcement of parental rights, operated as an emancipation from them.

From these decisions it appears that the parent's right to the services and earnings of his minor child are not absolute, but contingent upon his actually providing support for the child and of his retaining parental control over him; and that when he ceases to provide support, or voluntarily or by operation of law releases his parental authority, his right to the child's services and earnings

Because of these reasons, the decision in Wyatt v. Williams, and the fact that no action of this nature has ever been maintained in this state, we are of the opinion that the demurrer should be sustained.

Demurrer sustained. All concur.

(75 N. H. 285)

In re HOBBS.

(Supreme Court of New Hampshire. Rockingham. June 1, 1909.)

1. ATTORNEY AND CLIENT (§ 38*)—DISBARMENT OF ATTORNEY—GROUNDS—INTENTIONAL MISCONDUCT.

To constitute cause for disbarment of an attorney it is not recessory that he should be

attorney, it is not necessary that he should be guilty of intentional wrongdoing.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 38.*]

2. ATTORNEY AND CLIENT (§ 45*)—DISBARMENT OF ATTORNEY—CONDUCT JUSTIFYING.

An attorney, as justice of the peace, tried various persons for violation of Laws 1905, p. 501, c. 86, \$ 10, relating to use of automobiles, but failed to keep the record thereof, as required by law. He tried some of them upon complaints not signed or sworn to and without any warrant and used such purported com-plaints after they had been once used and one person convicted therein in other later cases for different offenses by inserting the name of the subsequent respondent therein. He received, in such proceedings, money as fines and as cash bail and did not pay it over to the town or county, but converted it to his own use, though his conversion was not intentional; his method of conducting the prosecutions being due to extreme carelessness, indicating a willful disregard of the ordinary modes of procedul disregard of the ordinary modes of procedulary modes of procedu ful disregard of the ordinary modes of procedure in such cases. *Held*, that his acts constidure in such cases. Held, the tuted ground for disbarment.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 63; Dec. Dig. § 45.*]

8. ATTORNEY AND CLIENT (§ 61*)—SUSPEN-BION OF ATTORNEY—REINSTATEMENT.

A guilty attorney may be reinstated if he has reformed.

[7d. Note.—For other cases, see Attorney and Client, Cent. Dig. § 84; Dec. Dig. § 61.*]

4. ATTORNEY AND CLIENT (§ 58*)—SUSPENSION OF ATTORNEY.

Where it appears that a suspension from practice will work such reforms in his character and mental processes that he will then be of good moral character, trustworthy, and capable of performing properly the duties of an attorney, he may be suspended for a term, instead of disbarred.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 76-78; Dec. Dig. § 58.*]

Proceedings for disbarment of Llewellyn F. Hobbs, an attorney at law. Petition for disbarment denied, and ordered that respondent be reprimanded and suspended from practice for six months.

Hobbs was admitted to practice in 1904 on evidence of age, good moral character, and admission and practice in another state, under the provisions of section 3, c. 213, Pub. St. 1901. He has also held the office of justice of the peace. The following charges made against him were found to be true: "That during the summer and fall of the year 1907 said Hobbs, as such justice, held court at said Hampton for the arraignment and trial of various persons charged with violations of section 10, c. 86, p. 501, Laws 1905; but said Hobbs failed to keep such record thereof as is required by law. That said Hobbs has tried, found guilty, and imposed sentence upon respondents in such cases upon complaints which have not been signed or sworn to by any complainant. That said Hobbs has tried, found guilty, and imposed sentence upon said respondents without any warrant having been issued. That said Hobbs has used such purported complaints, after the same had been once used, and one respondent convicted thereupon, in one or more later cases for different and separate offenses, by merely inserting the name of the subsequent respondent therein, and has then used said alleged complaint as the basis for one or more subsequent arraignments, trials, and convictions. said Hobbs has arraigned, tried, and convicted such respondents without having any complaint or warrant as the basis for such proceedings."

The charge "that said Hobbs has, as such justice, received in such proceedings certain sums of money as fines and as cash ball, which sums of money said Hobbs has not paid over to the town or county, but has converted the same to his own use," was found "true, with qualification that said Hobbs has not intentionally and deliberately converted the money to his own use." There was an additional finding that "his method of conducting the prosecution was due to

extreme carelessness on his part, indicating a willful disregard of the ordinary modes of procedure in such cases; and his method of keeping account of the fines paid to him was so unjustifiable as to amount to gross carelessness."

Charles H. Batchelder, for the State. Samuel W. Emery, for Hobbs.

PEASLEE, J. The rule laid down in some of the earlier cases in this state was that there must bave been intentional wrongdoing to make cause for the disbarment of an attorney. Bryant's Case, 24 N. H. 149; Barker's Case, 49 N. H. 195. The true rule, however, is stated in a later case. temptation to which Delano yielded is one to which he would be constantly exposed in the practice of his profession. The money he misapplied was not the money of a client; but his situation as collector of taxes was, in substance, the situation of an attorney receiving money for a client. And when it appears that he could not be safely trusted in the former case, it thereby appears that he cannot be safely trusted in the latter. If his defaication had occurred before he was admitted to the office of attorney, that fault should have prevented his admission; and, being enough to prevent his admission, it is enough to require his removal. * * * An attorney is a public officer. Admission to and expulsion from his office are regulated by law. He takes an official oath. The public is entitled to ample protection against the danger of any abuse of the great powers of the office which the public by its agents has conferred upon him. * * • It is indispensable that an attorney be trustworthy, and he is not trustworthy if he is capable of improperly applying to his own use his client's money, whether he intends to return it or not. It would be an unreasonable construction of the statute to hold that his license cannot be revoked when it invites the community to trust him in a particular wherein he cannot safely be trusted. The Legislature could not have intended to abolish the ancient requirement of his continued integrity, and require another branch of the government to continue to hold him out to the world as worthy of confidence, when the holding out becomes false and fraudulent." Delano's Case, 58 N. H. 5, 42 Am. Rep. 555.

Judged by the standard here set up, the course pursued by Hobbs is such as to plainly call for his disbarment. A justice of the peace, who conducts the judicial duties of his office in such a way as to indicate a willful disregard of the ordinary modes of procedure in criminal cases, has not the moral character required of applicants for admission to the bar. One who is guilty of gross carelessness in handling trust funds is not a trustworthy person. That the offenses were

r other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

not all willful does not much help the matter. The question is one of protecting the The danger may be greater from public. one incapable of caring for funds or affairs intrusted to him, than from one who, though capable, has on a single occasion failed to live up to the standards set for members of the legal profession. The petty thief is imprisoned for a few months. The kleptomaniac is kept in confinement all his days. There is no idea of punishment in the restraint of the kleptomaniac; neither is there in the case of the removal of an attorney from his office. Each is a step necessary for the protection of society.

Considering the case solely upon the facts as to Hobbs' past career, he should be removed from the office of attorney; but another issue has been presented. A guilty attorney may be reinstated, if he has reformed. In re Enright, 69 Vt. 317, 37 Atl. 1046. In the present case it is the opinion of the justices who heard the evidence and found the facts that the experience of this proceeding, followed by a suspension from practice, has and will work such reforms in the character and mental processes of the defendant that he will then be of good moral character, trustworthy, and capable of performing properly the duties of an attorney. They saw Hobbs at the hearing and have had opportunities to judge of this issue that the other members of the court have not had.

In view of all these considerations, the petition for the removal of Hobbs from the office of attorney is denied. The order is that he be reprimanded for willful disregard of proper criminal procedure and for grossly neglecting to turn over or account for fines imposed upon offenders, and that he be suspended from practice for six months.

WALKER and BINGHAM, JJ., did not sit. The others concurred.

BURGESS v. VESTA KNITTING MILLS. (Supreme Court of Rhode Island. June 26, 1909.)

MASTEE AND SERVANT (§ 239*)—INJUBIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Plaintiff was injured by getting her fingers under the plunger of a machine which she had used for an hour or so every day for two or three months. She operated the machine by putting her foot on a tread to bring the plunger down, and knew that if she got her fingers under the plunger when it came down she would be hurt. Held that, in the absence of proof of any emergency or change of conditions under which she had operated the machine during her service, she was negligent as a matter of law. service, she was negligent as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 749; Dec. Dig. § 239.*]

Exceptions from Superior Court, Providence and Bristol Counties; Charles F. Stearns. Judge.

Action by Mary Burgess against the Vesta Knitting Mills. The court directed a nonsuit. and plaintiff brings exceptions. Overruled,

James L. Jenks, for plaintiff. Vincent, Boss & Barnefield and Alexander L. Churchill, for defendant.

PER CURIAM. The plaintiff alleges in her declaration that she was in the exercise of due care at the time of her injury. There is absolutely no evidence to support this allegation. She does not, in her testimony, say a word about due care. She says she does not know how her accident happened; but she admits that she had used the same machine for "about an hour or so every day for two or three months," that she operated the machine by means of putting her foot on something to bring the plunger down, and that she knew, if she got her fingers under there when the plunger came down, she would get hurt. It is quite obvious that she was capable of running the machine without injury to herself, if she exercised due care, so that the inference of contributory negligence is conclusive under the testimony; there being no proof of any emergency, or any change of the conditions under which she had operated the machine, during the whole time of her service.

The nonsuit was properly granted, and the exception thereto is therefore overruled, and the case is remitted to the superior court, with direction to enter judgment for the defendant as of nonsuit.

NUGENT v. ALDRICH.

(Supreme Court of Rhode Island. June 26. 1909.)

Vendor and Purchaser (§ 317*)—Action for Purchase Money — Jury Question — Con-FLICTING EVIDENCE.

In assumpsit to recover for a farm and goods sold, where the evidence was conflicting as to the terms of the sale and as to whether the buyer paid the full price to the seller immediately upon delivery of the deed and bill of sale, those questions were for the jury.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 317.*]

Exceptions from Superior Court, Providence and Bristol Counties; Charles C. Mumford, Judge.

Action by James F. Nugent against Edwin F. Aldrich. Verdict for defendant, and plaintiff excepts. Exceptions overruled, and case remitted for judgment on verdict.

Assumpsit to recover for a farm and personal property sold and delivered to defendant by plaintiff.

John J. Heffernan and James H. Rickard, Jr., for plaintiff. George W. Greene, for defendant.

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes 73 A.-20

PER CURIAM. A careful reading of the testimony in this case shows that there was conflicting evidence, both as to the exact terms of the contract of sale and as to the question whether the defendant paid all moneys due the plaintiff immediately upon the delivery of the deed and bill of sale or not. It was peculiarly a case for the determination of the jury, and there was sufficient evidence before them to sustain the verdict which they returned. The court, which heard the case with the jury, refused to set aside the verdict, and we find no reason to differ with them.

The charge of the court fairly instructed the jury as to the law, and clearly set forth all that was required for the guidance of the jury in considering the conflicting evidence of the contending parties. We see no reversible error therein.

The defendant's exceptions are overruled, and the case is remitted to the superior court, with direction to enter judgment upon the verdict.

LA BELLE v. RHODE ISLAND CO. (Supreme Court of Rhode Island. June 26, 1909.)

1. Railboads (§ 350*)—Crossing Accidents
—Contributory Negligence.

In an action for death of the driver of an automobile, whether defendant was in the exercise of due care when he drove the automobile onto defendant's railroad tracks in front of an approaching car held for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1166-1187; Dec. Dig. § 350.*]

2. DEATH (§ 99*)—DAMAGES.

A verdict of \$7,000 for death of plaintiff's intestate, a man 29 years of age, with a life expectancy of 35 years, of good habits, and earning \$18 a week, with a reasonable expectation of increased wages, was not excessive.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125-130; Dec. Dig. § 99.*]

Exceptions from Superior Court, Providence and Bristol Counties; Charles F. Stearns, Judge.

Action by Emma G. La Belle against the Rhode Island Company. Plaintiff received a verdict, and defendant brings exceptions. Overruled.

Waterman, Curran & Hunt, for plaintiff. Joseph C. Sweeney and Alonzo R. Williams, for defendant.

PER CURIAM. The question of the plaintiff's due care and of the defendant's negligence were properly left to the jury under suitable instructions, to which no exceptions were taken. No request for special findings was made by either party. It is proper to presume that the jury, in arriving at their verdict for the plaintiff, decided all the issues of fact in her favor, and therefore must have found that the defendant's crossing plaintiff brings exception.

tender, or flagman, at its crossing at Lakewood, did invite Oliver La Belle, the plaintiff's intestate, to drive the automobile under his control upon the railroad tracks of the defendant company at a time when the automobile and an approaching car of the defendant were likely to collide; that a collision between them did occur, whereby Oliver La Belle, then 29 years of age, lost his life.

Whether La Belle, in accepting the invitation, and in driving upon the tracks as he did, and in his general conduct up to and in the collision, was in the exercise of due care was one of the questions of fact to be determined by the jury. The jury by their verdict must be deemed to have found that he was; and the justice of the superior court, who presided at the trial, has denied the defendant's motion for a new trial based upon the ground that the verdict was against the evidence.

The jury assessed damages for the plaintiff in the sum of \$7,000, and the defendant claims that this is excessive. Considering the plaintiff's intestate's expectation of life as 35 years, according to the life table used in evidence, we cannot say that the amount is excessive for the life of a young man of good habits, earning \$18 a week at the time of his death, and having a reasonable expectation of increased wages, according to the testimony of his employer. There is nothing in this case to indicate that it comes within any exception to the general rule referred to in Wilcox v. Rhode Island Company, 29 R. I. 292, 70 Atl. 913.

The defendant's exceptions are therefore overruled, and the case is remitted to the superior court, with direction to enter judgment on the verdict.

SULLIVAN v. NARRAGANSETT ELEC-TRIC LIGHTING CO.

(Supreme Court of Rhode Island. June 29, 1909.)

ELECTRICITY (§ 16*)—INJURIES INCIDENT TO PRODUCTION AND USE—NEGLIGENCE.

A company furnished electricity through its electric wires to the building of a third perthrough son. The wires were cut, and one was injured by coming in contact with them. Neither the man who cut the wires nor the one who ordered them cut was connected with the company, and neither of them had any authority to meddle with the wires. *Held*, that the company was not liable, for it was not bound to for see any not liable, for it was not bound to foresee any intermeddling, whereby danger of injury could arise.

[Ed. Note.-For other cases, see Electricity, Cent. Dig. § 9; Dec. Dig. § 16.*]

Exception from Superior Court, Providence and Bristol Counties; Charles F. Stearns, Judge.

Action by Timothy F. Sullivan against the Narragansett Electric Lighting Company. There was a verdict for defendant, and Overruled, and

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

cause remitted to the superior court, with di- 2. EXECUTORS AND ADMINISTRATORS (§ 286*)

-Contradiction-Effect.

Cooney & Cahill, for plaintiff. Vincent, Boss & Barnefield, for defendant.

PER CURIAM. The live electric wires belonging to the defendant, and used by it prior to the accident in conducting its electricity to the buildings of John R. White & Son, Incorporated, on India street, were left by the defendant attached to said buildings in the same position as before, upwards of 20 feet from the ground, and in a position of perfect safety so far as this plaintiff was concerned. These wires were cut by the order of a servant of John R. White & Son, Incorporated, and the actual cutting was done by an employé of one Higgins, who was engaged in removing various materials from the premises, including electric wires from the inside of the buildings, but who testified that he had given express directions not to remove these live wires. Neither the man who cut the wires, nor the man who ordered them cut, was an employe or in any manner connected with the defendant, or had any authority whatever to meddle with the wires, and but for their interference this injury to the plaintiff would not have occurred.

Furthermore, both of these men admit that they knew, as soon as the wires fell to the ground, that they were live wires, because the ends fell into a small puddle of water and sizzled there until they were removed. It became their duty to give notice of this dangerous condition caused by their intermeddling; but the testimony is conflicting as to whether the plaintiff received any warning or not. There is absolutely no evidence that the defendant had anything whatever to do with the matter. It was not bound to foresee any such intermeddling, whereby danger of injury could arise, and there is not a fact or circumstance in the case upon which any liability of this defendant can rest. The verdict for defendant was properly directed by the judge who tried the case.

The plaintiff's exception is overruled, and the case is remitted to the superior court, with direction to enter judgment for defendant on the verdict.

JOHNSON v. TAYLOR.

(Supreme Court of Rhode Island. 1909.) June 26,

1. EXECUTORS AND ADMINISTRATORS (§ 205*) SERVICES FOR INTESTATE.

Where claimant rendered necessary serv ices to defendant's intestate at his request, and with the distinct understanding that compensation should be given therefor, defendant's estate was liable for the reasonable value thereof.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 732; Dec. Dig. § 205.*]

Where claimant executed a release "in full for all claims of said estate," without reading or having the same read to her, on defendant, the administrator, representing that it was only a receipt to enable him to show the heirs what articles of personal property he had turned over to her, comprising articles which intestate had given to claimant in his lifetime, such release was no defense to a claim for services rendered by claimant on an understanding with intes-tate that they should be paid for.

[Fd. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1135; Dec. Dig. § 286.*]

Exceptions from Superior Court, Providence and Bristol Counties; Charles F. Stearns, Judge.

Action by Mabel Johnson against Clarrington E. Taylor, as administrator. A verdict was rendered in plaintiff's favor, and defendant brings exceptions. Overruled.

James J. McCabe, for plaintiff. Edward M. Sullivan, for defendant.

PER CURIAM. The evidence shows without contradiction that the services which the plaintiff , rendered to the defendant's intestate were rendered at the request of the intestate, were necessary, were worth what the plaintiff seeks to recover, and were rendered upon a distinct understanding between the intestate and the plaintiff that compensation should be given therefor. The release or receipt which the plaintiff signed, but claims she did not read, nor have read to her, she says the defendant told her was merely a receipt to enable him to show to the heirs what things he had turned over to her.

The plaintiff claims that the plane and other things enumerated in the receipt were all things which had been given to her at sundry times by the intestate, and were her own property, to which she was clearly entitled, and which the administrator had no right to retain as a part of the estate; and as to this she is corroborated by a number of other witnesses. The administrator clearly allowed her to take them in recognition of her title to them, and not by way of compromise of any disputed claim; and we think the plaintiff might well believe that she was merely giving a receipt for the specific articles, and not a general release of all claims, particularly in view of the undisputed fact that at this time neither she nor the administrator had in mind or contemplation any claim for services, and in view of still another fact that she had also told him sheowned and claimed the parlor suit as a gift from the intestate, but would not insist upon his giving up that to her because of the objection of the heirs. She might well have supposed, in view of all these facts, if she had her attention directed to the final words of the receipt, "in full for all claims of said estate." that they were intended merely to refer to claims for specific articles of person-

We think the evidence amply supports the plaintiff's claim, and that the jury were fully warranted in giving the plaintiff their verdict for the full amount claimed, and in regarding the so-called release as merely intended to be a receipt for specific articles.

The defendant's exceptions are overruled, and the case is remitted to the superior court, with directions to enter judgment on the verdict.

(29 R. I. 527)

HOPKINS v. RICHMOND.

(Supreme Court of Rhode Island. 1909.) May 28,

1. GUARDIAN AND WARD (\$ 25*)-REMOVAL OF GUARDIAN-ISSUES.

On petition for the removal of a guardian, the court properly refused to permit petitioner to prove that the guardian had never returned an inventory, where the petition did not so al-

[Ed. Note.—For other cases, see Guardian and Ward, Dec. Dig. § 25.*]

2. Guardian and Ward (\$ 25*)—Removal of

Z. GUARDIAN AND WARD (§ 25°)—REMOVAL OF GUARDIAN—PETITION—AMENDMENT.

A petition for the removal of a guardian could not be amended in the superior court, so as to allege that the guardian had never returned an inventory, or as to any other matter of substance which could be made a basis of proceedings in probate court.

[Ed. Note.—For other cases, see Guardian and Ward, Dec. Dig. § 25.*]

Exceptions from Superior Court, Kent County; Darius Baker, Judge.

Petition in the probate court by Cynthia E. Richmond, a minor, by Mary F. Richmond, her mother and next friend, for the removal of Alvero O. Hopkins, a guardian of the person and estate of the minor. probate court granted the prayer of the petition, and Hopkins appealed to the superior court, where the order appealed from was reversed, from which order petitioner brings exceptions. Overruled.

See, also, 72 Atl. 220.

Waterman, Curran & Hunt, for appellant. Samuel W. K. Allen, for appellee.

PER CURIAM. There is no merit in either the fifth or sixth exceptions of the appellee, the only ones which have been established by the court.

As to the fifth exception, the justice of the superior court who heard the case refused to allow the appellee to show that the appellant had never returned the inventory required by law to the probate court, because no allegation of that fact was contained in the petition for removal of said guardian, and also declined to allow the appellee to amend said petition so as to include such an allegation. We are of the opinion that the ruling of the court was correct. The

al property such as were enumerated in the ing, and the fundamental petition cannot be amended in the superior court in the matter of substance, so as to include something that may be the basis of another proceeding in the probate court. And clearly a party may not be allowed to offer evidence tending to prove a charge not contained in the original petition.

> The sixth exception substantially alleges that the decision is against the evidence. While the testimony relating to misconduct on the part of the guardian was conflicting, as might well be expected in a case of this kind, a careful reading of the testimony convinces us that the learned judge who saw and heard the witnesses reached a correct conclusion.

> The appellee's exceptions are therefore overruled, and the case is remitted to the superior court, with direction to enter a decree in accordance with its decision, and for further proceedings.

> GREEN v. RHODE ISLAND CO. (Supreme Court of Rhode Island. June 29, 1909.)

> 1. STREET RAILBOADS (§ 114*)—INJURIES—ACTIONS — SUFFICIENCY OF EVIDENCE — CON-

TIONS—SUFFICIENCY OF EVIDENCE—Con-TRIBUTORY NEGLIGENCE.

In an action against a street railroad com-pany for injuries sustained by striking plain-tiff's buggy while he was crossing a street, evi-dence held to show contributory negligence, so as to require a new trial upon verdict for plaintiff plaintiff.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 114.*]

2. STREET RAILROADS (§ 114*)—INJURIES—ACTIONS—SUFFICIENCY OF EVIDENCE—NEGLI-GENCE.

In an action against a street railroad company for injuries sustained by striking plain-tiff's buggy while he was crossing the street, evidence held to show that the motorman was not negligent in striking the buggy.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 114.*]

Exceptions from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Judge.

Action by Charles L. Green against the Rhode Island Company. Verdict for plaintiff, and defendant excepts. Exceptions sustained, and case remitted for new trial

Waterman, Curran & Hunt (Lewis A. Waterman, of counsel), for plaintiff. Joseph C. Sweeney and Alonzo R. Williams, for defendant.

PER CURIAM. A careful reading and analysis of the record of testimony in this case convinces us that such testimony strongly preponderates in favor of the defendant. both on the question of the defendant's negligence and on the question of contributory negligence on the part of the plaintiff. The petition was the foundation of this proceed- plaintiff was driving his horse and buggy

southerly along Elmwood avenue in such the horse and buggy in front of the car, as close proximity to the defendant's car, which was going in the same direction, that the plaintiff had every opportunity to know of the close proximity of the car just before the accident. One of his witnesses, a passenger on the car, says that he looked out from under the top of the buggy towards the car just before he turned, so that she saw him. and it is plain that he must or should have seen the car. There is evidence of several witnesses that the gong was sounded long enough before the accident to give ample warning of the approach of the car, and their testimony far outweighs that of several witnesses who testify that they did not hear the gong just prior to the accident, although none of them can swear positively that it was not sounded.

As to the question of speed, exceeding the limit of 10 miles an hour prescribed by ordinance, only two witnesses in behalf of the plaintiff swear positively to any excess (viz., 12 miles an hour by one, and 15 to 20 miles an hour by another), while eight disinterested witnesses in behalf of the defendant (not to mention the motorman and conductor) all swear that the speed was moderate, or average, or ordinary, or not excessive. All of the witnesses who saw the horse and buggy when the plaintiff turned to cross the track (save one) agree that the plaintiff made a quick, sharp turn into Wilson street towards and across the track, only being a short distance ahead of the car when the turn was made; the witnesses varying as to this distance from 10 feet to 21/2 or 31/2 car lengths away. There was a commotion in the car, some screaming or exclamations from the passengers, indicating fright because the car was so near the plaintiff when he turned into Wilson street that they feared he or his horse would be struck. It is quite obvious that the plaintiff, having just looked at the car and being in such close proximity thereto, could have heard the gong when sounded, as well as the noise and rumble of the car, had full opportunity to appreciate the speed and proximity of the car, and that in taking such a short and sudden turn as he did he must have been aware of the danger of so doing and have taken his chances. He had, if he had been in the exercise of due care at the time, as good an opportunity as did the passengers to appreciate his danger.

As the case stands, the plaintiff himself, having suffered a lapse of memory by reason of his injury, so that he cannot remember anything about the accident itself, or preceding it for more than an hour, and therefor not being able to tell whether he took any precautions, we find that the evidence strongly preponderates against the plaintiff on the question of contributory negligence. We further find that, under the circumstances, in view of the sudden turn of

the distance was so short, the motorman did all in his power to stop the car, and was not guilty of negligence in hitting the buggy. We do not find that the evidence clearly warrants the application of the doctrine of the last clear chance as against the defendant.

The defendant's exceptions are sustained, and the case is remitted to the superior court, with direction to grant a new trial.

MAROTTO v. ANDREWS et al. (Supreme Court of Rhode Island. June 26, 1909.)

Appeal from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Judge. Action by Domenico Marotto against Richard W. Andrews and others. Judgment for defendants, and complainant appeals. Dismissed. John C. Quinn, for appellant. Edwin C. Pierce, for respondents.

PER CURIAM. The decree of the superior court from which this appeal is taken is fully supported by the evidence in the cause. The appeal is dismissed, the decree of the superior court is affirmed, with a modification allowing a further period of redemption for 30 days from and after the date of the entry hereof in said superior court, and the cause is remanded to the superior court, with direction to enter its order in modification of its said decree in accordance herewith. accordance herewith.

(29 R. I. 580)

WAGNIERE v. DUNNELL et al.

(Supreme Court of Rhode Island. June 29, 1909.)

 Frauds, Statute of (§ 51*) — Contract for Services—Performance Within Year.
 A contract for a definite term of services longer than a year is not excluded from the statute of frauds because it contains provisions authorizing either party to terminate it within a year.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 78; Dec. Dig. § 51.*]

2. Frauds, Statute of (\$ 44*) — Contract For Services—Performance Within Year.

A contract employing plaintiff at a compensation of \$50 per week for three years from date, or for so much of such period as plaintiff's results showed the ability he claimed to be able to give the amployer. to give the employer, was within the statute of frauds as an agreement not to be performed within a year.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 66; Dec. Dig. § 44.*]

3. FRAUDS, STATUTE OF (\$ 113*)-MEMORAN-DUM-REQUISITES.

A memorandum, to satisfy the statute of frauds, must contain all the material substantive terms of the contract, so that it is not necessary to resort to oral testimony to supply one or more of the terms, or make it complete and definite.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 240; Dec. Dig. § 113.*]

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date. & Reporter Indexes

to be able to give defendant, was insufficient for failure to disclose the standard of plaintiff's ability by which the excellence of his work was to be measured.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 222-224; Dec. Dig. § 109.*]

Exceptions from Superior Court, Kent County; Darius Baker, Judge.

Action by Gustave Wagniere against William W. Dunnell and others. Verdict for defendants, and plaintiff brings exceptions. Overruled.

Patrick H. Quinn, for plaintiff. Gardner, Pirce & Thornley (William W. Moss, of counsel), for defendants

PARKHURST, J. The plaintiff brought suit in assumpsit, claiming damages for breach of an agreement which was as follows, viz.: "February 9th, 1906. Mr. Gustave Wagniere-Dear Sir: Understanding that you will give me your best ability as a finisher of cotton and silk or all silk goods especially, but of any other grade of goods within your knowledge and ability, I hereby agree to employ you at a compensation of fifty (50) dollars per week for three (3) years from the date hereof, or for so much of such three (3) years as your results show the ability that you now claim to be able to give me. Yours truly, Wm. Wanton Dunnell. Accepted: G. Wagniere. In presence of: Dudleigh C. Collins." After hearing all the testimony offered by both parties, before a jury, the superior court, upon defendant's motion, directed the jury to return a verdict for the defendant, upon the ground that "the contract sued upon was such as to bring it within the statute of frauds, and that it was not sufficiently expressed in writing to render the contract enforceable at law." This is the language of the exception, and the only exception taken by the defendant in his bill of exceptions, and is quoted therefrom, so that the only questions before this court are: (1) Is this contract within the statute of frauds? (2) Is it or not sufficiently expressed to be enforceable at law?

It is plainly an "agreement which is not to be performed within one year from the making thereof," under Court Practice Act 1905, § 226, cl. 5, which reads as follows: "Sec. 226. No action shall be brought: * * * Fifth. Whereby to charge any person upon any agreement which is not to be performed within the space of one year from the making thereof-unless the promise or agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized." It is established by the great weight of authority that a contract for a definite term longer than a year is not ex-

cluded from the operation of the statute of frauds because it contains a provision enabling either party to put an end to the contract within a year; the reasoning of the courts being that the rescission of a contract is not the performance of it. In re Pentreguinea Fuel Co., 4 De G., F. & J. 541: Birch v. Earl of Liverpool, 9 Barn. & C. 392; Roberts v. Tucker, 3 Exch. 632, at 640; Dobson v. Collis, 1 Hurl. & N. 81; Wilson v. Ray, 13 Ind. 1; Mallett v. Lewis, 61 Miss. 105; Meyer v. Roberts, 46 Ark. 80, 55 Am. Rep. 567; Biest v. Versteeg Shoe Co., 97 Mo. App. 137, 70 S. W. 1081; Browne. Stat. of Frauds, \$ 282; 20 Cyc. 208. In Dobson v. Collis, supra, the plaintiff's case was that it had been agreed between him and the defendants that he should serve the defendants and be retained by them in the capacity of a traveler until the 1st day of September, 1855, and for a year thereafter, unless the said employment were determined by three months' notice given by the plaintiff or defendants, respectively; that the plaintiff had entered into service of the defendants, etc., but had been dismissed by the defendants before September 1, 1855. The contract was oral, and was held to be within the statute of frauds as a contract not to be performed within a year, although it was defeasible within a year. Pollock, C. B., says: "A contract which by its general terms is not to be performed within the year is not taken out of the statute because it may be defeated on a given event. * * * A lease for five years, subject to a defeasance on the happening of a certain event, does not cease to be a lease for five years because it may be defeated at the end of the first year." In Biest v. Versteeg Shoe Company, supra, the plaintiff, by a written contract dated February 5, 1900, was employed as a salesman for the defendant "in the territory agreed upon (a list of these towns is hereto attached)," for a term of one year commencing April 1, 1900. It was provided in this contract that, if the plaintiff wished to discontinue the contract on October 1: 1900, he could do so by giving the defendant notice on August 1, 1900. No written list of towns was ever drawn up to go with this contract. It is held that the contract was within the statute of frauds as one not to be performed within a year, in spite of the stipulation as to discontinuance by notice, and that the memorandum was not sufficient to satisfy the statute. The court says: "Performance as used in the statute is construed to mean full and complete performance according to the terms of the agreement. * * * Most cases * * * hold a contract to render services for more than a year to be within the intention and force of the statute, notwithstanding one or both of the parties may have the option of ending it by notice in a year, because full performance cannot be

derstanding of the parties."

In the citation from Browne on the Statute of Frauds, the rule is stated as follows (section 282): "Thus a contract of hiring for more than a year is within the statute, although it be stipulated that either party may withdraw from the contract before the expiration of a year." Then, after quoting some of the above cases, the learned author proceeds: "In such cases as those just cited, it cannot be said that the agreement would be fully performed when one party withdrew from the contract of hiring. * * * should rather say that in such event the performance of the agreement according to its terms would be frustrated." It is clear that the parties intended that this agreement should run for three years, and that it could be terminated before the end of that time only upon breach by one party or the other. It could not be performed in accordance with its terms in less than three years, and if brought to an end sooner it must be an untimely end by breach and not by performance, or by the exercise of an implied option reserved to the defendant in case results should not "show the ability that you now claim to be able to give." As stated in Browne on the Statute of Frauds, p. 360, § 273: "The statute * * * means to include any agreement which by a fair and reasonable interpretation of the terms used by the parties, and in view of all the circumstances existing at the time, does not admit of performance, according to its language and intention, within a year from the time of its making." The contract involved in this case must, then, within the purview of the statute of frauds, be a contract not to be performed within a year, and is therefore unenforceable unless evidence by a memorandum sufficient to satisfy the requirements of the statute as construed by recognized authorities.

This raises the question, then, whether the letter in this case, signed by the defendant and accepted by the plaintiff, is a sufficient memorandum. It is well settled that the memorandum must contain all the material substantive terms of the contract, so that it is not necessary to resort to oral testimony to supply one or more of such terms and tomake it complete and definite. This rule is approved in the following cases: Hodges v. Howard, 5 R. I. 149, at 158; Peck v. Goff. 18 R. I. 94, at 97, 25 Atl. 690; Peltier v. Collins, 3 Wend. (N. Y.) 459, 20 Am. Dec. 711; Drake v. Seaman, 97 N. Y. 230, at 236; Boardman v. Spooner, 13 Allen (Mass.) 353, 90 Am. Dec. 196; Buck v. Pickwell, 27 Vt. 157, at 167; Lester v. Heidt, 86 Ga. 226, 12 S. E. 214, 10 L. R. A. 108; Stewart v. Cook, 118 Ga. 541, 45 S. E. 398; Nelson v. Shelby Mfg. Co., 96 Ala. 515, at 527, 11 South. 695, 38 Am. St. Rep. 116; Norris v. Blair, 39 Ind. 90, 10 Am. Rep. 135; Fisher v. Andrews, 94 Md.

rendered in a year consistently with the un- | Kan. 364, 23 Pac. 482; Smith v. Shell, 82 Mo. 215, at 218, 52 Am. Rep. 365; Fowler v. Lewis, 3 A. K. Marsh. (Ky.) 443; Wright v. Weeks, 25 N. Y. 153, affirming 3 Bosw. (N. Y.) 372; Ide v. Stanton, 15 Vt. 685, 40 Am. Dec. 698; Ridgway v. Ingram, 50 Ind. 145, 19 Am. Rep. 706; Riley v. Farnsworth, 116 Mass. 223; Ringer v. Holtzclaw, 112 Mo. 519, 20 S. W. 800; Scarritt v. St. John's M. E. Church, 7 Mo. App. 174, at 178; Blest v. Versteeg Shoe Co., supra; Snow v. Nelson (C. C.) 113 Fed. 353; Gault v. Stormont, 51 Mich. 636, 17 N. W. 214; Harney v. Burhans, 91 Wis. 348, 64 N. W. 1031; Watt v. Wisconsin Cranberry Co., 63 Iowa, 730, 18 N. W. 898; Kingsley v. Siebrecht, 92 Me. 23, at 27, 42 Atl. 249, 69 Am. St. Rep. 486; 2 Kent's Commentaries, 510, 511; 1 Mechem on Sales, 360, 365-367; Williston on Sales, 115. The rule is applied in contracts or agreements for labor or service, where the nature of the service to be rendered is not clearly set forth, but must be shown by parol evidence. Biest v. Versteeg Shoe Co., 97 Mo. App. 137, 70 S. W. 1081; Drake v. Seaman, 97 N. Y. 230, 236; Browne, Statute of Frauds (5th Ed.) §§ 371, 384; Wood, Statute of Frauds, § 345; 20 Cyc. 258. See, also, note of Banks v. Chas. P. Harris Mfg. Co. (C. C.) 20 Fed. 667, at 670. The rule as to what the memorandum must contain to satisfy the statute of frauds is laid down in Browne on the Statute of Frauds, § 371, as follows: "Upon this the general rule is that it must contain the essential terms of the contract expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties." Wood says (at page 647): "The statute only contemplated that such a note or memorandum should be made as men in the hurry of business may be supposed to be likely to make; but, nevertheless, of such a definite character in all the essentials of the contract that the intention of the parties, their names, and relation to each other under the contract can be gathered from the memorandum itself, leaving nothing to be supplied by parol." At page 658 the same author says: "The legal effect of a note or memorandum is left precisely as it was at the common law; but the whole contract must be embraced in the writing or other collateral writings connected therewith, and no part of it left resting in parol, because in such an event all the mischiefs which the statute was intended to prevent are likely to

In the present case, the defendant's obligation was subject to the condition that the results of the plaintiff's work should "show the ability that you now claim to be able to give me": and it was an important part of the plaintiff's obligation that he should give the defendant the benefit of such ability. The contract, then, is incomplete and too uncertain to be enforced, unless this standard 46, at 54, 50 Atl. 407; Brundige v. Blair, 43 is fixed in some way. It is not fixed in the slightest degree in the defendant's letter to throwing the hammer, it had nothing to do the plaintiff, which constitutes the only mem- with the case. the plaintiff, which constitutes the only memorandum of the contract; but resort must be had to one or more conversations between the plaintiff and defendant, or other parol evidence for the purpose of fixing the standard. It is "the ability which you now claim to be able to give me." The memorandum itself shows that it is incomplete and that oral testimony is necessary to complete it. The defendant was authorized by the express terms of the contract to discharge the plaintiff from his employment if his work was not up to a standard fixed in a conversation between them, and the defendant claims that the plaintiff was discharged for failure to show ability up to that standard. It is the main issue of fact in the case whether the plaintiff's results showed the ability that he had claimed to have, and the first thing in determining this issue is plainly to find out what ability the plaintiff had claimed to have. This must be done by resorting to oral testimony, and when it is resorted to the witnesses differ materially. This is precisely the state of affairs that the statute, as interpreted by the courts, was intended to prevent, by requiring that parties who entered into a contract which could not be wholly performed within a year must reduce it to writing, so as not to leave any of the material terms and provisions of the agreement to the changeable and unreliable memory of interested witnesses. It is clear that the memorandum in this case is insufficient to satisfy the statute, and therefore that the verdict for the defendant was properly directed by the trial court upon this ground.

The plaintiff's exception is overruled, and the case is remitted to the superior court for the county of Kent, with direction to enter judgment for the defendant upon the verdict.

(29 R. I. 587)

STATE V. CASASANTA.

(Supreme Court of Rhode Island. June 26, 1909.)

1. CRIMINAL LAW (§ 698*) — AD EVIDENCE—FAILURE TO OBJECT. - Admission of

Where testimony upon accused's objection was stricken out, but was afterwards introduced without objection or exception, accused could not complain thereof.

[Ed. Note.—For other cases, see Crim Law, Cent. Dig. § 1654; Dec. Dig. § 698.*]

2. CRIMINAL LAW (§ 838*)-EVIDENCE-MA-TERIALITY.

In a manslaughter case, a question asked a person who was present when accused killed decedent, and who threw a hammer at accused, as to whether he consulted counsel soon after the killing because he was afraid of being pros-ecuted in the matter, was properly excluded as immaterial, as he could not be prosecuted for the killing, and, if the question was to ascertain

[Ed.' Note.—For other cases, see Criminal Law, Dec. Dig. § 388.*]

3. CEIMINAL LAW (§ 1170*) — APPEAL — RE-VIEW—EXAMINATION OF WITNESSES.

There was no error in sustaining an objection to a question asked by the defense, where the testimony was allowed to be introduced in answer to the second question put thereafter to the same witness by accused's counsel.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 8147-8153; Dec. Dig. § 1170.*]

4. Witnesses (§ 851*)—Impeachment—Foun-DATION.

Testimony offered to impeach a witness, before any foundation has been laid for impeachment, is premature and properly excluded.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1150, 1151; Dec. Dig. § 351.*]

5. Homicide (§ 165*) - Evidence - Materi-ALITY.

In a manslaughter case, testimony as to the manner in which decedent was treated by her father before her marriage with accused was properly excluded as immaterial.

[Ed. Note.-For other cases, see Homicide, Dec. Dig. \$ 165.*]

6. Homicide (§ 169*) - Evidence - Materi-ALITY.

In a manslaughter case, where accused, after reciting part of a conversation between him and his father-in-law shortly after accused's marriage with decedent, started to recite the father-in-law's observations concerning the characteristics of women, an objection to his continuing was properly sustained.

[Ed. Note.-For other cases, see Homicide, Dec. Dig. § 169.*]

7. WITNESSES (\$ 352*)—COMPETENCY OF IM-PEACHING EVIDENCE.

In manslaughter case, where accused had testified that he had not left his uncle and gone to the house of his father-in-law on account of trouble with his uncle, it was permissible, in order to contradict him, to ask a witness whether, before accused went to his fatherin-law's house, witness had been present when any trouble occurred between accused and his uncle.

[Ed. Note.—For other cases, see Witnesse Cent. Dig. §§ 1153-1156; Dec. Dig. § 352.•1

8. CHMINAL LAW (§ 730*) — CONDUCT OF COUNSEL—ACTION OF COURT.

Where a person has been appointed court interpreter, counsel has no right to question the good faith of his interpretation; and, having done so, it was not error to instruct counsel not to address the jury in his closing argument upon that subject. upon that subject.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 730.*]

9. Chiminal Law (§ 829*)—Refusal of Requests — Charges Embraced in Others ĞIVEN.

Requests sufficiently embraced in charges already given are properly refused.

[Ed. Note.—For other cases, see Criming Law, Cent. Dig. § 2011; Dec. Dig. § 829.*] see Criminal

10. CRIMINAL LAW (§ 814*)—INSTRUCTIONS-APPLICABILITY TO FACTS.

In a manslaughter case, where at the time of the shooting the weapon used was not concealed, and the homicide was not occasioned by disobedience of the law relating to the carrywhether he was afraid of being prosecuted for ling of concealed weapons, a charge relating to

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the carrying of concealed weapons was prop- in were 10 persons; including his father-in-erly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1979–1987; Dec. Dig. § 814.*]

11. INDICTMENT AND INFORMATION (§ 189*)—
MANSLAUGHTER—GRADATION OF OFFENSE.
While Gen. Laws 1896, c. 285, § 24, as amended by Court Practice Act, 1905, § 1185, provides that where a person is tried upon a complaint or indictment, and the court or jury, as the case may be, is not satisfied that he is guilty of the whole offense, but is guilty of so much thereof as shall substantially amount to an offense of a lower nature, etc., he may be found guilty of such a lower offense, there is not a gradation of offenses in every felonious homicide; and where a killing was instantaneous, the result of a revolver shot, and the charge is merely manslaughter, accused is either guilty of that charge or innocent. ther guilty of that charge or innocent.

[Ed. Note.-For other cases, see Indictment and Information, Dec. Dig. \$ 189.*]

12. CEIMINAL LAW (\$ 7771/2*)—REFUSAL OF REQUESTS—CHARGE AMOUNTING TO STATE-MENT OF FACTS.

In a manslaughter case, a request to charge that accused was already in the house as far as he came that day, and when a third person threw a hammer at him he advanced no further, and so did not shoot his way into the house, was properly refused, as being merely a statement of facts.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 777½.*]

18. Homicide (§ 250*)—Manslaughter—Evi-

Evidence held to support a conviction of

manslaughter. -For other cases, see Homicide, [Ed. Note.-Dec. Dig. § 250.*]

Exceptions from Superior Court, Kent County; George T. Brown, Judge.

Vincenzo Casasanta, alias Jimmie Santa, was convicted of manslaughter, and brings exceptions. Exceptions overruled, and case remitted for sentence.

Henry W. Greenough, Asst. Atty. Gen., for the State. William M. P. Bowen, for defendant.

DUBOIS, C. J. The defendant, who shot and killed his wife on April 18, 1907, having been convicted of manslaughter in the superior court, has brought to this court his bill of exceptions, which is based upon certain alleged errors of the judge who presided at the trial, consisting of rulings, charge to the jury, refusals to charge, and denial of the defendant's motion for a new trial upon the ground that the verdict is against the law and the evidence.

It appeared in evidence that on the day aforesaid the defendant came home to the house of Giuseppe Amoroso, his father-inlaw, where he and his wife had been living with their children since January of the same year, having in his pocket a 88-caliber five-chambered revolver, which he had purchased that morning and had loaded shortly before his arrival at the house; that he said proceeding, tried by a jury in said su-

law, his wife, their children, and others; that the father-in-law was tapping a pair of shoes, and was making use of a carpenter's hammer in such employment; that a few words were spoken, and the defendant fired his pistol at his father-in-law; that the latter threw the hammer at the defendant, who continued to discharge his revolver until five shots had been fired, whereof one killed the defendant's wife; that the defendant ran away, and shortly afterwards was captured. The defendant claimed that he was struck upon the forehead with and dazed by the hammer before he began to shoot, that whatever he did was done in self-defense, and that he had no desire or intent to injure his wife. Amoroso, the father-in-law, claimed that the defendant fired two or three shots at him before he threw the hammer at the defendant, and that he does not know whether it hit the defendant or not. It does not appear that any one but the defendant saw the hammer when it hit him.

The defendant claimed that, while he had good cause for enmity towards his father-inlaw, he had no ill will towards his wife, and in support of this claim offered in evidence his letter to her, written in the Italian language and mailed April 11, 1907, which has been translated by his own interpreter as "Dear Wife: follows: Think always for your children that you may have the reward. The day is coming when we shall talk together in eternity, in that other world. Pardon me for the many times that I have wronged you without reason. I have you always in my heart, as also my dear children, and I swear over this [a cross] that I will not love another woman in my life. I have you always in my heart. You have been so good toward me to not feel badly on account of my going away, because I don't know if I shall live another week because of my sorrow. That I have to do was on account of your parents, because they are very ignorant toward their family. may God pay them. Now, therefore, if you like to keep my children, a day will come when you will be paid in gold. But the time will come when your father may come under my hands. Therefore in order to not go against I have made this resolve, therefore I kiss you my dear, very dear, both you and my dear children. I have written this letter crying with large tears. I kiss you. my dear, both you and both my little children. I bless them. Your dear husband, V. Casasanta."

Shorn of certain repetitions, the defendant's bill of exceptions reads as follows:

"The defendant in the above entitled indictment, being the accused in a criminal proceeding and a party entitled to except in went into the kitchen, a small room, where- perior court, comes and files this his bill of

exceptions, and says that said indictment; address the jury upon the question of the was tried before his honor, Mr. Justice Brown, one of the justices of the superior court, and a jury, on the 6th, 7th, 8th, 11th, 12th, 13th, and 14th days of November, A. D. 1907, and said jury found that said defendant was guilty in manner and form as charged in said indictment. And said defendant says that certain exceptions have been taken by him in the proceedings in said indictment as follows, as appears by the transcript of evidence, charge, and proceedings in said indictment, hereby referred to and made a part hereof:

"(1) To the admission by the trial court of conversation between two persons, not in the presence of the defendant, and not responsive to question 256 asked by the defense in cross-examination, as appears upon pages 47 and 48 of said transcript.

"(2) To the sustaining by the trial court of the state's objection to question 17, as appears upon page 211 of said transcript.

"(3) To the sustaining by the trial court of the state's objection, and to the ruling out by said trial court of question 6 asked by the defense, as appears upon pages 229 and 230 of said transcript.

"(4) To the sustaining by the trial court of the state's objection to question 7 asked by the defense, as appears upon page 312 of said transcript.

"(5) To the sustaining by the trial court of the state's objection to questions 8 and 9 asked by the defense, as appears upon pages 313 and 314 of said transcript, and the defendant expressly claims the protection of section 1, art. 14, of the amendments to the Constitution of the United States.

"(6) To the sustaining by the trial court of the state's objection to question 1 asked by the defense, as appears upon pages 315, 316, and 317 of said transcript.

"(7) To the sustaining by the trial court of the state's objection to question 30, asked by the defense, as appears on page 402 of said transcript.

"(8) To the sustaining by the trial court of the state's objection to question 31, asked by the defense, as appears on page 403 of said transcript.

"(9) To the sustaining by the trial court of the state's objection to question 33, asked by the defense, as appears on page 403 of said transcript.

"(10) To the sustaining by the trial court of the state's objection to the complete answer of question 21, asked by the defense, as appears upon pages 455, 456, and 457 of said transcript.

"(11) To the overruling by the trial court of the defendant's objection to the state's question No. 4, as appears upon page 575 of said transcript.

"(12) To the instruction of the trial court in the closing argument of counsel for the defense, wherein and whereby the trial court instructed the counsel for the defense not to

good faith of the interpretation of evidence by Michael Lubrano, used by the state as an interpreter; the good faith of Mr. Lubrano's interpretation of evidence having been questioned by the defense at the trial of said case, and constituting something that had occurred during the proceedings therein.

"(13) To the refusal of the trial court to charge the jury as requested in No. 1 of the defendant's requests to charge, as appears upon pages 615 and 624 of said transcript, as follows (the defendant expressly claiming and invoking the protection of section 1, art. 14, of the amendments to the Constitution of the United States, providing: 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws'): 'If the jury consider that the defendant, on April 13, 1907, believed he had been assaulted by Giuseppe Amoroso in throwing a hammer at the defendant and hitting the defendant in the forehead, and that the defendant reasonably believed Giuseppe Amoroso was about to follow this assault up with another felonious assault or further great injury to the defendant, the defendant was justified in shooting in order to frighten away Giuseppe Amoroso, and there was no criminality involved in such shooting by the defendant, and the jury must find the defendant not guilty.'

"(14) To the refusal of the trial court to charge the jury as requested in No. 3 of the defendant's requests to charge, as appears in pages 615 to 624 of said transcript, as follows: 'If the jury believe that the defendant shot Angelina Casasanta by accident, misfortune, or misadventure, while firing to frighten away Giuseppe Amoroso when the latter was attempting still further feloniously to assault the defendant, and while the defendant was exercising reasonable care, and without any intention to do her harm, the defendant is excused from all criminal liability for such shooting, and must be found by the jury not guilty.

"(15) To the refusal of the trial court to charge the jury as requested in No. 4 of the defendant's requests to charge, as appears upon pages 615 to 624 of said transcript, as follows: 'If the jury believe that the defendant shot Angelina Casasanta while he reasonably believed his life was in danger or he was in danger of suffering great bodily harm from Giuseppe Amoroso, and while endeavoring to protect himself from a supposed further felonious assault by Gluseppe Amoroso, the defendant exercising reasonable care and without intending to do her harm, the law excuses such shooting of Angelina Casasanta, and the defendant must be found by the jury to be not guilty.'

"(16) To the refusal of the trial court to



charge the jury as requested in No. 8 of the | pears in pages 615 to 624 of said transcript, defendant's requests to charge, as appears upon pages 615 to 625 of said transcript, as follows: 'As the carrying of a concealed weapon is merely a wrong prohibited by statute, and not a wrong in and of itself, if the defendant shot Angelina Casasanta by misfortune or chance, and not designedly, the defendant cannot be punished for the act of shooting, if arising from misfortune or chance, and must be found not guilty.

"(17) To the refusal of the trial court to charge the jury as requested in No. 10 of the defendant's requests to charge, as appears on pages 615 to 624 of said transcript, as follows: "The defendant had a right to enter Giuseppe Amoroso's house during the forenoon of April 13, 1907, to get the defendant's wife and children and furniture, or for any other proper purpose, and Giuseppe Amoroso had no right to assault the defendant; and, further, even if the defendant had been merely and solely a trespasser at that time, Giuseppe Amoroso would not on that account have been entitled to commit a felonious and unjustifiable assault upon the defendant.'

(18) To the refusal of the trial court to charge the jury as requested in No. 14 of the defendant's requests to charge, as appears upon pages 615 to 624 of said transcript, as follows: 'If it be uncertain whether the defendant first assaulted Giuseppe Amoroso, or any person in the latter's house, with a revolver, on April 13, 1907, or whether Guiseppe Amoroso first assaulted the defendant with a hammer, it is the duty of the state to prove beyond a reasonable doubt that the defendant committed the first assault; and if the state fails to satisfy the jury beyond a reasonable doubt on this point, the defendant must be acquitted.'

"(19) To the refusal of the trial court to charge the jury as requested in No. 17 of the defendant's requests to charge, as appears on pages 615 to 624 of said transcript, as follows: 'Although Giuseppe Amoroso might have been actually unarmed on April 13, 1907, at the moment of the shooting, if the defendant was a weak man at the moment of the shooting and Giuseppe Amoroso was a strong man, and if Giuseppe Amoroso assaulted and advanced upon the defendant so as reasonably to cause the defendant to believe his life endangered or that he would suffer further great bodily harm, either from Giuseppe Amoroso picking up the hammer already thrown at and hitting the defendant, or from any other article that the defendant might seize and use as a deadly weapon, the defendant would be justified in using his revolver in resistance, if he reasonably believed he could not safely retreat or escape from the kitchen, and that the use of the revolver was necessary to prevent great bodily injury to the defendant

"(20) To the refusal of the trial court to charge the jury as requested in No. 21 of the defendant's requests to charge, as ap- the defendant's wife and children and go to

as follows: 'It is within the province of the jury, if they do not find the defendant guilty of manslaughter, either to acquit him entirely, or, if they believe him guilty of any lesser offense, to find him guilty of either an assault with a dangerous weapon or of a simple assault; and, further, in case of conviction of any offense in this case, the jury may recommend the defendant to the mercy of the court.'

"(21) To the refusal of the trial court to charge the jury as requested in No. 22 of the defendant's requests to charge, as appears in pages 615 to 624 of said transcript, as follows: "That the defendant was already in the house as far as he came that day, and when Amoroso threw the hammer the defendant advanced no further into the house, and so did not shoot his way into the house.

"(22) To the refusal of the trial court to charge the jury as requested in No. 23 of the defendant's requests to charge, as appears in pages 615 to 624 of said transcript, as follows: 'If the defendant came into the house for a lawful purpose, Amoroso's throwing the hammer at defendant could not convert defendant's lawful entry into an unlawful entry or properly prevent defendant being there.'

"(23) The defendant expressly claims the benefit and protection of section 1, art. 14, of the amendments of the Constitution of the United States, providing: 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws'-in connection with the rulings of the trial court as appears upon pages 314 and 620 of said transcript.

"(24) To the decision of the trial court denying, on February 8, A. D. 1908, the defendant's motion for a new trial, which motion was based upon the following grounds: (a) That the verdict rendered in said indictment is against the evidence and the weight thereof. (b) That the verdict rendered by the jury in said indictment is contrary to the law as contained in the charge of the presiding justice.

"(25) To the refusal of the trial court to charge the jury as requested in No. 9 of the defendant's requests to charge, as appears in pages 615 to 624 of said transcript, as follows: 'As section 22, art. 1, of the Constitution of Rhode Island provides that "the right of the people to keep and bear arms shall uot be infringed," if the defendant on April 13, 1907, after being told the night before at Needham, Mass., the advisability of having a revolver there, bought and had in his possession a loaded revolver when he called at Gluseppe Amoroso's house at Norwood to get

Massachusetts, he had a perfect right to the from completing his answer to the followpossession of such loaded revolver and was guilty of no offense thereby, except the statutory offense of carrying a weapon concealed upon his person, if the revolver was hid from view in the defendant's pocket.'

"And the defendant insists that all of said rulings were erroneous, and that said errors entitle him either to a new trial or to an order that judgment be entered in said superior court for the defendant, and that said defendant be discharged from further prosecution under said indictment. Wherefore the defendant tenders this his bill of exceptions, and prays that the same may be allowed by this honorable court in accordance with law."

The first exception is without merit. The answer objected to was stricken out by order of the court, and the question was repeated and answered without objection or exception.

The second exception relates to an immaterial question asked by the defendant in cross-examination of Giuseppe Amoroso: "Did you employ or consult counsel soon after the shooting, because you were afraid of being prosecuted yourself in the matter?" Amoroso could be prosecuted because his daughter had been killed by the defendant does not appear. If it was for the purpose of ascertaining whether Amoroso was afraid of being prosecuted for assaulting the defendant with a hammer, it had nothing to do with the case.

The third exception has no value. court very properly sustained an objection to the question as then framed, but allowed the testimony to be introduced in answer to the second question put thereafter to the same witness by the defendant's attorney. No harm was done to the defendant by the few minutes' delay occasioned thereby.

The fourth exception relates to an attempt to contradict Amoroso before any foundation had been laid for that purpose. It was premature. The fifth exception is subject to the same criticism.

The sixth exception relates to an attempt to draw from the witness Amoroso a conversation had between him and his wife, which was properly excluded by the court.

The seventh exception relates to the refusal of the court to permit a witness to state what she knew of the manner in which the deceased was treated by her father before her marriage with the defendant. This was clearly immaterial. Whatever the answer might have been, it could shed no light upon the question at issue before the jury. The same reasoning will apply to the eighth exception.

The ninth exception, so called, never was taken, and it appears by the transcript that the counsel for defendant admitted that he did not remember that he had laid any foundation for the question.

The tenth exception relates to the action

ing question: "Then what further conversation occurred between you?" This related to a conversation between the defendant and Giuseppe Amoroso within two weeks after the marriage of the defendant in August, 1904, with the daughter of Amoroso. "I told him I was very very sorry for what his brother-in-law told me the night before; that if I had known it before I had married his daughter I wouldn't have married her. That is what the conversation was. Then he said I was a very foolish boy for worrying over that. 'A lady was made like water,' he says. 'You take a rock and throw it in the water-" The court very properly sustained the ob-The observations of Mr. Amoroso fection. concerning the gentler sex could hardly have assisted the jury in coming to a correct conclusion as to the guilt or innocence of the accused in the case on trial before them.

The eleventh exception relates to the ruling of the court in permitting the following question to be asked by the state's attorney of Mary C. Amoroso: "Now, at any time shortly before this defendant Jimmie came to your father's house to live, were you present when any trouble occurred between Jimmie and his uncle, Antonio Emilio?" question was properly asked for the purpose of contradicting the defendant, who had testified the he did not leave his uncle and come to the house of Amoroso on account of trouble with his uncle.

The twelfth exception cannot be sustained. The court properly instructed the counsel for the defendant not to address the jury upon the question of the good faith of Mr. Lubrano's interpretation. Mr. Lubrano was the court interpreter, and had been allowed by the court to interpret for the state during the entire proceedings. To have permitted reflections to be made upon his integrity in the performance of his sworn duty would have been equivalent to a permission to make reflections upon the judge, who was responsible, not only for his appointment, but also for his continuance in office. The zeal of counsel momentarily obscured his sense of propriety. It was not a matter for the jury to consider, and, furthermore, there is nothing apparent in the record to justify such a line of argument.

The defendant offered to the court 23 requests to charge the jury, whereof the court granted and charged 12 and refused and declined to charge 11. The court had already sufficiently charged the jury in the matter, and many of the requests were but repetitions of matters that had already been charged, or of each other. The first, third, fourth, tenth, fourteenth, seventeenth, and twenty-third requests were properly refused, because the jury had already been sufficiently instructed in the matters therein referred to. The eighth request was rightly refused. Conceding that the act of carrying a concealof the court in preventing the defendant ed weapon is malum prohibitum, and not



the homicide in question. At the time of this tery, or both, with a dangerous weapon, is shooting the weapon was not concealed. It was in sight and publicly discharged. The case is not one of accidental discharge of a concealed weapon in its place of conceal-The homicide under consideration ment was not occasioned by disobedience of the law relating to the carrying of concealed weapons. The ninth request was also properly refused. The right of the defendant to the possession of the loaded revolver was not an issue in the case.

The twenty-first request was properly refused. While it is true that Gen. Laws 1896, c. 285, § 24, as amended by Court and Practice Act 1905, § 1185, provides as follows: "Sec. 24. Whenever any person is tried upon a complaint or indictment, and the court or jury, as the case may be, shall not be satisfled that he is guilty of the whole offense but shall be satisfied that he is guilty of so much thereof as shall substantially amount to an offense of a lower nature, or that the defendant did not complete the offense charged, but that he was guilty only of an attempt to commit the same, the court or jury may find him guilty of such lower offense or guilty of an attempt to commit the same, as the case may be, and the court shall proceed to sentence such convict for the offense of which he shall be so found guilty, notwithstanding that such court had not otherwise jurisdiction of such offense"-and while in certain homicides there may be a gradation of offenses, as set forth in 2 Bish. New Crim. Law (8th Ed.) § 780 (3): "In felonious homicide, committed by an assault and a beating, there may be a gradation of offenses, the particulars of which will somewhat vary with the laws of the state in which it is committed. The lowest offense will be assault, the next above it will be battery, the next will sometimes be assault with a dangerous weapon, the next assault with a dangerous weapon with intent to kill, the next manslaughter, the next murder, and the last murder in the first degree. Each one of these, except the last, will be a less crime included in the greater; and, where the common-law rule that there can be no conviction for misdemeanor on an indictment for felony does not prevail, a person on trial for any higher one of these offenses may be convicted of any lower one which the proofs establish, if the indictment is, as it always may be made, in a form to include the lower"-it does not follow that there must be such a gradation of offenses in every felonious homicide.

It is perfectly apparent that in a case like the one at bar, where the killing was instantaneous, the result of a shot from a 38-caliber revolver, where the charge is merely manslaughter, the defendant is either guilty or not guilty of that charge. The punishment for manslaughter is imprisonment not exceeding 20 years. Gen. Laws 1896, c. 277,

malum in se, that act has no connection with | § 8. The punishment for assault, or batimprisonment not exceeding 2 years. Gen. Laws 1896, c. 277, \$ 19. The punishment for assault or battery, or both, is imprisonment not exceeding 1 year or a fine not exceeding \$500, or both. Gen. Laws 1896, c. 277, § 20, as amended by Court and Practice Act 1905, 1171. It is noticeable that no minimum penalty is fixed for any of the above-named offenses. After verdict of guilty on an indictment for manslaughter, the judge who pronounces sentence upon the defendant may, in any deserving case, make the punishment as light as if the charge had been simple assault.

> The twenty-second request is a pure and simple statement of fact, entirely improper for the court to charge as matter of law.

> The twenty-fourth exception is to the decision of the court denying the defendant's motion for a new trial on the ground that the verdict is against the law and the evidence. The verdict was not against the law. The jury evidently followed the instructions given to them by the court, which we have stated were correctly given. Neither is the verdict against the evidence. There is no question but that the defendant shot and killed his wife. Whether it was done accidentally, while he was trying to protect himself from bodily harm, was a question properly left to the jury, who decided that it was

> The defendant's exceptions are overruled, and the case is remitted to the superior court within and for the county of Kent for sen-

EISWALD v. NAUTICAL PREPARATORY SCHOOL.

(Supreme Court of Rhode Island. 1909.) June 15.

Case Certified from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Presiding Justice.

Action by George H. Eiswald against the Nautical Preparatory School. Exceptions taken to the master's report in the cause, and case certified from the superior court after hearing for final decree. Exceptions overruled, and cause remanded. with directions. cause remanded, with directions.

Edwards & Angell (Seeber Edwards, of counsel), for receiver. Albert A. Baker, McGee, Jeger & Fricke, Roe & McCombs, Marvin M. Taylor, Waterman, Curran & Hunt, Irving O. Hunt, and Cyrus M. Van Slyck, for certain patrons. Charles A. Wilson and Frank Healy, for James Riley Repair & Supply Co. Frank Healey, for Berwind White Coal Mining Ca. Green, Hinckley & Allen, for bondholders.

PER CURIAM. This cause comes before this court for its determination by certification from the superior court after hearing for final decree, as provided in Court and Practics Act 1905, \$ 338. The questions to be determined are raised by numerous exceptions taken to the master's report in the cause, by the receiver and by certain claimants as holders of bond certificates issued by the defendant.

All of the exceptions pressed before us may

† For opinion on motion for reargument, see 78 Atl. 1985.

be grouped into three general classes, raising | three general questions, viz.: (1) Whether, under the evidence and the law, the master was justified in finding that as between the defendant corporation and its patrons the defendant was guilty of fraud in obtaining the moneys of its patrons, so that such of them as saw fit had the right to rescind their contracts and to endeavor to trace their moneys and re-cover them back. (2) Whether, under the evidence and the law, the master was justified in finding that certain patrons, having rescinded their contracts, had succeeded in tracing their funds, as shown in detail in the report. (3) Whether, under the evidence and the law, certain other parties selling coals, more handies supplies, etc., had the right to rescind their contracts on the ground of fraud, and, having so rescinded, to trace their specific goods, or the proceeds thereof, and to recover back the proceeds, as found in detail in the report.

The entire court has spent a vast amount of

time in the reading and discussion of the testimony and exhibits in the cause, and of the master's most careful and voluminous report, and we have together examined and carefully considered all of the principal authorities cited, both in the master's report and in the able briefs of counsel for the numerous contending parties. We are of the unanimous opinion that the findings of the master are fully instiffed. parties. We are of the unanimous opinion that the findings of the master are fully justified by the evidence in the cause, that he has made no error in his very careful analysis and summary of the facts in issue, and that he has justly and properly applied to the facts those principles of the cases cited upon which he relies to support his conclusions in matters of law. We do not find it advisable to deliver an extended opinion in this cause, for the reason extended opinion in this cause, for the reason that such an opinion would, we believe, result in a substantial restatement of the conclusions of fact and law as stated by the master, and is therefore unnecessary.

The exceptions are overruled, and the cause is remanded to the superior court, with direction that it enter its decree confirming the master's report, and for further proceedings.

(224 Pa. 176)

QUINN et al. v. CITY OF PHILADELPHIA. (Supreme Court of Pennsylvania, March 22, 1909.)

MUNICIPAL CORPORATIONS (§ 800*).—DEFECTIVE SIDEWALKS—LIABILITY OF CITY.

Where a boy running on a city sidewalk trips over the ends of a cellar door and falls into an open great the city is not repropible for to an open area, the city is not responsible for his injuries because it permitted the area to remain uncovered.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1666; Dec. Dig. § 800.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Felix Quinn and Felix C. Quinn against the City of Philadelphia. From an order refusing to take off a nonsuit, plaintiffs appeal. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

John F. Gorman and Harry K. Blake, for appellants. Robert Brannan and Frederick Beyer, Asst. City Sols., and J. Howard Gendell, City Sol., for appellee.

POTTER, J. Damages are not properly chargeable to any alleged act of negligence. when it appears that subsequently an independent and unexpected factor intervened which in itself was the real cause of the mischief. Legal responsibility in such a case rests upon the intervening cause, and, unless that was the fault of the original wrongdoer, the latter is relieved from responsibility.

In the present case the city was charged with negligence in not pursuing the owner of the property, for permitting a small areaway to remain uncovered, opening from the sidewalk into the cellar, near the house line of the street. A small boy running upon the sidewalk tripped over the hinge of an adjacent cellar door and fell into the areaway, and from there into the cellar. It was apparent that the fall was caused by the obstruction in the sidewalk, consisting of the projecting hinge to the door, and was not in any way due to the presence of the uncovered areaway. It being there, he simply fell into the area, instead of falling upon its cover, as he doubtless would have done had there been one over it. Probably his fall was more severe than it would have been had the area been covered, but this is mere conjecture. The defendant was not at fault in placing the cellar door, with its hinge, in the line of the sidewalk. That was done by the property owner. But it does not appear that negligence in this respect was charged against any one. Had the fall been caused by negligence of the defendant, then the consequences which ensued would all have been chargeable to the defendant: but such was not the case. It was by no means clear that there was any lack of proper care upon the part of the city, in permitting the owner of the property to retain a small uncovered areaway, situated close to the house line; but, however this may be, plainly there was an intervening cause which led to the accident, and this was the obstruction in the sidewalk, due to the presence of the hinge of the cellar door. It was this new and independent factor which caused the child to stumble and fall, and it was therefore the natural and real occasion of the mischief.

Under these circumstances, the learned trial judge very properly entered a compulsory nonsuit, and the judgment is affirmed.

(224 Pa. 162)

QUINN v. PHILADELPHIA RAPID TRAN-SIT CO.

(Supreme Court of Pennsylvania. March 22. 1909.)

1. Cabriers (§ 328*)—Cabriage of Passen-Gers — Injuries — Contributory Negli-

To attempt to board a street car going fas-ter than a man could walk was contributory negligence barring a recovery for injuries sustained in being thrown to the ground.

[Ed. Note.—For other cases, see Carrier Cent. Dig. §§ 1367-1369; Dec. Dig. § 328.*] see Carriers,

2. TRIAL (\$ 115*)-ARGUMENT OF COUNSEL. It is error for counsel in his argument to state to the jury the amount of damages claimed in the declaration, as damages are to be ascertained by the jury from the evidence.

[Ed. Note.—For other cases, see Trial, Dec. Dig. 115.*]

Appeal from Court of Common Pleas, Philadelphia County.

Personal injury action by Joseph Quinn' against the Philadelphia Rapid Transit Company. Judgment for plaintiff for \$4,500, and defendant appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Thomas Leaming and Sydney Young, for appellant. John Monaghan and David Phillips, for appellee.

POTTER, J. It is admitted in this case that the plaintiff attempted to board a moving car, which at the time was going faster of ingress and egress. And the fact that than a man could walk. It is urged, how-plaintiff had not gotten beyond the running ever, upon the part of the plaintiff, that even board, when he was thrown off by the moif his carelessness in this respect be conced-tion of the car, shows that he had not comed, yet, at the instant when he was thrown pleted his perlious intention of mounting the from the car, he had passed the initial point moving car. The testimony of the passenof danger, and had attained what his counsel evidence that there is really no conflict as to head he was down, lying on the street."

plaintiff attempted to mount was running itself an act of negligence. north on Fourth street, and had passed the intersection with Dauphin street, and had wherein complaint is made of the refusal of begun its run towards the next intersection, the court below to withdraw a juror and

at the time the plaintiff attempted to get upon the running board. There is nothing in the evidence to show the motorman or conductor knew that the plaintiff wanted to get on the car at the time, until he made the effort to do so. If the car had been standing still at the regular place for passengers to get on, and the evidence had tended to show that it had been started suddenly while plaintiff was in the act of stepping up, the question would have been for the jury; but, as it was, there was nothing to warn the men in charge of the car of any impending peril to the plaintiff. There was therefore no duty upon them at that time with respect to the plaintiff, and there was no evidence of any negligence upon their part. On the contrary, the contributory negligence of the plaintiff is plainly apparent from his own story of the occurrence. He said that as the car came up to him he attempted to throw his body along with it, "to grab it as it came along." He testified upon cross-examination that as near as he could judge the car was about a length past the crossing when he tried to get on, and that it was about a length and a half above the crossing when he fell to the ground. This shows conclusively that his attempt to mount the side of the moving car and his fall to the ground were practically instantaneous. It was a continuous performance. The running board is not a place of safety. It is not intended for the use of passengers, except as a means gers who were on the car does not contradict contend was a place of safety. The trial that of the plaintiff, but it adds much to the judge instructed the jury that if they found details which under the circumstances he that the plaintiff, while attempting to board naturally could not be expected to recall. a moving car, was thrown from it, in the One passenger, sitting in the seat next to the very act of getting upon it, he could not re-back seat, said, in describing the accident: cover, as such an act would clearly have "I was sitting there, and I saw a man make been negligence upon his part; but we are a grab for the car. I could not say if he satisfied from a careful examination of the got hold or not. By the time I turned my this point. The only reasonable inference further said that the car was running pretty that can be drawn from the plaintiff's own lively at the time. Five other witnesses statement is that he was injured in the very agree substantially in saying that plaintiff act of attempting to board a moving car of jumped for the running board, and whether the defendant company, while it was going or not he succeeded in getting his feet on, he at considerable speed. This being the case, was almost instantly thrown off. Of course, it was the duty of the court to say that un- if the testimony of the other witnesses conder the evidence the plaintiff had failed to tradicted the plaintiff, it would be for the jury exercise reasonable care to prevent harm to to reconcile the discrepancies; but it all prachimself, and that his injury was the result tically supplements the plaintiff's own story. of his own fault, and he could not recover. The facts of the case bring it within the The testimony shows that the car which rule that to step on or off a moving car is in

There is a second specification of error,

continue the case, because of counsel for to settlor's daughter, for life and after her plaintiff having stated in his argument to death the stock to go absolutely to her children, the jury that he asked "for \$20,000 in this "dividend obligations" of one corporation and the jury that he asked "for \$20,000 in this suit." It is error for counsel to state to the jury the amount of damages claimed in the declaration. The damages are to be ascertained by the jury from the evidence, and are not to be determined by any estimate of counsel, not based on the evidence. Any suggestion to the jury of the arbitrary amount in which the damages are laid, in the declaration, is highly improper. Reese v. Hershey, 163 Pa. 253, 29 Atl. 907, 43 Am. St. Rep. 795. The second assignment is sustained, but it becomes unimportant in this case by reason of the lack of anything in the evidence which properly sustains the charge of negligence against the defendant company.

The only reasonable inference that can be drawn from the evidence is that the plaintiff was hurt by his own fault, without fault upon the part of the defendant, and the trial judge should have assumed the responsibility of disposing of the case.

The judgment is reversed, and is here entered for the defendant.

(224 Pa. 144)

Appeal of BOYER.

(Supreme Court of Pennsylvania. March 22. 1909.)

1. LIFE ESTATES (§ 15*)—INCOME—CORPOBATE DIVIDENDS—RIGHT TO AS BETWEEN LIFE TENANT AND REMAINDERMAN.

As between a life tenant and remainderman under a trust created in corporate stock, the under a trust created in corporate stock, the remainderman is entitled to what the stock was actually worth at the creation of the trust, no less and no more; and, in ascertaining the value of the stock at the time the trust was created, as compared with the value after the distribution of "dividend obligations" and "certificates of indebtedness," it was entirely inadequate to produce the right result to compare the amount standing to the credit of profit and loss upon the books of the respective corporations at the time of the creation of the trust with that standing to the credit of the same account at the time of the "dividend obligations" and the "certificates of indebtedness, and to regard the difference as earnings after the creation of the trust, since the amounts expended out of earnings for permanent improve-ments would have to be charged against the earnings, and would leave that much less to go to the credit of profit and loss at the time of the "stock dividends" and "certificates of in-debtedness."

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 34, 35; Dec. Dig. § 15.*]

2. LIFE ESTATES (§ 15*)—INCOME—CORPORATE DIVIDENDS—RIGHT TO AS BETWEEN LIFE TENANT AND REMAINDEBMAN.

As between the life tenant and remainderman of corporate stock, every disumptively goes to the life tenant. every dividend pre-

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 34, 35; Dec. Dig. § 15.*]

8. LIFE ESTATES (§ 15*)—INCOME—COEPOBATE DIVIDENDS — PERSONS ENTITLED AS BETWEEN LIFE TENANT AND REMAINDERMAN.

"certificates of indebtedness" of another, issued to stockholders, and representing earnings which might have been paid out in dividends to stockholders, but which had been expended in permanent improvements, are to be distributed to the tenant for life, where there is nothing to show that the issue of the "dividend obligations" or the "certificates of indebtedness" lessened the value of the stock below what it was at the creation of the trust.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 84, 35; Dec. Dig. § 15.*]

Appeal from Court of Common Pleas, Philadelphia County.

Nathalie C. Boyer filed exceptions to the auditor's report in the estate of Nathalie C. Robinson, deceased, and from an order dismissing the same, he appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Henry C. Boyer, for appellant. William Early Rhein and Charles Chauncey, for appellees.

POTTER, J. On November 19, 1869, Moncure Robinson, the father of Mrs. Nathalie C. Boyer, the appellant in this case, executed a deed of trust, under which he transferred to the trustees 62 shares of the capital stock of the Richmond, Fredericksburg & Potomac Railroad Company and 150 shares of the capital stock of the Seaboard & Roanoke Railroad Company. Under the provisions of the deed of trust the dividends, income. and profits of the stock were to be collected and paid over to the appellant, the daughter of the donor, during her natural life, and after her death the said stocks were to be transferred absolutely to her children. Afterwards, under the same conditions as contained in the original deed of trust, additional shares of stock were transferred to the same trustees, which increased the holdings in the Richmond, Fredericksburg & Potomac Railroad to 186 shares, and in the Seaboard & Roanoke Railroad Company to 150 shares. Under date of November 16, 1881, the board of directors of the Richmond, Fredericksburg & Potomac Railroad Company recommended the adoption by the stockholders of the following resolution: "Resolved, that for the purpose of dividing among the common stockholders of the company the amount standing upon its books to the credit of profit and loss, which amount has been heretofore earned by the company and expended in permanent additions to and improvements of the company's property, instead of being used in the payment of dividends, the board of directors be, and they hereby are, authorized in their discretion to issue dividend obligations or certificates in amounts of \$100, or multiples of that amount, Under a trust created in corporate stock, amounts of \$100, or multiples of that amount, the "dividends, income and profits" to be paid bearing, in lieu of interest on each \$100 of

the certificates, the dividend payable on each ! share of the common stock of the company at the several dates when such dividends shall be payable, and entitled in any division of the assets of the company to share in a corresponding proportion of the same. For the fractional part of \$100, to which any stockholder may be entitled, there shall be issued to him a certificate of dividend scrip, which certificates may be converted at the option of the holder into dividend obligations when presented in sums of \$100, but which shall not be entitled to interest or a share of the dividends until so converted. Respectfully referring the stockholders to the accompanying reports of the examining committee and of the general superintendent and to the statements of the treasurer for details, this report is submitted. By order of the Board of Directors. J. P. Brinton, President." These resolutions were duly adopted at a stockholders' meeting held the same day, and the board of directors, under date of January 1, 1882, duly issued the socalled dividend obligations, as therein described, to an amount equal to seven-tenths of the common stock then outstanding. Upon the 186 shares of the stock of this company held by the trustees they received dividend obligations of the par value of \$13,020.

Upon May 4, 1886, the stockholders of the Seaboard & Roanoke Railroad Company adopted the following resolutions: "Whereas, for a series of years, surplus earnings of the company, which could have been legitimately divided among the holders of its stock and dividend obligations in addition to the amounts actually divided among them, have been used by the company for the purpose of replacing wooden bridges by stone and iron structures; for improving the character of the roadway; for the building of freight and passenger houses; for the purchase and construction of wharves and terminal facilities; for relaying the road with steel rails; for the purchase and construction of machinery and cars, and for the acquisition of other property, and it is due to the holders of the stock and dividend obligations of the company, that they should receive evidence of the expenditure and investment of said surplus earnings from time to time according to the convenience of said company and its ability to pay interest upon such evidence, and whereas, the present actual value of the investment of such surplus earnings has been estimated by the directors of the company and the value thereof in the judgment of the said directors is not less than the amount of the par value of the entire capital stock, guaranteed and common, and the dividend obligations of the company; now, therefore, resolved, that certificates in amounts of one hundred dollars, or multiples of that amount, signed by the president and treasurer of the company, be issued to the several holders of its stock,

obligations, in sums of money equal in amount to the sum of fifty dollars for each share of the capital stock, guaranteed or common, held by the stockholders respectively, and in sums of money equal in amount to the sum of fifty dollars for each one hundred dollars of dividend obligations held by the respective holders of dividend obligations; the said certificates to be payable on or at any time after the first day of August, nineteen hundred and sixteen, at the pleasure of the company, in full or in installments of ten per cent. of the face value of such certificate, with interest at the rate of six per cent. per annum, to be computed from the first day of August, 1886, payable in equal semiannual installments as the same shall accrue on the first days of February and August in each year until the principal sum named in each and every one of such certificates shall be fully paid. Such certificates to be issued to the holders of stock (guaranteed and common) and of dividend obligations of record at the office of the company at the time of the passage of this resolution, to wit, the fourth day of May, 1886, except as hereinafter provided."

The resolutions further provided for the payment of fractional interest in cash, and exchange of bonds if subsequently issued by the company, and a form of certificate as follows: "United States of America. States of Virginia and North Carolina. Seaboard & Roanoke Railroad Company. Certificates of Indebtedness Authorized by Resolutions of the Stockholders, Passed May 4, 1886. "This is to certify, that the Seaboard & Roanoke Railroad Company for value received, is indebted to ---- in the sum of arelloh ---payable on or at any time after the first day of August, in the year one thousand nine hundred and sixteen, at the pleasure of the company in full or in installments of ten per cent. or in multiples thereof, with interest at the rate of six per cent. per annum to be computed from the first day of August, 1886, payable in equal semiannual installments as the same shall accrue on the first days of February and August of each year until the principal sum is paid. If at any time the company shall authorize an issue of bonds or other form of indebtedness secured by a deed of trust or mortgage subordinate to the mortgage to secure an issue of bonds of the aggregate amount of two million five hundred thousand dollars authorized by the resolution of its stockholders of May 4, 1886, then and in such case there shall be reserved by the company out of said issue of bonds or other form of indebtedness secured by said subordinate mortgage an amount thereof sufficient to pay or provide for said certificates at their maturity or to retire the same prior to their maturity by exchange by mutual agreement. This certificate is registered and is transferable only upon the books of the company in person or by attorney for a cerguaranteed and common, and its dividend tificate or certificates of the same aggregate amount, provided that each certificate shall be for one hundred dollars or a multiple of one hundred dollars. In witness whereof, etc."

Action was duly taken by the board of directors and the officers of the company, and on August 1, 1886, certificates of indebtedness in the form set forth were issued. It should be noticed that these certificates did not in any way purport to be for stock, nor were they similar to the so-called dividend obligations issued by the other company. They were straight out acknowledgments of indebtedness. Upon the 156 shares of this company's stock held by the trustees, they received certificates of indebtedness to the amount of \$7,800.

The auditor, and the court below, regarded these dividend obligations and these certificates of indebtedness as stock dividends, and apportioned them between the life tenant and those in remainder, upon the theory that they represented a distribution in part of profits earned by the companies prior to the creation of the trust. In making the apportionment the auditor simply compared the amount standing upon the books of the respective corporations to the credit of profit and loss, at the date of the creation of the trust, with that standing to the credit of the same account, at the date of the issue of the dividend obligations, and the certificates of indebtedness. The difference he regarded as the earnings of the companies after the creation of the trust. He apparently made no attempt to ascertain the real value of the stocks at the time when the life tenancy was created. Nor did he ascertain whether, after the issue of the dividend obligations by the one company, and the certificates of indebtedness by the other, the value of the stock in the respective companies was less than it was when the trust estate was created. The doctrine which the auditor attempted to apply is that which undertakes to give the bonus to the remainderman or to the life tenant, in accordance with the fact as to whether the bonus was earned before or after the creation of the trust; or, if part was earned before and part after, then to divide the bonus between the remainderman and the life tenant in the proportion which the amount accumulated before the creation of the trust may bear to that accumulated thereafter. This is the doctrine of Smith's Estate, 140 Pa. 344, 21 Atl. 438, 23 Am. St. Rep. 237, following and restating that of Earp's Appeal, 28 Pa. 368. But under that rule, as stated in substance in 9 Am. & Eng. Ency. of Law (2d Ed.) 715, as the Pennsylvania rule, "the result is arrived at by ascertaining what the value of the stock was when the life tenancy was created. After the issue of bonus its value is again determined. If it is less than it was at first, just to that extent is it held that the capital has been impaired, and the trustee must apply to the corpus of the estate enough of the

bonus to make the capital equal to what it was when the trust was created. If, on the other hand, the stock is found to be as valuable as when the trust was created, or of greater value, the capital has not been decreased, and the bonus goes in whole to the life tenant." In other words, it seems to be the doctrine of our cases that the remaindermen are entitled to just what the stock was actually worth at the time of the creation of the trust, no less and no more.

It may be suggested that this method makes no allowance to the remaindermen for such increase in value as may be due to an enlarged earning power of the corporation, or to an increased value of the franchise. But probably no rule could be framed which would work exact justice in all cases. any rate, the method by which the auditor in the present case undertook to apply the rule was entirely inadequate to produce the right result, for the reason that he confined his calculation merely to the gross amounts standing at the different periods to the credit of the profit and loss accounts. This would not afford any real index to the value of the stock, and yet that was the thing to be ascertained, the value at the time the trust was created, as compared with the value after the distribution of the bonus. Profit and loss is a resultant account, usually made up from the balances transferred from other accounts, and it must, from its nature, depend entirely upon the elements entering into those other accounts. For instance, in the present case it appears from the resolutions authorizing the issue of the so-called dividend obligations and the certificates of indebtedness that for some years prior thereto the earnings of the companies, which might have been paid out in dividends to the stockholders from year to year, had been expended in permanent additions to, and improvements of, the properties. Manifestly all such expenditures would be for the benefit of the remaindermen, and would be a taking of that which would otherwise have gone to the life tenant in dividends. The amounts expended in this way would have to be charged against the earnings, and would leave that much less to go to the credit of the profit and loss account. So that it is plain that the latter account, as it stood upon the books, would not represent the total earnings of the corporation. No man can ascertain his business worth from his profit and loss account alone. In order to learn that there must be shown a statement of bis assets and liabilities, and an inventory of his property.

This court said in Smith's Estate, 140 Pa. 344, 21 Atl. 438, 23 Am. St. Rep. 237: "It is the intrinsic value of the shares, to be ascertained from the amount and value of the assets (of the corporation) at the death of the testator, and at the time of the increase of the stock, which governs in the apportionment of the surplus profits. The market value may aid in the ascertainment of the actual

value, and is therefore properly received in evidence on that issue"—citing Earp's Appeal, 28 Pa. 368, and Moss's Appeal, 83 Pa. 204, 24 Am. Rep. 164. In the case now before us, the auditor apparently took no account of either actual value or market value of the stocks in question at any time, and therefore he missed the real point of the inquiry. Presumptively every dividend goes to the beneficial holder of the shares at the time it is declared. This will carry every dividend presumptively to the life tenant, instead of to the remainderman. Thompson on Corporations, § 2193.

In the present case the burden was upon those who claim in remainder to show that the issue of the dividend obligations in 1881 decreased the value of the stock of the Richmond, Fredericksburg & Potomac Railroad Company below what it was worth in 1869, when the trust was created, and, failing to do this, the whole of the bonus or dividend would, under the operation of the Pennsylvania rule, go to the life tenant. The same is true with respect to the certificates of indebtedness issued by the Seaboard & Roanoke Railroad Company. A very persuasive circumstance in the transactions is the fact that the dividend obligations and certificates of indebtedness were avowedly issued to make good to the shareholders the earnings which from year to year, instead of being distributed as dividends, had been applied to the permanent improvement and betterment of the properties. These dividends from earnings made after the creation of the trust would clearly have gone to the life tenant. For some 12 years in one case, and 17 in the other, she was thus deprived of her dividends, and the earnings out of which they might have been paid went, by way of improvements and additions to the property, to the benefit of the remaindermen. Was she not then fairly entitled to the obligations issued by the companies, avowedly in lieu of the dividends of which she had thus been deprived? It seems so to us. And then, after all, the rule for the determination of controversies over dividends between life tenants and remaindermen should be to give to each just what the donor intended each to have. As has been said, the intent of the grantor or testator is the pole star for the guidance of the courts.

The intent of the granter here, was that the "dividends, income and profits" from the stock in trust were to go to the life tenant. These terms are not necessarily coextensive or identical. It is to be presumed that the settlor meant to indicate by the use of these three words "dividends," "income," and "profits," pretty much everything in the way of advantage or benefit which might accrue from the stock, without decreasing the original value of the capital which it represented. We think the terms were broad enough

by the Richmond, Fredericksburg & Potomac Railroad Company, and the "certificates of indebtedness" issued by the Seaboard & Roanoke Railroad Company. The latter were not stock obligations, but were acknowledgments of indebtedness to the stockholders for the funds which it was considered fairly belonged to them as current earnings, but which had been appropriated to pay for improvements and additions. Mr. Robinson, the settlor, appears to have been thoroughly familiar with the conditions and management of the corporations in question, and he doubtless intended to cover whatever form the distribution of gains arising from the stock might take, when he provided that the life tenant should receive the "dividends, income and profits" of the stocks which he placed in trust. We see no evidence in this case that the issue of the dividend obligations, or the certificates of indebtedness, lessened the value of the stock below what it was at the time of the creation of the trust. That being so, there was no reason why the whole of the bonus, whether it be considered as "dividends," "income," or "profits" should not go to the life tenant. We are of the opinion that the auditor and the court below erred in making any apportionment.

The assignments of error are sustained, and the judgment of the court below. affirming the report of the auditor, is reversed. And it is now adjudged and decreed that, under the terms of this trust, the entire amount of \$13.020 of dividend obligations issued by the Richmond, Fredericksburg & Potomac Railroad Company, and the entire amount of \$7.800 of certificates of indebtedness issued by the Seaboard & Roanoke Railroad Company, were due and payable to the life tenant as dividends, income, or profits upon the shares of stock held in trust: and the proceeds thereof are hereby awarded to the appellant, as said life tenant.

(224 Pa. 357)

BOYER et al. v. LENGEL et al. (Supreme Court of Pennsylvania. April 12, 1909.)

Adverse Possession (§ 23*)—Evidence. In ejectment, where defendants claimed by adverse possession, evidence that the parties now and then cut some timber or ties or logs on the property were not acts sufficient to establish such possession.

[Ed. Note.—For cases, see Adverse Possession, Cent. Dig. §§ 112, 113; Dec. Dig. § 23.*]

Appeal from Court of Common Pleas, Schuylkill County.

Action by Mahlon H. Boyer and J. W. Beecher against Paul P. Lengel and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Argued before BROWN, MESTREZAT, POTTER. ELKIN, and STEWART, JJ.

appellants. W. F. Shepherd and R. S. Bashore, for appellees.

PER CURIAM. In submitting this case to the jury, they were instructed that in the opinion of the court plaintiffs had shown a good paper title, which should prevail unless the defendants had acquired one by adverse possession. In his charge the learned trial judge explained fully and correctly what the defendants were required to prove in support of the title which they set up. The jury were told: "When parties claim title by adverse possession, by virtue of the statute of limitations, it has been said time after time that that possession must be a hostile, adverse, open, visible, notorious, and a continuous possession, in order for them to maintain 'title. In other words, the mere fact of parties going in now and then and cutting some timber, or cutting some ties, or some logs, such acts in themselves do not constitute adverse possession." We have discovered no error in the rulings of the court or in the instructions under which the question of the defendants' title went to the iurv.

The assignments of error are all overruled, and the judgment is affirmed.

(224 Pa. 858)

In re FOY.

(Supreme Court of Pennsylvania. 1909.) April 12,

ELECTIONS (§ 154*)—PRIMARY ELECTIONS-NOMINATION—EXCEPTIONS—APPEAL.

Where an order sustains exceptions to the nomination for a public office, and the court refuses to grant a rehearing, on appeal only the legality of the record can be considered, and, where no abuse of discretion in refusing the rehearing appears, the judgment will be affirmed. Note.—For other cases, see Elections, Dec. Dig. § 154.*]

Appeal from Court of Common Pleas, Schuvlkill County.

In the matter of the nomination of P. C. Foy to the office of school director. From an order refusing a rehearing of an order sustaining exceptions to the nomination, P. C. Foy appeals. Affirmed.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Wm. Wilhelm and E. J. Maginnis, for appellant. William C. Devitt, for appellee.

PER CURIAM. P. C. Foy, the appellant, was returned to the office of the county commissioners of Schuylkill county as having been nominated in the Middle ward of the borough of Girardville at a primary election held on January 18, 1908. Exceptions were filed to his nomination February 6th following, which, four days later, were sustained by the court. This appeal is not from the

A. W. Schalck and Joseph W. Moyer, for | action of the court sustaining the exceptions, but from the refusal to grant a rehearing on the petition of the appellant presented February 24, 1908—eight days after the election.

The single assignment of error is the refusal to rehear the case. On this certiorari we pass only upon the regularity of the record, and, as nothing appears from it showing that the court erred or abused its discretion in refusing the rehearing, its action is affirmed.

(224 Pa. 154)

CONN v. HUNSBERGER.

(Supreme Court of Pennsylvania. March 22, 1909.)

L LIVERY STABLE KEEPERS (§ 10*)—HIRING OF HORSES—NATURE OF RELATION.

OF HORSES—NATURE OF RELATION.

The relation between a livery stable keeper and a customer is that of bailor and bailes for hire, and the former assumes the liability which the contract of bailment imposes.

[Ed. Note.—For other cases, see Livery Stable Keepers, Cent. Dig. § 11; Dec. Dig. § 10.*]

2. LIVERY STABLE KEEPERS (§ .11*)-HIBING OF HORSES-IMPLIED WARRANTY

A livery stable keeper impliedly warrants that a horse let to hire is not unruly or vicious, but is safe and suitable for the purpose for which hired.

[Ed. Note.—For other cases, see Livery Stable Keepers, Cent. Dig. § 12; Dec. Dig. § 11.*]

8. LIVERY STABLE KEEPERS (§ 11*)—HIBING OF HORSES—DUTY OF KEEPER.

It is the duty of a livery stable keeper to inform himself of the habits and disposition of the horses which he keeps for hire; and, if he knows that they are dangerous and unsuitable, or by reasonable care could ascertain the fact, he is liable for any injuries to waterware requiring from their states. customers resulting from their vicious propensi-

[Ed. Note.—For other cases, see Livery Stable Keepers, Cent. Dig. § 12; Dec. Dig. § 11.*]

4. Livery Stable Keepers (§ 11*)—Hibing OF HORSES-LIABILITY

A livery stable keeper is not an insurer of the suitableness of a horse or carriage let to a customer, but is bound to exercise reason-able care to furnish a horse or carriage that is fit and suitable for the purpose contemplated.

[Ed. Note.—For other cases, see Livery Stable Keepers, Cent. Dig. § 12; Dec. Dig. § 11.*]

5. LIVERY STABLE KEEPERS (§ 11*)—INJURIES TO HIBER — ACTIONS — PRESUMPTIONS AND BURDEN OF PROOF.

Where, in an action against a livery stable keeper for injuries to the hirer of a horse, the hirer introduced evidence to show the vicious conduct of the horse, and that the livery stable keeper was negligent in not furnishing a suitable animal, the burden was upon the keeper to show that the horse was not vicious or unruly, or that he was ignorant of its vicious character, and had exercised proper care to incharacter, and had exercised proper care to incharacter. character, and had exercised proper care to inform himself thereof.

[Ed. Note.—For other cases, see Livery Stable Keepers, Cent. Dig. § 12; Dec. Dig. § 11.*]

6. LIVERY STABLE KEEPERS (§ 11*)-INJURIES TO HIRER-DEFENSES.

A livery stable keeper, sued for injuries to the hirer of a horse, may show as a defense that the conduct of the animal was occasioned by the hirer, or by an event that would cause such conduct by a gentle or well-trained horse, or that the hirer knew of the habits of the

[•]For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1507 to date, & Reporter Indexes

horse, and assumed the risk, or any other mat-ter which would relieve him from the alleged negligence or breach of implied warranty.

[Ed. Note.—For other cases, see Livery Stable Keepers, Cent. Dig. § 12; Dec. Dig. § 11.*]

7. LIVERY STABLE KEEPERS (§ 11*)-INJURIES

TO HIBER—ACTIONS—PLEADING.

Where, in an action against a livery stable keeper for injury to the hirer of a horse, the statement of claim is sufficient to show the contract of hiring, out of which an implied war-ranty by the keeper arises, the fact that the statement also contains an averment of a special warranty will not prevent the hirer from recovering upon the implied warranty.

[Ed. Note.—For other cases, see Livery Stable Keepers, Cent. Dig. § 12; Dec. Dig. § 11.*]

8. LIVERY STABLE KEEPERS (§ 11*)-INJURIES

To HIREE-FORM OF ACTION.

The hirer of a livery stable horse injured by its vicious acts may enforce his right to damages by an action for a breach of the implied warranty that the horse was not unruly and suitable for the use intended, or by an action in tort for negligence. in tort for negligence.

[Ed. Note.—For other cases, see Livery Stable Keepers, Cent. Dig. § 12; Dec. Dig. § 11.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Charles O. Conn against Harry K. Hunsberger. Judgment for defendant, and plaintiff appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Louis Goodfriend, for appellant. Edwin M. Abbott, for appellee.

MESTREZAT, J. This is an action of trespass to recover damages for injuries caused by the vicious acts of a horse. The defendant is a livery stable keeper in the city of Philadelphia, and for several months prior to November 12, 1906, the plaintiff had hired of him a horse to be used for drawing a delivery wagon about the city. On the morning of the day mentioned the plaintiff went to the defendant's stable and obtained a mare to drive in his wagon during the day. This mare was different from the one which he had previously hired and used in his business; the defendant having purchased her that morning. The plaintiff testified that the defendant knew the purpose for which the mare was hired, that he recommended her very highly, and that she was safe and suitable for the purpose, and that he had purchased her especially for the plaintiff's use. The plaintiff was familiar with, and had been driving, horses for 25 years. The mare was harnessed to a light wagon, and the plaintiff started on his drive about the city. Within half an hour after the animal was hired, she suddenly, without any apparent cause, started to kick violently, and finally ran off. She kicked the dashboard off, hit plaintiff above the eye, and kicked the seat from under the plaintiff. While she was running, the wagon violently struck a truck standing on the street, broke the liveryman to guard him against the dan-

the front axle at the hub, and threw the plaintiff out. He was knocked unconscious, and was severely injured. This action was brought to recover damages for the injuries which the plaintiff sustained. On the trial of the cause the above facts were made to appear, and witnesses were also called who testified that the conduct of the mare on the occasion of the accident showed that she was not mild, kind, and gentle, but was wild and vicious, and that a gentle horse would not act as she did. These witnesses were owners of horses and knew their habits, traits and dispositions. The learned judge directed the jury to find a verdict for the defendant on the ground that there was "no evidence that the defendant knew, or by the exercise of reasonable care could have known, that the mare was unsuitable for use, if in fact she was so." The plaintiff has taken this appeal.

The relation between a livery stable keeper and his customer is that of bailor and bailee for hire, and the former assumes the liability which the contract of bailment imposes. When the bailor lets a horse for hire. he impliedly promises or warrants that the animal is fit and suitable for the purpose for which it is hired. He warrants that the horse is not unruly or vicious, but is safe, manageable, and suitable for the use for which the customer has bired it. It is the duty of a livery stable keeper to inform himself of the habits and disposition of the horses which he keeps in his stable for hire, and if he knows that they are dangerous and unsuitable, or by the exercise of reasonable care could ascertain the fact, he is liable for any injuries to his customers resulting from their vicious propensities. The law will not permit him to close his eyes and his ears, thereby remaining ignorant of the vicious habits of his horses, and relieve him from liability for injuries to a customer resulting from such habits. In his contract of hiring he impliedly engages that he knows, or has exercised reasonable care to ascertain, the habits of his horses, and says to his customer that the horse which he lets is safe and suitable for the purpose for which he has hired it. His warranty is against defects or vicious habits, which he knows, or by the exercise of proper care could know; and, if he fails to exercise such care, and it occasions injury to his customer, he will not be relieved of liability. though he did not actually know the horse was unsuitable for the service. It is true a liveryman is not an insurer of the suitableness of a horse or carriage let to a customer, but he is bound to exercise the care of a reasonably prudent man to furnish a horse or carriage that is fit and suitable for the purpose contemplated in the hiring. The customer is at his mercy, and must rely upon

ger of a vicious animal or defective vehicle, and hence he has the right to demand of the liveryman that he will use such care in supplying a horse or carriage as a reasonably prudent man exercises in the conduct of his own business affairs. While this court has not passed upon the question, the doctrine here announced is recognized and applied in other jurisdictions. 25 Cyc. 1513; 19 Am. & Eng. Ency. of Law (2d Ed.) 432; Edwards on Bailments, § 373; Fowler v. Lock, L. R. 7 C. P. 272; Id., 10 C. P. 90; Horne v. Meakin, 115 Mass. 326; Lynch v. Richardson, 163 Mass. 160, 39 N. E. 801, 47 Am. St. Rep. 444; Windle v. Jordan, 75 Me. 149; Stanley v. Steele, 77 Conn. 688, 60 Atl. 640, 69 L. R. A. 561; Nisbet v. Wells, 76 S. W. 120, 25 Ky. Law Rep. 511.

In Lynch v. Richardson Mr. Justice Knowlton, delivering the opinion, said: "It was the duty of the defendant to furnish a horse that had no such vicious habit, and if he knew of the existence of the habit, or if, by the exercise of reasonable care to ascertain whether the horse was suitable for the use of hirers, he ought to have known that it was dangerous, he is liable for such injuries as resulted from his wrongful conduct. • • It was the duty of the defendant to try to inform himself in regard to the habits of horses kept in his stable for use in his business. It does not require a very long acquaintance with a horse to enable an ordinary livery stable keeper to form a correct opinion of his qualities. Usually he tries to ascertain as much as possible about it before becoming its owner."

In the case at bar, therefore, the questions were whether the mare was vicious and unsuitable for the purpose for which she was hired, and whether the defendant knew, or by the exercise of reasonable care should have known, the fact. The burden of establishing both propositions was on the plaintiff. He assumed the burden, and introduced evidence to show the vicious conduct of the mare at the time she became unmanageable and injured the plaintiff. In addition to this witnesses were called whose familiarity with horses, their dispositions and habits, gave their testimony weight, and they testified that the actions of the mare on that occasion showed that she was not gentle or kindly disposed, but was wild and unmanageable. We think the evidence, if believed by the jury, was sufficient to show a breach of the defendant's implied warranty that the mare was fit and suitable for the service for which she was hired, and that the defendant was negligent in not furnishing the plaintiff a gentle and suitable animal. Such evidence having been introduced by the plaintiff, the burden was then imposed upon the defendant of satisfying the jury that the animal was not vicious or unruly, or that he was ignorant of the vicious character of the animal, and had exercised proper care to inform himself as to its habits. The defendant may the liveryman.

also show as a defense that the conduct of the animal was occasioned by the hirer, or by the happening of an event that would cause such conduct by a gentle or well-trained horse, and one not addicted to a vicious habit. or that the hirer knew, or was informed, of the havits of the horse, and he assumed the risk, or any other matter which would relieve the liveryman from the alleged negligence or breach of implied warranty. It is imposing no heavy burden upon the keeper of a livery stable to require him to investigate the character of the horses he keeps in his stable before hiring them to persons whose safety may be endangered by their vicious habits. If he cannot get any information in regard to their habits, he can at least satisfy a jury on a trial, where the conduct of an animal shows a vicious propensity, that he made diligent efforts to do so.

It has been suggested that the plaintiff's statement sets forth a special warranty, and that therefore he cannot recover upon the implied warranty which arises from the contract of hiring. This position is not tenable. The statement is amply sufficient to show the contract of hiring out of which an implied warranty arises; and if, in addition to such warranty, the statement contains an averment of a special warranty, it will not prevent the plaintiff, if the evidence is sufficient, from recovering upon the implied warranty. Windle v. Jordan, 75 Me. 149. In that case it was contended that the plaintiff was confined to a special warranty, but the court said: "It is true that the plaintiff and his witness to the contract of hiring testify that both the defendant and his hostler recommended and warranted the horse, except in the matter of laziness, but that testimony was not essential to the plaintiff's case. When it was proved and admitted that the defendant was a livery stable keeper, and that he let the horse for hire to the plaintiff for the trip, the law settles the contract upon the breach of which the plaintiff counts."

The learned trial judge evidently thought that this case belonged to that class of cases in which it is held that, before a person who has been injured by a vicious animal can recover against the owner, he must show that the owner knew of the animal's vicious propensities. This was a misapprehension of the law. The owner of a vicious dog who bites another is responsible only on proof of the scienter. There, there is no contract relation between the parties, and liability is not based upon such relation. In cases of the character under consideration the liability of the owner of the livery stable keeper rests on contract and an implied warranty that the animal hired to the customer is free from defects and infirmities making it unsuitable for the purpose for which it was hired. The breach of this contract, by failing to exercise reasonable care and diligence in furnishing a suitable animal, imposes a liability upon

The statement in this case sufficiently avers | a breach of an implied warranty on the part of the livery stable keeper of the suitableness of the animal let to the plaintiff. It also avers facts sufficient to show negligence on the part of the defendant in that he did not exercise proper care in ascertaining the vicious nature of the animal, a fact which could have been known to the defendant had he used the diligence and care required of him. There was no demurrer to the state-The courts, however, have, in this ment. class of cases, permitted the plaintiff to enforce his right to damages by an action for a breach of the implied warranty, or by an action in tort for negligence. The question was distinctly ruled in Hyman v. Nye, L. R. 6 Q. B. Div. 685. In that case Lindley, J., said (page 689): "It was objected on the part of the defendant that the plaintiff had in his statement of claim based his case on negligence on the part of the defendant, and not on any breach of warranty express or implied. * * But the absence of such care as a person is by law bound to take is negligence; and, whether the plaintiff sues the defendant in tort for negligence in not having supplied such a fit and proper carriage as he ought to have supplied, or whether the plaintiff sues him in contract for the breach of an implied warranty that the carriage was as fit and proper as it ought to have been, appears to be wholly immaterial." None of the cases on the subject, so far as we have seen, give any attention to whether the action was founded upon a technical warranty or upon negligence.

We think the evidence was sufficient to send the case to the jury, and that the court was in error in directing a verdict for the defendant.

The judgment is reversed, with a venire facias de novo.

(224 Pa. 95)

COMMONWEALTH, to Use of HAINES, v. FIDELITY & DEPOSIT CO. OF MARYLAND.

(Supreme Court of Pennsylvania. March 15, 1909.)

1. TRUSTS (§ 380*)—EXTENT OF LIABILITY—PAST DEFAULTS.

Application was made to a fidelity company to become surety on the new bond of a trustee, and in the application the amount of the entire trust estate was given, and it was stated that the bond was to secure the same. The application further stated that all of the trust estate had come into the hands of the trustee, and that the bond was to secure to the parties in interest the proper application of the trust estate. The company made an investigation as to the amount of the trust estate, the character of the securities held by the trustee, and thereafter executed a bond as surety to be answerable for the faithful discharge by the trustee of his duties, and that he "shall faithfully apply all the assets received by him in said trust estate." Held, that the liability

of the fidelity company to answer for the unfaithful discharge of his duties by the trustee was not limited to defaults occurring after the execution of the bond, but that it was also liable for any misconduct prior thereto.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 380.*]

2. Trusts (§ 385*)—Actions Against Surety
— Conclusiveness of Decree Against
Principal.

Where from a decree of the orphans' court surcharging a trustee because of gross negligence and fixing the amount of his liability no appeal was taken, the question of gross negligence cannot be opened up four years thereafter in an action on the trustee's bond.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 385.*]

8. PRINCIPAL AND SURETY (§ 145*)—ACTIONS AGAINST SURETY — CONCLUSIVENESS OF JUDGMENT AGAINST PRINCIPAL.

As to official bonds, bonds of indemnity, and bonds to insure the faithful performance of duty and a proper accounting by persons in fiduciary relations, a judgment against the principal is conclusive against his sureties as to his misconduct and failure to account.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 397-401; Dec. Dig. § 145.*]

Appeal from Court of Common Pleas, Chester County.

Action by the Commonwealth, to the use of Benjamin W. Haines, trustee for Helen H. Holmes, under the will of Daniel B. Hinman, deceased, against the Fidelity & Deposit Company of Maryland. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before FELL, BROWN, MESTRE-ZAT, ELKIN, and STEWART, JJ.

William A. Glasgow, Jr., John H. Hall, and Washington Bowie, Jr., for appellant. J. Carroll Hayes and Wm. M. Hayes, for appellee.

ELKIN, J. In 1889 a trustee was appointed by the orphans' court of Chester county to take charge of a fund bequeathed by will for the benefit of a cestui que trust for life with remainder to her children. On the same day the trustee presented his bond with two sureties which were approved by the court and filed of record. In 1900, the trust estate not having been settled, the duties of the trustee still continuing, and one of the original sureties on the bond having died, there arose some doubt as to the sufficiency of the bond to protect the trust estate, and steps were taken to secure a new bond for this purpose. Application was made to appellant, a bonding company, to become surety on the new bond. This company, organized for this and other kindred purposes, received the application, and through its agents or representatives made such investigation as to the amount of the trust estate, the character of the securities held by the trustee, and the investments made by him, as it deemed necessary to be fully informed of the nature and

extent of the liability of the principal in able, the presumption is that the contract of order to determine whether it was a desirable contract of suretyship to make, and for the further purpose of being advised as to the assets in the hands of the trustee to be accounted for in order to fix a limitation upon the responsibility it was willing to assume. The trustee submitted a list of securities then held and investments then made by him, and counsel for appellant after examination reported the conditions as they then existed. There was no misrepresentation or concealment of any material fact, and we do not understand that there is any allegation of fraud, accident, or mistake which could affect the rights of the parties here. Being in possession of the knowledge thus obtained, which we must assume was satisfactory. appellant executed the bond upon which this suit was brought, obligating itself in the penal sum of \$15,000 to be answerable for the faithful discharge by the trustee of his duties, and that said trustee "shall faithfully apply all the assets received by him in said trust estate."

The contention earnestly made in the court below and ably pressed here is that the bond in question is binding upon the surety prospectively only and not retrospectively; that is to say, the burden upon the bonding company was to answer for the unfaithful discharge of his duties by the trustee after the date of the execution of the bond, and not for any dereliction of duty prior to that date, and that it was only bound to answer for a proper accounting by the trustee to the extent of the value of the assets in his hands when the second bond was approved or which came into his hands after that date. Under the facts of the present case, we think this position is not tenable. The appellant through its learned counsel contends that the correct rule applicable in such case is that bonds so given should be construed as intended presumptively to cover future losses and not past defaults, unless there is something in the bond itself, or in the surrounding circumstances, to indicate a different intention. With the rule thus stated as a general proposition of law we have no quarrel. However, it is one of those general rules to which there are so many exceptions under the facts of particular cases as to require the greatest care in its application in order that injustice may not be done or the legal rights of parties be defeated. We cannot agree, that, taking into account the language of the bond itself, the application made by the trustee to appellant specifying the nature of the bond required and the extent of the liability thereunder, and all the surrounding circumstances, including the character of the trust, its indefinite duration, the purpose for which the bond was given, and the investigation made for the purpose of determining prior to its execution the amount of assets in the hands

suretyship was only intended by the parties themselves or by the court which approved it to apply to what may be termed future losses. Indeed, as we read the conditions of the bond in connection with the application and the surrounding circumstances, there is no escape from the conclusion that it was intended to cover all losses to the trust estate resulting from the unfaithful discharge of duty by the principal in his fiduciary relation, and of his failure to account for all assets in his hands at the time of the execution of the bond or which came into his hands afterward.

No other conclusion can be reached without disregarding the application upon which the contract of suretyship is based, and which must be read in connection with the bond in order to properly understand and interpret its meaning. In paragraph 5 of the application, the bond required was stated to be one in a penal sum of \$15,000, which was to secure the principal sum of \$12,000, being the amount of the entire trust estate. In paragraph 12 the estate is described as all that trust estate which came "into my hands in cash from a former trustee, under the will of Daniel B. Hinman, deceased." All the cash which did come into his hands as trustee under the will mentioned was represented by the securities and investments, a list of which was shown appellant before the execution of the bond, and the amount of the liability was fixed to cover the entire estate consisting of these securities, the value of which either was known or should have been known by the bonding company when, for a consideration, it assumed the burden of answering to the cestuis que trustent for the faithful performance of duty by the trustee and the accounting for all assets belonging to the trust estate. In paragraph 6 the nature of the bond is stated to be to secure the parties in interest, the cestuis que trustent here. the proper application of the principal and interest of the trust estate created by the will of the testator above mentioned.

Under these circumstances, how can there be any doubt as to the nature of the obligation or the extent of the liability the bonding company voluntarily took upon itself. When the new bond was given and approved, the entire assets of the trust estate had already been received by the trustee and were represented by the securities and investments on hand at that time, and about which appellant was informed prior to its becoming a surety. No default had then been declared, and neither the trustee nor the cestui que trust nor the surety was in position to say that there was an existing default. These securities may or may not have been good at that time. If they should subsequently be realized on, there would be no default. If not realized on in full, there might or might not be a deof the trustees for which he was account- fault depending upon the gross negligence of the trustee. The entire trust estate was intact in the hands of the trustee to the extent of the securities held by him and exhibited to the bonding company when the new bond was taken. The most that can be said of the situation at that time is that the value of the securities may not have been known or ascertained. The moneys of the trust estate were invested in western mortgages under an agreement that the trustee was not liable for losses unless for gross negligence, and, of course, his surety had no greater burden than the principal. It could be held liable for losses on these investments only upon the ground of the gross negligence of the trustee. The question of gross negligence was raised and determined when the trustee filed his account in the orphans' court. The attempt was there made, and successfully made, to surcharge the accountant upon the ground of gross negligence, which was the only ground upon which a surcharge could be made under the agreement. The account was first referred to an auditor who took the testimony which was afterward fully considered by the court with the result that the charge of negligence was sustained and the accountant surcharged accordingly. From the order or decree surcharging the accountant and fixing the amount of his liability as trustee no appeal was taken, and now, after the lapse of four years, we think the question of gross negligence cannot be opened up in a collateral proceeding. The trustee is bound by the decree of the orphans' court, unappealed from, and why should not his surety be likewise bound? As to official bonds, bonds of indemnity, and bonds to insure the faithful performance of duty and to secure a proper accounting by persons in fiduciary relations, the rule of our cases seems to be that a judgment against the principal is conclusive against his sureties as to his misconduct and failure to properly account. In this class of cases the surety submits himself to the acts of his principal and to the judgment as a legal consequence, following the scope of the suretyship. Masser v. Strickland, 17 Serg. & R. 354, 17 Am. Dec. 668; Giltinan v. Strong, 64 Pa. 242; Commonwealth v. Gracey, 96 Pa. 70. To permit appellant to raise the question of the gross negligence of the trustee already determined in the orphans' court against the principal in this collateral action as a defense to the bond in suit, the rule of these cases must be disregarded. Again, there is no distinction in principle between the case at bar and Commonwealth v. Cox, 36 Pa. 442, in which it was held that, where a guardian was required to give additional security, the sureties on the second bond are equally bound with those on the first bond for the full performance of the duties of the guardianship trust by their principal.

Judgment affirmed.

(224 Pa. 208) CASTOR et al. v. SCHAEFER et al. (Supreme Court of Pennsylvania. 1909.)

MUNICIPAL CORPORATIONS (§ 706*)—ACCIDENT AT CROSSING—INJURIES BY TEAM—NONSUIT.

AT CROSSING—INJURIES BY TEAM—NUNSUIT. In an action by a girl to recover for injuries received by being run down at a crossing by a team, it is error to enter a compulsory nonsuit, where the evidence, though condicting, tends to show that defendant was driving at a high rate of speed, and raises the inference that was negligent.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 706.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Louisa Castor, by her next friend, Calvin H. Castor, and George J. Castor, administrator, against Louisa K. Schaefer and John Birkman, executor. From an order refusing to take off nonsuit, plaintiffs appeal. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Augustus T. Ashton and Victor Frey, for appellants. Joseph W. Catharine, for appellees.

STEWART, J. The plaintiff, a young girl under the age of 14, while attempting to cross a street in the city of Philadelphia, at a public crossing in daytime, was run over by a passing team driven by George Birkman, the original defendant, since deceased, whose executors have been substituted on the record. It was charged that plaintiff had sustained her injuries in consequence of the negligence and carelessness of defendant in driving his horse at a rapid and excessive rate of speed, and failure on his part to direct its course of travel with due regard to the safety of the plaintiff. At the close of the testimony offered on part of plaintiff, the court directed a nonsuit, which it afterwards re-fused to take off. We are not permitted to know the considerations which prevailed to determine this action of the court, since no opinion was filed and no expression of view is to be found in the record. Whatever these considerations may have been, we think them inadequate to support the nonsuit,

With respect to the question of the defendant's negligence the inference to be derived from the testimony is fairly debatable. Apart from the plaintiff, whose narrative of the occurrence is lacking in particularity, but two witnesses testified as to how the accident befell. Their testimony is not in exact accord, due perhaps to the circumstance that their points of observation were not the same; but, however this may be, in considering the question now before us, we must have regard to the testimony which makes most strongly for the plaintiff's contention. It is always for the jury to reconcile conflicting statements of witnesses and say which is to prevail. The testimony presents

this view of the occurrence: Plaintiff was | walking east on Howell street, and had reached the north crossing of Torresdale avenue. Before attempting the crossing, she looked up the avenue and saw a fire engine coming south, but no other vehicle coming from that direction. She had ample time to clear the crossing before the engine could reach it, but thought it prudent to walk rapidly. There is a double line of railway tracks on the avenue. The one on the west side, where plaintiff was, is ordinarily used for travel moving south, the other for travel moving north. As plaintiff stood on the pavement before starting to cross, a lumber wagon came along proceeding northward on the track farthest from her. It had reached the crossing when she started and obstructed her view of the driveway beyond; that is, the driveway beyond the east track and between the track and the pavement along which the defendant was driving south. Plaintiff had advanced to the middle of the street, and was between the two lines of railway tracks when the lumber wagon cleared the crossing. She immediately advanced in the rear of the wagon, only, however, to be struck by the defendant's team which came along between the east track and pavement at a rapid rate. It does not appear where the defendant first saw the plaintiff-whether when she first entered on the crossing, or not until the moment she was struck-but in either case the speed at which he was driving might well support an inference that he fell short of his duty with respect to the plaintiff. If he saw her when she was just advancing on the crossing, a duty was upon him under the circumstances to regulate his speed with special reference to her safety. If he did not see her until she was directly in front of his horse, it must have been either because he was unobservant, or his view obstructed. If the latter, so much the greater care was required of him in approaching the crossing, especially in view of the fact that he was driving south on the side of the street not ordinarily used for travel in that direction. Of course, if the defendant, through no fault of his, had lost control of his horse, and its speed was not of his ordering, there would be no liability; and in actions of this kind the plaintiff assumes the burden of proving affirmatively the negligence charged. While the testimony on this branch of the case is somewhat conflicting, and not easy to reconcile, yet, having regard to that which makes most for plaintiff's contention, there was quite enough in it to support a finding that the speed was within defendant's control.

The question of plaintiff's contributory negligence was clearly for the jury. Waiving consideration of the circumstance that having regard exclusively to the facts as on her second assignment of error.

they appear from the evidence submitted, a determination by the court that contributory negligence was thereby established could not be sustained.

Judgment reversed and procedendo awarded.

(224 Pa. 327)

GUEMPLE v. PHILADELPHIA RAPID TRANSIT CO.

(Supreme Court of Pennsylvania. April 12, 1909.)

APPEAL AND EBBOR (§ 262*)—ASSIGNMENT OF ERROR—OBJECTIONS NOT MADE BELOW. -Assignments

An assignment of error to an order directing a verdict for defendant will not be considered, where no exception was taken to the instruction at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1588; Dec. Dig. § 262.*]

2. TRIAL (§ 413*)—OBJECTIONS TO EVIDENCE —WAIVER—DIRECTING VERDICT.

-WAIVER-DIRECTING VERDICT.

Where the court directs a verdict for defendant without objection or exception by plaintiff, an assignment of error to the disallowance of testimony cannot be considered.

[Ed. Note.—For other cases, see Trial, Dec. Dig. \$ 413.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Mary Guemple, administratrix, against the Philadelphia Rapid Transit Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART. JJ.

Henry J. Scott and Walter Stradling, for appellant. Thomas Leaming and Sidney Young, for appellee.

BROWN, J. On this appeal from the judgment on a verdict for the defendant we have two assignments of error. The first complains of the court's direction of the verdict in its favor. The affirmative answer to the point requesting such direction was not excepted to, and we must sustain the contention of counsel for appellee that the first assignment cannot be considered. Curtis v. Winston, 186 Pa. 492, 40 Atl. 786; Sibley v. Robertson, 212 Pa. 24, 61 Atl. 426.

The second assignment is to the disallowance of the following question asked a witness called by the plaintiff: "Q. When the motorman struck the wagon or the time he struck it or immediately thereafter, what, if anything, did he say?" When this question was objected to the purpose of the offer was not stated, and the answer of the witness might have shown that what the motorman said was utterly irrelevant to the issue; but, aside from this, as there was no exception taken to the court's direction of a verdict for the defendant on the record as it stood when plaintiff closed her case, the the plaintiff was under 14 years of age, and judgment on that verdict cannot be disturbed

the motorman may have said was no longer in the case after a verdict was directed without objection or exception by the appellant. The two assignments are dismissed, and the judgment is affirmed.

(224 Pa. 285)

FIRST NAT. BANK OF NEW CASTLE V. CITY OF NEW CASTLE.

(Supreme Court of Pennsylvania. April 12, 1909.)

MUNICIPAL CORPORATIONS (§ 247*)—OFFICERS - UNAUTHORIZED CONTRACTS - LOA CITY TREASURER-LIABILITY OF CITY.

A city treasurer, without the knowledge or approval of the city, borrowed money from a bank, and the same was placed to his official credit in an account kept by him with the bank. Held, that the city was under no obligation to repay the same, especially where at the time the city treasurer was a defaulter.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 654; Dec. Dig. § 247.*]

Appeal from Court of Common Pleas, Lawrence County.

Action by the First National Bank of New Castle against the City of New Castle. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

James A. Gardner, City Sol., and Robert K. Aiken, for appellant. B. A. Winternitz and Oscar L. Jackson, for appellee.

BROWN, J. John Blevins, who died January 7, 1899, had been treasurer of the city of New Castle for some years prior to his death. During the time he so served the city he kept an account with the appellee, the First National Bank of New Castle, depositing with it large sums of money to the credit of "John Blevins, City Treasurer." On September 19, 1898, he called at the bank, and stated that he needed some money for the city, naming the amount as \$5,431.49. This sum was the aggregate of nine certificates of indebtedness which had been issued by the city to different persons for work done and materials furnished. He executed a note, of which the following is the material part: "New Castle, Pa., Sept. 19, 1898. \$5,431.49. Four months after date, for value received I hereby promise to pay to the First National Bank of New Castle, Penn'a, or order at said bank fifty four hundred thirtyone & 49-100 dollars, with interest at the rate of 6 per cent. per annum after due, having deposited with said bank as collateral security for the payment of this note, and also as collateral security for all other present or future demands of any and all kinds of the said bank against the undersigned due or not due, or that may be hereafter con-

that in future may be made by me the following property, viz.: Sundries cert's of indebtedness of city of New Castle, Pa., for \$5,431.49, and interest." The obligation was signed "City of New Castle, John Blevins Treasurer." The amount asked for by Blevins was placed to his credit as city treasurer. At the time the loan was made his account as city treasurer with the plaintiff showed a baiance to his credit of \$7,000. In addition to the proceeds of the loan he deposited on September 19, 1898, \$2,568.51 in cash, making the credit balance \$15,000. Between September 19, 1898, and the date of his death-January 7, 1899-he deposited various sums with the appellee, amounting in the aggregate to \$67,267.50, making the total cash placed to the credit of his account during that period \$82,267.50, against which checks were drawn and paid amounting to \$55,767.50. Many of these checks were made payable to his own order, and the cash was paid to him. At the time of his death there was to his credit with the appellee \$26,500.

On January 17, 1899, John H. Preston was elected as his successor, and the said balance was transferred from the account of John Blevins, city treasurer, and credited to the account of John H. Preston, city treasurer. Blevins had an account as treasurer with the Citizens' National Bank of New Castle, and the balance to his credit in that institution at the time of his death was \$12,-500. The balance in the two banks aggregated \$39.000. At no time between September 19, 1898, and January 7, 1899, was the balance in the account of Blevins as city treasurer less than \$5,431.49. At the time he made the loan from the appellee he was clearly a defaulter, his default amounting at the time of his death to more than \$25,000. There is no evidence, however, that the bank knew of the default at any time prior to his death. No action of the city or its council authorized the loan made by Blevins, and the city had no knowledge of the transaction until after his death. The First National Bank of New Castle was not even a designated depository of the city. The city, under the foregoing facts, refused to pay the plaintiff's claim, and in this action recovery is sought, not upon an express contract, as evidenced by the note, nor upon the certificates of indebtedness attached to it, but upon what it is contended is the implied obligation of the city arising out of the circumstances under which the money was credited to its financial agent. The position of the appellee, as stated by its counsel on the trial. was that the claim was not on the note or on the certificates attached, but for money advanced to the city which went into the city treasury, and therefore the city ought to pay it back on a claim for money had and received by it. In other words, the tracted, including any indorsement made or claim against the city was upon its implied

liability, and recovery was permitted on that receiving the benefit from the work done and theory.

The duties of Blevins as city treasurer were limited to receiving the moneys of the city and paying them out on warrants. He had no authority, by virtue of his office, to do anything else for it or in its name, and was powerless to make any promise on its behalf. An obligation signed by him as city treasurer could no more commit the city to its discharge than if signed by him as an in-This is not questioned. The attempt of the appellee is not to enforce any valid contract executed by Blevins on behalf of the city, but is to compel payment, on the ground of the implied liability incurred by the municipality under the undisputed evidence in the case. It has been truthfully said of the extent of the liability of a municipal corporation that "the authorities are a tangled web of contradictions, and it is difficult to assert any proposition with respect to the same for which adjudications on both sides may not be cited"; but we know of no case in which the doctrine of implied municipal liability was stretched to the limit to which the learned court below carried it in instructing the jury that the appellee could recover in this proceeding. The doctrine of such liability has been applied to cases of informal or irregular contracts entered into by a city, and from which it has obtained substantial benefits. See cases referred to in 28 Cyc. of Law & Pro. 668, 669. Argenti v. City of San Francisco, 16 Cal. 255, a leading case, and the one upon which the learned judge relied for his instructions to the jury, was a case of that kind. The plaintiff, by virtue of contracts entered into with an officer of the city of San Francisco, which contracts were executed by such officer in his official capacity, made valuable and permanent improvements to the city for the exclusive benefit of itself These improvements and its inhabitants. were made under the immediate supervision of an officer of the city, and, when completed, were approved of, and received by him on behalr of the city. In making the improvements the plaintiff relied on the validity of the contracts and the obligations of the city to pay as therein provided. The city authorities were fully informed of these facts, but took no steps to repudiate the contracts, or to inform the plaintiff as to its disposition not to pay. On the other hand, it had collected moneys to pay for the improvements. In making the contract for them certain legal requirements had not been complied with, and for that reason the city ultimately attempted to repudiate liability for the work done. This, of course, was not permitted. The city had knowledge of what was being done and had undertaken to contract for it. It was

receiving the benefit from the work done and had collected moneys to pay for the same. There was simply a want of compliance with legal requirements in making the contract.

In the recent case of Long v. Lemoyne Borough, 222 Pa. 311, 71 Atl. 211, in which the municipality attempted to evade the payment of money which it had borrowed, and intended to borrow, because the loan had not been contracted in strict conformity to legal requirements, we said, in holding that, while there was no valid, express contract upon which it could be held, it was impliedly liable for money had and received. The borough had intended to contract for the money. and could lawfully have contracted for it, and, having received and used it, was bound to pay. But this is not the situation here. If it were, the appellant would have to pay. The city of New Castle never intended to borrow the money from the appellee, and had no knowledge until after the death of Blevins that he had made the loan. As stated, he was unquestionably a defaulter at the time he applied to the bank for the money. Suppose at the time he borrowed the money he had done so for the purpose of settling with the city and turning over its funds in his hands to his successor in office, if the amount lent to him by the bank had been sufficient to make up his default, he would have been able to pay over to the city all of its moneys in his hands, and, in turn, would have received from it whatever security he had given for the faithful discharge of the duties of his office. After a settlement so made, can it be seriously contended that the city should subsequently be compelled to pay to the bank the money borrowed by its defaulting treasurer for the purpose of covering up his default, simply because the money borrowed by him had been placed to his credit as treasurer of the city, and paid over by him as a part of what he owed it? The mere suggestion of such a situation, possible at any time, it seems to us, is sufficient in itself to prevent recovery by the appellee. But even if he had not been a defaulter, a rule of public policy imperatively requires that, for the safety of municipalities, no one of its ministerial officers shall be permitted to impose liability upon it in the way Blevins is alleged to have done. It is because of the disastrous results that may come to municipalities if they are held impliedly liable for moneys borrowed by a municipal treasurer, without the knowledge, consent, or approval of the municipality, even if placed to his official credit, that a recovery cannot be permitted in this case.

The second, third, and fourth assignments of error are sustained, and the judgment is reversed.



(214 Pa. 374)

HUPPERT v. HUPPERT.

(Supreme Court of Pennsylvania. April 12, 1909.)

JUDGMENT (§ 68*)—JUDGMENT BY CONFESSION—OPENING.

A judgment, entered on a judgment note, will not be opened on defendant's allegation of fraud, which is not corroborated, and is denied on oath by plaintiff.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 123, 124; Dec. Dig. § 68.*]

Appeal from Court of Common Pleas, Schuylkill County.

Action by Annie P. Huppert against Charles Huppert. From an order discharging rule to open judgment, defendant appeals. Affirmed.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

W. F. Shepherd and L. D. Haughawout, for appellant. C. E. Berger, for appellee.

PER CURIAM. On June 12, 1899, the appellant executed and delivered to his wife a judgment note for \$1,294.66, which, on the following day, was entered in the court of common pleas of Schuylkill county. In 1908, after a sci. fa. had been issued to revive it, he presented his petition to the court below. asking that it be opened, on the ground that it had been fraudulently obtained from him, and had been executed and delivered to his wife without any consideration. To this an answer was filed by the appellee, now the divorced wife of the appellant, denying the allegation of the fraudulent procurement of the judgment, and averring that it had been given to secure to her moneys which she had received from the estates of her father and grandfather, and advanced to her husband, or in his behalf. In support of his petition to open the judgment the appellant was examined as a witness. His testimony was not corroborated by that of the only other witness called in support of the rule. The case as presented to the court below was practically appellant's oath against the oath of his former wife and the written instrument under seal, and the rule to open was properly discharged. Cloud v. Markle, 186 Pa. 614, 40 Atl. 811; Cruzan v. Hutchison, 210 Pa. 88, 59 Atl. 485.

Appeal dismissed at appellant's costs.

(224 Pa. 359)

HALLOCK et al. v. LEBANON CITY.

(Supreme Court of Pennsylvania. April 12, 1909.)

WATERS AND WATER COURSES (§ 200*)—PUB-LIC WATER SUPPLY—CONTRACT WITH CITY. Where a city contracted for a water supply, all tests to be made by the city engineer, but the report should be conclusive on both parties, the report by the engineer after a test made that there was neither a complete nor

substantial performance of the contract held a bar to a recovery of the contract price.

[Ed. Nots.—For other cases, see Waters and Water Courses, Dec. Dig. § 200.*]

Appeal from Court of Common Pleas, Lebanon County.

Action by L. G. Hallock and James Kinney, Jr., against Lebanon City. From an order refusing to take off a nonsuit, plaintiffs appeal. Affirmed.

At the trial the court entered compulsory nonsuits; Ehrgood, P. J., filing the following opinion:

"By agreement of the parties the aboveentitled two suits were tried as one and the motion to take off the nonsuit relates to the consolidated suit. The foundation of the suit is a written contract entered into between the plaintiffs and the defendant city, in which the plaintiffs, for a stipulated consideration, agree to furnish to the defendant city daily 1,000,000 gailons pure soft water from wells or springs other than those already owned by the said city. The plaintiffs sought to recover in this case, or in these two consolidated cases: First, upon entire performance of the contract; second, or upon substantial performance of the contract; or third, that the defendant city accepted part performance of the contract. After an extension of time of almost a year by the defendant city to plaintiffs to comply with and completely perform the contract, the city of Lebanon demanded a test to be made as to quantity, but the plaintiffs still wanted and were given more time and thereafter paid no attention to notices received as to tests. 'Under the specifications, a part of the contract, all the tests of the amount of pure soft water furnished by the said contractors were to be made by and entirely in charge of the city engineer of Lebanon, Pa., and his assistants, and the report of the said city engineer upon the same shall be final and conclusive and equally binding upon both the said contractors and the city of Lebanon.

"The report of the city engineer of the city of Lebanon as offered in evidence is as follows: 'Lebanon, Pa., February 5, 1900. To the Board of Water and Lighting Commissioners, Lebanon, Pa. Gentlemen:—In accordance with the request of yourselves the Special Water Committee of City Councils and the City Solicitor, I have carefully tested the rate of flow of the Hallock & Kinney wells at various times between December 6, 1899, and January 31, 1900, inclusive, and I would most respectfully make the following report; the various tests occupied in all nearly two weeks, and while making them, between 900 and 1000 weir measurements were taken. The greatest rate of flow for the Hallock & Kinney wells was obtained on December 7, 1899, when they gave at the rate of 825,100 gallons in 24 hours. The least

rate of flow for the Hallock & Kinney wells was obtained on December 14, 1899, when they gave at the rate of 506,000 gallons in 24 hours. The mean rate of flow for the Hallock & Kinney wells based upon dividing the sum of the rates of flow for the different days of testing, by the number of days of testing, amounts to the rate of 674,700 gallons in 24 hours. The average daily rate of flow for the Hallock & Kinney wells, based upon the assumption that there was a uniform increase or decrease (according to circumstances) in the rate of flow between any two consecutive tests, amounts to the rate of 648,163 gallons in 24 hours. Yours respectfully, George W. Hayes, City Engineer.' This report conclusively shows that there was neither a complete performance nor a substantial performance of the contract on the part of the plaintiffs. This report is binding on the plaintiffs as well as on the defendant.

"There was no evidence submitted by the plaintiffs from which the jury would have been justified in finding or inferring that there was an acceptance of the water supply plant of Hallock & Kinney; on the contrary, as soon as the report of the city engineer was received, which was on February 19, 1900, the water board immediately, on the same evening, reported to councils and the contract was then rescinded, and whatever use was made of said plant or any part of it prior was done in accordance with the provisions of the contract.

"We are of the opinion that the plaintiffs have failed to sustain any one of the three propositions for which they contended at the trial, and their motion ought not to be

"And now, June 23, 1908, the motion to take off nonsuit is refused."

Argued before BROWN, MESTREZAT, POTTER, ELKIN and STEWART, JJ.

Warren G. Light and Fred. Spriggs, for appellants. Walter C. Graeff, City Sol., and Gobin & McCurdy, for appellee.

PER CURIAM. The judgments in these cases are affirmed on the opinion of the court below refusing to take off the nonsuits.

(224 Pa. 233)

In re LEVI'S ESTATE. (Supreme Court of Pennsylvania. March 29, 1909.)

1. EXECUTORS AND ADMINISTRATORS (§ 93*)-CARRYING ON BUSINESS OF TESTATOR CLAIMS OF CREDITORS.

Testator directed that his sons should continue his business after the death of his wife, and one of his sons, who was sole executor, car-

claims of creditors based on transactions with the executor while continuing the business.

[Ed. Note.-For other cases, see Executors and Administrators, Cent. Dig. §§ 407, 408; Dec. Dig. § 93.*]

2. EXECUTORS AND ADMINISTRATORS (§ 207*)—CLAIMS AGAINST ESTATE—EVIDENCE.

A married woman borrowed money on a mortgage on her personal property, and it was used in the business of her husband. After his death, the mortgage was paid out of money re-ceived from an insurance policy on the dece-dent's life in the widow's favor. Held, that the dent's life in the widow's favor. Held, that the widow was entitled to recover the amount of the loan from her husband's estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 734; Dec. Dig. § 207.*]

Appeal from Orphans' Court, Lycoming County.

In the matter of the estate of Michael Levi. From an order dismissing exceptions to auditor's report, David Levi and Her-mine Levi appeal. Appeal of David Levi dismissed, and decree as to him affirmed, and assignment of error on appeal of Hermine Levi sustained in part, and decree affirmed as modified.

Michael Levi died on April 9, 1906, leaving a will by which he provided, inter alia, as follows: "Item. It is my wish and I direct that after my death, or if my beloved wife, Hermine Levi, shall be living at that time, then after her decease, my sons, Morris C. and David L., shall continue the clothing business which I am now engaged in, until all my living daughters are married, during which time, and for which purpose, my said sons shall have the use of the money, which I shall have in the bank to my credit at my decease, and during which time the profits of said business shall be disposed of as follows, to wit." He appointed his son David to be the sole executor of his will. David as executor carried on the business of the testator, and his mother and brothers and sisters acquiesced in this course, and the widow received her living expenses out of the proceeds of the business. At the audit various creditors presented claims based on transactions with the executor while conducting the business after the father's death. claims were allowed by the auditor. testator's wife, Hermine Levi, claimed the sum of \$6,000 which she claimed she had loaned to her husband during his lifetime. This claim was disallowed by the auditor. David Levi as executor and Hermine, the widow. filed exceptions to the auditor's report. All of the exceptions were dismissed, Hart, P. J., filing the following opinion:

"The findings and conclusions of the auditor as to the construction of the will of Michael Levi, deceased, relative to the duty ried on the business with the acquiescence of the widow and testator's children, his legatees. The widow received her living expenses from the profits of the business. Held, that neither she nor the children could object to payment of thority contained in the will to conduct the

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

business of the decedent during the lifetime ducting of the business as carried on by the of the widow of the decedent, the ascertainment of the value of the personal estate of the decedent and the valuation placed thereon, the distribution to the creditors of the decedent, and the rejection of the claim of Hermine Levi seem to us to be sustained by the evidence and warranted under the law. The only part of the auditor's findings and conclusions about which we have doubt is that part relating to the distribution to the creditors whose claims against the estate were contracted for goods furnished in carrying on the clothing business, as formerly conducted by the decedent, by the executor, after his decease. By the terms of the will, any surplus over and above the amount required to pay the debts of the decedent would belong to the widow of the decedent during the period of her natural life, with remainder to the children of the testator named. A diversion of this fund, or balance left after the payment of debts, could only be justified on the ground that the widow and legatees in remainder had done some act or thing that would estop her and them from denying the right of such creditors to participate in the distribution of such balance, and make it inequitable and unjust to such creditors not to allow them to participate in this distribution.

"The counsel for the accountant and for the widow of the decedent in his written argument to the court says: "The executor openly and notoriously proceeded to carry on the business of the decedent. To this the widow of Michael Levi made no objection, nor did any of her children or legatees, nor did any of his creditors.' And again he says: "The widow, the children, and legatees of the testator and all the creditors of the testator must either have interpreted the will of Michael Levi in the same way that his executor interpreted it, namely, as authorizing him to carry on the business, or assented to carrying on of this business as the best way of settling this estate.' It also appears that during the period of time these credits were given and debts contracted the widow was receiving her living expenses from the proceeds of the business being carried on. Now, this being the situation as disclosed and contended for by the widow's counsel, it would seem to us as though she cannot be heard now to deny to the creditor his claim, who was led to give credit on the belief that the business was being so conducted as to give him a lawful claim against the estate of the decedent. Whilst this cannot affect the creditors whose claims are based on contract with the decedent in his lifetime, and whose rights to participate in this distribution and to be paid the full amount of their claim could only be waived by express agreement based upon a valid consideration, the widow and legatees stand in a different relation to the estate; and being participants in the con-

executor after the death of the testator, and admittedly assenting to the conducting of the same and in obtaining the credit on which these claims are based, it does not seem unjust or inequitable that their claim as widow and legatees should give way to that of creditors whose claims have been contracted on the faith of what they now and what they have always claimed to be the right of such creditor to look to the funds and property of the estate of the decedent for their pay.

"This being so, the auditor's distribution to such creditors seems to us justifiable and equitable.

"And now, January 5, 1909, the exceptions to the auditor's report are overruled, and the report is confirmed absolutely."

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Max L. Mitchell, for appellants. T. Ames, A. R. Jackson, Candor & Munson, and Thos. H. Hammond, for appellees.

MESTREZAT, J. We agree with the auditor and the court below in their construction of the will of Michael Levi, deceased, and are of opinion that David Levi, the executor, has no just cause of complaint against the decree of the court below. We think there was ample evidence to sustain the auditor's findings of fact except as to part of Mrs. Levi's claim, and, his report having been confirmed by the court, we will not disturb it save in this one respect. We do not agree with the auditor and court below in the disallowance of Hermine Levi's claim of \$6,000. We are aware that claims of this character must be sustained by a higher degree or quality of proof than is required of a stranger. She must establish her claim, not simply by the weight of the evidence, but by proof that is clear and satisfactory. The opportunities for fraudulent collusion between husband and wife are so great, and the difficulty of defeating it by opposing proof imposes so great a burden, that the protection of creditors in such cases requires a much higher standard of proof than in ordinary cases. As said in Earl v. Champion, 65 Pa. 191, 195: "The family relation is such and the probabilities of ownership so great on the part of the husband that a plain and satisfactory case should be made out before the wife can be permitted to hold property against honest creditors." We think Mrs. Levi brought herself within the most stringent rule applicable in such cases, and sustained her claim of \$6,000 by proof that was both clear and satisfactory. In fact, it is not clear how under the circumstances she could have proved her claim by a higher degree of proof, except the whole transaction had been in writing. Her claim was for money secured from Snellenburg on a mortgage of her real estate in Williamsport and loaned

to her husband. David Levi, her son, testified that the money was raised on the mortgage of her separate property, and that it went into her husband's business. He was the manager of his father's business, and therefore had an opportunity to know about the facts of which he testified. He further testified that the mortgage was paid by Mrs. Levi after her husband's death out of money which she received from a life insurance policy carried by Levi in her favor. The testimony of David Levi was not impeached by any witness, nor by any fact except his relationship to the interested parties. His testimony was corroborated by the production of the bond and mortgage, a letter of Snellenburg acknowledging the receipt of the money from Mrs. Levi, and the record satisfaction of the mortgage after Levi's death. There was nothing, save the relationship of the parties, to discredit any part of this testimony. Every opportunity was given the appellees to cross-examine David Levi and to produce testimony to defeat the claim of Mrs. Levi, and to discredit the proof introduced in its support. The mortgage records of Lycoming county, the life insurance company, and the testimony of Snellenburg were all available to the appellees as evidence if they desired to impeach the claimant's testimony. If David Levi was testifying falsely as to the insurance policy and the money received on it, or as to the mortgage transaction, the sources of information were open to the appellees by which they could have easily discovered the fact. It was quite natural for David Levi to act for his mother in all these transactions, and the fact is not in itself sufficient to discredit his testimony, especially as he gave the data which enabled the appellees to verify the truth or falsity of his testimony. He gave a detailed statement as to the loan by Snellenburg, how it was secured, and how it was paid in addition to the written evidence sustaining the claim. Mrs. Levi cannot testify, her lips are sealed, and the testimony in the case shows that David Levi knew for whom and for what purpose the money was borrowed from Snellenburg. Acting as the agent of his mother. he also knew about the life policy, the receipt of the money on it, and the payment of the Snellenburg mortgage. As we have said, the evidence in support of Mrs. Levi's claim is not contradicted by either parol or record evidence. It shows the loan to Levi, and it also shows that the source from which Mrs. Levi obtained the money to make the loan was not her husband nor her husband's estate. It is not material whether she owned the real estate upon which the mortgage was placed in view of the fact that the mortgage was satisfied out of Mrs. Levi's own funds, the money she received on the life policy of her husband. The two material questions in the case are whether there was

a loan by Mrs. Levi to her husband, and whether the loan was made by her from money other than that received from her husband. The uncontradicted evidence in the case answers both questions in the affirmative.

The appeal of David Levi, executor, at No. 30, January, term, 1909, is dismissed, and the decree as to him is affirmed. In the appeal of Hermine Levi at No. 29, January term, 1909, the second assignment of error is sustained as to the claim of \$6,000, which is directed to be allowed, and, with this modification, the decree is affirmed.

(224 Pa. 298)

NOBLE v. POLICE BENEFICIARY ASS'N. (Supreme Court of Pennsylvania. April 12, 1909.)

 Insurance (§ 783*)—Benefit Insurance— Rights of Beneficiart.

A beneficiary in a benefit certificate has, during the lifetime of the member, merely an expectancy, which does not become a vested right until death of assured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1949; Dec. Dig. § 783.*]

2. INSURANCE (§ 782*)—BENEFIT INSURANCE—CHANGE OF BENEFICIARY.

A member of a benefit association named

A member of a benefit association named his sister as beneficiary. On marrying he surrendered the certificate, and obtained a new certificate, wherein the wife was named as beneficiary. Held that, on the member's death, his wife had sole interest in the proceeds of the certificate, though a by-law of the association provided that the certificate should be transferred only on the consent of the beneficiary, and the sister did not in fact consent; the insured having retained the certificate in his possession during his lifetime.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1948; Dec. Dig. § 782.*]

3. Insurance (§ 781*)—Benefit Insurance—Transfer of Certificates.

A benefit association may waive its bylaws as to transfers of the benefit certificate, without any person having a right to complain thereof.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 781.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Annie M. Noble against the Police Beneficiary Association. From a decree distributing fund paid into court, Margery E. Dittmer, intervening claimant, appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

James Collins Jones, for appellant. Joseph P. Gaffney and Thomas F. McNichol, for appellee.

BROWN, J. This contest is over the proceeds of a beneficial certificate issued by the Police Beneficiary Association, of the city of Philadelphia, to James Noble, one of its members. On April 20, 1907, it issued a

certificate to him, in which Margery E. Dittmer, his sister, was named as the beneficiary. He retained this certificate in his possession until December 23, 1907, when he surrendered it to the association, and, on his application for another in lieu of it, the one under which the appellee, his widow claims was issued to him. In this she is named as the beneficiary. He died January 22, 1908, and suits were brought against the association by his widow and sister, each claiming the fund. The association was ready to pay it to the one entitled to receive it, and, disclaiming all interest in it, leave was granted to pay it into court. There being no disputed facts, a rule to show cause why it should not be paid to Annie M. Noble, the widow, was made absolute. From this the sister has appealed, her ground of complaint being that the certificate naming the wife as the beneficiary was invalid as against the one in which she had been named as beneficiary, because issued in violation of a provision of a by-law of the association that "a member may transfer his certificate heretofore issued either to his wife, child or children, heirs at law, parent or parents, affianced wife, or the person or persons dependent upon the member, consent in writing, however, to be first had of all the living beneficiaries named therein, excepting, however, that when a certificate has been made payable to a member's parent or parents, and such member subsequently marries, the member can substitute the name of his wife, and this without the consent of the parent or parents named in the certificate, and excepting also, however, as hereinafter provided."

A beneficiary named in a certificate or policy issued by a beneficial association acquires no vested interest in it, nor a right to anything, during the lifetime of the member to whom it is issued, but merely an expectancy, which does not become a vested or absolute right to the proceeds of the certificate or policy until the death of the assured. Fischer, to Use. v. American Legion of Honor, 168 Pa. 279, 31 Atl. 1089; Brown v. Ancient Order of United Workmen, 208 Pa. 101, 57 Atl. 176; Supreme Conclave, Royal Adelphia, v. Cappella et al. (C. C.) 41 Fed. 1. In this latter case it was said by Brown, Circuit Justice: "In case of an ordinary policy the right of the person for whose benefit a policy is issued cannot be defeated by the separate or joint acts of the assured and the company, without the consent of the beneficiary (Bliss, Ins. § 318), while it is entirely well settled that in cases of this description the beneficiary has no vested interest in the benefit certificate until the death of the insured member." During the lifetime of a member of a beneficial association to whom a beneficial certificate is issued the beneficiary named in it is a mere volunteer, having no contractual relations either with the association or the assured. The contract is between the association and its member alone. The first contract between Noble and the Police Beneficiary Association was for the payment to Margery E. Dittmer, upon his death, of the amount of the assessments collected from the members, provided that at the time of his death he should be a member in good standing, and she continued to be his designated beneficiary. He might at any time have allowed the first certificate to become null and void by neglecting to pay assessments levied upon it. This is one of the conditions of the certificate issued to him; and, if he had allowed it to lapse, the sister would have had no ground of complaint, either against him or the association. He did not "transfer" the certificate to another without the consent of the beneficiary named in it, to whom it had not been delivered, but, still having possession of it, surrendered it to the association. He then made application for a new certificate, and a new contract was entered into between him and the association, in pursuance of which the certificate was issued to him, naming his wife as the beneficiary. Of this the sister could not have complained, for she had no vested right under the certificate which was surrendered. Even if the issuing of the second certificate is to be regarded as a violation of the by-laws of the association, it would be estopped from questioning the regularity of that certificate, for, by issuing it, it waived all provisions in the by-laws as to transfers. If those by-laws were not complied with, can this appellant raise any question as to their violation? As stated, the certificate was never delivered to her, and, before the time that she had acquired any rights under it, it was returned to the association. If the second one was issued in disregard of the by-laws of the association, that disregard prejudiced no rights of the appellant, for she had no rights at that time. The by-laws were made solely for the convenience and protection of the association. Regulations concerning the method of changing beneficiaries are adopted for the protection of the society, and if it has, by waiver or estoppel, lost the right to object to a change in the name of the beneficiary, no one else may raise that objection; and, if a change of beneficiaries has actually been consummated and acted on by the society in the member's lifetime, the original beneficiary has no standing to attack the change, because not made in compliance with the regulations of the society. See cases cited in 29 Cyc. p. 135.

In our state, in the recent case of Pennsylvania Railroad Company v. Wolfe, 203 Pa. 269, 52 Atl. 247, we held that such rules are for the protection of the association, and if it waives its rights, or does not claim them under such rules, no one else can take its place. Among other cases there cited and approved is Titsworth v. Titsworth, 40 Kan. 571, 20 Pac. 213, in which the association waived a provision that no change of a beneficiary should be valid, or have any binding

force or effect, unless made in accordance with certain requirements in the constitution of the grand lodge. The new beneficial certificate, issued in disregard of the constitutional requirements, was upheld in a controversy with the first-named beneficiary over the proceeds of the certificate, the court saying: "In the determination of the various questions arising in this case, it must be constantly borne in mind that the Ancient Order of United Workmen, the association that issued the benefit certificate, is no longer a party, and is not taking any part in the litigation. It has paid the money into court, and has been released from all obligation respecting it. This payment, however, is an admission on its part that the benefit certificate was rightfully issued, and hence all contention as to whether its rules and regulations respecting these matters had been complied with is out of the case, and is entirely disposed of. We mean by this to assert that when the association issues a certificate, or changes the beneficiary, all questions as to whether it is done or not in accordance with their rules and regulations are concluded."

The appellant having no right or interest of any kind which the association was bound to regard at the time it accepted from Noble the first policy issued to him and issued the second, the order of the court below is affirmed.

(224 Pa. 375)

MAHANOY CITY, S., G. & A. ST. RY. CO. et al. v. ASHLAND BOROUGH et al.

(Supreme Court of Pennsylvania. April 12, 1909.)

STREET RAILBOADS (§ 57*)—PAVING STREETS—RIGHTS OF STREET CAR COMPANIES — INJUNCTION.

Equity will not enjoin a municipality, at the suit of a street railway company, from paving a street in a particular way for the better accommodation of the public, though the paving will increase the difficulty of operating the street cars when weather conditions are bad.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 57.*]

Appeal from Court of Common Pleas, Schuylkill County.

Bill by the Mahanoy City, Shenandoah, Girardville & Ashiand Street Railway Company and another against Ashland Borough and others. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

The conclusion of law referred to in the opinion of the Supreme Court was as follows: "That the defendant borough's control over and right to improve its streets by paving is above any privilege plaintiff company may have under its ordinance, and that, the proposed paving being for the benefit and advantage of the said community and traveling public, it cannot be restrained by plaintiff."

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

R. H. Koch and F. J. Laubenstein, for appellants. M. M. Burke and W. C. Devitt, for appellees.

PER CURIAM. Counsel for appellants fairly criticise the statement in the opinion of the court below that it is not alleged in the bill nor contended by complainants that the proposed paving of Centre street up to the rails of the Mahanoy City, Shenandoah, Girardville & Ashland Street Railway Company will render it impossible to operate its cars upon the said street. There is an averment in the eighth paragraph of the bill that by the paving of the street up to the tracks the right of the company to operate cars will be unlawfully interfered with and frequently entirely prevented; and one of the requests for a finding of fact was that paving the street with vitrified brick against or near the rails of the track will increase the danger of operating the cars, and is likely to render such operation wholly impossible when weather conditions are bad, on account of the slipping of the wheels. The court, however, refused to find as so requested. On the contrary, it found that, while the paving of the streets will increase the difficulty of operating the cars when weather conditions are bad, the operation of the cars will not be rendered wholly impossible. A fact found at the request of the defendants was that the paving of the street is a municipal improvement and betterment, intended for the better and modern accommodation of the traveling public.

On the first conclusion of law, found at the request of the appellees, the decree is affirmed, and the appeal dismissed, at appellants' cost.

(224 Pa. 811)

WESLEY v. SULZER.

(Supreme Court of Penusylvania, April 12, 1909.)

1. Deeds (§ 171*)—RESTRICTIONS AS TO USE— CONSTRUCTION—BUILDINGS. Where a restriction in a deed forbids the

Where a restriction in a deed forbids the erection of a building over nine feet in height "on the rear end" of certain ground described, the owner of the land will be enjoined from erecting a brick factory five stories high occupying the entire space of the lot in question

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 537-542; Dec. Dig. § 171.*]

2. Deeds (§ 171*)—Restrictions as to Use— Construction—Buildings.

Where a restriction in a deed forbids the erection of a building more than nine feet high "on the rear end of the lot," though the words are indefinite as to what constitutes the rear end of a lot, the grantee will be enjoined when he admits that he proposes to erect a five-story building on the entire lot.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 537-542; Dec. Dig. § 171.*]

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Court of Common Pleas, Philadelphia County.

Bill by John S. Wesley against Gustavus W. F. Sulzer. From a decree dismissing the bill, plaintiff appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

Charles S. Wesley, for appellant. John G. Johnson and James Wilson Bayard, for appellee.

BROWN, J. In 1829 Frederick and Charles Graff were the owners of a piece of land situated on the west side of North Eleventh street, in the city of Philadelphia, extending from a point 121 feet south of Vine street southwardly 218 feet, and thence westwardly 183 feet to Madison street, bounded on the north by Graff, now Winter, street, and on the south by Branch alley. On this lot of ground there had been laid out, parallel to Eleventh street, 96 feet westwardly from it, an alley 20 feet wide, called Brigg street, now known as Jessup street. Rows of residences were erected on Madison street and Eleventh street. The Graffs conveyed their land to various parties, subjecting each lot sold to certain restrictions in favor of the remaining lots on Madison street and Eleventh street. These restrictions were substantially the same in each grant. That portion of the Graff land facing on Eleventh street is now composed of premises Nos. 232 to 254, inclusive. On May 1, 1829, by a deed duly executed and recorded, the Graffs conveyed to Eli B. Fourestier, the appellant's predecessor in title, the premises No. 232 North Eleventh street. In the conveyance it was "understood, conditioned, and agreed to by and between the parties" that the said grantee, "his heirs and assigns, shall and will not at any time hereafter erect or build or permit or suffer to be erected or built on the rear end of the lot of ground above described and granted any building or part of a building exceeding nine feet in height, and also that they, the said Frederick Graff and Charles Graff, and their respective heirs and assigns, shall not nor will not at any time hereafter erect or build or permit or suffer to be erected or built on the rear end of their remaining lots of ground on Eleventh street or on the rear ends of their several lots of ground on the east side of the said Madison avenue any building or part of a building exceeding nine feet in height as aforesaid." The appellant acquired title to his property by deed dated November 13, 1897. In 1829 and 1831 the Graffs conveyed to the appellee's predecessors in title premises Nos. 252 and 254 North Eleventh street, the conveyances containing the same restriction as to the erection of any building or part of a building on the rear end of the lots exceeding nine feet in height and cove-

would not at any time erect or build, or permit or suffer to be erected or built, on the rear end of the remaining lots owned by them any building or part of a building exceeding nine feet in height. The appellee acquired his titlé by deed dated July 17, 1906. Under condemnation proceedings all of the lots of ground fronting on Madison street, together with the buildings erected thereon, have become the property of the Philadelphia & Reading Terminal Railroad Company, and there has been erected thereon a solid elevated structure for the support of its railroad. That portion of the premises formerly owned by the Graffs fronting on Madison street is therefore not to be taken into consideration in determining the rights of the appellant. On March 28, 1908, this bill was filed, averring that the appellee, the owner of premises Nos. 252 and 254 North Eleventh street, was about to erect a fivestoried brick factory for the manufacture of gas and electric fixtures, the said building to cover tue entire lots now owned by him, and an injunction was prayed for to restrain such erection as being in violation of the building restrictions in the conveyances from the Graffs. Under the undisputed facts of the case, the court below refused the injunction and dismissed the bill, mainly on the ground of the indefiniteness of the restriction, saying as to this: "There is nothing in the restriction indicating or in any way defining what is meant by the 'rear end' of the several lots. Is the 'rear end' 1 foot, or 20 feet, or 50 feet in depth from the alley? Is the 'rear end' of any different depth on the Madison street houses where the lots are only 67 feet in depth? There is nothing in the terms of the restrictions which will enable a chancellor to declare to what point a building more than 9 feet in height can be extended."

Other reasons given for dismissing the bill are that for more than 21 years on some of the lots north of complainant's premises back buildings have stood of a greater height than 9 feet, extending to from 10 to 25 feet from the rear end of the lots; that, when the complainant bought in 1897, he was bound to take notice of the existence of these back buildings which might be in violation of the restrictions; that his premises are more than 150 feet away from respondent's, and he has not shown he will suffer any special damages by reason of the erection of any building on respondent's premises; that the neighborhood is entirely changed, and, from being one of residences for which abundance of light and air were of importance, it has become a business one, where use of all the ground for business purposes is the most beneficial use to which the premises of the several owners can be put. But these reasons are not to avail the appellee if what he now proposes to do is an unequivocal violation of a building restriction placed upon his nants on the part of the grantors that they premises for the benefit of every lot owner south of him, who, with him, traces title to i negligence in falling to protect himself by the

Whether the words "the rear end of the lot" are too vague and indefinite to restrain the erection of a building some feet distant from the western line of appellee's premises is not the question now before us. We are not now to determine what is embraced in the rear end of the appellee's lots, or upon what parts of them he may put up buildings of a greater height than nine feet. What he admits that he proposes to do is to erect a brick factory, five stories high, for the manufacture of gas and electric fixtures, which shall occupy the entire space of the lots now owned by him, 38 feet on Eleventh street, 38 feet on Brigg street, and 96 feet in depth on Graff street. That this is a violation of the building restriction placed upon his premises, and of the covenants of his grantors, cannot be questioned. When he builds up to and on the western or rear line of his lots, he is clearly doing that which is forbidden in his title, and in the face of what he would do the words "rear end of the lot" are not indefinite. The complainant's property is still a residence, occupied by a tenant, for the benefit of which the building restriction was placed on each lot sold by the Graffs, and it is not to be utterly disregarded by the appellee without the consent of the appellant.

The decree of the court below is reversed. the bill is reinstated, and it is now ordered, adjudged, and decreed that the appellee be perpetually restrained from erecting the building described in the fifth paragraph of appellant's bill, the costs below and on this appeal to be paid by the appellee.

(224 Pa. 328)

GRIESEMER V. SUBURBAN ELECTRIC CO.

(Supreme Court of Pennsylvania. 1909.) April 12,

1. Trial (§ 262*) — Instructions — Inconsistent Requests.

Where defendant asked for a binding instruction because of failure of evidence of any negligence which was the proximate cause of the injury, and the only instruction on this subject asked for was by a point for a charge involving also the question of contributory negligence, and it could not have been affirmed without passing on the latter question they were out passing on the latter question, there was no error in refusing the point.

[Ed. Note.—For other cases, see Trial, Dec. Dig. \$ 262.*]

2. Master and Servant (§ 246*)—Injury to Servant — Contributory Negligence — ACTS IN EMERGENCIES.

A master employed by a street railway company to erect trolley poles on a public highway worked under an electric light company's wires whose insulation had worn off. One of the trolley poles was accidentally brought in contact with the wire, and, without time for reflection, plaintiff's intestate put his arm around the pole to lower it, and was killed. *Held*, that he cannot be charged with contributory

use of rubber gloves which had been furnished

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \$\$ 789-794; Dec. Dig. \$

Appeal from Court of Common Pleas. Philadelphia County.

Action by Sophia Griesemer against the Suburban Electric Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Defendant presented these points:

"(2) The uncontradicted evidence is that the plaintiff's husband had been provided with rubber gloves for the purpose of protecting himself against injury from an electric shock, and that he failed to protect himself at the time of the accident by the use of these rubber gloves. His own negligence, therefore, contributed to the accident, and your verdict must be for the defendant. Answer: To which I answer that, if you find that the use of these rubber gloves would have been protective under the circumstances, the point should be affirmed.

"(3) The proximate cause of the death of the plaintiff's husband was his use of an unusual and unsafe method of erecting the trolley pole, and his failure to observe precautions that would have protected him from injury. The defendant was not bound to anticipate that its wires might be disturbed in this manner, and your verdict must be for the defendant. Answer: In answer to points I am under the law obliged merely to affirm or deny them without more, and, as I cannot affirm this, I decline to charge it."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

R. Stuart Smith and Charles E. Morgan, for appellant. J. Edgar Butler and Charles F. Warwick, for appellee.

FELL, J. The plaintiff's husband was the foreman of a gang of men employed by a street railway company to erect iron poles to support trolley wires. At the time of the accident that caused his death he was superintending the erection of poles at the side of a street directly under the electric light wires of the defendant, the Suburban Electric Company, which were 30 feet above the sidewalk. In erecting a pole a rope sling was placed near its middle, and it was raised by means of a block and tackle attached to a tower wagon. and the lower end, which was kept near the ground, was guided to the hole in which it was to be placed. The sling had been put too near the bottom of a pole, and, when the pole was raised, it did not have the right inclination: the lower end being too high. The deceased and one of his assistants put their arms around this end to lower it by their own weight. This brought the top of the pole in contact with the defendant's

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

wires, and it became charged with the electric current. There was testimony on behalf of the plaintiff that tended to show that the insulation of the wire had become defective by long-continued exposure and use, and that the defects were so apparent as to charge the defendant with constructive notice of them. And there was testimony from which the jury might have found that the death of the plaintiff's husband was caused by his negligence in not insulating the top of the pole by fastening around it a nonconducting material and in not protecting himself by the use of rubber gloves, with which he was provided by his employer and which he had taken off a few minutes before the accident.

Whether the defendant was entitled to binding instructions in its favor because of the failure of proof of any negligence on its part that was the proximate cause of the accident is a question not raised by the record of the trial. The only instruction asked for on this subject was by a point for charge, which invoived also the question of contributory negligence. It could not have been affirmed, nor could judgment have been entered non obstante veredicto without passing on the latter question. This could not have been done in the absence of proofs so certain and direct that the court could have said that the facts alleged were established beyond doubt. The plaintiff's case as made out did not show contributory negligence. The defendant's proofs as to it depended on the credibility of its witnesses and the conclusions to be drawn from their testimony. If the deceased had been working with or among highly charged electric wires without the use of gloves, negligence could have been imputed to him. But he was working on a public highway 30 feet under the wires with which the pole was accidently brought in contact, and he was called upon to act in an emergency suddenly arising without time for reflection.

The judgment is affirmed.

(224 Pa. 212)

SAMUEL HANO CO. v. HANO et al. (Supreme Court of Pennsylvania. March 29, 1909.)

TRUSTS (§ 156*)—EXECU LIABILITY OF TRUSTEES. -Executors as Trusters

Testator left his estate, including stock in a foreign corporation, to his executors in trust. The executors filed their account, and a decree was rendered awarding the stock to them as trustees. The court of the state in which the corporation was organized thereafter levied an assessment against the executors, Held no ground for judgment in the state against the

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 158.*]

2. EXECUTORS AND ADMINISTRATORS (§ 518*)— DISTRIBUTION—LIABILITY FOR DEBTS OF HS-

Where, on settlement of an executor's ac-

the decree awarding the stock cannot be impeached collaterally, and while it stands the stock in the hands of the trustees is discharged from liability for any indebtedness of the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 518.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by the Samuel Hano Company against Aaron R. Hano and others, trustees under the will of Louis Hano. From an order discharging rule for judgment for want of a sufficient affidavit of defense, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Stevens Heckscher, for appellant. John G. Johnson and Furth & Singer, for appellees.

STEWART, J. By a decree of a New Hampshire court made January 8, 1906, an assessment was levied upon the shares of stock of an insolvent corporation of that state for the payment of the debts of the corporation. One Louis Hano, a citizen of this state, was, at the time of his death, December 14, 1897, the owner of 5,100 shares. These shares were included in the general assessment, and were assessed as held by "Aaron R. Hano, Rachel Hano, and Samuel Cohen, executors of the will of Louis Hano, of Philadelphia, Pa." The amount of this particular assessment was \$10,200, and the present action was brought by the receiver of the corporation, in the name of the corporation, against these defendants for its recovery. If the action were for the recovery of an assessment made against these defendants, or if it were against the legal representatives of the estate of Louis Hano, deceased, the several very interesting questions involving the regularity and enforcibility within this jurisdiction of the foreign decree sued on, and which were so ably discussed on the argument, would necessarily be for our consideration and determination; but we face neither of these conditions. The assessment was not made against the defendants, nor are they brought into court as the executors of the will of Louis Hano, but as "trustees under the will of Louis Hano, deceased." The plaintiffs would derive liability on their part as trustees from the following facts which are recited in the third paragraph of the statement of claim filed: 'At the time of his death, said Louis Hano was the owner of five thousand one hundred (5,100) shares of stock of said Samuel Hano Company, and by his last will and testament, dated August 19, 1897, and a codicil thereto dated November 12, 1897, and recorded in the office of the register of wills of Philadelphia county, in Will Book 196, pp. 569, etc., bequeathed and devised all count, shares of stock are awarded to trustees, his property, including the aforesaid stock,

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to his executors, Aaron R. Hano, Rachel no significance. When they settled their ac-Hano, and Samuel Cohen, in trust for the uses and purposes declared in his said will and codicil. Said will and codicil were duly probated before the register of wills of Philadelphia county, state of Pennsylvania, and the said Aaron R. Hano, Rachel Hano, and Samuel Cohen duly qualified as executors of the estate of said Louis Hano, deceased. Said executors duly filed their account, and by an adjudication of the orphans' court of Philadelphia county, state of Pennsylvania, dated March 17, 1899, in said estate of Louis Hano, deceased, No. 559, October term, 1897, all of the aforesaid shares of stock were awarded to the accountants, the said Aaron R. Hano, Rachel Hano, and Samuel Cohen. as trustees (the defendants herein), for the further uses and trusts declared in said will. Said stock continued to be held by defendants as trustees up to the time of and subsequent to the levying of the assessment of \$2 per share aforesaid and is still held by said trustees."

Had the decree of the New Hampshire court ordering the levy of an assessment been directed against the defendants as trustees owning or holding the stock, the facts above stated would be pertinent, and quite sufficient, other things being equal, to impose liability on the estate in their hands; but the decree established an indebtedness of Hano, and involved his estate only. The defendants, as trustees, stand in no relation, at least no representative relation, to the estate of Hano. The funds they hold, and which they are answerable for, were, it is true, derived from the estate of Hano; but they ceased to be any part of that estate when they were awarded to and received by the defendants under a decree of distribution in the adjudication of the account of the executors. If for any reason they can yet be made answerable for any unsatisfied indebtedness of the estate of Hano, it is quite certain that no such recovery can be reached through a common-law action brought by the creditor against the trustees. Yet this would be the result were the present action to be sustained. The debt here sought to be recovered is the debt of Hano fixed and established by the decree against the estate. Even conceding that there may be equitable reasons why the estate in the hands of these trustees should be held liable for its payment, these can only avail as they are asserted in a proceeding for a review of the adjudication under which the trustees held. So long as the decree upon that adjudication stands, it may not be impeached collaterally or circumvented, and these defendants will continue to hold the funds awarded them thereunder discharged of liability for any indebtedness of the estate of Louis Hano. The fact that the individual trustees were

count as executors, their functions as executors ceased so far as concerned the estate accounted for and distributed. Thereafter they continued to act as trustees, not by reason of the fact that they had been executors, but by virtue of the appointment contained in the will. The learned judge of the court below in his opinion dismissing the motion for judgment for want of sufficient affidavit of defense states the case in a paragraph: "Here then," he says, "is an action in which it is attempted to recover money from certain persons acting in one capacity on the basis of the decree of a court in another state which require those parties to pay it in an entirely different capacity. We are clear that the decree of the New Hampshire court against the defendants as the executors of Louis Hano affords no ground for the entry of a judgment against them as trustees under Louis Hano's will." In this conclusion we concur.

Appeal dismissed, at costs of appellant.

(224 Pa. 267)

GILLMAN v. MEDIA, M., A. & C. ELEC-TRIC RY. CO.

(Supreme Court of Pennsylvania. March 29, 1909.)

1. Evidence (§ 550*)-Opinion Evidence. Where the facts are admitted or established by the evidence, an expert may be asked his opinion on such facts.

[Ed. Note.—For other cases, see Cent. Dig. § 2366; Dec. Dig. § 550.*]

2. Evidence (§ 553*)—Opinion Evidence. A party may state specifically the par-ticular facts which he claims to have been shown by the evidence and ask the opinion of the expert on such facts, assuming them to be true.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2369-2374; Dec. Dig. § 553.*]

3. CONTINUANCE (§ 7°)-ABSENCE OF WITness.

Refusal to continue a case for absence of a witness, where there is no proof that he has been subpoenaed, nor offer to show what he would testify to, and the evidence would be simply cumulative, is not an abuse of discretion.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 17, 18; Dec. Dig. § 7.*]

Appeal from Court of Common Pleas, Delaware County.

Action by Bertha Gillman against the Media, Middletown, Aston & Chester Electric Railway Company. Judgment for plaintiff. and defendant appeals. Affirmed.

Trespass to recover damages for personal injuries.

At the trial, when Dr. Paxson was on the stand, he was asked the following question: "Q. If Bertha Gillman, prior to June 9, 1906, was in good physical health, and on that day received an injury on a trolley car which fractured her coccyx, and has since that time executors of the will as well is a matter of been operated upon for that fracture, and is

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in poor physical health now, and has been the case. The Court: I take it for granted since that time, might, in your judgment, that injury cause her present poor physical health? Mr. Howell: I object to that question. I presume it is intended to be a hypothetical question. It does not state all of the facts of the case, and I think it is improper. The Court: I do not think a hypothetical question must necessarily state all of the conditions. There may be thousands of conditions not stated. Mr. Howell: Yes, sir; that is the point, and to ask whether, applying it to this woman, a certain thing itself were anything else, when there are other complications admitted, it permits the drawing of a wrong inference. The Court: What other complications? Mr. Howell: Dysmenorrhea, painful menstruation, previous history of an operation, and the removal of ovaries. The Court: State your proposition again. Question read as follows: Q. If Bertha Gillman, prior to June 9, 1906, was in good physical health, and on that day received an injury on a trolley car which fractured her coccyx, and has since that time been operated upon for that fracture, and is in poor physical health now, and has been since that time, might, in your judgment, that injury cause her present poor physical health? A. Yes, sir. The Court: I think you had better add to that, there being no other physical conditions excepting those mentioned, because that excludes everything else, you see. Mr. Fronefield: I have no objection to that. The Court: Add that to it, and I will let it be answered. Mr. Howell: Your honor understands that is the very point of my objection? The Court: I say, there being no other physical conditions. Mr. Howell: The testimony is there were others. The Court: I do not know whether there are or not. You can cross-examine on that. The objection is overruled. (Exception.) Mr. Fronefield: Q. Will you please answer the question? A. My answer is that I only examined the woman one day, and never have seen her since except in the courtroom, and what I found at that time I believe to be the cause of all her trouble then. As to now, I know nothing about."

Dr. Charles S. Potts, a witness for the plaintiff, was asked this question: "Mr. Fronefield: Q. From your examination of Bertha Gillman, after having received a full history of her case, what, in your judgment, is the least time required and the least expense required to give her the rest cure of which you have spoken? Mr. Howell: I object. Court: If it is divided up, I will let him state the least time and rule the other out. Mr. Fronefield: I will make the question refer to the least time required. Mr. Howell: I object to that question. The Court: The doctor may give his judgment as to the probable time in which she will get well with proper treatment. Mr. Howell: My objection is the if he has not sufficient knowledge to enable him to state it he won't state it. If he has no such knowledge as will enable him to give an opinion upon that, I take it for granted he won't give it. Mr. Howell: He said a year. A. I probably said a year. Mr. Fronefield: Q. What is your answer to that question, the least time? The Court: You may state whether in your judgment she would be restored in a year. (Exception.) A. If you give me the least time, I would say six months, although I would not promise it in that time."

Dr. Charles S. Potts, a witness for the plaintiff, was asked this question: "Q. Doctor, in your judgment, could Miss Gillman's condition be caused by the accident of being hurt on a trolley car, such as has been detailed in your presence here. A. Yes, sir; undoubtedly so. Mr. Howell: I object. (Objection overruled.) Mr. Howell: I formally ask an adjournment until to-morrow to permit the obtaining of the presence of the two physicians who are prevented from coming on account of important cases of illness that they cannot leave. Mr. Fronefield: Who are the physiclans? Mr. Howell: Dr. S. R. Crothers and Dr. Joseph Manasses. Mr. Fronefield: I object to the continuance. The Court: Objection sustained. Mr. Howell: I then would formally ask for a continuance of this case on account of the absence of a material witness who has been subpænaed to be here. He has been in attendance, but, as he is a physician, was compelled to absent himself in attendance of an ill patient. The witness is Dr. S. R. Crothers. I ask for a general continuance to the next term of court. Fronefield: That is also objected to for the same reason and because Dr. Crothers simply is called as an expert to give us his opinion as to the illness of the plaintiff; it appearing that the doctor was present, representing the defendant company, at the operation in 1906. The Court: Objection sustained."

The court charged the jury, in part, as follows:

"The testimony read this morning of Dr. Manasses says that she was nervous and neurasthenic, both, if there is any difference in them what they are, prior to June, 1904, and the contention of the defendant is that what she is suffering from now is but a continuation of her old trouble, and that there was nothing took place on this car on June 9, 1906, that brought about the trouble or increased it, because it is quite apparent that if it was brought about by the shock given to her by being thrown against the car, and the company was negligent, and she was not, then she would be entitled to recover, and if that was the primary cause of the trouble, and she would also be entitled to recover if that happened if it increased her former difficulties or trouble. There has been some testimony about whether that would tend to doctor does not know the entire history of increase the former trouble, if it had existed. You will remember it. It is all a question which is not conflicting, an expert may be for you entirely. No law about it except the law the court has laid down. which is not conflicting, an expert may be interrogated as to his opinion upon such law the court has laid down.

"Now, she will be entitled to recover if you find she was not negligent, find that the company was, and find that the cause of her trouble arose out of the shock which she says she received there, or her trouble increased by reason of what took place there. Then what will compensate her? She will be entitled to be compensated for her pain and suffering, whatever that has been in the past and will likely be in the future. It is a very difficult thing to tell, but you will have to take up that question and dispose of it. She will also be entitled to be compensated for her loss of earning power."

Defendant presented these points:

"(4) If the jury believe that the plaintiff got on the car while it was standing still, and that the car was started in the usual and ordinary way after the plaintiff was in the car, but before she had an opportunity to seat herself, there can be no recovery in this case, and your verdict must be for the defendant. Answer: We would affirm that unless the car was started hastily, recklessly, power turned on so that it would start suddenly, because it would be negligent for a motorman or a conductor, where they had charge of the moving of a car, to start it so suddenly and recklessly as to throw persons down who were in the aisle seeking seat. That is affirmed as a general proposition."

"(11) The burden is on the plaintiff to convince the jury that any pain and suffering she may have endured was caused by an injury at the defendant's hands, and from no other cause. Unless she has done so, your verdict must be for the defendant. Answer: That is refused, if it means that all her troubles must have arisen out of the accident. In other words, if the condition she says she is in now was an old and previous condition and this accident happening was not the cause of that condition, but it increased it, still she may recover. Therefore this point is refused."

"(17) Under all the evidence in this case, the verdict must be for the defendant. Answer: That is refused. It will be for you."

Verdict and judgment for plaintiff for \$3,950. Defendant appealed.

Argued before FELL, BROWN, MESTRE-ZAT, POTTER, and STEWART, JJ.

E. A. Howell and David Wallerstein, for appellant. W. Roger Fronefield and J. Howard Reber, for appellee.

MESTREZAT, J. Notwithstanding the 13 assignments filed in this case, we are not convinced that the learned court below committed error on the trial of the cause. The assignments alleging error in the admission of expert testimony are without merit. Where the facts are admitted or proved by evidence

interrogated as to his opinion upon such facts. As, however, it is the province of the jury to determine the facts, an expert cannot be asked his opinion upon the whole evidence in the case where that is conflicting; but a party may state specifically the particular facts he believes to be shown by evidence or such facts as the jury would be warranted in finding from the evidence, and ask the opinion of the expert on such facts, assuming them to be true. The other side may likewise put a hypothetical question based upon such facts as he alleges are shown by the evidence or the jury would be justified in finding from the evidence. Neither side is required in putting the hypothetical question to include therein any other facts than those which he may reasonably deem established by the evidence. The purpose of a hypothetical question is to elicit from the expert an opinion upon facts either admitted or established by the evidence, and the facts upon which the question is predicated should be clearly stated so that the jury may know upon what the opinion is based. The objection to the question put to the expert witness was "that it does not state all of the facts of the case." It, however, did state all of the facts disclosed by the evidence in the case from the standpoint of the party interrogating the witness, and that was all that is required. Coyle v. Com., 104 Pa. 117; Davidson v. State, 135 Ind. 254, 34 N. E. 972: Cowley v. People, 83 N. Y. 464, 38 Am. Rep. 464; Stearns v. Field, 90 N. Y. 640. In the Coyle Case, Mr. Justice Clark, speaking for the court, said (page 133): "Each side had the right to an opinion from the witness upon any hypothesis reasonably consistent with the evidence, and, if meagerly presented in the examination on one side, it may be fully presented on the other; the whole examination being within the control of the court, whose duty it is to see that it is fairly and reasonably conducted." Coffey, J., delivering the opinion in the Davidson Case, says (page 261 of 135 Ind., page 974 of 34 N. E.): "In the examination of expert witnesses, counsel may embrace in his hypothetical question such facts as he may deem established by the evidence, and, if opposing counsel does not think all the facts established are included in such question, he may include them in questions propounded on cross-examination. Any other course would result in endless wrangles over the question as to what facts were, and what were not, established." In Stearns v. Field it is held that: "If testimony of an expert is proper, counsel may ask a hypothetical question, assuming the existence of any state of facts which the evidence fairly tends to justify. An error in the assumption does not make the interrogatory objectionable, if it is within the possible or probable range of the evidence." It may be suggested that the testimony of

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Dr. Paxson which is assigned for error did the defendant no harm if it was erroneously admitted. His reply was not a direct answer to the question. The hypothetical question put to the doctor invited his opinion whether the injury on the trolley car was the cause of the plaintiff's "present poor physical health." In his answer he says that he examined the woman, "and what I found at that time I believe to be the cause of all her trouble then." He does not say what he found and hence he does not testify as to the cause of her present condition of health. His answer to the hypothetical question does not disclose that it is based upon the injury which she alleges she received on the trolley

Dr. Potts, whose testimony is also objected to, had made an examination of the plaintiff and testified as to the result of the examination. He also was present at the trial and heard all the testimony in the case except a part of the plaintiff's testimony. The trial judge interrogated the witness and stated to him the facts disclosed by the evidence. A hypothetical question was then put to Dr. Potts as to the probable time in which the plaintiff would recover with proper treatment. The defendant's counsel interposed the objection, that "the doctor does not know the entire history of the case." The doctor made a personal examination of the plaintiff a short time previous to the trial and diagnosed her ailment as a combination of neurasthenia and hysteria, and he simply gave his opinion as to the probable time it would require her to recover from that ailment. He heard the testimony as to the condition of the plaintiff's health subsequent to the accident. We do not think the second assignment of error should be sustained.

The third assignment must be overruled for the reasons given for dismissing the first assignment of error.

The refusal of the court to continue the cause under the circumstances was not an abuse of discretion amounting to reversible error. The testimony on both sides of the case, except that of Dr. Crothers, was concluded. It did not appear by proof that the doctor had been subpœnaed, nor was any offer made to show what he would testify to. In addition to this his testimony would have been simply cumulative.

The parts of the charge assigned for error are not justly open to criticism. Especially is this true when we consider the affirmation by the court of the defendant's thirteenth, fourteenth, and fifteenth points for charge. The court's answers to the fourth and eleventh points are likewise unobjectionable, and are sufficiently full and explicit to vindicate themselves.

The assignments are overruled, and the judgment is affirmed.

(224 Pa. 877)

LEIBY v. LUTZ et al.

(Supreme Court of Pennsylvania. April 12, 1909.)

1. APPEAL AND EBROE (§ 103*)—WHEN APPEAL ALLOWED—AFFIDAVIT OF DEFENSE.

Under Act April 18, 1874 (P. L. 64), authorizing an appeal from refusal of the court to enter judgment for want of an affidavit of defense, an appeal is authorized only in clear cases of error at law, and, where a case requires a broad inquiry into the facts, the matter in controversy should go to the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 699; Dec. Dig. § 103.*]

2. Pleading (§ 158*) — Affidavit of De-

Where two persons who are partners were sued for work done four years after its completion, and no statement was filed until 20 years after action brought, an athidavit of defense made by one partner on information and belief that, within six months after the work was done, it was paid for by the other partner, is sufficient.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 312; Dec. Dig. § 156.*]

Appeal from Court of Common Pleas, Schuylkill County.

Action by William N. Leiby against James L. Lutz and Frank Schwartz. From an order discharging rule for judgment for want of a sufficient affidavit of defense, plaintiff appeals. Affirmed.

appeals. Affirmed.
Argued before BROWN, MESTREZAT,
POTTER, ELKIN, and STEWART, JJ.

J. O. Ulrich, for appellant. H. B. Graeff and B. J. Graeff, for appellees.

PER CURIAM. This action was brought in 1889 for work alleged to have been done by the plaintiff for the defendants between December, 1883, and September, 1884. After waiting for more than four years to bring this suit, he waited until November 2, 1908. to file his statement. More than 24 years after the last work is alleged to have been done the plaintiff for the first time filed his claim and called upon the defendants to file an affidavit of defense. In it there is an averment by Schwartz that he has been informed and believes that within six months after the work was done Leiby "was settled with and paid in full for all his services" by James L. Lutz, one of the defendants. Under the circumstances, the court did not err in holding that this affidavit of defense was sufficient to prevent a summary judgment. The act of April 18, 1874 (P. L. 64), authorizing an appeal from the refusal of the court of common pleas to enter judgment for want of a sufficient affidavit of defense, is intended to reach only clear cases of error in law. In doubtful cases, and especially in those requiring broad inquiry into the facts, the matter in controversy should go to a jury. Griffith et al. v. Sitgreaves, *81 Pa. 378.

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

This is clearly such a case, and the order of the court in discharging the rule for judgment is affirmed.

(224 Pa. 166)

COMMONWEALTH, to Use of BECKING-HAM, v. MAGEE et al. (No. 1.)

(Supreme Court of Pennsylvania. March 22, 1909.)

1. EXECUTORS AND ADMINISTRATORS (§ 537*) ACTION ON ADMINISTRATOR'S BOND-STAT-UTOBY PROVISIONS.

Act June 14, 1836 (P. L. 638), prescribing mode of procedure in an action on an administrator's bond, and giving to all persons who have several interests the right to join in the suit by suggestion of the right before judgment, or by scire facias after judgment, is exclusive and prohibitory of any other remedy.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2486; Dec. Dig. § 537.*]

2. DISMISSAL AND NONSUIT (§ 12*)-VOLUNTARY DISCONTINUANCE - RIGHT OF USE PLAINTIFF.

Though ordinarily the use plaintiff, in an action on an administrator's bond, may not discontinue it, as only one action is permitted, and that is for the use of all parties interested, yet an action on an administrator's bond, where there has been no default, and no one has a right of action, is premature, and the party who brought the action should be permitted to correct the error by discontinuing and commencing de novo.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 27; Dec. Dig. § 12.*]

8. DIRMISSAL AND NONSUIT (§ 32*)—DISCON-

TINUANCE—LEAVE OF COURT.

In strict law, a discontinuance is always by leave of court, but in practice, leave to dis-continue is assumed in the first place, without the formality of an application, but subject to be withdrawn on cause shown.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 64; Dec. Dig. § 32.*]

4. DISMISSAL AND NONSUIT (§ 39*)—DISCONTINUANCE—LEAVE OF COURT.

The discharge of a rule to strike off a dis-

continuance is equivalent to a grant of leave.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 66; Dec. Dig. § 39.*]

5. DISMISSAL AND NONSUIT (§ 43°)—DISCONTINUANCE—DISCRETION OF COURT.

The causes that will move the court to withdraw its assumed leave to discontinue are addressed to its discretion, and usually involve some disadvantage to other interested parties.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 86; Dec. Dig. § 43.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by the Commonwealth, to the use of Charles Beckingham, against James E. Magee and another. From an order discharging rule to strike off discontinuance, Magee appeals. Affirmed.

See, also, 220 Pa. 201, 69 Atl. 805.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

William Brown, Jr., Charles L. Brown, and Alex. Simpson, Jr., for appellant. Trevor T. Matthews, for appellee.

FELL, J. The appellant is the surety on a bond given by an administrator in 1891 to secure the accounting by him for the proceeds of the sale of the real estate of the decedent, made by order of court for the payment of debts. An action was brought upon the bond by the use plaintiff while exceptions to the allowance of his claim were pending, and before a final decree had been entered in the orphans' court. On an appeal to this court it was held that the action was prematurely brought. See Com. v. Magee, 220 Pa. 201, 69 Atl. 805. The use plaintiff. then discontinued the action without leave of court, and caused a new summons to be issued. The surety obtained a rule to show cause why the discontinuance should not be struck off, and the second summons quashed, which after hearing was discharged. The appeal is from the order discharging the rule.

The act of June 14, 1836 (P. L. 638), prescribes a mode of procedure in actions on bonds such as that in suit, and gives to all persons who have several interests the right to join in the suit by suggestion of the right before judgment, or by scire facias after judgment has been entered for the commonwealth. The remedy provided is exclusive and prohibitory of any other. Com. v. Cope, 45 Pa. 161. Since only one action is permitted, and that is for the use of all parties interested, it follows that ordinarily the use plaintiff in the action may not discontinue it. But an action brought on an administrator's bond, when there has been no default, and no one has a right of action, is premature, and the party who brought the action and in whose way it stands should be permitted to correct the error by discontinuing and commencing de novo. Com. v. Magee, 220 Pa. 201, 69 Atl. 805. The better practice in such a case is to obtain leave of court to discontinue. In strict law a discontinuance is always by leave of court, but in practice leave to discontinue is assumed in the first place without the formality of an application, but subject to be withdrawn on cause shown. The discharge of a rule to strike off a discontinuance is equivalent to a grant of leave. The causes that will move the court to withdraw its assumed leave are addressed to its discretion, and usually involve some disadvantage to other interested parties. Consolidated Nat. Bank v. McManus, 217 Pa. 190, 66 Atl. 250. The only advantage of which the defendant was deprived by the discontinuance was that of asserting that he had been summoned before a right of action arose.

The appeal is dismissed.

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1997 to date, & Reporter Indexes

(224 Pa. 168)

COMMONWEALTH, to Use of BECKING-HAM, v. MAGEE et al. (No. 2.)

(Supreme Court of Pennsylvania. March 22, 1909.)

1. Principal and Surety (§ 156*)-Affida-

VIT OF DEFENSE—SUFFICIENCY.

The same degree of particularity is not required of a surety who sets up payment by the principal as would be required of the principal, but all that may be required is that the aver-ments shall be as explicit and specific as the circumstances reasonably admit.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 423; Dec. Dig. § 156.*]

2. EXECUTORS AND ADMINISTRATORS (§ 537*) BONDS—ACTIONS—AFFIDAVIT OF DEFENSE -SUFFICIENCY.

An affidavit of defense, in an action against the surety on an administrator's bond, 16 years the surety on an administrator's bond, 16 years after the audit of the administrator's account, averring that the surety is informed, believes, and expects to be able to prove that the claim for which the action is brought has been paid in full by the administrator, but that he cannot state the time, place, and manner of such settlement, because the same was secretly had between plaintiff and the administrator, is sufficient under the rule that all that may be required of the surety is that his averments shall be as explicit and specific as the circumstances reasonably admit.

stances reasonably admit. [Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2559; Dec. Dig. § 537.*]

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit on an administrator's bond by the Commonwealth, to the use of Charles Beckingham, against James E. Magee and another. From an order making absolute rule for judgment for want of a sufficient affidavit of defense, defendants appeal. Reversed.

See, also, 220 Pa. 201, 69 Atl. 805. Argued before MITCHELL, C. J., and

FELL, MESTREZAT, POTTER, STEWART, and ELKIN, JJ.

William Brown, Jr., Charles L. Brown, and Alex. Simpson, Jr., for appellants. Trevor T. Matthews, for appellee.

FELL, J. This appeal is from an order making absolute a rule for judgment against the surety on the bond of an administrator, for want of a sufficient affidavit of defense. It appears from the statement of claim that the bond was given in May, 1891, on the return or the order of sale of real estate. The administrator's account was audited and confirmed nisi in May, 1892. Exceptions filed by the heirs to the allowance of the claim of the use plaintiff, a creditor, were dismissed in October, 1902. In October, 1905, on bill of review the adjudication was amended so as to show that the award to the plaintiff was payable out of the proceeds of the sale of the real estate sold for the payment of the proceedings.

debts of the decedent. This action against the surety on the bond was commenced in May, 1908, 16 years after the audit of the account of the administrator.

The affidavit of defense contains the following averment: "This deponent says that he has been informed, believes, and expects to be able to prove on the trial of this case, that before commencement of this suit the said James E. Magee, administrator and codefendant with this deponent and principal debtor, made a full settlement with the said use plaintiff, Charles Beckingham, of the amount of said claim, and released the said James E. Magee from all other and further claim regarding said debt, whereby said deponent has been, and is, released of and from all claims upon the bond sued upon in this suit. And that this suit is being prosecuted by the use plaintiff to recover a second time for the same debt. Deponent cannot state the time, place, and manner of said settlement at this time, for the reason that the same was secretly done by and between said James E. Magee and use plaintiff only. All of which facts deponent is informed, believes, and expects to be able to prove upon a trial of this case." This averment by a principal debtor, whose duty it is to pay, and who knows what he has done, or caused to be done, would be insufficient to prevent judgment. It would be incumbent upon him to state the time and manner of payment, and by whom made. The facts being within his own knowledge, he would be bound to set them out with such certainty and particularity that the court might determine whether the payment alleged to have been made was a discharge in fact or in law from facts disclosed. But the same degree of particularity is not to be required of a defendant who is under no duty to pay in the first instance, and whose liability is only secondary, who sets up payment by the principal debtor. All that may be required of him is that his averments are as explicit and specific as the nature of the circumstances reasonably admits. In the affidavit in this case the defendant avers that he is informed, believes, and expects to be able to prove that the claim for which suit is brought has been paid in full by the administrator, and states an adequate reason for not being able to state the time, place, and manner of settlement. This positive and distinct averment, in view of the peculiar facts of the case, the long delay in perfecting the record of the orphans' court and in bringing this action, was, we think, sufficient to entitle the defendant to a trial.

The assignment of error to the order making the rule for judgment absolute is sustained, and the record is remitted for further

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Dizs, 1937 to date, & Reporter Indexes

(224 Pa. 233)

In re SINNOTT'S ESTATE.

(Supreme Court of Pennsylvania. April 12, 1909.)

EXECUTORS AND ADMINISTRATORS (§ 495*)—
COMMISSIONS—UNCONVERTED ASSETS.

Where an estate is worth over \$2,000,000 and none of the assets have been converted, but the whole estate has been awarded back to the executors for further accounting, a commission of 5 per cent. on such assets cannot be allowed. [Ed. Note.—For other cases, see Executors

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. \$\frac{2}{2} 2068-2116; Dec. Dig. \$\frac{4}{2} 495.*]

Appeal from Orphans' Court, Montgomery County.

In the matter of the estate of Joseph F. Sinnott. From a decree dismissing exceptions to the adjudication, Clinton R. Sinnott appeals. Reversed.

Solley, P. J., in the court below filed the following adjudication:

"Joseph F. Sinnott, a resident of the township of Lower Merion, died on or about June 20, 1906, testate, leaving surviving his widow, the said Annie E. Sinnott, and issue, several children.

"His last will and testament, dated November 10, 1905, with codicil dated May 18, 1906. was duly admitted to probate June 25, 1906, and letters testamentary granted to the accountants, who with Samuel Castner, Jr., were appointed executors, the latter renouncing the trust. The testator provided for the payment of his debts and funeral expenses, and expressly directed that, should any balance be due on the principal of his bond with the accompanying mortgage secured upon premises 1816 South Rittenhouse Square. Philadelphia, belonging to his wife, it should be forthwith paid and satisfied as a debt of his estate. He devised and bequeathed to his wife one full equal third part of his personal estate absolutely, and one full equal third part of the rents and profits of his real estate for and during the term of her natural life, said devise and bequest to be in full of any dower or share which his wife might be entitled to in his estate under the intestate laws of the state of Pennsylvania. He directed that his wife should be permitted to occupy, rent free, his residence known as Rathalla, situate at Rosemont, for the term of her life, should she so desire, and, if she should continue to occupy the same, then during the first two years of such occupancy he directed the executors to pay her \$25,000 a year during these two years for her support, and the support of any of his family residing with her at said home. Upon his wife ceasing to reside at or not wishing to occupy said home, he directed the same to be sold. He also bequeathed to his wife so long as she shall occupy said home all furniture, paintings, books, silver, household goods, etc., contained therein, with

same, and the live stock of every description. In the event of the sale of said home, or his wife ceasing to live there, he empowers her to make such distribution of the contents, furniture, and equipment among all his children as she may deem fit, keeping for herself such portion as she may desire to furnish a home for herself and the unmarried children, or, she may sell the whole of said furniture and equipment, if she deems best, and the proceeds, if not used by her for the purposes of furniture and equipment for a new home, shall become a portion of the residuary estate. In the event of the death of his wife before such distribution is made, the same power for distribution or sale of said furniture and equipment is given to Mary E. Sinnott, a daughter. In the event that said home is not sold until after the death of the wife and daughter, then the same power for distribution or sale is conferred upon John Sinnott, a son, and Annie L. Devereux, a daughter.

"In the third and fourth items legacies are given to a number of persons, without any deduction for collateral inheritance tax. United States legacy, or other tax whatsoever (which shall be borne and paid by the residuary estate), but the testator directs that none of these bequests, excepting the one to his brother, Rev. James P. Sinnott, in trust for the support of Agnes E. Sinnott. and the ones to his daughter, Mary E. Sinnott, and John Sinnott, in trust for Emily Harmer, and that to Martha McGahan, and those to his servants, shall be payable, except at the discretion of the executors, for a period of 5 years after his decease, and that such legacies shall bear interest from his decease at the rate of 4 per cent. per annum. All annuities shall be payable from the time of his decease.

"In the fifth item the testator gives a number of money legacies to certain charities, free of collateral inheritance or other taxes, which he directs shall be borne by the estate, which said bequests shall not be paid until after the expiration of two years from the date of his death without interest. unless in the judgment of the executors they can conveniently be paid before that time. He provides that, if at the time fixed for the payment of these legacies the market value of the assets of his estate after the payment of debts shall not exceed \$1,000,000, then all the bequests to said charities shall be reduced one-quarter in amount, and, if the value of the estate after payment of debts shall not exceed \$500,000, then said bequests shall be reduced one-half amount.

the same to be sold. He also bequeathed to his wife so long as she shall occupy said home all furniture, paintings, books, silver, household goods, etc., contained therein, with bequeaths to his executors and the survivor the offices, stables, and equipments of the

[•]For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tate, to rent, manage, sell, assign, transfer, mortgage, or convey any or all of the real estate as may be necessary for the purposes of the trust, and to invest the proceeds derived therefrom, and to collect the rents, issues, dividends, etc., and after deducting necessary expenses of the trust, and paying the sum of \$25,000 each year for two years to his wife should she occupy Rathalla as before provided, to pay, during the lifetime of his wife, one-sixth of the net income to his daughter, Mary E. Sinnott; one-sixth part to his daughter, Annie L. Devereux; one-sixth part to his son, Clinton R. Sinnott; one-sixth part to his son, John Sinnott. Another one-sixth part is directed to be divided into five parts, and during the lifetime of the wife to pay \$3,000 annually to his son, James Frederick Sinnott, and the balance to Annie E. Sinnott, wife of testator. And out of the remaining four parts of said one-sixth part to pay one of said parts to the wife of said James Frederick, and the other three parts in equal shares to the children of said James. As to the remaining sixth part of said net income to pay out of the same \$3,-000 annually to Clarence C. Sinnott, a son, and the balance to the wife of the testator. The testator further provides for the payment of the income of the trust after the decease of his wife, but it is unnecessary at this time to refer specifically to the various provisions concerning the same.

"At the time of his death and for many years prior, the testator was engaged in distilling liquor, and was the owner of what are known as the Gibsonton Mills or distilling property or plant, situate on the Monongahela river, at Gibsonton, in the state of Pennsylvania. He was solicitous for the preservation of this very valuable property and asset, and he accordingly provided in the eighth paragraph of his will, and expressed the desire, that a corporation should be formed for the continuance of the business, and he directed that said property and plant should be transferred to said company, either sold or leased. He further expressed the desire that the good will of the business and the property should be incorporated under the laws of such state as the executors and trustees deem most convenient and advisable. He authorizes and empowers the executors to accept in payment for such property and estate contributed and sold to such corporation the stock or bonds of said corporation, they, however, not to accept less than a majority of the stock or bonds issued as a first lien upon the franchise and property. Should the corporation decline to buy the merchandise and fixtures of the business, the executors are directed to sell the same in open market for cash. He outlines the entire scheme very completely. He believes a continuance of the business for a period of five years from the time of his death without forming a corporation might

executors and trustees so to do. In case they carry on the business, he strongly recommends the employment of his son, John Sinnott, as general manager at a salary not less than \$15,000 per annum. The whole plan is fully elaborated in this item of the will, and it is unnecessary to give further details. In the same item he refers to his ownership of a large amount of the capital stock of the Philadelphia & Reading Railway Company, which he urges on his executors to keep as an investment after his death, because of his great confidence in the probable increased prosperity of the company.

"In the codicil a change is made in that part of the seventh paragraph of the will which relates to the distribution of one of the sixth parts of the net income of the residuary estate where he divided it into five parts and directed that out of one of said five parts \$3,000 per annum should be paid to his son, James, and the remaining portion to the wife of the testator, and to the wife and children of James. This provision is revoked, and in lieu thereof he directs that from said one-sixth part of said income \$1,200 shall be paid annually to his daughter-in-law, Edith, wife of James, in equal monthly payments so long as she remains the wife or widow of said James, and the remainder of said six parts is directed to be divided into five equal parts. Out of . one of said parts \$3,000 is to be paid annually to James, and the remainder of said onefifth part to testator's wife during life. Another fifth part is to be paid to said testator's wife during life, and the other threefifths part paid to the children of said James in equal shares.

"At the time of his death the personal estate of the decedent consisted of cash, bonds, notes, and corporate stocks, and the assets of his business at Gibsonton Mills, and at the warehouses in Philadelphia, New York, and Boston. The inventory value of his personal assets was \$2,351,830.20. The largest and most valuable asset was the latter.

The cash on hand belonging to the business was	\$ 61.334	98
Bills receivable	7.575	
Accounts receivable and consider-		
_ed good	212,103	30
Miscellaneous accounts receivable	9,233	94
Merchandise	1,089,632 114,860	72
Machinery and fixtures	114,860	64

such corporation the stock or bonds of said corporation, they, however, not to accept less than a majority of the stock or bonds issued as a first lien upon the franchise and property. Should the corporation decline to buy the merchandise and fixtures of the business, the executors are directed to sell the same in open market for cash. He outlines the entire scheme very completely. He believes a continuance of the business for a period of five years from the time of his death without forming a corporation might enhance the estate, and he recommends the

ed to give bonds aggregating in amount about \$2,509,000, and, as we understand, these bonds are required to be annually renewed. There were about 40,000 barrels of whisky in the bonded warehouses at Gibsonton, and 30,000 barrels more belonging to customers. The decedent had established agencies in the cities of New York and Boston. Expert accountants were retained to examine the books and accounts of the decedent's business, so that the executors might be properly informed of the situation. They retained Mr. John Sinnott as manager, as the testator expressly recommended, at a salary of \$15,000 per year, and they placed a Mr. Daly in charge of the business at Gibsonton. The importance of the business, the great responsibility resting upon the executors, their positive duty to manage it for the best interests of the estate and those interested, called for the best business judgment, and the executors very properly resolved themselves into a board of directors, so to speak, held regular meetings, kept full minutes of every proceeding, and acted after full consultation and due deliberation. There were frequent consultations with the expert accountants, the manager, and those in charge of the business at Gibsonton. The manager was required to furnish accounts of the business each month. A full detailed statement every three months. There were daily consultations with the manager and the executors' counsel. Many difficult questions arose day after day requiring not only work and labor to solve, but also the application of the very best business judgment. Under the laws of the state of Massachusetts, in order that the agency business in the city of Boston might continue, ancillary letters on the estate were required. This involved additional labor and responsibility. matter of grave concern arose out of the failure of the Real Estate Trust Company of Philadelphia, the surety upon the bonds given by the executors to the United States. Immediately after the public had been informed of the failure of the company, United States officials notified the executors to file new bonds. This required the executors to find additional surety and to act without delay, because failure to comply with the demand of the government would have resulted in the closing down of the entire distillery business. We have gone somewhat into detail at this point of the labor and responsibility of the executors of this estate, because one of the children has objected to the compensation claimed by the executors in the account before us, and which will be disposed of later on.

"The account of the executors was filed August 26, 1907. They have charged themselves with the amount of the inventory and appraisement, and certain other items of principal not included therein. They have taken credit for sundry disbursements, and

\$2,200,346. They have in hand, however, unconverted assets consisting of bonds, notes, and stocks all itemized in the account, value of the distillery business, and the appraised value of the household effects, etc., at Rathalla, amounting in the aggregate to \$2,229,-730.30. But \$10,000 has been credited in distribution, the cash being taken from income, and there is due accountants \$39,384.30. There has been paid to Margurite A. Donnelly and James A. Donnelly each \$5,000, the full amount of their legacies, and this \$10,-000 represents the distribution account before referred to. There is attached to the account a summary of the management of the decedent's business for the year subsequent to his death, as conducted by the manager, John Sinnott, showing a profit of \$228,255.-23. This amount is not actual cash, but it is the net result of the operation of the business, as shown on the books, and is embraced in the assets of the business. Income to the amount of \$27,734 is accounted for. Where an objection is made to the compensation of accountants credited in the account, we have never denied a hearing. Indeed, we think the court whenever appealed to should investigate the compensation claimed by the accountant, and determine what is just and fair. In this case the executors filed an answer, and at the hearing they authorized counsel to state that they courted the fullest investigation. We consented to hear and pass upon the whole matter.

"In Lilly's Estate, 181 Pa. 478, 37 Atl. 557, it is said that 'the labor and responsibility involved in the proper administration of the estate and the care and skill shown by the executors in the performance of the duties connected with the trust must be taken into consideration in passing upon their claim, and so must the direction of the testator in regard to commissions for their services.' was also said:. There can be no doubt that in a very large majority of estates of decedents there has been an allowance to the executor or administrator of a commission of 5 per cent.' In the opinion of the court the very early case of Pusey v. Clemson, 9 Serg. & R. 204, was referred to, and the language of Chief Justice Tilghman quoted. He said: 'It is very desirable both for the sake of the executors and the family of the testator that there should be some standard to which both may look on the subject of commissions. And, in the cases which generally occur, it appears to me, after considerable research, that the common opinion and understanding of this country is fixed upon 5 per cent. as a reasonable allowance. But to this rule there must be exceptions. There are estates where the total amount is small, and that too collected in driblets. In such 5 per cent. would be sufficient. On the contrary, there are others where the total being very large, and made up of sums collected and paid away in large masses, 5 per cent. would be too show a balance of principal amounting to much. It must be left to the courts to as-

certain those cases in which the general rule should be departed from.' And the court declared that this quotation states, as fairly as any that can be made, the present state of the law in relation to the allowance of commissions to executors. But it is said in Wistar's Estate, 192 Pa. 289, 43 Atl. 1006, that there is no set rule as to percentage on the estate in cases of the exceptional nature of the accountant's labor. The rule is fair compensation for the amount and character of the labor. The responsibility involved in large estates is also an element to be compensated, though not a controlling one. Or, as it is more elaborately stated in Harrison's Estate, 217 Pa. 207, 66 Atl. 854, the rule as to commissions in all cases is compensation for the responsibility incurred and the services and labor performed. 'In arriving at the compensation to which a trustee in any capacity is entitled,' says the court, 'it is necessary to consider the amount of the estate, the labor performed, and the responsibility imposed.' These are elements which enter into and determine, not only the amount of the compensation, but the right to compensation at all. This was practically an affirmance of the rule laid down by Chief Justice Gibson in Harland's Account, 5 Rawle, 323. So that there is no rate of percentage fixed by rule as compensation for an executor, administrator, guardian, or trustee. It is usual to allow a percentage of the fund, but that is not the legal way to ascertain what commission a trustee is entitled to for the responsibility incurred and the services performed in the execution of his trust. See, also, Young's Estate, 204 Pa. 32, 53 Atl. 511; Moore's Estate (No. 2) 211 Pa. 343, 60 Atl. 989. A very complete brief of the cases in Pennsylvania on the subject of the commissions or compensation of trustees is that of counsel for appellee in Wistar's Estate, 192 Pa. 289, 43 Atl. 1006.

"In addition to the facts already found concerning the responsibility of the accountants, and the vast amount of labor performed by them, all of which were unusual and extraordinary, it was also made to appear that in conducting the vast business interests of the decedent since his death, imposed upon them by the testator, a very large amount of money has passed through their hands, and as the result of their management of the business a net profit to the estate of \$228,-255.23 is shown It is true that the 10,000 shares of stock of the Philadelphia & Reading Railway Company have not been converted; neither has the distilling business, etc. These two items constitute the greater part of the estate remaining in the hands of the accountants unconverted. But the mere fact that this property has not been converted into money or that the corporation referred to in the will has not been created ought not to deprive the executors of their proper compensation for the performance of their duties. It was the express desire of the testa- court that by reason of some further respon-

tor that the stock should not be disposed of until such time as in the judgment of the executors it would be for the benefit of his estate, as he had great faith in the future value of the company, and also great faith in the vast importance to his wife and children of the immense distillery business.

"What is a fair and reasonable compensation for the executors? That and that only is the question, and the answer depends upon the size of the estate, the responsibility incurred by them, and the work and labor done. The exceptant realized that the executors were entitled to at least 3 per cent. on \$2,000,000 at this time. We think they are entitled to more. The testator himself on April 18, 1900, entered into an agreement with the Fidelity Trust Company, in which he agreed to appoint the company one of the executors and trustees under his will. and he provided that they should have a commission of 11/2 per centum on the principal of his estate if it inventoried over \$1,-000,000, and a commission of 2 per centum on the income, and that they should have for acting as trustee 2 per centum on the income, and an allowance of one-half of 1 per cent. on reinvestments. The compensation of the company was graduated if the inventory was over \$500,000 and less than \$1,000,-000, or if it was over \$100.000 and less than \$500,000. The agreement also provided that the company's compensation should be outside of the compensation of other executors and trustees which the decedent was to fix. Now, there can be no question as to the compensation of the Fidelity Company as one of the executors. They are entitled to 11/2 per centum on the principal and 2 per centum on The other executors are as the income. much entitled to a reasonable and fair compensation as the Fidelity Company, because they have had an equal responsibility and have performed their fair share of the labor in connection with the administration of the estate. The commission claimed is 5 per cent. on \$2.446.892.81, or \$122,344.64. Under all the facts and circumstances, in view of the responsibility imposed upon the accountants, and the labor which their duties required, we are of the opinion, and so find, that the compensation claimed is fair and reasonable and just. Another fact which should be taken into consideration, and which is entitled to weight, is that as trustee these accountants will have a very great deal of responsibility and labor, and cannot. under the law, receive dual commissions, both as executors and trustees. What they now receive as executors upon the corpus of the estate must be for all time. In allowing the commission, it must be understood that no additional compensation will be allowed the accountants in the conversion of the assets of the estate now in their hands, unless it is made to appear to the satisfaction of the sibility they should be additionally compen- without conversion—that is to say, in specie

"We have now passed upon every matter, claims, and compensation of accountants raised at the audit.

"The assets embraced in the trust account are awarded back to the executors for further accounting."

Argued before FELL, BROWN, MESTRE-ZAT. POTTER, and STEWART, JJ.

N. H. Larzelere and M. Hampton Todd, for appellant. Wm. Rudolph Smith and Henry Pleasants, for appellees.

STEWART, J. That the administration of this large estate, so far as it has been proceeded with, has been wisely and judiclously accomplished by the executors, is conceded. The principal effort, however, up to the time of accounting, has been to conserve, not convert, only because the testator in his will so advised. There is but a single exception to the adjudication in the court below, and that relates to the compensation allowed the executors. The compensation of the Fidelity Trust Company, one of the executors, was made the subject of contract in the lifetime of the testator, and with that we have no concern. The auditing judge allowed the executors a commission of 5 per cent. on the total inventoried and appraised value of the estate, and a like percentage on some additional items omitted from the inventory. Their compensation, as thus determined, amounts to \$122.344.64.

The basis on which compensation must be determined in every case where it takes the form of a commission is the amount of the estate administered upon and accounted for. With this amount ascertained such per centum rate may be allowed thereon as in the opinion of the auditing judge will afford just and reasonable compensation to the accountants. We have frequently recognized the method as a convenient and entirely suitable way of determining compensation; but it can easily be misapplied, and made to give a seeming fairness to inequitable results. Ordinarily, it is safe enough to adopt the total debit side of an account as the basis for the per centum assessment in these cases, for ordinarily such total represents the extent of the conversion that has taken place. But not always so. There are exceptional cases, and this is one of them. Here the executors have charged themselves with the entire inventoried estate at its appraised value, and have been allowed a commission of 5 per cent. thereon, while the account shows that they have not converted a single item included in the inventory. If the estate, as inventoried, was to be distributed we have here indicated.

-that would be an entirely different matter. Nothing of the kind, however, is intended. The order of adjudication expressly recommits these specific assets, amounting at their appraised value to \$2,351,830.20, into the hands of the accountants to be converted by them and thereafter accounted for. Until such conversion shall have been accomplished, no compensation will have been earned as to these assets, and therefore none should be allowed. Here they have been allowed by way of anticipation as appears from the order recommitting the assets. That order directs that they be converted by the executors without further compensation. The inequity of such an adjudication is apparent. Suppose for some reason the place of these executors should become vacant-a contingency perhaps too remote to be seriously considered in this particular case, but a contingency which not unfrequently occurs in the estates of decedents-and the duty of converting these assets should fall upon their successors, where would the compensation of the successors come from? Would it not necessarily result that the estate would be taxed twice for the same service? We express no opinion as to what would have been proper compensation had the whole estate been administered upon and accounted for. It will be time enough to meet that question when the condition arises. It is enough to know that it has not yet been accounted for, and that the accountants have been allowed a compensation which exceeds in amount all that they have actually received, according to the account filed, and for which they are liable by reason of their accounting. We have not overlooked the fact that the account does not include the income derived by the accountants from the unconverted assets, and that such income is exhibited in a separate statement filed. There can be no reason why it should not be embraced in the account—made part of it. Only as it is thus accounted for can commissions be allowed thereon. The case calls for a restatement of the account along the lines we have indicated. Until this is done, it cannot be made to appear by percentage or otherwise what would be just compensation to the accountants. This is for the auditing court in the first instance. We have simply indicated the proper method of reaching the result.

The decree, so far as it embraces the compensation of the executors, is reversed; and the record is remitted, with directions to proceed in the matter of the adjudication in accordance with the methods and principles



In re JONES et al.
(Supreme Court of Rhode Island. July 6, 1909.)

TRUSTS (§ 125*)—DEED—PROPERTY CONVEYED.

A deed of trust conveying all the lands of the grantor situated on a designated avenue in a city, together with the appurtenances, conveys the land situated on the designated avenue previously acquired by the grantor under a deed describing the land, and it does not convey other lands not situated on the avenue owned by the grantor.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 125.*]

Petition, under Court and Practice Act 1905, § 323, by Pembroke Jones and another for the opinion of the court as to the title to land conveyed by a deed of trust. Deed construed.

Sheffield, Levy & Harvey, for Pembroke Jones. Gardner, Pirce & Thornley, Charles R. Haslam, and Newton W. Adams, for heirs at law of Theodore A. Havemeyer. Burdick & McLeod, for certain trustees.

PER CURIAM. The court is of the opinion that the description contained in the deed of trust executed by the late Theodore A. Havemeyer on August 21, 1895, conveying "all the lands and premises belonging to the said Theodore A. Havemeyer, situate on Bellevue avenue, at Newport, R. L. together with the appurtenances, and all the estate and rights of the said Theodore A. Havemeyer and Emilie Havemeyer, his wife, in and to said premises, subject to the trust and other provisions as if they had been originally incorporated," conveyed exactly what it purported to convey, and nothing more; that is to say, the tract of land, with its appurtenances, bounded as described in the deed to said Havemeyer from Blandina B. Andrews et al., dated December 16, 1880, as "easterly, on Believue avenue; southerly, on Bancroft avenue; westerly, on Coggeshall avenue; northerly, partly on land of J. A. Hazard deceased, and partly on land now or formerly of C. F. Chickering—containing 51/2 acres, more or less." This description is sufficiently exact and definite, and we see no reason to make it ambiguous by the inclusion of other lands not situated on Bellevue avenue, which were owned by Havemeyer, and which came to him from other grantors and were otherwise and properly described in the conveyances to him, and which, so far as they bound on any highway, are bounded on Coggeshall avenue, an established public highway, and not on Bellevue avenue.

It follows, accordingly, that the premises described in the contract of sale aforesaid, set out in the petition, did not pass under the trust conveyance, and that title to the same is vested in the heirs of Theodore A. Havemeyer, as set forth in the agreed statement of facts.

BATTEY v. LUNT, MOSS & CO.

(Supreme Court of Rhode Island. July 6, 1909.)

1. PRINCIPAL AND AGENT (§ 143*)—UNDIS-CLOSED PRINCIPAL—ACTION ON CONTRACT BY AGENT.

An undisclosed principal may sue on a contract made by his agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 502, 506; Dec. Dig. § 148.*]

2. EVIDENCE (§ 459*) — PAROL EVIDENCE — AGENCY OF PARTY TO CONTRACT.

Parol evidence is admissible to show that

Parol evidence is admissible to show that a person signing a contract in his own name acted as agent for another.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1910, 2112; Dec. Dig. § 459.*]

3. Sales (\$ 279*)—Warranties—Construction.

Where a contract for sale of an engine embraced warranties that if any parts should be broken or uscless the seller would repair without charge upon return of the engine to the factory, and that the engine would do good work when properly handled, the warranties were separate, and the buyer was not required to return the engine for repairs before suing for breach of the waranty that it would do good work.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 783; Dec. Dig. § 279.*]

Exceptions from Superior Court, Providence and Bristol Counties; Darius Baker,

Action by John A. Battey against Lunt, Moss & Co. Verdict for plaintiff. and defendant excepts. Exceptions overruled, and case remitted for judgment on the verdict.

Page & Cushing, for plaintiff. Terence M. O'Rellly and James E. Smith, for defendant.

BLODGETT, J. After verdict for the plaintiff for \$300 damages for breach of a warranty in a contract for the purchase of a gasoline engine that "this machine will do good work when properly handled," and the denial of a motion for a new trial by the superior court, the defendant has brought his bill of exceptions here.

The contract of purchase was signed by John A. Battey, Jr., in his own name, and the first ground of error alleged is that the present plaintiff, his father, could not recover thereon. It was undisputed that the father was the proprietor of the business, and that his son had acted in his behalf for many years. The price of the engine and mill contended for was paid by the check of the father. It is well settled that an undisclosed principal may sue on a contract made by his agent. In Ford v. Williams, 21 How. 289, 16 L. Ed. 38, it is said: "The contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein; and, notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parol, it is well settled that the

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principal may show that the agent who made the contract in his own name was acting for him. * * * The array of cases and treatises cited by the plaintiff's counsel shows conclusively that this question is settled, not only by the courts of England and many of the states, but by this court." And see New Jersey Steam Navigation Co. v. Merchants' Bank, 6 How. 381, 12 L. Ed. 465, and cases cited. There was no error in admitting evidence that the son in fact signed the contract on behalf of and as agent of his father.

There is no ground for the exception to the charge of the trial justice, as follows: "Neither does the second, which provides that, 'any part or parts being broken or useless, the purchaser may have the privilege of sending engine to factory, where it will be repaired without charge.' The charge is not that the engine needed repairing. The charge was that the engine was not good, was not suited to do the work which it was sold for, and was worthless. That is what the plaintiff says. Not that it needed repairing, but the machine and engine sold to them was not good for anything, and, of course, that part which applies to the repairing was not applicable to this plaintiff's case."

Exception was also taken to the refusal to charge the jury "that the plaintiff is bound by the terms set forth in the warranty as to returning to factory before bringing suit." The contention of the defendant that this was a condition precedent is unfounded, and this objection is overruled. The warranty on which the action is based is entirely separate and independent of this provision, and the latter in no way constitutes an exception to or a limitation upon it.

The remaining request to charge, if now pressed, was upon an immaterial issue, and does not affect the merits of this case.

The evidence was conflicting, and the questions of the capability and the worthlessness of the engine and machine were properly left to the jury, who have decided the issues so submitted to them in favor of the plaintiff. We see no sufficient reason to disturb their finding.

Defendant's exceptions overruled, and case remitted to the superior court, with direction to enter judgment on the verdict.

(20 R. I. 63)

CAMPBELL v. CAMPBELL et al. (Supreme Court of Rhode Island. July 6, 1909.)

1. Trial (§ 57°)—Reception of Evidence— Number of Witnesses—Limitation.

While the court, in its discretion, may limit the number of witnesses on a particular point, the discretion must be so used as not to impair

the rights of the parties, and an abuse thereof is reversible error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 133; Dec. Dig. § 57.*]

2. TRIAL (§ 57°)—RECEPTION OF EVIDENCE—WITNESSES — LIMITATION — ABUSE OF DISCRETION.

Plaintiff's counsel not having been notified that the court would hold an evening session, having no more witnesses present at 4:50 p. m., which was practically the usual time of adjournment for the day, asked for an adjournment until the next morning. The court, as a condition to adjournment, required plaintiff's counsel to state the names of the witnesses whom he would call on the succeeding day. Counsel objected to this, but, being required to comply, stated the names of certain witnesses, whereupon the court replied that he would hold counsel pretty rigidly to the number of witnesses to-morrow, and stated to the attorney for defendants that they, too, would be expected to proceed as soon as complainant had finished on the succeeding day. Held, that the court's refusal to permit complainant on the succeeding day to call and examine a material witness, who had not been named on the preceding evening, was an abuse of discretion.

was an abuse of discretion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 133; Dec. Dig. § 57.*]

8. TRIAL (§ 413*)—RECEPTION OF EVIDENCE—EXCLUSION OF WITNESSES.

Where a witness was offered in rebuttal generally, and the court refused to permit him to testify at all, the ruling could not be assisted by plaintiff's concession that, if the court would permit the witness to testify, he would be examined only as to one question.

[Ed. Note.—For other cases, see Trial, Dec. Dig. \$ 413.*]

4. TBIAL (§ 57*) — NUMBER OF WITHESEES — LIMITATION—NATURE OF TESTIMONY.

Where the court declined to permit a witness to testify at all in rebuttal because his name had not been mentioned by plaintiff's counsel as a condition to adjournment on the preceding day, the ruling was unsustainable because the proposed testimony would have been cumulative; the party holding the burden of proof being entitled to offer any material evidence bearing directly on the issue.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 57.*]

5. Trial (§ 64*)—REBUTTAL—REITERATION OF STATEMENTS.

A witness, whose testimony is denied by a witness testifying in rebuttal, cannot be recalled to reiterate her statements.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 154, 155; Dec. Dig. § 64.*]

Blodgett, J., dissenting.

Exceptions from Superior Court, Providence and Bristol Counties; Charles F. Stearns, Judge.

Claim by Elisha J. Campbell against the estate of James Campbell, deceased, to which George E. Campbell and others filed objections, From an order of the superior court, on appeal from commissioners, denying complainant's motion for a new trial after verdict for less than the relief demanded, he brings exceptions. Sustained. Case remitted for new trial.

See, also, 29 R. I. 428, 71 Atl. 1058.

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

James Harris and Irving Champlin, for appellees.

JOHNSON, J. The plaintiff filed in the municipal court in the city of Providence his claim against the estate of James Campbell, his father, late of said Providence, deceased, for \$15,550. This claim was made up as follows: \$10,000 due on a promissory note given for work and labor and money loaned by the plaintiff to his father; \$4,050 due from his father for wages for two years and three months at \$150 per month from April 1, 1902, to June 28, 1904; and \$1,500 due for money loaned his father from April 1, 1902, to June 28, 1904. The estate having been declared insolvent and commissioners appointed, said claim of \$15,550 was in part allowed by the commissioners to the extent of \$2,700 for work and labor for two years and three months at the rate of \$100 per month. From this allowance the plaintiff appealed to the superior court, where the jury awarded him a verdict for \$3,024.

The plaintiff filed a motion for a new trial, which was denied, and the case is now before this court on the plaintiff's bill of exceptions; the exceptions being as follows: (1) To certain rulings of said justice at the trial of said action in respect to certain evidence, as shown on pages 133 and 252 of the transcript of testimony filed herewith. To the ruling of said justice at the trial of said action not permitting a certain witness to testify, as shown on pages 602, 603, 610, 611, and 612 of said transcript of testimony filed herewith. (3) To the decision of said court denying the plaintiff's motion for a new trial, which motion was based upon the following grounds: (a) That said verdict and finding was against the law. (b) That said verdict and finding was against the evidence, and the weight thereof, in that said verdict and finding should have been for a much larger sum. (c) That said verdict and finding was against the evidence, and the weight thereof, in that the jury should have found, in addition to the amount they did, the amount of the note in said cause and interest thereon from the date of said note. (d) That said verdict and finding was against the law and the evidence, and the weight thereof. (e) That the amount of said verdict and finding was entirely inadequate and insufficient. (f) That the appellant had discovered new and material evidence, which he had not discovered at the time of the trial of said cause, and which he could not have discovered at said time by the exercise of reasonable care.

We think that the exception secondly set out in the bill, viz.: "To the ruling of said justice at the trial of said action not permitting a certain witness to testify, as shown on pages 602, 603, 610, 611, and 612 of said transcript of testimony filed herewith," should

Green, Hinckley & Allen, for appellant. | ception, it is necessary to recur to page 610, where the witness was offered and the objection made. The record follows:

> "Mr. Waterman: Mr. Bradford Campbell. "Mr. Champlin: I shall have to object to the testimony of this witness. Mr. Waterman made an agreement with us and with the court last night, and I shall insist that that agreement is kept.

> "Mr. Waterman: Now, if your honor please, at that time I said there might be one thing that I had overlooked in the testimony, in the haste of closing up. There is one thing that I have overlooked, and that is the statement of Mrs. Rebecca Campbell as to Mr. Bradford Campbell coming up at one time and getting the signature to a note, and that is what I want to examine him about. I will limit my examination to that, although I would like to examine him as to Mr. James Campbell's condition during the time mentioned. We didn't have him here yesterday, because, as I said, I thought we had enough witnesses to fill the day up, and we did not go to undue expense to get him in.

> "Mr. Champlin: This man is a son of Elisha J. Campbell, lives with him. and they could have had him here any time they chose. Last night your honor told Mr. Waterman that, unless he would name the witnesses, you would go ahead on this case last night, and you waited for him to name the witnesses. He insisted that he would put on whatever witnesses he could get. Your honor told him then you would go ahead with the trial last night unless he would name them, and you would hold him strictly to the agreement. He finally said that he would name three persons, and then eventually he got up and said he would take one of those persons out, and he would put on only those two persons, and he named those two persons. With that information we had from him, and with your honor's statement that you would hold him strictly to his agreement, we have made no preparation whatever to meet anything except the testimony of those two witnesses. We are not bound, under that agreement and under the ruling of your honor, to meet the testimony of this witness. He is going to contradict, perhaps, the testimony of Mrs. Rebecca Campbell. Mrs. Rebecca Campbell's deposition is in here. It would put us in the position to bring her in at the twelfth hour, and either make us go to the jury with an unfinished case, or ask your honor to take the deposition of Mrs. Rebecca Campbell.

> "By the Court: I shall hold you to your agreement, Mr. Waterman.

> "Mr. Waterman: Will your honor note my exception?

"By the Court: I note your exception."

As the court's ruling refers to and is based upon an agreement made by Mr. Waterman, the appellant's attorney, it becomes necessary to find out what the agreement be first considered. To understand the ex- was. Recurring to page 602 of the transscript of evidence, we find the following rec- | Butler v. State, 97 Ind. 378; Kesee v. Chiord:

"At 4:50 p. m. counsel for appellant asks that the trial of the case be adjourned until the following morning, and states that he has been unable to reach other witnesses whom he intends to procure in behalf of the appellant in rebuttal.

'By the Court: How many more witnesses are you going to call to-morrow?

"Mr. Waterman: We expect to get Mr. Collins, of course; Mr. Hawkins and Mr. Vial we intend to see; and that is all that I can say definitely about now.

"By the Court: I shall hold you pretty rigidly to your number of witnesses to-morrow, because I am ready to go on now, and I certainly- Of course, you understand the situation. I do not desire to handicap your case in any way, but it is a simple necessity on my part. I want a distinct understanding, before we separate to-night, the case is to be held down very close to-morrow morning on the number of witnesses. I don't think I am unfair in asking you to specify now exactly what you propose to do in the morning.

"Mr. Waterman: In order to expedite the matter, if your honor please- Of course, I will state that I didn't know the court was going to sit overtime to-night, and I thought we had enough testimony to fill up the time until adjournment, and did not like to ask business men, who would not be needed today, to come twice. In order to expedite the matter, I will agree to put on simply those that I know about-Mr. Collins and Mr. Hawkins. They will both testify as to his condition.

"By the Court: Now, then, gentlemen on the other side, you understand what you have to meet, and I shall expect you to go on with your case, too, as soon as they have finished theirs. On that condition, we will stop now till half-past 9 to-morrow morn-

It is well settled that the trial court, in the exercise of a sound and reasonable discretion, may limit the number of witnesses that may be allowed to testify on a given point. "If it were otherwise, the length of a trial could be protracted to an unreasonable and unwarrantable extent, and the time of the court consumed by the useless and unnecessary reiteration of testimony." calt v. Johnston, 9 Colo. App. 519, 49 Pac. 1058. "But the discretion must be reasonably exercised, so as to deprive the parties of no material rights, and an abuse of it in this respect will be reversible error." Burhans v. Norwood Park, 138 Ill. 147, 27 N. E. 1088; Ragsdale v. Southern Ry. Co. (C. C.) 121 Fed. 924; Jones v. Glidew Ark. 161, 13 S. W. 723, 7 L. R. A. 831; Huett v. Clark, 4 Colo. App. 231, 35 Pac, 671; Union National Bank v. Baldenwick, 45 Ill. 375; Mueller v. Rebhan, 94 Ill. 142; Mergen-

cago, etc., R. Co., 30 Iowa, 78, 6 Am. Rep. 643; State v. Pratt County, 42 Kan. 641, 22 Pac. 722; Burt-Brabb Lumber Co. v. Crawford, 27 Ky. Law Rep. 798, 86 S. W. 702; Cushing v. Billings, 2 Cush. (Mass.) 158; State v. Whitton, 68 Mo. 91; Biester v. State, 65 Neb. 276, 91 N. W. 416; Anthony v. Smith, 4 Bosw. (N. Y.) 503; Powers v. McKenzie, 90 Tenn. 167, 16 S. W. 559; Meier v. Morgan, 82 Wis. 289, 52 N. W. 174, 33 Am. St. Rep. 39; Bunnell v. Butler, 23 Conn. 65; Nolton v. Moses, 3 Barb. (N. Y.) 31. "Where the point in dispute is collateral to the main issue, as in the case of impeaching or sustaining a witness, or in the case of impeaching or sustaining the character of a party whose character is not directly in issue, the trial court has wide discretion in the matter of limiting the number of witnesses." 8 Am. & Eng. Ann. Cas. 829, note.

In St. Louis R. Co. v. Aubuchon, 199 Mo. 352, 97 S. W. 867, 9 L. R. A. (N. S.) 426, 116 Am. St. Rep. 499, 8 Am. & Eng. Ann. Cas. 822, at page 823, the court says: "On collateral and incidental issues, as, for example, the general reputation of a witness, or an issue upon a motion for a change of venue, or for costs, etc., it is a wise and settled rule to allow trial courts wide discretion." Outcalt v. Johnston, 9 Colo. App. 519, 49 Pac. 1058; Bunnell v. Butler, 23 Conn. 65. See collection of cases in note, 8 Am. & Eng. Ann. Cas. 829. Great latitude is also allowed trial courts in limiting the number of expert witnesses on a single point. See cases collected in note, 8 Am. & Eng. Ann. Cas. 829. A distinction has, however, been made where the fact to be established is not sworn to directly by witnesses, but must be established by proof of other facts from which the existence or nonexistence of the fact in controversy may be inferred.

In Green v. Phœnix Mut. Life Ins. Co., 134 Ill. 310, 25 N. E. 583, 10 L. R. A. 576, the court says: "One of the important questions involved at the hearing was whether, at the time of the execution of the trust deeds and the subsequent sale thereunder, and from thence to shortly before the filing of the original bill, appellant had been and was insane. • • • The law presumes the fact of sanity, and hence the burthen is cast upon the party alleging insanity to establish it by a preponderance of proof. No rule can be formulated as to the quantum of evidence necessary to establish insanity, otherwise than that it must be sufficient to overcome the legal presumption of sanity and to overbalance the testimony tending to sustain such presumption. This preponderance of evidence necessary to satisfy the judicial mind does not, as a matter of course, depend upon the number of witnesses testifying on either side; but when all are apparently possessed of the same means of knowledge, and are equally intelligent and credible. theim v. State, 107 Ind. 567, 8 N. E. 568; the greater number must generally prevail.

discretion as to the number of witnesses to prove a given fact that is not disputed, or that is merely collateral to the main issue, depending very much upon the nature and subject-matter of the inquiry. The phases of insanity and the facts and circumstances which may tend to establish, and are proper for consideration, are so numerous and varied that a great number of witnesses may be required to determine the fact in issue. And it is found that persons of equal intelligence differ in opinion as to the inference to be drawn from such facts and circumstances. In such cases great latitude has always been allowed. and should prevail. * * It must be apparent that the limitation of witnesses in such cases to an equal number on each side, as was here done, even supposing they were of equal credit, and had equal means of knowledge, would be to defeat the party holding the affirmative of the issue. The court may undoubtedly limit the number of witnesses called as experts, and in some cases for the purpose of impeachment. • • • It should, however, be understood that in such cases the exercise of the discretion must be reasonable. The court may not arbitrarily determine the number of witnesses that may testify in such cases."

In Galveston, etc., R. Co. v. Matula, 79 Tex. 577, 15 S. W. 573, the court says: "There must exist in every court the power to determine when evidence purely cumulative shall cease, or there would be no limit to trials, and the exercise of such a discretion would be no ground for reversal of a judgment unless it was made to appear that this had been abused. Such a power is one, however, to be exercised with the utmost care; and in a case where there is little or no controversy as to a given fact, such evidence might properly be cut off, where it would be improper to do so when the evidence was greatly conflicting. In a case in which a fact to be established is not sworn to directly by witnesses, but must be so established by proof of other facts from which the main fact is to be inferred, then evidence of different facts from which the inference may be drawn is not strictly cumulative. From the bill of exceptions it may be inferred that the court below refused to hear further evidence tending to prove the controverted fact or 'subject,' because other evidence, although not to the same facts, had been introduced tending to prove the same issue. If this was the ruling, it was erroneous."

Ward v. Dick, 45 Conn. 235, 29 Am. Rep. witnesses. Held ground for granting a new point, and to deny the right is error." trial. The court said: "The subject-matter | And in Pritchard v. Henderson, 8 Penne i of the inquiry was the value of a reputation. will (Del.) 128, 50 Atl. 217, the court held

The trial court must, of necessity, exercise; To the law this is a tangible thing. It is: property in the highest sense; and we are. not aware that in actions for injuries to. property courts have assumed the right, either to prevent the plaintiff from establish. ing the value thereof at the highest possible point to which he could carry it by: the power of testimony, or the defendant, from diminishing it by the same means. And actions for injuries to character are not: exceptions. It is true that in Bunnell v., Butler, 23 Conn. 65, this court sanctioned: a limitation, upon the number of witnesses to be heard in the matter of the impeachment of the character of a witness for: truth; but that character was not the ground of the action. It could at most only affect; the weight to be given to the testimony of one witness, and he may have been one, of many to the same point, and not at all; essential to the support of that, and the point, if established, may have been of very little importance. And in other instances: courts have restricted, the number of wit-. nesses giving opinions upon matters collat-. eral to the main issue. Character, for the; purposes of a judicial investigation, is the aggregate of opinions expressed concerning. an individual by those who know him; and, a name, good or bad, is most firmly established where the testimony of credible, witnesses covers the widest range of the life of the person who bears it. Therefore, where, as in the case before us, the life, of the plaintiff has been broken into sections. by changes of residence from one locality to another, the defendant was entitled to, the privilege of showing that in each there, was a preponderance of opinion adverse to, his good name. Again, it may often happen i that a few only can be found on the one; hand to sustain, or on the other to disparage, the name of an individual, while the great body of opinion is in each case on: the other side. In such instances the effect, of a limitation is to render it easy for the few to make it appear, to the jury that: public opinion rests at the equipoise upon : the name in question, when the fact is quite, otherwise."

In South Danville v. Jacobs, 42 Ill. App. 1 533, the court said: "We are aware of no rule authorizing the court to limit the num- . ber of witnesses a party may introduce, i unless it be upon some question collateral: to the main issue. If a fact is sufficiently: proven, and is not controverted, or if it is : expressly admitted by the adverse party, a court may, in the exercise of a sound dis-; cretion, refuse to allow its time to be wasted in hearing further evidence. When, how-677, was an action for slander, in charging ever, a controlling fact is controverted, each i plaintiff with dishonesty. Defendant offered party has the right to have all witnesses; evidence of plaintiff's bad reputation in heard who have knowledge of facts and cirthat respect. The court limited him to 10 cumstances bearing upon the contested (

that a rule of the court which permits but he would examine upon the following day. six witnesses to be examined on a side as The court then said to counsel for the apto a single fact does not apply where the matter inquired about is the mental condition of the testator. In such case the question relates, not to a single point, but to a condition that grows out of a number of observations. See, also, Nelson v. Wallace, 57 Mo. App. 397; Fisher v. Conway, 21 Kan. 18, 30 Am. Rep. 419; Barhyte v. Summers, 68 Mich. 341, 36 N. W. 93; Union Nat. Bank v. Baldenwick, 45 Ill. 375.

The case at bar differs from the cases of limitation to a given number of witnesses on each side upon a particular point; but, as the court's ruling had the effect to limit the number of witnesses for the plaintiff in rebuttal, we have examined a great many eases in which for one reason or another the number of witnesses has been limited by the court. From our examination of the cases the net result appears to be that each case must be decided upon its own special facts and circumstances. The court necessarily has discretion to limit the number of witnesses upon a particular point. If it were otherwise, a trial could be drawn out to an unreasonable and unwarrantable extent, and the time of the court consumed by the useless reiteration of testimony. This discretion must, however, be so used as not to impair the rights of the parties. There must be no abuse of discretion, and, if there is, it is reversible error.

The record shows that the appellant's counsel was, at 4:50 p. m., practically at the usual time of adjournment, confronted with a demand on the part of the court that he go on with the case that evening, when he had no other witnesses present, or name to the court the witnesses whom he would call the next morning. To this was added the statement: "I shall hold you pretty rigidly to your number of witnesses to-morrow, because I am ready to go on now, and I certainly— Of course, you understand the situation. I do not desire to handicap your case in any way, but it is a simple necessity on my part." The court's readiness to go on that night was announced then, without any previous notice that the session would continue beyond the usual time. He said he did not want to handicap appellant's case, "but it is a simple necessity on my part." What the necessity was the court did not state. He also added: "I want a distinct understanding, before we separate to-night, the case is to be held down very close to-morrow morning on the number of witnesses." If the court had positively required appellant's counsel to go on at that time, he doubtless would have excepted. and that question would now be before us. But the requirement that he then go on with the case was used as the alternative and the inducement to compel counsel to name

pellees: "I shall expect you to go on with your case, too, as soon as they have finished theirs." Quite a natural expectation, it would seem. No limitation of witnesses was, however, imposed upon them.

The agreement, as we have seen by the record, was relied upon by the court in excluding the testimony of the witness Bradford Campbell. Counsel for the appellee argue earnestly as to the same, and lay stress upon its being "offered by Mr. Waterman in violation of his agreement made in open court, in presence of his client." The transcript shows the conditions clear enough, we think. There are before us, however, in regard to the transcript, certain affidavits filed with a petition to establish the exceptions. Mr. Waterman, counsel for appellant, made an affidavit in which he stated that the colloquy incident to the above, as reported in the transcript of evidence in said case, is only a part of the colloquy which actually took place at the time, and that counsel for the appellant "did at the time strenuously object to being forced to choose between said two alternatives." The affidavit of Mr. Van Slyck, also counsel for the appellant, is to the same effect. The court stenographer who took the testimony in the case also made an affidavit in which, after stating the request for an adjournment by appellant's counsel on December 19th, he said "that thereupon there ensued a colloquy which I did not note stenographically, and which does not appear in the proceedings reported by me, and that I again began to make notes, when the court asked, 'How many more witnesses are you going to call tomorrow?" There appears, also, on page 611 of the transcript, in the remarks of Mr Champlin, of counsel for the appellee, the following statement: "Last night your honor told Mr. Waterman that unless he would name the witnesses you would go ahead on this case last night, and you waited for him to name the witnesses. He insisted that he would put on whatever witnesses he could get. Your honor told him then you would go ahead with the trial last night, unless he would name them, and you would hold him strictly to the agreement." While the affidavits do not add to the substance of the transcript, still, taken in connection with the statement of Mr. Champlin in the transcript itself, we think they indicate quite clearly that the submission of Mr. Waterman to the court's action was not quite so lamblike as counsel for the appellee now try to make it appear.

We think it is clear that the agreement was made under compulsion. The appellant's counsel was forced either to close his case in rebuttal then and there on the testimony which he had already put in or name the witnesses whom he would call on the followand thereby limit the number of witnesses ing day. The trial justice also told him that



he should hold him pretty rigidly to his num- | have not got. XQ. 493. What did he have? ber of witnesses on the following day. We A. He said that his grandfather had signed do not think that this was a proper exercise of judicial discretion. It is true that the plaintiff did not then and there except. But if the court's action on December 19th technically escaped being error, only because not excepted to at that time, neither said action nor its consequence, the agreement of appellant's counsel referred to, can avail to support and make proper the ruling on the 20th of December, refusing to permit Bradford Campbell to be called as a witness. The latter ruling was excepted to, and was clearly erroneous, unless justified by the agreement referred to by the trial justice in making the ruling. The justification having failed, the ruling is not assisted thereby.

Counsel for the appellees further argue that the exception "should be overruled because it appears by the statement of plaintiff's counsel, above quoted, that he offered the testimony of Bradford Campbell solely to contradict the testimony of Rebecca Campbell as to the former's going to the house of James Campbell at one time and getting his signature to a note (Transcript of Testimony, p. 611)." The ruling of the court, and the exception of counsel, are confined to the testimony of Bradford Campbell in that particular only. A comparison of the affidavit of Bradford Campbell with the deposition of Rebecca Campbell shows no contradiction in that particular. The testimony of Bradford Campbell was not offered for the purpose of showing that James Campbell was of sound mind, and the ruling of the court does not extend to such a matter. But, in any event, such testimony would have been cumulative. The attention of the court is called to the following excerpts from the deposition of Rebecca Compbell: "Q. 30. Did he [Bradford Campbell] ever stay here in the last years of your husband's life? A. He didn't live here. Once in a while he would come in the evening, if he went to a place of amusement. He would come here and stay occasionally overnight. * * * Q. 184. Do you remember at any time that Elisha sent his son to try to get one of those blank notes signed? A. Yes, sir; I do. Q. 185. What was done? A. For all I know, he got his grandfather to go into the other room and sign something. I didn't see what it was, but the boy came here and had something signed. I said: 'What is the matter now?' He was kind of- (Objected to.)" Crossexamination: "XQ. 487. When was it that Bradford Campbell came up here? A. I could not tell you. It was— I know he came here one night, I went out. I said, What are you doing now? XQ. 488. Never mind what he said to you. About when was he came. It was some time before he died. • • XQ. 492. Might it have been more by James Campbell on that occasion. than two years before he died? A. I should

some notes. XQ. 494. Did you see what it was? A. No; I didn't see anything. Brad told me his grandfather had signed some notes. The signature was not right, and he wanted a good signature. That is what Brad told me. XQ. 495. Did you see the notes?

A. No; I did not. That is all I know, is what he said. XQ. 496. Did you see the notes that your husband signed at that time? A. What notes did he sign? XQ. 497. When Bradford came up here? A. No; I didn't see anything. But he said that it was some notes that his grandfather had signed, or some checks that he had signed. The signature wasn't right, and he wanted a good signature. XQ. 498. You could have seen them if you wanted to? A. I suppose so. XQ. 500. You thought Mr. Campbell was perfectly able to look out for himself? A. No; I did not. * * * XQ. 504. Didn't you see whether this note, or whatever was signed at that time, was blank? A. I didn't see it at all." Counsel then argue: "From the testimony above quoted, it appears that Bradford Campbell's affidavit, so far as it refers to James Campbell's signing blank notes, is unimportant, since Mrs. Campbell did not testify that Bradford Campbell ever took any blank notes to James Campbell and secured his signatures thereon. Bradford Campbell's statement that he frequently passed the night at James Campbell's house is in substantial accord with Mrs. Campbell's testimony. His statement that he never noticed any peculiarities in James Campbell is in contradiction of several of the defendants' witnesses, particularly expert witnesses, and is simply corroborative testimony of other witnesses who testifled in behalf of the plaintiff."

As to the testimony of Rebecca Campbell, she did testify as follows: "Q. 184. Do you remember at any time that Elisha sent his son to try to get one of those blank notes signed? A. Yes, sir; I do. Q. 185. What was done? A. For all I know, he got his grandfather to go into the other room and sign something. I didn't see what it was; but the boy came here and had something signed. I said, 'What is the matter now?' He was kind of— (Objected to.)" Tals testimony was not very definite as to her knowledge, and may have been weakened by the cross-examination above quoted; but there was the direct statement, in answer to the question, "Do you remember at any time that Elisha sent his son to try to get one of those blank notes signed?" "Yes, sir; I do." indefiniteness of the testimony of the witness on cross-examination should not deprive the appellant of the right to call Bradford Campbell to rebut the testimony given, and it that he came? A. I don't know what time state the facts as to his being there, and his reasons for being there, and what was done

As to the statement of counsel for the apthink it was all of that. All the dates I pellee that the testimony of Bradford CampBell was not offered for the purpose of showing that James Campbell was of sound mind. and that the ruling of the court does not exfend to such a matter, if we turn to page 610 of the transcript we find that Bradford Campbell was called as a witness by Mr. Waterman, and objection was made by Mr. Champlin, stating the ground that "Mr. Waterman made an agreement with us and with the court last night, and I shall insist that that agreement is kept." Mr. Waterman then made the statement quoted supra, saying therein: "I will limit my examination to that [the statement of Rebecca Campbell], although I would like to examine him as to Mr. James Campbell's condition during the time mentioned. We didn't have him here yesterday because, as I said, I thought we had enough witnesses to fill the day up, and we did not go to undue expense to get him in." The offer to limit his examination to one matter was plainly made as a concession, in order to have him permitted to testify at all. As the concession offered did not avail, we do not think the court's ruling can be assisted by it. The witness was offered generally to testify to what he could properly testify to in rebuttal.

It is also urged that in any event his festimony as to the mental condition of ames Campbell would have been cumulative. Upon that point we think the language of the court in Ward v. Dick, supra, 45 Conn. 235, at page 237, 29 Am. Rep. 677, is entirely in point: "We know no better rule than to allow the party holding the weight of evidence an opportunity to bring it to bear upon the jury, when it concerns the real issue." An affidavit of Bradford Campbell has been filed, which reads as follows: "I, Bradford Campbell, of the city and county of Providence, state of Rhode Island, on oath depose and say that I am the son of Elisha J. Campbell; that I saw my grandfather about every week up to the fall of 1903; that I stopped overnight at his house requently up to that time; that he always appeared to me to be all right. He talked rationally and intelligently. He seemed to understand what he was talking about. He was weaker physically than he had been. He had more of a stoop and a slower gait than formerly. He did not talk so much as formerly. I never noticed any peculiarity of his conduct at any time up through the year 1903. At one time I went up there to my grandfather's to get a note and check signed. The note and check were payable to a Morris Herman, I think, of New York. They were filled out. My grandmother was in the room when they were signed. I never took a blank note or check up to him to be signed. That is the only note and check that I ever took up for him to sign." We cannot say that the testimony of this witness as outlined in his affidavit would have had no effect upon the jury, or that it might not have changed the result.

The claim by counsel for the appellee, urged at the trial below, that, if Bradford Campbell contradicted the testimony of Rebecca Campbell, it would put them "in the position to bring her in at the twelfth hour, and either make us go to the jury with an unfinished case, or ask your honor to take the deposition of Mrs. Rebecca Campbell," is unsound. Bradford Campbell was called in rebuttal, and could only testify in rebuttal. If he denied the statements made by Rebecca Campbell, the appellee could not call her to reiterate her statements. As to his testifying in regard to the mental condition of James Campbell, we do not see how the appellee would have been injured thereby as a result of any reliance by his counsel on the agreement of counsel referred to. He had to meet the testimony of other witnesses upon that point, and we cannot see that he was in any worse position as to Bradford Camphell, by reason of the agreement. In any event, if necessary for the furtherance of justice, the court could have allowed the appellee such time to meet the testimony as the circumstances of the case demanded.

Our conclusion is that the ruling of the court refusing to permit Bradford Campbell to testify was erroneous. The exception thereto is sustained. Our decision upon this exception renders a consideration of the other exceptions unnecessary.

Case remitted to the superior court for a new trial.

BLODGETT, J. (dissenting). After verdict for the appellant in the sum of \$3,024 upon his appeal from the municipal court of the city of Providence allowing a portion of his claim against the estate of his father, one James Campbell, deceased, for money alleged to have been loaned and services alleged to have been rendered to his said father, the appellant seeks a new trial because of certain alleged errors in the trial, and also because he claims the amount of the verdict is inadequate, and because of newly discovered evidence.

The first exception which is now pressed was as to the ruling of the court in declining on the last day of the trial to allow one Bradford Campbell, a son of the appellant, to be sworn and testify, in violation of an agreement of counsel for the appellant, made in open court at the close of the preceding day, that he would call only two witnesses. whose names he gave in open court to the opposing counsel, and to whom the court then said that the appellees need be prepared on the following day to meet only the testimony of these two witnesses, and who thereupon came to court the following day prepared only with testimony to rebut the aforesaid witnesses. In support of the exception the appellant's counsel contends that the presiding justice required him to elect, shortly before the usual hour of adjournment on the preceding day, and when he had no other

witnesses in court, either to inform the court | of the number of witnesses he should call the following day, or in default of so doing the court would then proceed with the trial of the case. The reason given for this requirement by the court was that, inasmuch as the trial had already lasted for several days and a large number of witnesses had testified, the court deemed it important, if possible, to conclude the trial before the Christmas recess, then close at hand, in order that the jury might not be obliged to wait until after that recess for the completion of the testimony upon which they were to base their verdict. It is claimed by the appellant that this action on the part of the trial justice was beyond his power, and that any agreement of counsel so made was an agreement made under duress and not binding. To this contention it is sufficient to reply that, if counsel desired to raise that question here, counsel should then and there have declined to comply with such a requirement, and should then and there have excepted thereto. This he did not do; but the record discloses the following colloquy between counsel and court relative to this matter:

"Mr. Waterman: In order to expedite the matter. if your honor please- Of course, I will state that I didn't know the court was going to sit overtime to-night, and I thought we had enough testimony to fill up the time until adjournment, and did not like to ask business men, who would not be needed today, to come twice. In order to expedite the matter, I will agree to put on simply those that I know about-Mr. Collins and Mr. Hawkins. They will both testify as to his [James Campbell's] condition.

"By the Court: Now, then, gentlemen on the other side, you understand what you have to meet, and I shall expect you to go on with your case, too, as soon as they have finished theirs. On that condition, we will stop now till half-past 9 to-morrow morning."

On the following morning, the last day of the trial, the appellant's counsel called as a witness one Bradford Campbell, a son of the appellant, and then living with his father, and thereupon the record discloses the following:

"Mr. Waterman: Mr. Bradford Campbell. "Mr. Champlin: I shall have to object to the testimony of this witness. Mr. Waterman made an agreement with us and with the court last night, and I shall insist that that agreement be kept.

"Mr. Waterman: Now, if your honor please, at that time I said there might be one thing that I had overlooked in the testimony, in the haste of closing up. There is one thing that I have overlooked, and that is the statement of Mrs. Rebecca Campbell, as to Mr. Bradford Campbell coming up at one time and getting the signature to a note, and that is what I want to examine him about. I will

would like to examine him as to Mr. James Campbell's condition during the time mentioned. We didn't have him here yesterday because, as I said, I thought we had enough witnesses to fill the day up, and we did not go to undue expense to get him in.

"Mr. Champlin: This man is a son of Elisha J. Campbell, lives with him, and they could have had him here any time they chose. Last night your honor told Mr. Waterman that, unless he would name the witnesses, you would go ahead on this case last night, and you waited for him to name the witnesses. He insisted that he would put on whatever witnesses he could get. Your honor told him then you would go ahead with the trial last night unless he would name them, and you would hold him strictly to the agreement. He finally said that he would name three persons, and then eventually he got up and said he would take one of those persons out, and he would put on only those two persons, and he named those two persons. With that information we had from him, and with your honor's statement that you would hold him strictly to his agreement, we have made no preparation whatever to meet anything except the testimony of those two witnesses. We are not bound, under that agreement and under the ruling of your honor, to meet the testimony of this witness. 'He is going to contradict, perhaps, the testimony of Mrs. Rebecca Campbell. Mrs. Rebecca Campbell's deposition is in here. It would put us in the position to bring her in at the twelfth hour, and either make us go to the jury with an unfinished case, or ask your honor to take the deposition of Mrs. Rebecca Campbell.

"By the Court: I shall hold you to your agreement, Mr. Waterman.

"Mr. Waterman: Will your honor note my exception?

"By the Court: I note your exception."

I am of the opinion that the exception to the action of the trial justice should be overruled. In so holding it is not necessary to decide that it is within the power of the trial justice to arbitrarily limit in all cases the number of witnesses which either party may in good faith call; but that is not this case, and this decision rests on the facts disclosed in the case now at bar. Here, after some discussion with the court, an agreement was made in behalf of the appellant, in open court, in the presence of the parties, upon which the court instructed the other party to rely, and upon which the record shows that they did rely. Section 483, Court and Practice Act 1905, is as follows: "Exceptions to rulings, directions, and decisions made during a hearing in a cause heard by the court without a jury or during a trial by a jury shall be taken immediately." In the case at bar, not only was there no exception taken to the requirement of the court at the time it was made, as required by statute. but counsel expressly announced in open limit my examination to that, although I court an unqualified assent to this requirement of the court in the presence of the appellant, and this agreement must be held to be an estoppel in law, as well as in morals, and to be a waiver of any ground of exception thereto, in view of the consequent instruction of the court to the opposing counsel and their reliance thereon and resulting action.

In Banks v. American Tract Society, 4 Sandf. Ch. (N. Y.) 438, 468, it was held as follows: "The defendants' declarations on that occasion, were intended to have weight with the court on the pending motion. They were a solemn statement, equivalent to a promise or engagement, made to the court and the adverse party, that the latter might, if they would, avail themselves of the light and air, over the open space left in the rear of the defendants' Spruce street lot, and that such space had been left for the mutual accommodation of both parties in respect of light and air. I have no reason to doubt that the statement was made in entire good faith. It will not answer for the defendants to assert now that their counsel were not authorized to make such a statement or engagement, after permitting it to go before the court, not merely undisputed and unquestioned by their executive officer, who was present, but actually sustained and warranted, to all appearance, by the defendants' answer in the cause, and the diagram annexed. They have been induced to deviate from the undertaking then made, and their ground for so doing, as stated by them, is their apprehension of danger to their own building and its contents, from any fire which may occur in the complainants' store. * * * Whether this apprehension be well or ill founded, it is not for me to say; nor do I deem it ma-In my view, the statements and representations made to the court and to the complainants, on the argument of the former motion, are to be regarded as a contract with the court, as well as the latter, and that it stands on the same footing as any stipulation or engagement made by a party, in facie curise, touching the subject-matter of the litigation, which the court is bound to enforce. It should be carried into effect, precisely as the court would enforce a promise of a party that he would not commit waste on mortgaged premises, made pending a motion for an injunction or receiver."

The majority opinion relies upon certain cases in other jurisdictions in support of the decision that the exception taken to the action of the trial court in this behalf sets forth reversible error, and it is therefore appropriate to examine them at some length in order to arrive at a determination as to their value and authority as precedents. First, conceding the general proposition that "it is well settled that the trial court, in the exercise of a sound and reasonable discretion, may limit the number of witnesses on a given point," it is then sought to qualify and limit that concession by a distinction which

appears to me to be inconsistent with it, as follows: "A distinction has, however, been made where the fact to be established is not sworn to directly by witnesses, but must be established by proof of other facts, from which the existence or nonexistence of the fact in controversy may be inferred." I am unable to concur in the conclusion reached by the majority of the court in this respect. It is important to keep in mind that in this proceeding the main issue was whether Elisha Campbell was a creditor of his father's estate, and, if so, in what amount. The issue of the mental competency of James Campbell at the time of the execution of a certain note, which constituted a part of the appellant's claim was pertinent; but the real issue as to that item was as to the consideration of the note.

Green v. Phœnix Mut. Life Ins. Co., 134 III. 310, 25 N. E. 583, 10 L. R. A. 576 (1890), cited in the majority opinion, appears to be overruled by the later case of Illinois Central R. R. Co. v. Treat, 179 Ill. 576, 587, 589, 54 N. E. 290, 294 (1899), in which the judgment of the trial court was affirmed, and in which it appears, from the dissenting opinion of Boggs, J. (who cites the Green Case), as follows: "Under this ruling of the court at least three witnesses whose testimony the appellant company desired to produce were excluded from the witness stand. This I think was error. * * * In the case at bar the point to which the testimony of the excluded witnesses was directed was controverted, and it was the right of appellant to lay before the jury all competent testimony it had which tended to meet and deny the charge it had negligently failed to supply a sufficient number of officers, agents, or guards to protect the public upon the platform. The exclusion of witnesses produced for the purpose of showing the number of persons so employed and so stationed on the platform on the occasion in question was, it seems, clearly wrong and so prejudicial as to constitute error reversible in character." But the majority of the court, in an opinion written by Carter, C. J., held that "the judgment must be affirmed." Mr. Wigmore, in his recent work on Evidence—volume 3, \$ 1908 (3)-in speaking of the powers of the court to limit the number of witnesses says: "For witnesses upon any point whatever a similar rule of limitation may be enforced. A court occasionally (in footnote, e. g., Illinois and Massachusetts) declares the rule applicable only where the fact is not actually controverted. But this limitation is unsound, because the value of merely cumulative witnesses may become trifling, even where the point is controverted, and the policy of the rule rests on the proportion between the probative value of the additional witnesses and the disadvantages they bring." And in commenting on the Green Case, supra, he says that the limitation of the number was there held improper "partly same subject. If cumulative testimony can because the order was not made at the opening of the trial, and partly because the issue was the main one in dispute"—adding (page 2526): "Moreover, the intimation in Green v. Insurance Co. (Illinois), that the notice must be given at the opening of the trial, is unjust and impracticable as a general rule." Mr. Wigmore further says: "Sometimes a court declares the qualification that the limiting of numbers is proper only upon collateral issues, though there is little authority for this"-and cites as the only instance of such "little authority" the Green Case in question. In view of this later decision of the Supreme Court of Illinois, it is not necessary to further consider the cases from the inferior courts of that state or the earlier decisions referred to in the majority opinion, of which there are five

As to the citations that, when the issue is as to sanity at a given time, a different rule prevails:

The case of Galveston, etc., R. Co. v. Matula, 79 Tex. 577, 580, 15 S. W. 573, 574 (1891), is cited in the majority opinion. This was an action for the recovery of damages for causing the death of plaintiff's wife by a collision between a train and a wagon in which appellee and his wife were at a public crossing on the railway. The court refused to admit the depositions of two witnesses (five having testified on similar issues). It appears that "the evidence related to facts bearing on plaintiff's ability to have seen the approaching train from where he was long before it reached the crossing, and to some other matters about which there was some conflict of testlmony." So far from arising in a case in which mental competency was in issue, or laying down a rule for guidance in that respect in that class of cases, the citation relied on in the majority opinion is the direct authority to the contrary, as appears in the later case of Delgado v. Gonzales, 28 S. W. 459, decided in 1894, in which it was held by the Court of Civil Appeals of Texas, and which was a will contest, as follows: "Upon the trial of the cause, appellee, without objection, introduced the will, the written proofs used in the county court for probating it, and then rested his case. Appellants then introduced quite a number of witnesses to show that the mind of the testator was in such condition that he was incapable of rationally disposing of his property. After appellants closed, a number of witnesses were introduced by appellee who swore to the sanity of the testator. Appellants then desired to introduce other witnesses as to testator's state of mind. This was not permitted by the court, and the action is assigned as error. The testimony offered was only a reiteration of testimony already introduced, and it was within the discretion of the trial

be urged as being in rebuttal, a trial might become interminable, and the contest would be narrowed down to a question of the number of witnesses that could be introduced. There must exist in every court the power to determine when evidence purely cumulative shall cease, or there would be no limit to trial; and the exercise of such discretion would be no ground for reversal of a judgment, unless it was made to appear that this had been abused.' Galveston, etc., R. Co. v. Matula, 79 Tex. 577, 15 S. W. 573. There is nothing offered to show that the discretion invested in the trial judge was abused in this case. There was a great conflict in the testimony on the question of the sanity of the testator; but the jury have determined the conflict in favor of appellee, and we are not disposed to disturb their verdict."

In Fraser v. Jennison, 42 Mich. 206, 223, 3 N. W. 882, 895, which was a will contest in which testamentary capacity was one of the issues, it was held by Judge Cooley: "The court was quite justified in declining to permit Dr. Johnson to be called as an expert by the contestants after five other experts had been called and examined on their behalf. If testamentary cases are ever to be brought to a conclusion, there must be some limit to the reception of expert evidence, and that which was fixed in this case was quite liberal enough. To obtain such evidence is expensive, since desirable witnesses are not to be found in every community; but an army may be had if the court will consent to their examination, and if legal controversies are to be determined by the preponderance of voices, wealth, in all litigation in which expert evidence is important, may prevail almost of course. But one familiar with such litigation can but know that for the purposes of justice the examination of two conscientious and intelligent experts on a side is commonly better than to call more; and certainly, when five on each side have been examined, the limit of reasonable liberality has in most cases been reached. The jury cannot be aided by going farther. Little discrepancies, that must be found in the testimony of those even who in the main agree, begin to attract attention and occupy the mind, until at last jurors, with their minds on unimportant variances, come to think that expert evidence, from its very uncertainty, is worthless. This is not a desirable state of things, and it can only be avoided by confining the use of expert evidence within reasonable bounds."

Ward v. Dick, 45 Conn. 235. 357, 29 Am. Rep. 677, is cited in support of the contention that in an action for slander it is error to limit the number of witnesses as to plaintiff's character and reputation. The decision is directly opposed by the case of Bissell v. Cornell, 24 Wend. 354, in which the Supreme Court of New York, in an action of ludge to exclude further testimony on the slander, charging plaintiff with having had , criminal connection with a certain woman | permitted to testify, and stated that they and having assisted her in procuring an s abortion, sustained the verdict for the plain-, tiff when the trial court had refused to allow defendant to call more witnesses in impeach-, ment of the plaintiff's character than the plaintiff called in support of his character. : saying: "We have heretofore held that the , judge at circuit may exercise a sound discretion as to the number to be sworn of im-, peaching and supporting witnesses. There must be some limit. Any one familiar with , trials must be aware that after some dozen , of witnesses on a side have been examined, . equally supporting and impeaching a party or witness, very little additional benefit is , derived by enlarging the number. The relative strength of the testimony will be the same, however extended the examination. A balanced public opinion will appear."

To fully understand the reference to Pritch-, ard v. Henderson, 8 Pennewill (Del.) 128, 50 , Atl. 217, it should be stated that this was a ruling made orally in a jury trial in an action of ejectment held in the Superior Court. It is not a decision of the Supreme Court of Delaware, which does not appear ever to , have passed upon the point in question.

. In like manner Nelson v. Wallace, 57 Mo. . App. 897, is a decision of an inferior court, and is not the decision of the Supreme Court of Missouri. While holding in St. Louis R. .Co. v. Aubuchon, 199 Mo. 352, 97 S. W. 867, 9 L. R. A. (N. S.) 426, 116 Am. St. Rep. 499, that a ruling limiting the number of witnesses in an action for the assessment of damsages for land taken by a railroad for its right fof way to four on each side was arbitrary and unreasonable, especially when not announced antil one side had already called three witinesses and had but one choice remaining, and the other side had called none and had four choices remaining, to which ruling it "Plaintiff excepted to the rule appears: when announced and excepted to its application when made"—the Supreme Court of Missouri has repeatedly sustained the action of "the trial court in limiting the number of witnesses, even in criminal cases of the gravest nature, none of which are overruled in the decision supra. Thus, in State v. Lamb, 141 Mo. 298, 304, 42 S. W. 827, 830, which was an indictment for robbery in which the defense was an alibi, the trial court refused to allow the defendant to call more than six witnesses to establish the alibi, and the Supreme Court of Missouri held as follows: "As to the charge that the court excluded competent evidence on the part of the defendant, the only ground for that charge consists in these circumstances: Six witnesses besides defendant having testified that defendant was at the Free Silver parade and tending to show that defendant did not participate in the robbery, 'whereupon the defendant by his attorney produced several additional witnesses in

would testify that on the night of the alleged robbery the defendant, Thomas Lamb, was present at the place of meeting of persons and clubs to participate in the Democratic parade, and was in said parade from the time that it started from Twelfth and Market streets, about 9 o'clock, until ft disbanded, in the neighborhood of 12 o'clock, and that from about half past 8 until 12 o'clock on the night of the alleged robbery the defendant was in their company and presence, and he was not during that time at the place of the alleged robbery.' But the court refused to hear any more witnesses on the subject of alibi. How fully and with what degree of particularity the seven witnesses testified as to an alibi for defendant does not appear; their testimony being taken down in short form. Now, if they testified as fully as was proposed the nontestifying witnesses would testify, we are not prepared to say as a matter of law that the court erred in refusing permission to other witnesses to testify on the question of alibi. A court has some discretion in these matters, and may limit the number of witnesses on a particular point, and, unless an abuse of such discretion appears, no reversible error has been committed. 2 Elliott's Gen. Prac. § 564, and cases cited; State v. Whitten, 68 Mo., loc. cit. 92." In State v. Smith, 164 Mo. 567, 582, 583, 65 S. W. 270, 273, which was an indictment for murder, in which the defense was self-defense, it appears: "The record disclosed that after defendant had introduced and examined eight different witnesses with respect to threats made by Watson against him, some of which were communicated to him and others that were not, the court refused to allow the defendant to introduce any further testimony on the subject of threats, to which ruling defendant excepted"—and the Supreme Court of Missouri held: "But it does not necessarily follow, we think, under the facts disclosed by the record, that the judgment should be reversed because of the refusal of this court to hear evidence with respect to other and additional threats made by deceased against defendant, after having heard evidence by so many witnesses, at least eight. in regard to the same subject-matter, though made at different times. There must be a limit to such inquiries somewhere in the course of a criminal trial, in order to avoid unnecessary consumption of the time of the court, and it does seem to us that it had been reached at the time the court announced that it would hear no more evidence in regard to threats, especially when threats of violence by deceased against defendant at different times and places had already been abundantly proven. It was not, therefore, prejudicial to defendant, nor an abuse of its discretion. for the court to refuse to hear still further evidence on the same subject. While it would have been better for the court to have heard ud requested that they be sworn and | the evidence, the judgment should not, under

In Fisher v. Conway, 21 Kan. 18, 24, 30 Am. Rep. 419 (1878), also cited in the majority opinion, the plaintiff sued eleven defendants for an alleged trespass, and the court below refused to hear more than four of them, and it was held by Brewer, J.: "Again, it is claimed that the court erred in limiting the number of witnesses on the part of the defense. After four witnesses had testified on the part of the defense to the circumstances of the entry upon the premises, the difficulty with Mrs. Conway, and the threshing, the court refused to permit any further witnesses upon these matters. In this we think the court erred. It is doubtless true as to any collateral matter, as the impeachment of a witness, that the court may restrict the number of witnesses, and, unless it appears that there had been an abuse of discretion in that respect, no error will lie. Anthony v. Smith, 4 Bosw. (N. Y.) 503. Perhaps, also, the court may have to some extent a like power, even where the testimony runs to the matter principally and directly in dispute, though see, upon this, Hubble v. Osborn, 31 Ind. 249, and White v. Hermann, 51 Ill. 243, 99 Am. Dec. 548. But still it may not prevent any defendant against whom a recovery is sought from being heard upon the witness stand as to what he knows of the matters charged against him. Here the plaintiff sued eleven parties for an alleged trespass. They denied the trespass. That was a denial good for each of them, and each one had a right to tell the jury what he saw and knew of the transaction. The rights of no one defendant were greater than those of any other; and the court could not compel them to select which of their number should be witnesses and which should not, or, as appears to have been done, after some had testified forbid the rest from the witness stand." The decision is thus based upon the exclusion of the defendants in the action, and rests upon a different principle than the case at bar, and is undoubtedly a correct decision. But in the later case of State v. Commissioners of Pratt Co., 42 Kan. 641, 648, 22 Pac. 722, 725 (1889), also cited in the majority opinion, in which an injunction was sought to restrain certain county commissioners from completing a purchase of certain lands for a county poor farm, it is said: "It is further claimed that the purchase of the land was void for the reason that the land was not worth the amount which the commissioners agreed to pay for it. • • * In this connection the plaintiff in error also claims that the court below erred in limiting the number of witnesses to prove the value of the land to six on each side. Under the circumstances of this case, however, we think the court below certainly did not err. • • • Under the circum-

the circumstances be reversed for its failure tion imposed by the court as to the number of witnesses was very reasonable."

> In Barhyte v. Summers, 68 Mich. 341, 36 N. W. 93 (1888), cited in the majority opinion, which was an action of deceit in the sale of a horse known to be unsound, the trial court limited the number of witnesses as to the condition of the horse as to soundness prior to the sale, and it was held to be error. The decision was contrary to the previous decisions of that court. Thus in Riggs v. Sterling, 60 Mich. 643, at page 655, 27 N. W. 705, at page 711, 1 Am. St. Rep. 554, the court says: "The value of this homestead was really the only question to be determined in this case. Six witnesses on each side were allowed to testify upon the subject, and no more. The refusal to allow more to testify on the part of the plaintiff is assigned as error; but we think there was no abuse of discretion on the part of the court in not allowing more cumulative evidence upon this point." And in the later case of Detroit City Railway v. Mills, 85 Mich. 634, 659, 48 N. W. 1007, 1012 (1891), the court held: "It is insisted that the court was in error in excluding testimony as to the dangers and actual perils witnessed by persons from the use of the new method of transit, for the reason that this testimony had a bearing upon the interference with the customary use of the street. This question arose three times upon the hearing. On the first two occasions the testimony ruled out referred entirely to the tendency of these cars to frighten horses. The court made its third ruling at the close of the testimony of one Mrs. Rascher, who had testified to the decrease of travel upon the street, to the frightening of horses, and the decrease in rents. The court then announced that eight or ten witnesses had testified to the condition of the road, and no more testimony would be allowed on that point. Defendant's counsel announced that they had a large number of witnesses to the same effect, and asked permission to call two or three more. The court said that five or six witnesses to any particular fact was sufficient, and that it was clearly within its discretion to limit the number of witnesses; that as to the points already covered defendants would not be permitted to call more witnesses. but as to any new facts they might call more. The circuit judge was clearly right in this exercise of his discretion."

Of the other cases cited in the majority opinion, Anthony v. Smith, 4 Bosw. (N. Y.) 503, is direct authority for the contention, not only that the number of witnesses may be limited, but that such action is not even ground for exception. The case was an action for damages for an assault and the court held that (page 508) "the court, in its discretion, may limit the party as to the number of witnesses to be examined as to what occurred, at a given time and place, between stances of the case we think that the limita- | the parties. If he exercises his discretion to the actual prejudice of either party, his decision in that respect is not the subject of an exception which can be reviewed on an appeal from the judgment. • • • The exercise of that discretion is not the subject of an exception. If probable prejudice has resulted from it in the trial of any cause, the remedy is a motion for a new trial, on a case."

. Nolton v. Moses, 3 Barb. 31, also cited, is authority for the same proposition. This case was an action for slander, and the Supreme Court of New York says: "The limitation of impeaching and sustaining witnesses to three on a side in this case, looks, to a person unacquainted with such trials, like depriving the parties of a right. But the surrounding circumstances would enable the judge at the circuit to perceive whether any benefit would result from an increase of the number. * * * In the present case I have no doubt the defendant suffered more from the attack he made upon the witnesses by general evidence than from being restrained from repeating it. Be that as it may, we cannot interfere upon a bill of exceptions, and the motion for a new trial must be denied."

Meier v. Morgan, 82 Wis. 289, 294, 52 N. W. 174, 175, 33 Am. St. Rep. 39, also cited in the majority opinion, is authority also for the contention that exception must be taker "when the original ruling is made," and not afterwards; and this position is reinforced by the case therein cited. This case was an action to recover for personal injuries by the falling of a portion of an icehouse, and the court held that "during the trial, after the defendants had been examined as to the manner in which the ice was packed in the icehouse, the defendants called other witnesses to establish the fact that the ice was properly packed; and at the close of the testimony of the second witness the court ruled that he would only allow three more witnesses as to that particular fact, making eight witnesses in all, including the defendants themselves. No objection or exception was taken at the time to this ruling, but at a later stage of the trial, after the number allowed by the court had been examined, the defendants offered another witness on the point, and his testimony was ruled out, and defendants except. We think the proper time to take the exception was when the original ruling was made. The ruling seems to have been practically assented to when originally made. Certainly it was without objection. McConnell v. Osage, 80 Iowa, 296, 45 N. W. 550, 8 L. R. A. 778. A reasonable limitation of the number of witnesses upon a single fact is within the discretion of the trial court."

And in McConnell v. City of Osage, 80 Iowa, 293, 295, 45 N. W. 550, 8 L. R. A. 778, above cited, which was an action for damages received from a defective sidewalk, the

court says: "The trial court limited the number of witnesses for each side to six on the question of the general condition of the walk where the plaintiff was injured, and the appellant complains of such action of the court. So far as we can judge, the order was made near the commencement of the trial, and without objection of either party. Later plaintiff desired to introduce additional witnesses, which the court refused. From the state of the record, it does not appear that the question is properly before us for review, for we find no exceptions taken to the action of the court. If the order was made without objection, we must assume that the parties assented thereto; and of such action they could not afterwards complain."

I pass now to a consideration of other cases which sustain the contention that no error was committed by the trial court. The power of a court to limit the number of witnesses to be called in an issue arising either in a civil or a criminal proceeding has been frequently upheld.

In Outcalt v. Johnston, 9 Colo. App. 519, 49 Pac. 1058, the trial court declined to hear more than four witnesses in surrebuttal of testimony impeaching the character of the defendant for truth and veracity, and it was held no error; the Supreme Court of Colorado saying: "It rests largely in the discretion of the court as to how many witnesses may be allowed to testify on a given point. If it were otherwise, the length of a trial could be protracted to an unreasonable and unwarrantable extent, and the time of the court consumed by the useless and unnecessary reiteration of testimony."

In Butler v. State, 97 Ind. 378, which was an indictment for murder, in which the number of depositions of witnesses from without the state was fixed by the trial court at 45, the Supreme Court of Indiana says (page 386): "The court has a discretion as to the number of witnesses that may be called. This rule is recognized in the case of Gardner v. State, 4 Ind. 632. If the court had no discretion in such cases, then the case might be indefinitely delayed, and an unlimited number of witnesses called. But for this rule courts would be subject to the caprice of counsel, and public good would seriously suffer. We agree that this discretion should be so exercised as not to impair the rights of a defendant. Nevertheless it does exist. But, as the power is a discretionary one, an appellate court can only interfere where it has been abused." See, also, Union Railroad Transfer & Stockyard Co. v. Moore, 80 Ind. 458. And in Mergentheim v. State, 107 Ind. 567, 8 N. E. 568, which was an indictment for a public nuisance in polluting a canal, the court affirmed Butler v. State, supra, saying: "The court limited the parties to the examination of seven witnesses on each side in respect to the subject of the condition of the canal, and the odors emitted therefrom.

tion of the court."

In Kesee v. Chicago, etc., R. Co., 30 Iowa, 78, at page 80, 6 Am. Rep. 643, the court limited the defense to two witnesses on a certain question and refused to hear two others who were offered thereon, and the Supreme Court of Iowa held that: "A nisi prius court must be permitted to exercise a discretion as to the number of witnesses, the order and manner of their examination, etc., in cases before them, else examinations and trials might be indefinitely prolonged. the absence of a manifest abuse of such discretion, an appellate court ought not to interfere. No such abuse appears from this record." In Bays v. Herring, 51 Iowa, 286, 291, 1 N. W. 558, 562, which was an action for malicious prosecution, the court says: "The defendant asked to introduce further witnesses impeaching the general reputation of George W. Bays for truth and veracity.' To this the court said: 'Seven witnesses having already been examined on that point, the application is denied.' The trial court must, of necessity, have the power, in the exercise of a legal discretion, to control the number of witnesses that should be examined to establish any fact. Otherwise trials might be prolonged to an alarming extent, and for the purpose of bringing about a mistrial by reason of the necessity that existed to adjourn the court. There is nothing in the record to indicate that the discretion with which the court is vested was abusec. On the contrary, it seems to us to have been wisely exercised." In Everett v. Union Pacific R. Co., 59 Iowa, 243, 13 N. W. 109, these two cases above were affirmed upon the proposition that "the trial court had a legal discretion to limit the number of witnesses that might be examined to establish a single point or proposition." And see Bays v. Hunt, 60 Iowa, 251, 14 N. W. 785. In State v. Beabout, 100 Iowa, 155, 160, 69 N. W. 429, 430, which was an indictment for rape the trial court limited the defendant to five witnesses impeaching the state's witnesses, and the "This ruling of the court is court savs: claimed to be erroneous. The power of the court to limit the number of witnesses upon a given point is not an open question in this state." And it was held there was no error.

In Sixth Ave. R. R. Co. v. Metropolitan Elevated Ry. Co. et al., 138 N. Y. 550, 553, 34 N. E. 400, 401, it is said: "The questions in this case relate solely to the damages to the fee of the property owned by the plaintiff herein. * * * The limitation of the number of experts who should be called was matter of fair discretion with the trial court, and there is not the slightest trace in this record of any abuse of that discretion."

In Powers v. McKenzie, 90 Tenn. 167, 16 S. W. 559, the court say as to the limitation of the number of witnesses as to the genuineness of handwriting: "It is further assigned as error that the chancellor erred in the part of the court"

A reasonable limitation is within the discre- | limiting the number of experts to each side to five. Manifestly a trial judge must have some control over the dispatch of business in his court, and some discretion respecting the number of witnesses he will hear upon a spe-, cific line of inquiry incident to a case. This conceded, it follows, from the essential nature of the juridical connection of inferior and appellate courts, that the latter will not reverse the ruling of the former, originating in the exercise of this discretion, unless it has been abused and it can be seen that this abuse has resulted in injury"-and held no error had been committed.

In Skeen v. Mooney, 8 Utah, 157, 30 Pac. 363, which was an action for damages to land by diversion of water therefrom, it is said: "It also appears that the court limited the respective parties to three witnesses on either side of any point. This ruling of the court, the defendants now insist, was error. But they made no objection, nor did they take any exception, at the time. If objection had been interposed, and exception taken, however, we would not be disposed to regard the ruling of the court as reversible error, in view of the facts of this case and of its nature."

In Larson v. City of Eau Claire, 92 Wis. 86, 89, 65 N. W. 731, 732, which was an action to recover damages suffered because of a defective highway, the court said: "The propriety of the ruling limiting the number of witnesses the defendant might examine as to the condition of the highway, which resulted in the exclusion of the testimony of Riley on that point, though not made until he was called, is not an open question in this court. A reasonable limitation of the number of witnesses upon a single question is within the discretion of the trial court. Meier v. Morgan, 82 Wis. 289, 52 N. W. 174, 33 Am. St. Rep. 39; McConnell v. Osage, 80 Iowa, 296, 45 N. W. 550, 8 L. R. A. 778; Bays v. Herring, 51 Iowa, 286, 1 N. W. 558; Thompson, Trials, § 358. It is the better practice, no doubt, to impose the limitation at the commencement of the trial, or as soon as the necessity for it is reasonably apparent. In the present case the defendant had examined nine witnesses, a greater number than the plaintiff, on the point in question. It cannot be admitted that, as a matter of right, the defendant might continue indefinitely to call and examine witnesses in respect to it. Perhaps a hundred or more might have been found competent to testify on the subject. It would be highly absurd to hold that the court was bound to sit and hear testimony of witnesses on this point, without limit of number. Certainly the court must possess a discretion to limit the party to a reasonable number. Whatever may have been held elsewhere on the subject, we see no good reason for changing the rule already established in this state. nothing to show any abuse of discretion on

In Preston v. City of Cedar Rapids, 95; plication of the rule to a particular class of Iowa, 71, 73-75, 63 N. W. 577, 578, which was an action for damages to plaintiff's property by reason of change of grade of a street, the court say: "At the commencement of the trial, and upon its own motion, the court limited the number of witnesses touching the value of the property to seven upon each side. It is contended that this was error. The right of a trial court to limit the number of witnesses who may be called to testify to a given point has been too often recognized by this court to be an open question. It was said in Kesee v. Railroad Co., 30 Iowa, 80, 6 Am. Rep. 643: 'A nisi prius court must be permitted to exercise a discretion as to the number of witnesses, the order and manner of their examination, etc., in the case before them, else examinations and trials might be indefinitely prolonged. In the absence of manifest abuse of such discretion, an appellate court ought not to interfere.' In Bays v. Herring, 51 Iowa, 291, 1 N. W. 558, we said: 'The trial court must, of necessity, have power, in the exercise of a legal discretion, to control the number of witnesses that should be examined to establish any fact.' Everett v. Railroad Co., 59 Iowa, 244, 13 N. W. 109; Bays v. Hunt, 60 Iowa, 254, 14 N. W. 785. In Minthon v. Lewis, 78 Iowa, 622, 43 N. W. 465, we held that the court might limit the number of witnesses on any point in the case. also, McConnell v. City of Osage, 80 Iowa, 293, 45 N. W. 550, 8 L. R. A. 778. Counsel for appellant called seven witnesses to testify to the value of the plaintiff's real estate before and after the change of grade in 1886. It appeared upon the examination of two of them that they had no such knowledge of the value of the property as qualified them to testify relating thereto. Whereupon he proposed to call other witnesses to the same point, and the court refused to hear them. It is claimed that the order limited the number of witnesses 'to give testimony on the damages and value to seven on a side,' and, as only five of the seven he had called did give such evidence, he was entitled, under the form of the order, to call two more. The order limited the number of witnesses upon the question of value of the property to seven on each side. Defendant was not prejudiced by the order. It knew before the case began that it was only entitled to call seven witnesses upon the question of values of the real estate. If two of its witnesses showed a lack of knowledge of values of the realty, and hence were not competent to testify thereto, that was no reason for setting aside or ignoring the order. It was defendant's business to know before it called its witnesses that they possessed the requisite knowledge to testify touching that matter. It is urged that, while this rule is proper as applied to collateral issue, it should not be held applicable to the main issue in a case.

cases, or to certain issues. The power thus given trial courts, when discreetly exercised, is alike applicable in all cases and to all issues. The only question is: Did the court, in this case, abuse its discretion? We see no reason for so holding. The preponderance of the evidence is not necessarily determined by the number of witnesses on each side who testify touching the same facts. In our judgment, the court very properly exercised its discretion, and there was no error in refusing to hear additional witnesses offered by the defendant as to the value of the real estate.

In Cushing v. Billings, 2 Cush. (Mass.) 158, which was an action to recover the amount due on a promissory note, in which both the genuineness of the signature and the consideration was in issue, it was said by Shaw, C. J. (page 159): "So, as to the number of witnesses, where the testimony may be extended almost indefinitely, as in the case of evidence to usage or character. The case of handwriting is very similar, because, in regard to almost any man of business, hundreds of persons may be qualified, by having seen him write, to give an opinion which would be evidence. In such a case, suppose a great number of witnesses to be called to prove the genuineness of a signature, and when as many of them have testified as are necessary, in the opinion of the judge, to make a case, the court interferes and stops the further introduction of witnesses. If, then, as great or a greater number is called and introduced on the other side to testify against the genuineness of the signature, the judge has a discretionary power to admit further witnesses to be called in its support. The orderly course of proceeding requires that the party whose business it is to go forward shall bring out the strength of his proof, in the first instance; but it is competent for the judge, according to the nature of the case, to allow a party who has closed his case to introduce further evidence. This depends upon the circumstances of each particular case, and falls within the absolute discretion of the judge, to be exercised or not as he may think proper. Exceptions overruled."

In Hollywood v. Reed, 57 Mich. 234, 237, 23 N. W. 792, 793, which was an action to recover the amount claimed to be due the plaintiff as a physician, the court says: "In the forenoon of the second day of the trial the defendant had placed four witnesses upon the stand, who swore that the reputation of the plaintiff for truth was bad, and then rested his case. The plaintiff then placed four witnesses upon the stand who supported the plaintiff's character for truth and veracity and that they would believe him under Adjournment was then had for an oath. hour and a half for dinner, and upon the convening of the court, the plaintiff offered We discover no reason for limiting the ap- in evidence the enrolled decree for divorce,

which, on objection, was excluded. Another | Errors of Connecticut held (page 69): "In witness was then called in support of plaintiff's character for truth, after which it appears that the court requested the plaintiff's counsel to proceed, when he announced that there were several important witnesses almost at the door of the courtroom, and asked the court to wait not over five minutes; that they had not expected this attempt at impeachment, and would not delay. court inquired if his witnesses were in court. Counsel replied: 'No; but I am informed that they are on the way, and almost at the door of the courtroom.' The court then said: 'I order the case to go on.' Counsel for plaintiff then explained that he had no witnesses present. Some further contention then arose between court and counsel, the court ordering counsel to go to the jury, and the counsel refusing to do so; and he thereupon called Henry Starkey as a witness, who testified in support of the plaintiff's character, and also two other witnesses to the same effect. Plaintiff's counsel was then sworn as to the computation of interest. In looking at the contention between counsel and court, it will be seen that the delay was asked to enable plaintiff to bring forward sustaining witnesses as to his character. It had been attacked by four witnesses. He had aiready introduced five witnesses to sustain it. When impeaching testimony is given of general character for truth, the number of impeaching and sustaining witnesses which will be allowed to be introduced is in the discretion of the court, and is generally limited to an equal number on each side. Here the plaintiff had already exceeded the number introduced by the defendant, who had given testimony tending to impeach the plaintiff's character for truth. There appears no reason, then, as the case stood when the court requested plaintiff's counsel to proceed, why he should not have sworn himself as a witness as to his computation of interest and closed his case. Certainly it cannot be claimed that there was anything arbitrary, or an abuse of discretion, in ordering the case to proceed. The situation of the case did not justify plaintiff's counsel in insisting upon further delay. He did not claim that he had rebutting testimony other than that of a sustaining character, and therefore it resolved itself into the simple question under his request whether the court would delay the trial for the arrival of further witnesses of that kind. We think he was not obliged to do so."

In Bunnell v. Butler, 23 Conn. 65, which was an action on a promissory note, in the trial court "the defendant called witnesses to impeach the general character of Bunnell, for truth. When the first impeaching witness was called, the court limited the number of such witnesses to six upon each side. The defendant offered more, and claimed a right to examine them; but their testimony the next place, it is claimed that the court erred in limiting the number of impeaching witnesses. This, however, was a matter within the discretion of the court. It would be absurd to hold that upon an inquiry of that sort, depending in a great measure upon the opinion of witnesses, a party has the right to examine as many as he pleases, and that the court and jury are bound to sit and hear them, without any power to interfere. There must necessarily be a limit to such inquiries, and it is for the court to prescribe it."

In Hilliard v. Beattle, 59 N. H. 462, which was an action for damages for an assault, the trial court limited the number of medical witnesses on each side to three, and the Supreme Court of New Hampshire says (page 464): "The number of witnesses called as experts may be limited by a special order, which should not be so modified as to give either party an unfair advantage."

In Hupp v. Boring, 8 Ohio Cir. Ct. R. 259, which was an action for the recovery of real estate, in which the defense was adverse possession for more than 21 years, the facts were these: "On the trial of the issue to a jury, the plaintiff examined a number of witnesses, whose testimony tended to support the issue on her part, and rested her Thereupon the defendant called a number of witnesses, whose testimony tended to establish adverse possession in him for more than 21 years of the land in dispute. and was about to call a number of additional witnesses 'as to the present condition of things along the line of the fence, indicating whether the fence had been changed or not, when the judge announced that he would limit the number to four on each side as to any such indications. The defendant called four and rested. The plaintiff then called four, and offered to call the fifth, and more to the same facts; but the court refused to permit further testimony to be given as to those facts, to which ruling the plaintiff excepted. It is conceded that the fact as to whether the fence had been moved within the 21 years was material, and, if found one way or the other, might determine the issue. The jury returned a verdict in favor of the defendant, upon which judgment was duly entered. To the order of the court limiting the number of the witnesses to four error is assigned," and the court held (pages 260, 262): "It has long been held that, in eliciting the truth from a witness, the manner and extent of the examination is largely in the discretion of the trial judge; but, when it comes to the number to be called to establish a fact or a given issue, must all discretion be denied? A trial sometimes becomes a contest as to which side can overwhelm the other with the larger number of witnesses; and we have repeated what recently occurred in a common pleas court in was not received." The Supreme Court of this circuit, the issue between two neighboring farmers being the identity of three sheep, I not worth to exceed \$15. A hundred witnesses were called, ten days consumed in the trial, the three sheep were soon followed with the loss of the entire flocks of unfortunate farmers, and also a large part of their farms. In another part of this circuit the issue tried was the alleged warranty of a heifer at an auction sale of stock. All the men present at the sale were called by one or the other of the contending parties, with a result not less disastrous than the sheep case. A court of justice that has no power to regulate such exhibitions of bad temper is hardly worthy of the name. * * * We conclude that a reasonable limitation of the number of witnesses who may be called in proof of a fact, or of a single issue, is within the discretion of the trial court, to be exercised, no doubt, with caution, considering the nature of the case, the character of the witnesses, and the state of the proof." The judgment of the court was affirmed in 55 Ohio St. 635, 48 N. E. 1113.

In J. H. Clark Company v. Rice, 127 Wis. 451, 466, 106 N. W. 231, 237, which was an action on a note given for a patent right, in which the defense alleged that the patent was of no utility and that the plaintiff induced the defendant to give the note by false and fraudulent representations as to the practical utility of the patented device, the court say: "Error is assigned for the rejection of testimony. We perceive no abuse of discretion in limiting the respective parties to 15 witnesses on the question of the utility of the device covered by the patent."

In Swope v. Seattle, 36 Wash. 113, 120, 78 Pac. 607, 610, in which the plaintiffs sought an injunction against completing a change of grade of a street until damages therefor were paid, and in which damages were assessed, the Supreme Court of Washington says: "The [trial] court refused to permit the respective parties to examine more than three real estate expert witnesses as to the value of the plaintiff's premises. That was a matter resting largely in the discretion of the court, and we are not convinced that such discretion was abused, or that the plaintiffs were injuriously affected by the ruling of the court."

In Austin v. Smith & Holliday Co. (Iowa) 109 N. W. 289, in which the number of witnesses had been limited to five by the trial court on a certain question, the Supreme Court of Iowa said: "The authority of the court to limit the number of witnesses which may be called on any issue has been settled too long to require any discussion at this time." See, also, White v. Boston, 186 Mass. 65, 71 N. E. 75; Sizer v. Burt, 4 Denio (N. Y.) 426.

From these decisions in other jurisdictions it is evident that the right to limit the number of witnesses, as to any issue, main or collateral, in a case, has frequently been

crimes known to the law, as well as in equitable proceedings and other civil actions, and that it must affirmatively appear that injustice has been caused in so doing to constitute reversible error; that in some jurisdictions such action is not even a subject of exception, and in other jurisdictions the exception must be claimed when the order is made and not later; and there is substantial unanimity of authority that the number of witnesses as to matters of opinion, such as genuineness of handwriting and mental competency, may unquestionably be controlled by the court; and it is of this latter nature that the testimony of Bradford Campbell is composed, as appears by his affidavit. was not properly offered in rebuttal of the alleged testimony of Rebecca Campbell that she had seen him carry away notes signed by his grandfather James Campbell, for she distinctly states in cross-examination that she did not see his grandfather sign anything. The testimony of Rebecca Campbell in that behalf is as follows (direct examination): "Q. 184. Do you remember at any time that Elisha sent his son to try to get one of those blank notes signed? A. Yes, sir; I do. Q. 185. What was done? A. For all I know, he got his grandfather to go into the other room and sign something. I didn't see what it was; but the boy came here and had something signed. I said, 'What is the matter now?' He was kind of- (Objected to.)" These were the final questions before the cross-examination of the witness, and make it perfectly plain that whatever was signed by her husband was signed in another room and that she did not see what was signed.

In cross-examination her lack of knowledge is made even clearer: "C. Q. 487. When was it that Bradford Campbell came up here? A. I could not tell you. It was-I know he came here one night I went out. I said, 'What are you doing now?' Brad said to me— C. Q. 488. Never mind what he said to you. About when was it that he came? A. I don't know what time he came. It was some time before he died. C. Q. 489. About when? A. I could not tell you. C. Q. 490. Can't you give me an idea about when it was? A. I can't. It might have been a year or two years. I guess it was a couple of years. C. Q. 491. Before he died? A. Yes. C. Q. 492. Might it have been more than two years before he died? A. I should think it was all of that. All the dates I have not got. C. Q. 493. What did he have? A. He said that his grandfather had signed some notes. C. Q. 494. Did you see what it was? A. No; I didn't see anything. Brad told me his grandfather had signed some notes. The signature was not right, and he wanted a good signature. That is what Brad told me. C. Q. 495. Did you see the notes? A. No; I did not. That is all I know, is what he said. C. Q. 496. exercised in cases involving the gravest Did you see the notes that your husband

signed at that time? A. What notes did he | and there respectfully urge that objection upsign? C. Q. 497. When Bradford came up here. A. No; I didn't see anything; but he said that it was some notes that his grandfather had signed, or some checks that he had signed, and the signatures was not right, and he wanted a good signature. C. Q. 498. You could have seen them? A. I didn't try to. C. Q. 499. You could have seen them, if you wanted to? A. I suppose so. * * C. Q. 504. Didn't you see whether this note, or whatever was signed at that time, was blank? A. I didn't see it at all. C. Q. 505. You could have, if you wanted to? A. I suppose so."

Both in her direct and in her cross-examination she expressly says she did not see what was done; so evidently knows nothing, of her own knowledge, in that respect. Thus no rebuttal was requisite, if, indeed, permissible. The remaining purpose of Bradford Campbell's testimony is to show that in his opinion his grandfather was mentally competent at a certain time. On this point 12 witnesses had already testified for the appellant, including men who had known his grandfather long before the grandson was born, and only 11 for the appellees. It is not necessary here to determine whether the court would or would not have been justified in limiting the appellant to 2 witnesses in rebuttal, since the trial justice did not do this; but, on the contrary, imposing no limitation in number, he properly required counsel to keep the agreement then made with the court and opposing counsel in the presence of his client.

It is said in the majority opinion that "we think it is clear that the agreement was made under compulsion. The appellant's counsel was forced either to close his case in rebuttal then and there on the testimony which he had already put in or name the witnesses whom he would call on the following day." I cannot assent to such a definition of duress; nor is any authority referred to therefor, if, indeed, any such authority can be found. I fail to see that such a requirement, unlimited as to the number of witnesses which he might name, possesses the essential elements of duress. No case has been cited by counsel, and an exhaustive personal examination, intended to cover every reported case in the United States on this subject, has disclosed no decision granting a new trial, where counsel, when required to state the witnesses proposed to be offered, without the slightest limitation as to such number made by the court, instead of excepting at the time to the requirement of the court, unreservedly announce assent to the requirement in open court in the presence of the client, and, after having thus misled both the court and opposing counsel, on a later day repudiate the agreement thus solemnly made. If the requirement of the court was deemed to be beyond the power of the court, it was

on the court, and to then and there except to the ruling, and the question would thus be presented on the record, and the rights of all parties preserved.

The refusal of this appellant's petition for a new trial, under section 472, Court and Practice Act 1905, in this case, reported in 29 R. I. 428, 71 Atl. 1058, was based by this court upon the following ground: "The conduct of the court complained of was subject to exception to be taken immediately, under Court and Practice Act, § 483. This course I deem to be imperatively required by the mandatory provisions of section 483, Court and Practice Act 1905. I am unable to assent to the opinion of the majority of the court, which seems to me, not only to disregard our own decision heretofore rendered in this case and to nullify that statute, but also to renounce a power inherent in the court, as well established by abundant authority, and which certainly weakens, if it does not entirely subvert, that requirement of good faith with the court which it is the constant duty of counsel to observe.

To the exception that the verdict is inadequate in amount, and, inasmuch as certain items of the appellant's claim were not allowed, is contrary to the weight of the evidence, it suffices to say that upon a careful examination of the conflicting evidence submitted to the jury, whose verdict has been approved by the trial justice in declining to grant a new trial on this ground, I am not willing to disturb the finding of the jury.

A new trial is also sought upon the ground of newly discovered evidence, and numerous affidavits relating to the mental competency, in his later years, of James Campbell, who admittedly died of paretic dementia, have been submitted. The same issue of mental incompetency was raised in the hearings before the commissioners appointed by the municipal court of the city of Providence, and the record of testimony there given was used by counsel for purposes of cross-examination at the trial in the superior court. Medical and other testimony upon the same issue was offered by both sides at this trial, and in effect the appellant's present contention is that he did not offer all the evidence he might have offered on that fact; for I see no reason he should suppose the issue would not be raised, and he should have prepared himself to meet it. Obviously, his contention, that he was entitled to suppose that a defense which seems to have been successfully interposed in the former hearing would be abandoned at this hearing, is untenable. All these affidavits relate only to the mental competency of James Campbell, and they were all obtained and filed between the rendering of the verdict on December 20, 1906, and January 11, 1907. Except for the statement that he was unable to procure this testimony "by the exercise of reasonable care," both the right and the duty of counsel to then the case presented by them is not dissimilar

to the case of Riley v. Shannon, 19 R. I. 504, 34 Atl. 989: "He apparently seeks to excuse his failure to present the testimony on the ground that, the plea filed being the general issue, he had no notice of the evidence and was surprised by the defendant's testimony. If surprised, he should have asked for a continuance, that he might have had an opportunity to procure the additional testimony, if he deemed it important. This he did not do. Having gone on with the hearing and taken the chances of a decision, it is too late after an adverse decision to ask for a new trial for the purpose of putting in additional testimony."

In my opinion the appellant's exceptions should be overruled, and the case remitted to the superior court, with direction to enter judgment on the verdict.

(30 R. I. 8)

FULLER v. PERKINS et al.

(Supreme Court of Rhode Island. 1909.) July 6.

CORPORATIONS (§ 123*)—STOCK — PLEDGER -

"LIQUIDATION."

"LIQUIDATION."

Of the shares of a corporation, complainant held 250 shares, of which 185 had been pledged to decedent in his lifetime as security for complainant's note to testator. The remaining 250 shares were held, 100 by defendant trustees and 150 by two other persons individually. The business being unsuccessful, it was decided to liquidate, whereupon the estate, feardecided to liquidate, whereupon the estate, fear-ing that the dividend distributable to complaining that the dividend distributable to complainant on the pledged stock would be insufficient to pay the note, proposed that if complainant would turn over his other 65 shares the note would be surrendered, with the understanding that if, in liquidation, the property of the company amounted to more than enough to pay the note and accrued interest, the balance would be turned over to complainant, which proposition was accepted in terms, after which complainant participated in the liquidation agreement, one of the clauses of which declared that ment, one of the clauses of which declared that after the corporation's indebtedness was paid the treasurer should divide the balance among the treasurer should divide the balance among the stockholders in proportion to their several holdings. Held, that the word "liquidation," as used in such agreement, meant the act or operation of winding up the affairs of the company by getting in the assets, settling with its debtors and creditors, and apportioning the amount of profit or loss, and that the agreement should be construed to mean only that, if complement's proportion of the net assets amount of the net assets amount. plainant's proportion of the net assets amounted to more than enough to pay the note, he should receive the balance, and not that he should receive all of the net assets above the amount necessary to pay the note.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 123.*

For other definitions, see Words and Phrases, vol. 5, p. 4180.]

Appeal from Superior Court, Providence and Bristol Counties; George T. Brown, Judge.

Suit by John G. Fuller against Frederick E. Perkins and others, trustees. Decree for defendants, and complainant appeals. Affirmed and remanded.

Bassett & Raymond (R. W. Richmond, of counsel), for appellant. Walter H. Barney, James B. Littlefield, and Barney & Lee, for respondents.

BLODGETT, J. This bill in equity for an accounting comes here by complainant's appeal from the decree of the superior court, and involves the construction to be given to the following agreement:

"Providence, R. I., Apl. 6, 1905.

"Mr. J. G. Fuller, San Remo Hotel, New York City-Dear Sir: I do not suppose it is necessary for me to remind you that your note is due after to-morrow (April 8th); but I do wish to say that Mr. Henry Perkins and myself have been looking over the statement with Mr. Rogers, and Mr. R. informs us that you had a statement March 31st, so you know the figures as submitted by him. Careful examination of the assets of the company leads us to believe that your share of the assets will not realize enough to pay your note, and I would ask if you are willing to turn over to the estate of Charles H. Perkins the other 65 shares of the stock held by you and take your note, with the understanding that, if in liquidation the property of the company will more than pay your note and accrued interest, we will turn over to you the balance, whatever it may be. This course of action will avoid any legal proceedings, which we shall be obliged to take in case there is a shortage on the note, and also might save you some embarrassment in the future. Should like to have your prompt reply to this letter, as, unless the note is paid April 8th, we shall be obliged to take steps to protect ourselves. Yours very truly,

"Charles R. Stark. "For Estate of Charles H. Perkins." "Providence, R. I., April 8, 1905.

"Estate of Charles H. Perkins, Charles R. Stark, Esq., 112 Industrial Trust, Providence -Dear Sir: Your letter to Mr. J. G. Fuller, dated April 6th, has been mailed to me for answer. Mr. Fuller's necessities had compelled a conveyance by him of the 65 shares you speak of, but in view of your offer he will repurchase these shares and assign them to you. I therefore, in Mr. Fuller's behalf, accept your offer upon the condition contained therein, 'that if in liquidation the property of the company will more than pay your [his] note and accrued interest, we [you] will turn over to you [him] the balance, whatever it may be.' Respectfully yours,

"Edward D. Bassett."

The company referred to in these letters is the J. G. Fuller Company, of whose stock appellant then held 250 shares, of which 185 shares had been pledged as collateral security for a note of \$6,500 to Charles H. Perkins in his lifeti. 1e, and on which interest had been paid for some time to the respondent trustees under his will, and 65 shares of

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

which were not so pledged, and are the 65 shares referred to. The remaining 250 shares were held as follows: One hundred shares by the respondent trustees as aforesaid, 140 shares by one Charles H. Perkins, Jr., individually, and 10 shares by one Fred H. Perkins, individually. The business proving unprofitable, it was unanimously voted by the stockholders of the corporation to authorize one Everett I. Rogers to wind up and liquidate the affairs of the corporation: the ninth clause of the vote, defining the duties of said Rogers, being as follows: "Ninth. That after all the assets of the corporation have been thus reduced to cash, and all its indebtedness paid, the balance on hand shall be divided by the treasurer of the corporation, under the direction of said attorney, among the several stockholders of the corporation then of record, in proportion to their several holdings and upon surrender to the treasurer of their several certificates." The appellant duly transferred his 250 shares to the respondent trustees, who duly surrendered his note for \$6,500, and the present contest is based upon the contention that the agreement in question, entitles the appellant to all the assets of the corporation, then estimated at about \$12,-000 above indebtedness, after payment of his note, whether by dividends received in liquidation on his stock, in addition to dividends received for stock held by the trustees and by Charles H. Perkins, Jr., and Frederick H. Perkins, or however otherwise; the respondents' contention being that the appellant is only entitled to share in the excess of dividends in liquidation, if any, which may accrue on the 250 shares theretofore the property of the complainant.

It is not denied that the proposition in question is couched in language which, upon its face, would authorize the contention of the appellant. But a close examination of its terms convinces us that this is not the real intent of the terms used. The proposition is: "If in liquidation the property of the company will more than pay your note and accrued interest, we will turn over to you the balance, whatever it may be." The appellant was present, and assented to the appointment of Rogers, and the conferring on him of the powers conferred by the ninth clause of the vote, above set forth, and must have understood that the liquidation referred to in the proposition was the liquidation thus authorized, and which required more than a mere payment of all the debts of the company, but required a division of the cash then remaining "among the several stockholders of the corporation then of record, in proportion to their several holdings." It is in testimony, too, that there had never been any transfer of record of the 65 shares in question by the appellant prior to the transnot a forced construction, therefore, to adopt the definition of the word "liquidation," in this proposition as given in 3 Cent. Dict. 3475: "In its general sense liquidation means the act or operation of winding up the affairs of a firm or company by getting in the assets, settling with its debtors and creditors, and apportioning the amount of profit or loss." So used, it is perfectly clear that the appellant would be entitled to dividends only on his 185 pledged and 65 unpledged shares, and the proposition of the respondent, limited as it is to the proceedings in liquidation already inaugurated, must be construed in harmony with the unanimous vote of the corporation in that respect. To give the appellant all the assets of the corporation so in liquidation after the payment of his note would be to transgress the vote of the corporation in that respect, to which the appellant had assented, and, indeed, would be beyond the power of the respondent trustees to do, since it is manifest they could not of their own motion give to the appellant corporation dividends due to Charles H. Perkins, Jr., and Frederick H. Perkins, in their individual capacity as stockholders

In the case at bar while a dividend in liquidation has already been paid, it is conceded that the contract in question is still executory as to the remaining final dividend. It is clear, not only that the respondents did not intend their offer in the sense which the complainant seeks to put upon it, but that they are and were without power to make such a contract without committing a fraud upon the estate of which they are trustees. In no proper sense, indeed, can it be held that assets belonging either to the trust estate or to the individual respondents are to be considered to mean "property of the company" liable for the payment of the appellant's note in the proposition which is the basis of this proceeding. Such payment could both legally and equitably come only from that portion of the property of this company owned by the appellant. The proof clearly shows that the dividends already paid on the appellant's shares, both pledged and unpledged, are insufficient to liquidate his note, and that he has thus obtained release from liability thereon for much less than the amount due on it. If, therefore, there shall hereafter be sufficient dividends in liquidation on the 250 shares formerly belonging to the appellant sufficient to enable him to receive payments in excess of the amount due on said note, he will have received all that to which he is so entitled, either in law or in equity.

ers of the corporation then of record, in proportion to their several holdings." It is in testimony, too, that there had never been any transfer of record of the 65 shares in question by the appellant prior to the transfer made to the respondent trustees. It is

(29 R. I. 606)

COLE v. DAVIS AUTOMOBILE CO. (Supreme Court of Rhode Island. 1909.) July 8.

MASTER AND SERVANT (§ 190*)-VICE PRIN-CIPAL.

Where a foreman brought a tank to a servant to be repaired, knowing that it was a gasoline tank and would be liable to explode if placed near a hre, and ordered the servant to repair it, he acted as a vice principal, even if he performed the act of a fellow servant in placing the tank near a lighted gas forge while giving orders for its repair, which resulted in its explosion and the servant's injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 450; Dec. Dig. § 190.*] Blodgett, J., dissenting.

Exceptions from Superior Court, Providence and Bristol Counties; Charles F. Stearns, Judge.

Personal injury action by Andrew E. Cole against the Davis Automobile Company. Plaintiff was nonsuited, and brings an exception. Sustained, and new trial granted.

A. B. Crafts and A. A. Capotosto, for plaintiff. Harry J. Williams, Thomas A. Carroll, and Walter P. Suesman, for defendant.

DUBOIS, C. J. This is an action of trespass on the case for negligence, brought by the plaintiff to recover damages for personal injuries sustained by him in June or July, 1906, through the explosion of a gasoline tank caused by the ignition of the gasoline fumes therefrom by the flames of a lighted gas forge near which the tank had been placed by Warren Ballou, superintendent or foreman of the defendant corporation, who had complete control of the repair shop, a separate department of the defendant's business. The explosion, which bulged out the sides and blew out one end of the tank, occurred immediately after the plaintiff had placed his left knee against the same, a cylinder about two feet in length by about a foot in diameter, and which was lying across a bench which was from 26 to 28 inches wide, for the purpose of scraping around the rivets to make a clean surface for the application of solder in the repairs which he had been ordered to make by Mr. Ballou, the foreman. Upon trial in the superior court the plaintiff was nonsuited, upon the ground that the job was "an ordinary repair job, * * * and that the negligence, assuming there was negligence, of the foreman, the boss, was the negligence of a fellow servant." To this ruling the plaintiff excepted, and the case is before this court upon the plaintiff's bill of exceptions based thereon.

It appears that the plaintiff, a master plumber, was employed by said Ballou, for the defendant corporation, about March, 1906, to repair automobile water coolers, and that during his said employment he repaired a water cooler and tank combined, was the proximate cause of the accident

water coolers, headlights, and copper tubes. but that he was not employed to, and had never been asked to, repair gasoline tanks, and he testified: "If I had any idea that it was a gasoline tank, I would not have stayed there even to converse with Mr. Ballou. I regard my life more than a gasoline tank." He further testified that the tank which exploded resembled in size and shape the water tank that he first repaired. In answer to a question on cross-examination as to how the said accident happened, the plaintiff testified: "I stated that Mr. Ballou brought in this tank. I presumed it was a water tank, and laid it aside the forge, and we conversed over repairing it. He saidhe stated—that the tank had to go out within an hour or thereabouts, and I stated that it would be impossible to make it, repair it in that given time; that the tank had to be taken apart and reinforced on the inside, soldered on the inside. After that he stated it had to go and had to give a demonstration. I stated it was impossible. Mr. Ballou, he says, 'It has got to be,' and took up the tank and laid it on my bench, within four or five inches of this burning gas forge, and walked out." And, further, in answer to the question: "You hadn't started to do anything on it at all? A. No, sir; I just simply laid down a piece of the lamp I was repairing, and I put my knee up like this (indicates) to brace the tank while I worked on it, and just picked up my knife to make some scratches around some rivets to clean up the metal, so as to make the metalic edges join together, when the explosion took place. * * * Q. It never occurred to you it might be a gasoline tank at all? A. It didn't. I was very busy. I was the man to make the repair. Q. There was sufficient gasoline, you say, to cause an explosion? A. Yes, sir: a teaspoonful in there would cause an explosion. Q. If there was a teaspoonful in there, and it caused an explosion, would it indicate it was there to any of your senses? A. Indicate that the gas or gasoline was in the tank? Q. Yes. A. Nothing that I knew. I knew of no gasoline being in the tank. Q. Did you ever smell gasoline? A. The shop was full of the odor. Q. That machine shop over there is so full of gasoline that you could not distinguish anything? A. I could not. Q. Is that your testimony? A. It was so full in my system, being accustomed to smelling that odor, I could not detect anything as readily as a man coming from the outside could detect the fumes, which were so strong from the explosion in the cylinders to even hurt your eyes. I called that to Mr. Ballou, how it smarted my eyes there at times."

To determine whether or not the negligence complained of is the act of a fellow servant, it is necessary to consider what

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

which resulted in the plaintiff's injuries. The plaintiff claims injury to his left knee, left arm, and scrotum, and that he received the injuries from the explosion of the gasoline tank, lying across the work bench, at a time when he was standing at the bench, with his left knee against one end of the tank and his left hand upon it, while he had hold of the knife with his right hand for the purpose of scraping the tank as required. If the plaintiff had not been near the tank when it exploded, he would not have been hurt. If he had not been in front of the same, in the position that he had assumed, he would not have been injured in the manner that he was. He claims that his attitude was necessary for the proper performance of the work. The fact that he had been ordered to perform this work is undisputed. The order was peremptory: "It has got to be." The necessity for such repairs was urgent, if not emergent. All other work had to be suspended for this purpose. The proximate cause of the plaintiff's injury was his obedience to the command of his foreman to work upon the tank, made dangerous by the careless act of such foreman. Even if the foreman was a fellow servant of the plaintiff while placing the tank containing gasoline near the flame of the gas forge, because such act was the act of a servant, rather than that of a master, yet when he (Warren Ballou) discussed the possibility of the repairs being accomplished within the time that he required the tank for use in the demonstration of an automobile, and when, notwithstanding the objections of the plaintiff that it was impossible to make the repairs within the time limited, he determined that it must be done, and ordered the plaintiff to do it, such act was that of a master. In so acting as master, he acted with the knowledge that the tank was a gasoline tank, and he knew, or by the exercise of ordinary care he might have known, that it contained gasoline. He knew, if it contained gasoline on that day in June or July, if there were openings in the tank, that gas was liable to form, and the same was likely to escape from the tank, and that if such a tank in that condition was placed near a lighted gas forge the fumes from the tank might ignite and an explosion result therefrom. Having this knowledge, or means of knowledge, his duty in the premises was to inform the plaintiff of the dangerous condition of the tank, or to abstain from ordering him to repair the same until it had been rendered innocuous; but, instead of performing this duty, he required the plaintiff to leave off all other work and forthwith give to this his undivided atten-In so doing he was acting as vice principal. The nonsuit was therefore improperly granted.

The plaintiff's exception is sustained, and the case is remitted to the superior court for a new trial.

BLODGETT, J. (dissenting). At the trial of this action on the case for negligence the plaintiff was nonsuited, and assigns such nonsuit as error. The record discloses that the plaintiff was employed in the repair shop of the defendant and was under the immediate direction of one Ballou. On the day of the accident Ballou brought to the plaintiff's work bench a gasoline tank from a certain automobile, and placed it thereon within a short distance of a lighted gas forge, and requested plaintiff to make some repairs thereon by soldering the same before a certain time. Unknown to the plaintiff and to Ballou, there was a slight quantity of gasoline in the tank, and the fumes from it ignited while the plaintiff was at work upon the tank, and the resulting explosion caused the injury for which the plaintiff seeks to hold the defendant corporation liable, claiming that Ballou was a vice principal of the defendant. The trial justice held that the case was governed by the decisions of this court in Milhench v. E. Jenckes Mfg. Co., 24 R. I. 131, 133, 52 Atl. 687, 688, where this court held as follows: "If he intends to rely upon the fact that his injury was caused by reason of the negligence of a vice principal, he must clearly fail, because, under the well-settled law of this state, it is the character of the act, and not the rank of the person performing it, which is the test of vice principalship. Hanna v. Granger, 18 R. I. 512, 28 Atl. 659; Morgridge v. Telegraph Co., 20 R. I. 386, 39 Atl. 328, 78 Am. St. Rep. 879." The trial justice, in granting the nonsuit, said: "This was not a fixture, or permanently attached to the structure, but simply an ordinary repair job, and it seems to me that the negligence, assuming there was negligence of the foreman, the boss, was the negligence of a fellow servant."

I am of the opinion that the plaintiff's exception should be overruled. The evidence shows no lack of repair in any of the fixtures or appurtenances of the shop, and no unsafe conditions there, for either of which the defendant corporation could be held responsible. The accident seems to have resulted from the act of Ballou in personally placing the tank, which he knew to be a gasoline tank, but which the plaintiff avers he supposed was a water tank, in dangerous proximity to the lighted forge, without first assuring himself that there was no gasoline in the tank which might cause an explosion. Whatever the liability may be of Ballou, I am unable to agree that the defendant corporation is liable because of his act. said by this court in Larich v. Moies, 18 R. I. 513, 514, 28 Atl. 661: "The manner of proceeding with the work was committed to a foreman or 'boss,' and this involved the exercise of such discretion and judgment as belongs to a co-worker in a superior grade. No duty of a master was omitted or violated; but the negligence, if there was negligence, was purely that of a fellow servant. new matter, and concluded with a verification, for which the plaintiff cannot recover against the principal." Here there is shown no neg-'he principal." Here there is shown no neglect in the selection of suitable appliances. and the declaration contains no count even charging the employment of unskilled or incompetent servants.

(80 R. I. 8)

LAVIN v. DODGE.

(Supreme Court of Rhode Island. July 8, 1909.)

1. TRESPASS (§ 43*)—EJECTMENT (§ 82*)—ISSUES AND PROOF—TITLE.

In trespass and ejectment, which is an action distinctively to try title, upon a plea of the general issue, the plaintiff must prove title as a sine qua non of maintaining an action.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 107; Dec. Dig. § 43; * Ejectment, Cent. Dig. §§ 222-228; Dec. Dig. § 82.*]

2. Trespass (§ 20*)—Possession to Sustain ACTION.

ACTION.

In trespass quare clausum, possession alone is sufficient to maintain the action, unless the defendant defends on the grounds that the title is in him, and that hence there was no trespass, in which case the defendant must specially plead title in himself, or liberum tenementials and the called tum, as it is called.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 38; Dec. Dig. § 20.*]

8 Trespass (§ 41*)—Plea of Liberum Ten-ementum—Effect.

Where a defendant in trespass quare clausum pleads liberum tenementum, he thereby admits the possession of the plaintiff and the committing of the acts complained of.

Cent. Dig. § 96; Dec. Dig. § 41.*1

4. TRESPASS (§ 44*)—PLEA OF TITLE—BURDEN OF PROOF.

A plea of liberum tenementum in trespass quare clausum throws the burden on the de-fendant of establishing his title by a preponderance of the testimony.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 112; Dec. Dig. § 44.*]

5. TRESPASS (§ 42*)—PLEA OF TITLE—REPLI-CATION.

Where, in trespass quare clausum, the defendant pleads liberum tenementum, thereby admitting plaintiff's possession, the plaintiff should reply by traversing the plea, or, if in posses-sion under a tenancy created by defendant, then by confession and avoidance.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 98; Dec. Dig. § 42.*]

6. Thespass (\$ 42*)-Plea of Title-Repli-CATION.

Where, in trespass quare clausum, the plaintiff replies to a plea of liberum tenementum by setting up title in himself, the reply not being the proper one, and possession being sufficient to maintain the action, which is admitted by the plea of liberum tenementum, the court will construe the reply as a denial only of defendant's plea of title, and treat the rest as surplusage. as surplusage.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 99; Dec. Dig. § 42.*]

7. Trespass (§ 42*)—Plea of Liberum Tene-MENTUM-REPLY

[Ed. Note.—For other cases, se Cent. Dig. § 99; Dec. Dig. § 42.*]

8. TRESPASS (§ 71*)-PLEA OF TITLE-REPLI-CATION-JUDGMENT.

In such case, if the evidence wholly fails to sustain defendant's plea of title, judgment should be entered for plaintiff for damages for the trespass and that the freehold was not in the defendant; but judgment should not go for plaintiff on her erroneous reply setting up title.

[Ed. Note.—For other cases, see Cent. Dig. § 157; Dec. Dig. § 71.*] see Trespass.

9. PLEADING (§ 90*)—DIFFERENT PLEAS.
Under the Court and Practice Act, permitting a defendant to plead as many several pleas as he chooses, a defendant in trespass quare clausum, failing to establish his plea of liberum tenementum, which admits the posses-sion of plaintiff and the acts complained of, cannot be found not guilty under the general

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 184-194; Dec. Dig. § 90.*] 10. Trespass (§ 46°)—Quare Clausum—Sufficiency of Evidence.

In trespass quare clausum, a stipulation filed, admitting defendant's entrance upon the close described against plaintif's protest and the testimony as to the possession by the plain-tiff under a bona fide claim of right at the time of the trespass complained of, is sufficient to support a general verdict for plaintiff.

[Ed. Note.—For other cases, see Cent. Dig. § 123; Dec. Dig. § 46.*]

Exceptions from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Judge.

Action by Bridget Lavin against John W. Dodge for trespass. Verdict for plaintiff. Defendant brings exceptions. Exceptions sustained in part.

Doran & Flanagan, for plaintiff. Tillinghast & Collins, for defendant.

SWEETLAND, J. This is an action of trespass for breaking and entering the close of the plaintiff, described in the declaration, situated in the town of Barrington. The defendant pleaded the general issue, and also soil and freehold in himself. To the plea of the soil and freehold in the defendant the plaintiff has replied by two replications: First, that the close was the soil and freehold of the plaintiff, and not of the defendant, and she concludes' this replication with a verification; and, second, that she and her father and mother, from whom she derives her title, have been for more than 20 years preceding the trespasses in the deciaration complained of, in the uninterrupted, quiet, peaceable, and actual seisin and possession of said close during said time, claiming the same as her and his proper, sole, and rightful estate in fee simple, and concluding with a vertification. To these replications the defendant has filed rejoinders, in The fact that the plaintiff erroneously con-sidered her reply to the plea as setting forth leging soil and freehold in herself, and adwhich he traverses the plaintiff's reply, al-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

verse possession in herself and her ancestors, tum, as it is called." Schaeffer v. Brown, 23 and concludes each rejoinder to the country.

At the trial before a jury in the superior court the defendant entirely failed to establish title in himself under his plea of liberum tenementum, as he admits. At the trial much testimony was introduced by the plaintiff and the defendant upon the question of the plaintiff's title to the close. At the conclusion of the testimony the justice presiding directed the jury to find specially "that the close described in the declaration, the soil and freehold, is not in the defendant John W. Dodge," and the case was submitted to the jury upon the general issue and upon the special finding, "Is the close described in the declaration the soil and freehold of the plaintiff, Bridget Lavin?" The jury found that the defendant was guilty as alleged in the declaration, and assessed damages for the plaintiff in the sum of 10 cents, and also found specially "that the close described in the declaration, the soil and freehold, is of the plaintiff, Bridget Lavin," and, as directed by the justice, found that the soil and freehold is not in the defendant. John W.

The case is before this court upon the defendant's bill of exceptions, in which are certain exceptions taken during the trial to the admission of testimony, and exceptions to the refusal of the justice to direct a verdict for the defendant, to the ruling directing a verdict upon the special finding, to the ruling granting certain of the plaintiff's requests to charge the jury, to the ruling refusing certain of the defendant's requests to charge, to certain portions of the charge to the jury, and to the decision of the justice denying the defendant's motion for a new the verdict is contrary to the law.

If the issue as to the title of the plaintiff was properly submitted to the jury upon the pleadings in the case, we should remit the case with directions for a new trial, as we are of the opinion that the testimony did not warrant the finding of the jury upon the plaintiff's claim of title to the land in dispute, either under the deed to the plaintiff's father, given in 1857, or under the claim of title by adverse possession. But we are of the opinion that the issue as to the plaintiff's title was not properly before the jury. The gist of this action is the injury to the "In trespass and ejectment, possession. which is an action distinctively to try title, upon a plea of the general issue, the plaintiff must prove title as a sine qua non of maintaining an action. In trespass quare clausum, possession alone is sufficient to maintain the action, unless the defendant defends upon the ground that the title was in him, and hence that there was no trespass, in which case the defendant must specially plead title in himself, or liberum tenemen-

R. L. 364, 50 Atl. 640. "The action being trespass quare clausum, the only issues were the possession of the plaintiff and the acts of trespass by the defendant. * * * question of title in such an action is only put in issue upon the setting up of title in the defendant." Sayles v. Mitchell, 22 R. I. 238, 47 Atl. 820.

When the defendant pleaded liberum tenementum there can be no question, under the authorities, but that he admitted the possession of the plaintiff and the committing of the acts complained of, and assumed the burden of establishing his title by a preponderance of the testimony. Carpenter v. Logee, 24 R. I. 383, 53 Atl. 288. See, also, Wilbur v. Peckham, 22 R. I. 284, 47 Atl. 597; City of Providence v. Adams, 10 R. I. 184. To the plea of title in the defendant the plaintiff should have replied traversing the plea, or, if she was lawfully in possession under a tenancy created by the defendant, then she should have replied in confession and avoidance. The defendant contends that the plaintiff has filed replications in confession and avoidance, that a new issue has been tendered, and that the burden is upon the plaintiff to prove her replies.

We do not consider these replications to be in confession and avoidance of the plea. but rather that in these replies the plaintiff has, by the assertion of her own title, denied that pleaded by the defendant. Such an assertion was unnecessary. The allegations of title in the plaintiff, set out in the replications, may be disregarded. The traverse is complete without them. These statements of title in herself are inconsistent with the proper course of pleading in this action, untrial, for which he moved on the ground that less they may be considered as denials of the the verdict is contrary to and against the plea, and not as new matter set up by the evidence and the weight thereof, and that plaintiff. The plaintiff erroneously considered these assertions of title in herself to be new matter, as she concluded with a verification. She should have concluded to the We do not consider, however, country. that this has changed the nature of the replication. The issue was not changed. The burden remained upon the defendant to prove the title which he had pleaded. In 1 Chitty on Pleading, 621, it is said that in trespass to real property the plaintiff might, to the plea of liberum tenementum, reply according to the facts in either of four ways. Of these four ways the first is as follows: "(1) If the name or abuttals of the close had been so minutely stated in the declaration that there could be no question what close was alluded to, and the plaintiff's title was inconsistent with the defendant's, as if the plaintiff insists that the locus in quo is his freehold, or the freehold of another person, then the replication should deny the defendant's title by replying that it is the plaintiff's or the third person's freehold, and not the defendant's, and should conclude to the country."

The statement of the plaintiff's title in the

replication is regarded as a reply to the de-! fendant's claim of freehold, not as the pleading of new matter. In this view of the replication, the case stood thus at the beginning of the trial: The defendant, by his plea of freehold in himself, admitted the possession of the plaintiff, and the acts alleged as acts of trespass, and upon the traverse of the plaintiff the only issue remaining was the title of the defendant. At the close of the testimony it appeared, as he admits, that the defendant had failed to establish his claim. The plaintiff was entitled to a verdict for damages for the trespasses and to a finding that the freehold was not in the defendant. She was not entitled to a finding that the freehold was in her. That was not properly an issue before the jury. The testimony introduced as to her title was in opposition to the claim of title by the defendant,

The defendant contends that, although he failed upon his plea of liberum tenementum. still he might be found not guilty upon the general issue; that, as the Court and Practice Act permits the defendant to plead as many several pleas as he chooses, he may assume the inconsistent position of admitting the possession of the plaintiff and the commission of the acts complained of, and at the same time denying the plaintiff's possession and the trespasses under the general issue. This is clearly not the view taken by the cases in this state. Even if the defendant's contention in this regard was conceded, the general verdict of the jury should not be disturbed, as the defendant, by his stipulation filed in the case, admits his entry upon the close described in the declarations against the plaintiff's protest, and the testimony as to possession by the plaintiff under a bona fide claim of right, at the time of the trespasses complained of, was sufficient to support the general verdict.

The case is remitted to the superior court. with directions to disregard the finding of the jury that the soil and freehold is in the plaintiff, and to enter judgment upon the verdict upon the general finding that the defendant is guilty and upon the special finding that the soil and freehold is not in the defendant, John W. Dodge.

(30 R. I. 161)

MESSIER v. RAINVILLE et al.

(Supreme Court of Rhode Island. July 8, 1909.)

WILLS (§ 167*) — CHARACTER — AGREEMENT NOT TO REVOKE.

A testator's will is ambulatory until he dies. in the absence of proof by indisputable evidence of an agreement not to revoke it.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 167.*]

2. WILLS (§ 58*)-CONTRACT TO WILL-EVI-DENCE.

Evidence held insufficient to establish a contract to make a will in complainant's favor, and | plainant. It is alleged that the daughter and

not to revoke the same, in consideration of com plainant's agreement to care for testatrix during her lifetime.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 165; Dec. Dig. § 58.*]

8. ESTOPPEL (§ 118*) — EVIDENCE — REVOCATION OF WILL.
Facts held insufficient to estop testatrix from revoking a will in complainant's favor.
[Ed. Note.—For other cases, see Estoppel,

Dec. Dig. § 118.*]

Appeal from Superior Court, Kent County; Charles F. Stearns, Judge.

Suit by Hermenigile Messier against Cordelia E. Rainville and others. From a decree for complainant, defendants appeal. Reversed and dismissed.

Felix Hebert and Vincent, Boss & Barnefield, for appellants. A. B. Crafts and M. L. Lizotte, for appeliee.

JOHNSON, J. This is a suit in equity, brought in Kent county, by Hermenigile Messier against his sister, Cordelia E. Rainville, her husband, Stanislas Rainville, and his mother, Cordelia Chevalier Messier, to set aside a deed and mortgage, and for a reconveyance, and for relief in the nature of specific performance, and for an injunction. It was alleged in the bill that on the 12th day of January, 1891, the respondent Cordelia Chevalier Messier was possessed of certain real and personal estate in the town of Warwick, and that prior to that time she had agreed with the complainant, who was her son, "that she would then and there make a will, and would not revoke the same, giving him absolutely all the real and personal estate of which she should die seised, or possessed, or to which she should at her death be entitled. and that he should have the use, control, and rentals of all said real estate until her death, he paying all the expenses of maintaining the same," in consideration that he "then and there promised and agreed with her that he would for and during her natural life support and take care of her. supply her with clothes, nursing, medicine, medical attendance, and all the necessities of life, and hire and pay for at his own expense a pew in the Roman Catholic Church, at said Warwick, for her use, and give her a suitable burial in a certain burial lot then and there owned and possessed by said Cordelia Chevalier Messier." It is further alleged in the bill that the will was made in accordance with the alleged agreement, and that the complainant has since, relying upon the alleged agreement and the will, made valuable improvements on the property, and that he has managed the estate, collected the rents, paid all expenses, and supported his mother. November 22, 1907, it is alleged, the complainant's mother left his house and went to board with her daughter, the respondent Cordelia E. Rainville, a sister of the com-

efor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

her husband. Stanislas Rainville, with knowl- tby the respondent Cordelia C. Messier, and edge of the alleged agreement by undue and improper influence persuaded the respondent Cordelia C. Messier to destroy her will, to convey her real estate to her daughter Cordelia E. Rainville, and to take a mortgage back conditioned on proper support of the mother by the daughter. The complainant prays "that said deed from the said Cordelia C. Messier to the said Cordelia E. Rainville, and all rights conferred thereby upon said Cordelia E. Rainville, and her said husband. Stanislas Rainville, should be adjudged absolutely null and void and of no effect, and that the said Cordelia E. Rainville and her said husband, Stanislas Rainville, should be ordered and adjudged to convey by suitable deed all the right and interest which they now have in said real estate to the said Cordelia O. Messier, and that said agreement in the form of a mortgage from the said Cordelia E. Rainville to the said Cordelia C. Messier should be adjudged null and void, and that the said Cordelia C. Messier should be ordered and directed to hold said property and real estate subject to the terms and in accordance with the aforesaid agreement between the complainant and the said Cordelia C. Messier, and that the said Cordelia E. Rainville, Stanislas Rainville, and Cordelia C. Messier should be enjoined and restrained forever from making any conveyance or incumbrance, or doing anything whatsoever in violation of the terms of said agreement between the complainant and said Cordelia C. Messier, so long as the complainant performs or is willing to perform the terms of said agreement."

The cause was heard on bill, answer, and testimony. March 9 and 10, 1908, before a justice of the superior court. The complainant testified that he was 40 years old; that he and his brothers and sisters lived at home with their mother, the respondent Cordelia C. Messier, until 1891, when he and his mother were living alone, the other children having married and left home: that in 1891 he and his mother made an agreement in writing. which the mother called a "testimony," which provided that "she gave him all the property she had and he was supposed to take care of her during her lifetime," and the mother promised not to break the agreement. clearly appeared from the evidence, and complainant's counsel admitted in open court, that "whatever agreement there was was in the form of a will"; and it appeared that a will was made by the mother by which her property was given to the complainant. After the execution of the will the complainant looked after the repairs on the house and paid the taxes and water bills. He had performed these services for his mother before the making of the will, after his elder brother had left the maternal home. In 1892 a house was built upon this land. It cost about

\$600 was borrowed by her from the Centreville Savings Bank on the security of a mortgage made by her. The complainant looked after this matter and worked on the house, being a carpenter by trade; but he received no wages, the amount which he would have earned being credited toward the amount due on the contract. The complainant paid all but \$200 of the amount due the bank under the mortgage; but he had the rents from the property. The complainant was married June 17, 1901, and brought his wife to his mother's home, and the latter gave up her duties as mistress of the house. Before his marriage he gave his wages to his mother. After marriage he handled all the money. Subsequently they moved into a house owned by the complainant's wife. After living together for a number of years, until November 22, 1907, the mother left her son's house and went to the house of her daughter, the respondent Cordelia E. Rainville, and conveyed her property to her daughter, taking a mortgage back, upon condition of being properly supported and the performance of certain acts. There is evidence, also, that the will was destroyed. The superior court on the 13th day of July, 1908, entered a decree ordering the deed and mortgage set aside and a reconveyance on the ground of fraud. The respondents' claim of appeal and the transcript of the evidence were duly filed; but the transcript was not allowed within the proper period, the judge who heard the case being on vacation. A petition to establish the correctness of the transcript was duly filed, and after an amendment had been made thereto the petition was granted.

Complainant testified: "Q. Now, did you make an agreement with your mother concerning this property in 1891? A. Yes, sir. Q. You tell to the court what that agreement was. A. Well, the agreement was like this: She give me all the property she have. Q. You just turn your face to the court. The Court: You stand back to your own table, and he will likely talk toward you. ness: The agreement was like this: give me all the property she had, and I was supposed to take care of her during her lifetime; give her all the necessaries for living, and for that she would give me the property. Q. And did she put that agreement in writing, do you know? A. Yes, sir. Q. Who made the writing? A. Father Gaboury. Mr. Boss: There is no allegation that-Mr. Lizotte: Whatever agreement there was was in the form of a will. Q. You say the French priest living there at the time? A. Yes, sir. Q. Where is he now? A. In Wickford. Q. Did she have this will made, or agreement made, in pursuance with an understanding between you two? A. Yes, sir. Q. Now, was you there when this writing was made? A. Yes, sir. Q. You was pres-\$1,100, and of this amount \$300 was provided ent? A. Yes, sir. Q. What was it supposed to be called? A. Called it an agree-| could the other boy. He was the best boy of ment; a bargain, I should say. Q. Was it the family. That is what she told me many mentioned there that it was a will or an a time. Q. What did she say he was supposagreement? A. Mentioned agreement. Q. An agreement. Did your mother call it anything else besides an agreement? A. Yes; mother called it a testimony, I think, or something of that kind. Q. A what? A. Testimony. Q. That is a French word for what word in English? What do we say for the word 'testimony'? What do we call ordinarily a testimony? A. An agreement. Q. Do you know whether it is called anything else? A. No; it might be, but I don't know. Q. But she called it a testimony? A. Yes. Q. After this agreement was made, or this testament was made, what was done, what did you do for your mother? A. Well, I was working every day, and gave her all my salary, and supported her; supported the house." He further testified that he furnished her clothing, medicine, and everything she needed; that he paid for a seat for her in church; paid the church society for her, and "let the repairs on the house." asked, "Is there anything else you did for her?" he answered, "That it all I remember." He also testified that she occupied the house with him; that she kept house and did the cooking; that this continued for 11 years, until he was married; that he was married in 1901, and he and his wife and mother lived together thereafter until November 22, 1907. Later he testified on this subject: "Q. Now, when you made this agreement with her, what further was said than you have told us, if anything? You said that you were supposed to take care of her during her lifetime, and so on. Now, was there anything else said between you two? Yes; she promised me at that time she wouldn't break the agreement she had with me. Q. Did she tell you why—give you reasons why? A. No; I don't remember she tell me the reasons why." The complainant had no prior conversation with his mother, and knew nothing about the fact that she was to make a will, until the day the will was made, when she told him she was to "give him an agreement" that the property should be his.

The witness Dutilly testified: "Q. Never mind the details. Did you have any talk with Mrs. Messier about this agreement that Mr. Messier has said he made with his mother? A. Well, she told me that she had nothing to do about doing any kind of business, because she had left it all to him. Q. Well, what did she say? A. She said to me like that; that he was doing the business and she was depending on him for her living. He was the best boy of the two, and she trusted him to live with him, and she would give him what she had; but I don't knowshe never told me she had signed any agreement, or anything of the kind. Q. Said she had given him all she had? A. To support for his mother and all that; but I cannot

ed to do for her? A. He was supposed to support her. She didn't tell me the particulars of it. We never came as far as that, about her agreement, all those points. She told me, as I tell you, that she gave everything she had to him to be supported, because he was the best boy of the family, and she trusted him with it.

Aglae Martel testified that she had a conversation with Mrs. Messier concerning an agreement she made with her son, the complainant, "Q. And what was the agreement, did she say? A. She said that she made a will with her son, and I told her she could break her will; it was not very good. She says, 'I could not break it, for my son asks for his labor or his wages, so I would be bad situated,' or something like that."

Exelia Duhamel testified: "Q. Well, did you hear her say anything about an agreement that she made with her son? A. Yes, sir. Q. What was that agreement? A. She told me she gave everything to Hermenigile because she know he is a good son, and she says she couldn't depend so much on the others in the family, so she gave him everything belonged to her. Q. Did she tell you what he was supposed to do to her for that? A. Never had so much talking. Q. How is that? A. I say no; she never told me."

Joseph Duhamel testified: "Q. Now, you tell the court what you heard her say about this agreement. A. Well, what I heard Mrs. Messier say in to my house, she said that she had given everything she had to her son Hermenigile, because he was the best child of the family. He was the only one that could take care of her. Hermenigile could take care of her. That is about all I could say that Mrs. Messier said."

On the motion of the complainant the testimony of Charles P. Gaboury, who drew the will, was taken in a commission issued by this court. He testified that he remembered drawing the will. As to what directions she gave him as to the will, he testified: "My impression is this: Maybe 20 years ago, maybe 18, she came to me to have a will. She spoke to me about certain matters, but I cannot swear positively of them. She said to me, for instance, 'You know that I want to give that to my son, providing he will provide for me for life.' That is my impression. See? But I cannot swear that she said it positively. I want to make a distinction between the two. I can have a general idea of the thing, but I cannot swear positively that it is so. It is so far away that the more I think of it, you understand, the more I doubt if she said it or not. Now, I knew the family well. I knew Mr. Messier well. My impression was that he was to provide her, because she trusted him better than she swear that she said it, that she put it in her of mine. I cannot swear to it."

The respondent Cordelia C. Messier testifies that she made no agreement with the complainant concerning the property, and that the complainant promised nothing in consideration that she should make the will. in cross-examination she testified: "Q. At the time you made the will, when the will was made and signed, was it, or not, understood that you were to go home and live with your son, and your son was to take care of you the rest of your life? A. I lived there. There was no understanding that I would go and live with him, because I always had. Q. Did you expect to live with him after making your will, and he to take care of you? A. We were together. He cared for me, and I cared for him. Q. Now, what care was he supposed to give you? What did you expect from him? A. I expected no care from him. What he did, he did with good will. Q. Didn't you expect that he would have to buy you food to eat and give you a room to live in? A. No agreement whatever." The respondent Messier made a will because Father Gaboury advised her to do so.

There is no testimony that the complainthe making of the will. He testified that the agreement was in writing, and his answers to the questions of counsel as to what he agreed to do refer either to what he supposed was in a written agreement (the will) or to subsequent talks with his mother. From the evidence it is clear that there was no agreement, either oral or written, to make a will prior to the making thereof. Wherever in the testimony an agreement is referred to, it is clear that the reference is to the will, and only to the will. The complainant testified that the first he knew of the "agreement," as he called it, she told him of it. He also said: "Well, the very day she made that agreement, she show it to me, and I read it." Elsewhere he testified that, as it was in English, he couldn't read it very well, and that Father Gaboury read it to him. He does testify that she promised him she would not break the agreement she all that he did on that property in consequence of the agreement, and that he would not have done what he did if he had thought his mother could change it. He did not, however, tell his mother that he would not support her unless she gave him the property. He testified that nothing was said about the rent at that time. As to the new the word "break" is used to signify "rehouse, when that was built, he testified that voke," there is no consideration shown for she said the rents should be his. Mrs. Mes- any such alleged promise. In Edson v. Parsier testified that she made no agreement sons, 155 N. Y. 555, at p. 568. 50 N. E. 265, with the complainant concerning the proper- 268, Judge Gray says: "A general maxim, ty, and that the complainant promised noth- which equity recognizes, is that a testator's

will or she said so. It is only an impression would say in response to the reiterated questions of his counsel was, "I was supposed to support her." She did not call for any accounting, but she says she felt so sure of dying with him that she did not meddle in the business.

The complainant figures that he has paid \$500 on the principal and \$188 on the interest. From the testimony, receipts, and expenditures of the complainant, since he took charge of the property, appear to be approximately as follows:

Receipts.

Rent of new house 15 years	\$2,430 812	00 00
Gross receipts	\$2,742	00

Expenditures.

Principal and interest on note Taxes for 17 years, estimated at \$20	\$ 638	00
per year	340 306	
Repairs on both houses	130 36	00
Total armenditures	 450	_

This leaves a balance of receipts over exant made any promises in consideration of penditures of \$1,292. It is impossible from the testimony to arrive at the amounts with entire accuracy. The complainant's counsel figure \$4,500 for board of Mrs. Messier for 17 years. It was only 16 years from 1891 to 1907, anyway. Furtner, until the marriage of the complainant in 1901, his mother not only lived with him in the house, but kept house and did the cooking.

Contracts for testamentary disposition are allowed to stand only when established by clear proof. Spencer v. Spencer, 26 R. I. 239, 55 Atl. 637. It being clear that there was no agreement to make a will, the complainant's counsel argue that after the will was made the respondent Messier promised not to revoke it. There was no testimony in this case which had any tendency to show that the respondent Mrs. Messier was under any binding obligation not to revoke her will, unless it was the testimony of the complainant on page 13 of the transcript, where had with him. He also says that he did he says, in answer to question 99 on the preceding page, that his mother promised him, when she made the agreement, that she would not break it, and in answer to question 101 he says his mother told him no reasons why she would not break the agreement. Assuming that the complainant means "will" when he says "agreement," and that ing in consideration that she should make will is ambulatory until his death. It is a the will. The complainant did not testify to disposition of property, which neither can, promises made by him. The most that he nor is supposed to, take effect until after

death. I think it needs no further argument | 6. EXECUTORS AND ADMINISTRATORS (§ 120°) to show that to attribute to a will the qualto show that to attribute to a will the quality of irrevocability demands the most indisputable evidence of the agreement which is relied upon to change its ambulatory nature, and that presumptions will not, and should not, take the place of proof."

Our conclusion is that the evidence does not show a contract to make a will, that it does not show a contract not to revoke the will, and that it does not show conduct on the part of the respondent Messier which would estop her from revoking the same. This decision renders it unnecessary to consider the other points raised.

The decree below is reversed, and the

cause is remanded to the superior court, with direction to enter a decree dismissing the bill.

(90 R. I. 144)

PROBATE COURT OF CITY OF PAW-TUCKET v. WILLIAMS et al.

(Supreme Court of Rhode Island. July & 1909.)

1. TRIAL (§ 329*)-VERDICT-RESPONSIVENESS

TO ISSUES.

Where the breach of the obligation is the vital issue in a suit on an executor's bond, a verdict in plaintiff's favor for the penal sum named in the bond, with no finding as to the breach, is not responsive to the issues.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 774-776; Dec. Dig. § 329.*]

2. EXECUTORS AND ADMINISTRATORS (§ 537*)-LIABILITIES ON ADMINISTRATION BONDS-ACTIONS—"JUDGMENT."

A claim evidenced by a final decree in equity is a debt established by "judgment," within Court and Practice Act 1905, \$ 1027, giving judgment creditors a right of action on administration bonds.

[Ed. Note.—For other cases, see I and Administrators, Dec. Dig. § 537.*

For other definitions, see Words and Phrases, vol. 4, pp. 3827-3842; vol. 8, pp. 7695, 7696.]

8. Executors and Administrators (§ 59*)-ASSETS-OWNERSHIP-EVIDENCE.

Property of all kinds found in one's posses sion at his death is presumed to belong to his estate.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 59.*]

4 JUDGMENT (§ 720*)—Conclusiveness.

A decree in a former suit is conclusive be-tween the parties as to the issues raised and determined therein.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \$ 1251; Dec. Dig. \$ 720.*]

5. EXECUTORS AND ADMINISTRATORS (§ 224*)—
ALLOWANCE OF CLAIMS—PRESENTATION—
"CREDITOR."

A claimant of property held by a decedent in trust is not a "creditor," within the provisions of the probate law requiring the filing of claims.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. \$ 777; Dec. Dig. \$ 224.*

DE Bonis Non.

An administrator de bonis non cannot sue the estate of his predecessor for conversion of assets, except upon the administration bond authorised by Court and Practice Act 1905, § 830.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 488; Dec. Executors Dig. \$ 120.*]

7. Executors and Administrators (§ 528*) LIABILITIES ON ADMINISTRATION BONDS PROPERTY COVERED.

Property held by a decedent in trust. or in which he had merely a life interest, are not assets of the estate, and no action of the executor as to such property coming into his hands will render him or his sureties liable upon his administration bond.

[Ed. Note.—For other cases, see E and Administrators, Dec. Dig. § 528.*]

8. Executors and Administrators (§ 528*)-Liabilities on Administration Bonds-PROPERTY COVERED.

The sureties on an administrator's bond are not liable for funds coming into his hands, which are not assets of the estate, though charged to him in his report.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2378; Dec. Dig. \$ 528.*]

Exceptions from Superior Court, Providence and Bristol Counties; Charles F. Stearns, Judge.

Action by the Probate Court of the City of Pawtucket, for the use of Joseph U. Starkweather, as administrator de bonis non, against George Fred Williams, as executor, and others. Verdict for plaintiff, and defendants except. Judgment ordered for defendants.

Bassett & Raymond (R. W. Richmond, of counsel), for plaintiff. Gorman, Egan & Gorman, for defendants.

SWEETLAND, J. James O. Starkweather, late of the city of Pawtucket, died on August 5, 1887, leaving a last will and testament, which was duly admitted to probate in said Pawtucket. After providing for certain legacies of small value, the said will provided as follows: "I give, devise and bequeath to my wife, Amey M. Starkweather, all the rest and residue of my personal estate, of whatsoever nature and wheresoever situate, to be used by her, for her own benefit and behoof, for and during her natural life, or so long as she shall remain unmarried, with full power to sell, exchange, invest or reinvest said property in some standard personal security. My said wife is also to have the right to use so much of the principal of said personal property as may be necessary for her support. At the decease of my wife, or whenever she shall marry again, said personal property or so much thereof as shall then remain undisposed of is to be divided equally among all my children or their heirs." The said Amey M. For other definitions, see Words and Phrases, vol. 2, pp. 1713-1726; vol. 8, pp. 7622, 7623.] Starkweather was appointed by said probate

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

court executrix of said will, in accordance | with the nomination made therein, and letters testamentary were issued to her. The said Amey M. Starkweather, having remained unmarried after the death of James O. Starkweather, died at said Pawtucket, on January 11, 1898, leaving a last will and testament, which was duly admitted to probate in said Pawtucket, and on February 23, 1898, the defendant George Fred Williams, named as executor in said will, was duly appointed such executor, and letters testamentary issued to him. On February 23, 1898, Joseph U. Starkweather, a son of the said James O. Starkweather, was appointed administrator de bonis non with the will annexed of the estate of the said James O. Starkweather, and letters of administration were issued to him.

On August 9, 1898, the said Joseph U. Starkwenther, as administrator de bonis non of the estate of James O. Starkweather, filed in the appellate division of the Supreme Court a bill in equity against said George Fred Williams, as executor of Amey M. Starkweather, and against certain other per-As to the respondents in said bill other than the said George Fred Williams, the complainant sought no relief. The complainant in said bill in equity averred the bequest in favor of the said Amey M. Starkweather provided for in the will of the said James O. Starkweather; that the complainant believed that large sums of money and other personal property came into the possession of Amey M. Starkweather from the estate of James O., and was held by her under the provisions of the will of James O. during her life; that a very large part of said property remained in her possession at the time of her death; that the complainant, as administrator de bonis non of the estate of James O. Starkweather, had frequently applied to the said George Fred Williams, executor of the said Amey M. Starkweather, to render a statement of what assets, properties, and effects of James O. Starkweather, bequeathed for life to Amey M. Starkweather, had come into the possession of said George Fred Williams, and that the said George Fred Williams had refused to render any such statement. The prayer of said bill was as follows: "Wherefore, as your orator is remediless in the premises, except by the interference of a court of equity, he prays that the said George Fred Williams may be compelled by decree of this honorable court to disclose what assets, properties, and effects of the said James O. Starkweather were taken, held. and received by the said Amey M. Starkweather under the will of her said husband, and what disposition or change in form of investment, if any, the said Amey M. Starkweather made in the same, how much, if any, of the same was used by her as necessary for her support, and that all the assets, properties, and effects of the said James O. Starkweath- weather.

er, so bequeathed to the said Amey M. Starkweather for life, remaining in her hands and possession at the time of her decease, and which may have come into the hands and possession of her said executor since said time, may by decree of this honorable court be transferred, paid over, and delivered to the said Joseph U. Starkweather, administrator de bonis non as aforesaid, to be held by him and disposed of in accordance with the terms of the will of the said James O. Starkweather." The bill further prayed for an injunction restraining the said George Fred Williams from disposing, transferring, or in any way interfering with the assets of the estate of James O. Starkweather that were in the possession of said Amey M. Starkweather at the time of her decease. The respondents demurred to said bill, and the said demurrer was sustained. Starkweather v. Williams, 21 R. I. 55, 41 Atl. 1003.

The complainant was permitted to amend his will by striking out the prayer above quoted and inserting in place thereof the following, in addition to the bill:

"(7) And your orator showeth unto your honors that a large portion of said property consist of specific articles, the same being family relics and heirlooms of the Starkweather family, handed down from different generations, and the said family relics and heirlooms are greatly prized and valued by the children and administrator de bonis non of said James O. Starkweather, who are entitled thereto under the terms of his said will, and who place upon said relics and heirlooms a value far in excess of their intrinsic value, because of the fact that they are family relics and heirlooms, and connected with the history of the Starkweather family as aforesaid, and that no money equivalent would compensate them for the loss of said relics and heirlooms.

"(8) And your orator further avers that said Amey M. Starkweather in her lifetime held the same, to wit, said moneys and personal properties, in trust for the benefit of the legatees of said James O. Starkweather. to wit, his children, whether the same remained in their original condition or have been sold and the proceeds therein reinvested. and that the said moneys and other personal property came into the hands of George Fred Williams, executor of said Amey M. Starkweather, as trustee for said legatees and administrator de bonis non, and that the same are held by him in trust for the benefit of your orator and the said children of James O. Starkweather, and that it is the duty of said George Fred Williams, as such executor, to turn over said assets, property, and effects to your orator, that the same may be received by him and distributed by him in accordance with the will of said James O. Starkweather, and be administered by him in accordance with said will and as administrator de bouis non of said James O. Stark-

until he obtains a statement or an account from said George Fred Williams, as executor as aforesaid, of said assets, property, and effects of the said James O. Starkweather so bequeathed for life to the said Amey M. Starkweather, which have come into the hands and possession of said George Fred Williams, as executor as aforesaid, that he cannot file his inventory as such administrator de bonis non of the estate of said James O. Starkweather in the probate court, and that until there shall be an accounting taken of such assets, property, and effects under this bill of complaint, that he will be unable to file such inventory as aforesaid.

"(10) Wherefore, as your orator is remediless in the premises, except by the interference of a court of equity, he prays that an account may be taken of the assets, properties, and effects of the said James O. Starkweather, which were taken, held, and received by the said Amey M. Starkweather under the will of her husband, and what disposition or change in form of investment, if any, the said Amey M. Starkweather made in the same, how much, if any, of the same was used by her as necessary for her support, and that an account may be also taken of the assets, properties, and effects of the said James O. Starkweather so bequeathed for life to the said Amey M. Starkweather, which have come into the hands and possession of said George Fred Williams, as executor of said Amey M. Starkweather, and that in case any of said property, effects, and assets have been sold by said Amey M. Starkweather in her lifetime, and the proceeds reinvested, that an account may be taken of the proceeds of such sales so reinvested by her, which have come into the hands and possession of said George Fred Williams, executor as aforesaid, and that upon the coming in of such an account the said George Fred Williams, executor of said Amey M. Starkweather, shall be ordered and decreed to pay over, convey, and deliver to your orator all of such moneys and properties and effects and assets, including such specific articles, such as relics and heirlooms, which shall be found after the coming in of such an account to be in the hands of said George Fred Williams as such executor, or to be due from the estate of said Amey M. Starkweather to your orator as aforesaid, to be held by the said Joseph U. Starkweather, administrator de bonis non as aforesaid, and disposed of by him in accordance with the terms of the will of the said James O. Starkweather."

The respondent in said bill, George Fred Williams, in his answer said that he had no personal knowledge of the facts stated in the bill, but on information and belief denied that large sums of money, or any sums of money, or other personal property, came into the possession of Amey M. Starkweath-

"(9) And your orator further avers that er from the estate of James O., and were held by her during her life under the provisions of said will, and were in her possession at the time of her decease, and further said that he had no knowledge, personal or otherwise, of any such assets in his possession in his capacity as executor of the will of said Amey M. Starkweather. Testimony in said equity cause was taken before a commissioner and reported to the court. After hearing, upon bill, answer, and proofs, the court, on February 2, 1900, entered in said cause the following decree:

> "The above-entitled cause coming on to be heard at the present session, and it now appearing by the admission of the parties that the following sums have been paid out by the respondent, for which this complainant desires credit to be given to the said executor, to wit:

June 21, 1898. Feb. 25, 1899.	Patt & Davis S. C. Wilson & Son B. F. Smith Taxes 1898	\$ 2 1 426	
may 1, 1000.	Taxes 1000	#±0	40

Amounting in the whole to the sum

"Now, therefore, upon consideration hereof, it is ordered, adjudged, and decreed that said complainant recover of the said respondent George Fred Williams as aforesaid, from and out of the estate of the said Amey M. Starkweather remaining in his hands as executor, said sum of \$3,296.32, less said sum of \$430.23, to wit, the sum of \$2,865.09, and also that the said respondent executor as aforesaid turn over to the said complainant, upon his receipt therefor, all the articles of household furniture coming into his hands. and possession as such executor of said Amey M. Starkweather that were contained in the inventory returned by her, the said Amey M. Starkweather, as executrix of James O. Starkweather, late of said Pawtucket, deceased."

On August 4, 1902, the respondent filed a bill of review to review and reverse said decree. Said bill of review was dismissed upon demurrer on the ground that it was filed more than one year after the entry of said decree. Williams v. Starkweather, 24 R. I. 512, 53 Atl. 870; Id., 25 R. I. 77, 54 Atl. 931.

The said George Fred Williams failed to pay to the said Joseph U. Starkweather, administrator de bonis non, the sum of \$2,-865.09, as provided in said decree, and said George Fred Williams, as executor of said Amey M. Starkweather, was by said administrator de bonis non cited before the said probate court of Pawtucket to show cause why he should not be decreed guilty of unfaithful adminstration for his neglect and refusal to raise money out of the estate of said Amey M. Starkweather or to turn over money in his hands as such executor to liquidate said debt due from him as such executor to the administrator de bonis non of the estate of James O. Starkweather,

proceedings were taken under the provisions of Gen. Laws 1896, c. 218, § 27. On July 9, 1902, a decree was entered in said probate court adjudging said George Fred Williams guilty of unfaithful administration. appeal from this decree of said probate court, the proceeding was carried to the superior court, and upon exceptions to this court. By order of this court, a decree was entered confirming the said decree of the probate court. Williams v. Starkweather, 28 R. I. 145, 66 Atl. 67.

On March 9, 1907, the said Joseph U. Starkweather, administrator de bonis non, commenced, in the name of the probate court of Pawtucket, the action at bar against the said George Fred Williams and the sureties upon his bond, given as executor of the said Amey M. Starkweather, and in his declaration sets out the said bond in its terms, as follows:

'Executor's Bond to Return Inventory. "Know all men by these presents, that we. Geo. Fred Williams, of Dedham, in the county of Norfolk, and commonwealth of Massachusetts, as principal, and Herman G. Possner and Henry R. Wirth, both of Providence, in the county of Providence, and state of Rhode Island, as sureties, are holden and stand firmly bounden and obliged unto the court of probate of the city of Pawtucket, in the county of Providence, in the full sum of ten thousand dollars, to be paid to the said court, to the true payment whereof we bind ourselves, our respective heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals this twenty-third day of February, in the year of our Lord one thousand eight hundred and ninty-eight.

"The condition of this obligation is such that if the above bounden Geo. Fred Williams, who has been duly appointed executor of the last will and testament of Amey M. Starkweather, late of the city of Pawtucket, deceased, do make or cause to be made a true and perfect inventory of all and singular the goods, chattels, rights, and credits of the said deceased which have or shall come to the hands, possession, or knowledge of the said Geo. Fred Williams, or unto the hands or possession of any other person for him, and the same, so made, do exhibit upon oath to the court of probate of the city of Pawtucket within three months from the date hereof, and the same goods, chattels, rights, and credits, and all other goods, chattels, rights, and credits of the said Amey M. Starkweather at the time of her death, or which at any time hereafter shall come to the hands and possession of the said Geo. Fred Williams, or to the hands or possession of any other person or persons for him, do well and truly administer according to law and the provisions of said will, and further do make, or cause to be made, a

and exhibit the same to said court, upon oath or affirmation, at or before the twenty-third day of February which will be in the year one thousand nine hundred, then the before written obligation to be void and of none effect; or else to be and remain in full force and virtue.

> "Geo. Fred Williams. [L. S.] "Henry R. Wirth.

"Herman G. Possner. [L. S.] "Signed, sealed, and delivered in presence of "James A. Halloran to G. F. W.

"Lellan J. Tuck to H. R. W. and H. G. P."

The declaration further alleges "that the said Amey M. Starkweather was in her lifetime liable upon a certain indebtedness, which indebtedness was, after her decease. by legal proceedings against the said George Fred Williams, executor as aforesaid, reduced to a judgment against him as executor as aforesaid by a judgment of the appellate division of the Supreme Court of the state of Rhode Island, entered the 2d day of February, A. D. 1900, for the sum of two thousand eight hundred and sixty-five dollars and nine cents (\$2,865.09), which said judgment, with interest thereon to the date of the plaintiff's writ in this case, now amounts to the sum of four thousand eighty-five dollars and sixty-one cents (\$4,085.61)." And the declaration further alleges the neglect of said Williams to apply the assets of the estate to the payment of said judgment, the adjudication of unfaithful administration against said Williams, and that the said Williams has never well and truly administered, according to law and the provisions of said will, the goods, chattels, rights, and credits of the said Amey M. Starkweather which have come to his hands or possession or knowledge. The defendant filed five pleas, of which, in the superior court, the first and fourth were stricken out, and the fifth was overruled upon demurrer, to which action of said court the defendant excepted.

The action came on for trial before a jury in the superior court upon the issues raised by the second and third pleas and the replication thereto, which were that the said Amey M. Starkweather was not in her lifetime liable upon a certain indebtedness, and which indebtedness was not after her decease by legal proceeding against the defendant George Fred Williams, executor aforesaid, reduced to a judgment, and that the plaintiff has not, as provided by law, procured a final decree of the probate court of the city of Pawtucket that the said George Fred Williams has been guilty of unfaithful administration as the executor of the will of said Amey M. Starkweather. Upon the conclusion of the testimony offered at the trial in the superior court, the defendants requested the court to charge the jury in accordance with 12 written requests, and also moved that the court direct the jury to return a just and true account of his doings therein, verdict for the defendants. The justice presiding refused to charge the jury as requested by the defendants, and also denied the defendants' motion to direct a verdict in their favor; and the justice presiding, upon motion of the plaintiff, directed the jury to find a verdict in favor of the plaintiff for the penal sum named in the bond.

By direction of the justice the jury returned the following verdict: "By direction of the court the jury find that the supposed writing and obligation in the plaintiff's declaration mentioned is the deed of said defendants in manner and form as the plaintiff has in its declaration thereof complained against them, and return a verdict for the plaintiff in the penal sum of the bond, to wit, \$10,000. George T. Brown, Foreman.

The case is before this court on the defendants' bill of exceptions, wherein they set forth the exceptions to the ruling of the superior court, striking out the defendants' first and fourth pleas and overruling the defendants' flith plea, and to the refusal of the justice presiding at the trial to charge the jury as by the defendants requested, and to the refusal of the justice to direct the jury to return a verdict in favor of the defendants, and to the action of the justice in directing the jury to return a verdict in favor of the plaintiff.

.Whatever may be the view of this court upon the other exceptions contained in the defendants' bill, the verdict as directed by the court cannot be allowed to stand. It is a primary requisite of a verdict that it should be responsive to the issues before the jury. By direction of the court the jury found that the bond was the obligation of the defendants. As to this there was no controversy between the parties; but as to whether there had been a breach of this obligation the jury make no finding, and that was the vital question involved in the issues which were then being tried. See Leiter v. Lyons, 24 B. I. 42, 52 Atl. 78.

The plaintiff brings his action, as a creditor of Amey M. Starkweather, deceased, in the name of the probate court, upon the bind of the defendant given to the probate court. The only interest in the bond in question, which the plaintiff alleges, is as such creditor. Section 1027 of the Court and Practice Act of 1905 prescribes: "If such suit be brought by a creditor of the deceased person, he shal show: (1) That his claim has been duly filed. (2) That his claim has not been disallowed by the executor or administrator, or has been established by commissioners or by judgment. (3) That a decree of unfaithful administration has been entered as provided in the next following section, an if the estate be insolvent, he shall also produce a copy of the order (f distribution."

The plaintiff contends that he has established his claim as a creditor of Amey M. Starkweather "by judgment"; that is, by the final decree of the appellate division of the

fendant urges that this is not a debt ascertained by judgment within the intent of the statute. But this court has already held, in proceedings between these parties (Williams v. Starkweather, 28 R. I. 145, 66 Atl. 67), that said decree was a "judgment," within the meaning of the statute. In the same proceeding this court has also said that by virtue of said final decree the relation of debtor and creditor between Amey M. Starkweather and the estate of James O. Starkweather has been established. In Williams v. Starkweather, 28 R. I. 145, 66 Atl. 67, however, only the final decree entered in the appellate division was presented to this court, and the question was not then one of such fundamental and vital importance as in the proceeding at bar, which is based upon the allegation that Amey M. Starkweather was liable in her lifetime upon an indebtedness to this plaintiff or to the estate of James O. Starkweather. The whole record in the suit in equity in Starkweather v. Williams has been made a part of the record in this case, the matter has been fully argued by counsel, and it becomes necessary to consider the nature of the proceedings which were before the appellate division in said suit in equity. If said suit did not have for its purposes the ascertainment of an indebtedness of Amey M. Starkweather in her lifetime, then this plaintiff cannot be permitted to maintain this action at bar as a creditor of Amey M. Starkweather.

Amey M. Starkweather, by the will of her husband, received the residue of his personal property after the payment of debts and legacles, to be used by her during her natural life, with full power to sell, exchange, invest, or reinvest said property in some standard personal security, and also with the right in Mrs. Starkweather to use so much of the principal of said personal property as might be necessary for her support. At the death of Mrs. Starkweather there was in her possession of the personal property which she had received from her husband's estate a number of specific articles of furniture and plate, and there was also in her possession certain stock which she had purchased, in part, if not wholly, with money received from her husband's estate. This property came into the possession of Mr. Williams Mr. Williams, without after her death. knowledge of the true ownership of this property, was justified in treating it as property which belonged to the estate of his testatrix. Property of all kinds found in one's possession at his death is presumed to belong to his succession. Lynch v. Berton, 12 Rob. (La.) 113. Upon demand for it made upon him by the children of James O. Starkweather, or by the administrator de bonis non, Mr. Williams, for his own protection, might well require an adjudication as to its ownership before he permitted it to pass from his possession. The bill in equity against Mr. Wil-Supreme Court in the suit in equity. The de- | liams appears to us, from an examination of

the whole record, to have been a proceeding | ling, 16 Ill. App. 392; Connecticut Trust Co. having such an adjudication for its purpose.

There is no allegation in the bill of improper dealing with the property by Mrs. Starkweather during her lifetime, or any suggestion of an indebtedness from Mrs. Starkweather to the estate of her husband. nor is there the statement of any facts from which an indebtedness would arise against The purpose of the bill in its original and in its amended form is clearly to impress a trust in favor of the administrator de bonis non upon property which was held by Mrs. Starkweather in her lifetime, either as the executrix of her husband or as the life tenant under his will, which had come into 'the hands of her executor, which the administrator de bonis non claimed as assets unadministered by his predecessor, and which he sought to trace in its original or substituted form in the property which had come into the hands of Mr. Williams. An examination of the testimony which was before the court in equity fails to disclose any fact from which an indebtedness against Mrs. Starkweather would arise, and neither the administrator de bonis non nor any other witness. in his or her testimony, suggests the claim of an indebtedness on the part of Mrs. Starkweather. The defendant in the case at bar has sought to attack the proceedings in equity in a number of particulars and to discredit the decree entered in said cause. While many of these objections would be entitled to careful consideration if the suit was now pending before us, the matter is res adjudicata, and the decree entered therein is conclusive between these parties, only to the extent, however, of the issues raised and determined in that suit.

It is enough that the pleadings and the testimony do not raise any question of indebtedness on the part of Mrs. Starkweather in her lifetime. But there are a number of circumstances in the case which indicate that it was not the intention of the parties or of the court to establish such an indebtedness. There is no allegation in the bill, and it does not appear, that a claim was filed by the complainant against the estate of Amey M. Starkweather, as required by the probate law of this state. The complainant proceeded as one claiming property weld by the decedent in trust, and which came into the hands of mer personal representative impressed with the trust, in waich case the provisions of the probate law as to filing claims would not apply. "When the executor or administrator has property which belo gs to another, the owner is not required to present his account as if he were a creditor. The claimant of specific property, and not of a debt, cannot be called a creditor within the meaning of the probate law." Gunter v. James, 9 Cal. 643. And see, also, In re H. C. Kibbe's Estate, 57 Cal. 407; Gillett v. Hick- Court and Practice Act 1905, § 830, an ad-

v. Security Co., 67 Conn. 438. 35 Atl. 342.

Further, it is alleged in said bill that the respondent George Fred Williams was appointed by the probate court executor of Amey M. Starkweather on February 23, 1898. It does not appear at what date thereafter the said executor made the first publication of the notice of his qualification as such executor. Said suit in equity was filed in the appellate division on August 9, 1898, less than six months after the date of the appointment of the executor, and before the time when the executor could be held to answer to a suit at law or in equity by a creditor of the deceased, although such executor might at that time be sued in law or equity for the recovery of specific property not a part of the estate of his testatrix, or might be made respondent in a suit to trace funds in his hands, which his testatrix had held in trust for some other person.

Again, if said proceeding in equity had been instituted to establish a debt which the law might imply against said testatrix, because she had converted any of the property of the estate of James O. Starkweather while executrix of said estate, or because she had improperly mirgled the funds of the estate with her own, then such proceeding could not have been instituted by the administrator de bonis non of the estate of James O. Starkweather under the authorities and statutes of this state. Such suit could only be maintained by the heirs or creditors of James O. Starkweather. In Court of Probate v. Smith, 16 R. I. 444, 17 Atl. 56, which was an action of debt on the bond of Harriet Winsor, as administratrix on the estate of Mary Waterman, brought for the benefit of Daniel H. Remington as administrator de bonis against the personal representative of Harriet Winsor, this court held that "an administrator de bonis non is appointed to administer only so much of the estate as remains unadministered by the original administrator, and that his representative right or authority extends only to such remainder, unless it is further extended by statute. There can be, it has been said, only one administration; the administrator de bonis non taking it up where his predecessor left off, for the purpose of completing it, each being responsible to the creditors and next of kin, so far as he acts, and neither for or to the other. * Our conclusion is that the action is not maintainable." In this case the court cites with approval Beall v. New Mexico, 16 Wall. 535, 21 L. Ed. 292, which decided that "an administrator de bonis non cannot sue the former administrator or his representative for a devastavit or for delinquencies in office, nor maintain an action on the former administrator's bond for such cause." Since the decision in Court of Probate v. Smith, supra, by statutory provision now appearing in executor or administrator. But the authority of an administrator de bonis non to take action for maladministration of a preceding administrator has not been extended farther by statute in this state. When the only right of action given by statute to an administrator de bonis non for the conversion of any part of the personal assets of the estate by his predecessor is upon his official bond, such action cannot be maintained against the estate of the deceased administrator by such administrator de bonis non, except upon the bond of his predecessor. Orme's Estate v. Brown, 22 Ind. App. 569, 52 N. E. 1005.

The suit in equity was for the purpose of tracing the personal property of James O. Starkweather, which had not been administered already, into the hands of George Fred Williams, and for the purpose of obtaining a decree to recover the same from said Williams. This relief the administrator de bonis non received, and upon said decree the administrator de bonis non can pursue said Williams, but not upon his bond as executor. The obligation of the executor is that he shall well and truly administer, according to law and the provisions of said will, all and singular the goods, chattels, rights, and credits of the testatrix at the time of her death, or which at any time after his appointment shall come to the hands and possession of the executor, or to the hands or possession of any other person or persons for | 1. APPEAL AND ERROR (§ 882*)-RIGHT TO Ashim. The failure of the executor to so administer the goods, chattels, rights, and credits of the testatrix amounts to a breach of the bond. But property which the testatrix in her lifetime held in trust, or in which she had merely a life interest, are not assets of the estate, and no act of the executor as to such property will render him or the sureties liable upon the bond. "If the goods of another man be amongst the goods of the deceased, and then come altogether into the hands of the executor or administrator, these goods, that are the goods of another, shall not be said to be assets in the hands of the executor or administrator." Sheppard's Touchstone, 498. And see Cooper v. White, 19 Ga. 554; Governor v. Executors of Hooker. 19 Fla. 162. When an administrator received property which did not belong to the estate, and which it was not a part of his duty to receive, his sureties could not be made liable, because their undertaking was that he should faithfully discharge his duties as administrator as prescribed by law. Johnson v. Hall, 101 Ga. 687, 29 S. E. 37. When property comes into the hands of an executor which is not assets of the estate, executor which is not assets of the estate, even though in his report he charges himself as executor with said funds, this does not create a liability against the sureties upon of a highway, though not encroaching on the

ministrator de bonis non is authorized to his bond. People v. Petrie, 191 Ill. 497, 61 bring an action on the bond of the preceding N. E. 499, 85 Am. St. Rep. 268. And see First Nat. Bank v. Hummell, 14 Colo. 259. 23 Pac. 986, 8 L. R. A. 788, 20 Am. St. Rep. 257; Hubbard v. Irrigating Co., 58 Kan. 637, 86 Pac. 1053, 87 Pac. 625; Pace v. Pace, 19 Fla. 438; Connecticut Trust Co. v. Security Co., 67 Conn. 438, 85 Atl. 842; Jester v. Gustin, 158 Ind. 287, 63 N. E. 471; Simrall's Adm'r v. Graham, 1 Dana (Ky.) 574; Salter v. Sutherland, 123 Mich. 225, 81 N. W. 1070, 50 L. R. A. 140; Pierce v. Robinson, 13 Cal. 116; Smith v. Combs. 49 N. J. Eq. 420, 24 Atl. 9; Moses v. Murgatroyd, 1 Johns. Ch. (N. Y.) 119, 7 Am. Dec. 478.

This being the conclusion which we reach as to the nature of the proceeding in equity. and as to the claim of the plaintiff that he is a creditor of Amey M. Starkweather upon an indebtedness arising in her lifetime, we decide that the plaintiff cannot maintain this action. The direction of a verdict in favor of the plaintiff was error. The motion of the defendants that a verdict be directed in their favor should have been granted.

Case ordered remitted to the superior court, with direction to enter judgment for the defendants.

(80 R. I. 44)

TAYLOR v. WINSOR.

(Supreme Court of Rhode Island. July 7, 1909.)

SIGN ERROR.

Defendant cannot complain of the admission of testimony by plaintiff, where he offered similar evidence on the same subject.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591–3610; Dec. Dig. § 882.*]

808*1 2. Municipal Corporations (§ 698*) — Streets — Obstruction — Injuries—Evi-

Evidence held to show that the owner of wood piled in a street by another knew of its dangerous condition and assumed practical control over it.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 698.*]

8. MASTER AND SERVANT (§ 318*)—ACTS OF INDEPENDENT CONTRACTOR—LIABILITY.

While as a general rule an independent contractor, and not the owner, is liable for all damages to third persons from the contractor's negligence while work is in progress under his exclusive control and has not been accepted by the owner, yet where the owner, without formally accepting the work, assumes practical control of that upon which the work is done, as to third persons at least he treats it as his own, and becomes responsible for injury therefrom to the same extent as if he had formally from to the same extent as if he had formally accepted it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \$8 1257, 1258; Dec. Dig. \$ 818.*1

*For other cases see same topic and section NU_BER in Dec. & Am. Digs. 1507 to date, & Reporter Indexes

puisance.

[Ed. Note.—For other cases, see Highways, Cent. Dig. \$\frac{4}{2}\$ 417, 418; Dec. Dig. \$\frac{1}{2}\$ 153.*]

5. NEW TRIAL (§ 104*)—GROUNDS—CUMULA-TIVE EVIDENCE.

Additional cumulative evidence is ground for a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 218-220; Dec. Dig. § 104.*]

Exceptions from Superior Court, Providence and Bristol Counties; Charles F. Stearns, Judge.

Action by Walter O. Taylor against Nicholas S. Winsor. There was a verdict for plaintiff for \$14,000, which was ordered to be reduced, or a new trial would be granted. Both parties bring exceptions. Remitted, with directions to grant a new trial, unless a remittitur of the amount of the verdict over \$10,000 be entered.

Thomas A. Carroll, John W. Hogan, and Walter P. Suesman, for plaintiff. James Harris and Irving Champlin, for defendant.

BLODGETT, J. This is an action for the recovery of damages for injuries received by reason of the falling of a pile of wood belonging to defendant and piled within the limits of the highway between Harmony and Chepachet, on which the defendant was driving, frightening his horse, overturning his carriage, and throwing the plaintiff upon the ground, severely injuring him. The plaintiff recovered a verdict for \$14,000, which the trial court ordered to be reduced to \$6,500, or a new trial, on the ground of excessive damages, would be granted. The plaintiff refused to enter a remittitur as aforesaid, and has excepted to the reduction of the verdict, and the defendant has also taken various exceptions to the rulings of the trial court.

Those of the defendant's exceptions which are contained in paragraphs 1 and 2 of the bill are disallowed and overruled. They relate to the admission of testimony by the plaintiff as to the dangerous condition of the pile, and defendant offered evidence on the same subject in defense.

Two exceptions to the charge of the court were taken as follows: "The defendant excepts to that part of the charge to the effect that, under the evidence, the defendant is responsible for the manner in which Mr. Majer packed the wood; also to that part of the charge to the effect that the wood was a public nuisance."

As to the first of these exceptions it is admitted by the defendant that the wood was his, and that he had employed one John Maier to draw it from the place where it was cut, as follows: "He was to draw it out for 50 cents a cord. I asked him to see Mr. Steere, and see if arrangements could be made to leave it in a lot where I had had owner of the wood unquestionably by this

traveled portion thereof, constitutes a public | some previously; if not, he would have to put it outside in the highway." It is undisputed that this pile was about 150 feet in length, of approximately 8 feet in height for at least most of its length, was composed of sticks of firewood, cut in the ordinary lengths of 4 feet, and arranged in two tiers, within the limits of the highway and on one side of it, upon a slight embankment, and had been there for several months prior to the accident; the pile varying in size somewhat from time to time as the defendant's teams carted away portions of it to customers and as the wood so removed was replaced by new supplies so carted by Maier from the wood lot to the pile. Maier testifies that he had drawn more than 50 cords to the pile before the accident, but how much more he did not know-possibly 50 cords more. He drew 201 cords in all to the pile. He began drawing wood to the pile in December, 1908, and the accident occurred on March 28, 1904. The defendant knew that some of the wood so piled had fallen in the road before the accident, as evidenced by his testimony: "Q. Well, you do know they were drawing wood from Hick's Hill? A. Yes; that is, when I sent them. Q. And that was before the accident? A. Yes, sir. Q. So that you gave specific orders to your teamsters to take wood from this particular pile previous to the accident? A. Yes, sir. Q. And was that because some of the wood had fallen down into the road? A. They came home and reported that they had loaded some wood out of the road. Q. And that was before the accident, wasn't it, Mr. Winsor? A. About a week, I think. Q. So that of your own knowledge a week before the accident your teamers had reported that they had taken wood out of the road? A. Yes, sir. Q. And was it because that wood was in a falling condition that you gave particular orders to take from that pile? A. No, sir; they had been drawing from there prior to finding any wood in the road. Q. What was there about this particular pile that you gave instructions to draw from? A. They said they gathered some up from the roadside, and I suggested if it was high to go-when they went there to take off a few feet across the top. Q. Did you give orders to take two feet off the top? A. I didn't say two feet. I said a few feet. Q. Why did you give orders to take a few feet off of the top? A. Well, it would be easy to load and for them to do it if there was any danger of falling. Q. So, in order to save danger from this pile falling, you gave orders to have a few feet taken off the top of the pile. That is right, isn't it, Mr. Winsor? A. Yes, sir. Q. And that was before the accident to Mr. Taylor, wasn't it? A. Yes, sir."

Even if Maier was an independent contractor, as claimed by the defendant, the

testimony knew of its dangerous condition. and exercised such acts of ownership and control over the pile as to bring himself within the rule laid down by this court in Read v. East Providence Fire District, 20 "That as R. I. 574, 578, 40 Atl. 760, 761: a general rule, an independent contractor, and not the owner, is liable for all damages to third parties resulting from his negligence while the work is in progress and under his exclusive control and has not been accepted by the owner, as contended by the defendant, is well settled by all the authoritres, many of which are cited in his brief." See cases cited. "This rule is based upon the general proposition, which is certainly well founded in reason, that one person is . not liable for the acts or negligence of another unless the relation of master and servant exists between them. But it is not applicable to the case at bar, for the reason, as we have already seen, that here the evidence shows that the owner, without formally accepting the work, stepped in and assumed practical control of the structure by appropriating it to the use for which it was erected. And by so doing, as to third persons at any rate, it treated the structure as its own and became responsible for injury therefrom to the same extent as if there had been a formal acceptance thereof."

'This exception must be overruled.

'The trial court instructed the jury that "the act of Mr. Winsor and the act of John Maier carrying out instructions to place the wood on the highway was contrary to law; that is, it created a public nuisance." This instruction was correct. 'In Commonwealth v. King, 13 Metc. (Mass.) 115, the defendant was indicted for obstructing a highway on the following facts: "It was also admitted by the defendant that he, in October, 1846, erected about six rods of stone wall, a litthe less than a rod within the lines of said highway, and between the traveled way and his land, for the purpose of inclosing that part of the highway, around which said wall extended, with his land, and as a part of it. The defendant then offered to introduce evidence tending to prove that the part of said highway where said wall was erected, and the space between said wall and the exterior line of that side of said highway, had never been wrought nor prepared for travel, either by said turnpike corporation or by any persons; that the same had never been used for travel, and could not be traveled over, by reason of the ledges, rocks, and stones, in the place where said wall was erected, and in said space; that there was, after the said wall was erected, as ample and convenient room for all travel on said highway as there was before; and that said wall did not in any degree obstruct or hinder the travel on said highway. But the court ruled that such evidence, if admitted, would not constitute a good defense to the indictment, and refused to admit it. The jury found the defendant entered upon and obstructed by the defend-

guilty, and he filed exceptions to the ruling of the court." Dewey, J., in delivering the opinion of the court, said (pages 118-120): "The next inquiry is whether the facts alleged constitute an offense at common law. Upon this point we have no doubt. By the location of a public highway, with certain defined exterior limits, the public acquire an easement coextensive with the limits of such highway. Whoever obstructs the full enjoyment of that easement, by making deposits, within such limits of the located highway, of timber, stones, or other things, to remain there and occupy a portion of such public highway, is guilty of a nuisance at common law. It was contended by the counsel for the defendant that the rights of the public are confined exclusively to the made or traveled road, or to that part which might be safely and properly used for traveling, and that a deposit of timber, stones, or other articles, upon a part of the located highway, which, from its want of adaptation to use for travel, could not be thus enjoyed, as a portion of the way on which there was a high bank, or a deep ravine, would not subject the party to an indictment for a nuisance upon the highway. This principle is supposed to be sanctioned by the decisions of this court in reference to the rights of travelers, holding that such travelers are to use the traveled or made road, and that if such road is of suitable width, and kept in proper repair, the town may have fully discharged its duty, although it has not made and kept in repair a road of the entire width of the located highway. But there is a manifest distinction between the two cases. In the case supposed, the traveler has all the benefits of a public way secured to him. He only requires a road of proper width and kept in good repair. But the town, on the other hand, to enable itself to discharge its obligation to the public, requires the full and entire use of the whole located highway. The space between the made road and the exterior limits of the located highway may be required for various purposes, as for making and keeping in repair the traveled path, for making sluiges and water courses, or for furnishing earth to raise the road; and, not unfrequently, from the location of the road and from its exposure to be obstructed by snow, the entire width of the located road is required to be kept open, to guard against accumulations of snow that might otherwise wholly obstruct the public travel at such seasons. For these and other uses, in aid of what is the leading object, the keeping in good repair of the made or traveled road, the general easement in the public, acquired by the location of a highway, is coextensive with the exterior limits of the located highway; and the question of nuisance or no nuisance does not depend upon the fact whether that part of the highway, which is alleged to have been unlawfully

ant, was a portion of the highway capable | highway may be used by the traveler, and of being used by the traveler. Whether it be so or not, an entry upon the located highway, and occupation of any portion of it by deposits of lumber, stones, etc., would be a nuisance, and subject the party to an indictment therefor. We do not perceive any new principle to be settled in the decision of this case. It is only the frequently occurring case of an indictment for a nuisance upon a highway. Such indictments, charging acts of similar character to the present, have always been sustained as good at common law; and when an offense, punishable at common law only. is alleged to be contrary to a statute, this allegation may be rejected as surplusage. 1 Chit. Crim. Law, 289; Commonwealth v. Hoxey, 16 Mass. 385. * * * The court are of the opinion that this offense is properly punished as an offense at common law, and that the ruling of the court of common pleas upon the trial was correct." And see Morton v. Moore, 15 Gray (Mass.) 573, 577.

The same doctrine was upheld in Dickey v. Maine Telegraph Co., 46 Me. 483, where a telegraph wire of the defendant corporation, hanging too low over a highway, caught the upper part of a stage in which the plaintiff was a passenger and was the cause of its being upset, whereby the plaintiff was damaged. The court held (pages 485-487): "When a highway is laid out and opened, all persons have a right to pass upon it. By the legal laying out, and after all the requirements of the statute have been complied with, the public acquires an easement, as against the owners of the land, which extends to every portion of the road; and any person has a right to pass or repass, at his own risk, over any part, after it is opened, and before any work is done, or any traveled path made, and before the liability of the town to make it exists. When laid out and accepted, it becomes a public highway. State v. Kittery, 5 Greet l. (Me.) 259; Johnson v. Whitefield, 18 Me. 286, 36 Am. Dec. 721. The duties of the town in relation to preparing the way for travel are distinct from and subsequent to the laying out. The law requires the town to make and keep in repair a traveled path of suitable and sufficient width. It does not require the town, ordinarily, to make that traveled path the whole width of the road, and towns will not be liable for obstructions on the portion of the highway not constituting the traveled path, and not so connected with it as to affect the safety of the traveled portion. Bryant v. Biddeford, 39 Me. 193. But the right of travelers to use any part of a highway, if they see fit, is not restricted by the limitation of the liability of the town in case of accident. A person may go out of the beaten track at his own risk, as between himself and the town, and yet be entitled to protection against the unlawful acts of other persons or corporations. Any part of the

in such direction as may suit his convenience or taste. Stinson v. Gardiner, 42 Me. 248, 66 Am. Dec. 281. No private person has a right to place or cause any obstruction which interferes with this right on any part of the highway within its exterior limits. The extent of the liability of the town is no measure for such private person's liability. If the owner of the fee in the land, or any other person, should dig a pit, or stretch a cord, or place a pile of stones, on the highway near the outer limit, and at a considerable distance from the traveled way, and a traveler passing, using due care, should be injured thereby, it would be no sufficient answer to his claim for damages to aver and prove that under the circumstances the town, was not liable. The duty of the town is to perform a positive act in the preparation and, preservation of a sufficient traveled way. The duty of others is to abstain from doing any act by which any part of the highway would become more dangerous to the traveler; than in a state of nature, or than in the state, in which the town has left it. It may be; true that in many cases the same principles will be applied both to towns and individuals, in determining whether a given state of facts, in relation to a particular incumbrance, con-. stitutes a defect within the meaning of the law. But, admitting the defect, the question of liability for creating or allowing it may require for its solution the application of very different principles, in a case against a private person, from those which would apply to a town. * * * The defendants contend that the 'public use of the highway is the right which the great public owns, in distinction from the private rights which individuals have of passing out of the traveled path.' We cannot concur in this view. The public use of the highway is the right which has been before defined, viz., the right of any and all persons to use the highway, to pass and repass, at their pleasure, on any part. It is not confined to that portion which the town is by law compelled to make and keep in repair. It is very clear that this company could not legally erect posts a foot only in' height, and extend the wires at that distance from the ground, on the exterior limits and outside of the traveled path, if by so doing the use of any part of the highway was obstructed or rendered inconvenient and dangerous, or the traveler incommoded. If any injury should arise to any such legal traveler by such erection, he using due care, the company would be liable to him. The same rule will apply when, after erections properly made, they suffer the same to fall down, or to be out of repair, and to remain so after reasonable notice, so as to obstruct the traveler and endanger his safety. The instructions on this point were clear and distinct, and inour view correct."

The exception is overruled.

The exceptions relating to the alleged misconduct of certain jurors are substantially similar to the facts disclosed in Clarke v. South Kingstown, 18 R. L. 283, 27 Atl. 336, which this court held to be insufficient to grant a new trial. "We do not think that the remark of the juror complained of is a sufficient ground to entitle the appellants to a new trial. The allegation is that during the progress of the trial, before the testimony for the appellants had been put in, one of the jurors made a remark out of court that he had no doubt that the case would go for the town. The remark was a mere expression of opinion of the juror. There was nothing in it to indicate any prejudice on the part of the juror against the appellants which would prevent him from listening to and considering the testimony in favor of the appellants, or to show that he had so conclusively made up his mind in relation to the merits of the case that it would not be changed by further evidence, or by arguments of counsel, or the instructions of the court. Though the remark was improper, it was much less objectionable than remarks of jurors which have been held insufficient to warrant the setting aside of a verdict. Jackson, Adm'r, v. Smith, 21 Wis. 26, 27; Foster v. Brooks, 6 Ga. 287, 297; Taylor v. California Stage Company, 6 Cal. 228-280; Harrison v. Price, 22 Ind. 165, 168." And see Kaul v. Brown, 17 R. I. 14, 20 Atl. 10, and cases cited.

These exceptions are overruled.

The affidavits offered in support of the motion for a new trial are merely cumulative of the 1.199 pages of testimony now in this record, and do not furnish grounds for a new trial. A careful examination of all this long record shows a conflict of testimony as to matters of fact, which the jury have passed upon and decided in favor of the plaintiff. The trial justice has confirmed that finding, and we see no sufficient ground for disturbing that finding, except in the matter of damages originally awarded, which we find to be excessive. A majority of the court are of the opinion that the sum fixed by the trial judge is smaller than the evidence warrants, and are convinced that the sum of \$10,000 would be adequate compensation for the injuries and damages sustained by the plaintiff; but in my opinion the action of the trial justice in reducing the amount of damages to \$6,500 was correct.

The case is remitted to the superior court, with direction to grant the defendant's motion for a new trial to be had solely upon the question of damages, unless the plaintiff shall on or before the 31st day of July, 1900, enter his remittitur of the amount of said verdict in excess of \$10,000, and in case of due entry of such remittitur to enter judgment on the verdict as reduced thereby.

CLAVIN v. WILLIAM TINKHAM CO.

(Supreme Court of Rhode Island. July 6, 1909.)

1. Master and Servant (§ 185*)—Injuries—Fellow Servants.

A loom fixer, employed by defendant woolen mill company, who was repairing a loom near which plaintiff, a weaver, was sitting when injured by a shuttle flying out of the loom, because the repairer neglected to remove a betwhile making repairs, was not a fellow servant of plaintiff; he then being engaged in the performance of the master's duty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 385-421; Dec.Dig. § 185.*] 2. MASTER AND SERVANT (§ 103*)—MASTER'S DUTY—SAFE APPLIANCES—DELEGATION OF DUTY.

A master must see that machinery furnished his servants for operation is reasonably safe, and cannot delegate this duty to others, so as to relieve himself of responsibility for their negligence in performing it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. § 103.*]

 MASTER AND SERVANT (§ 289°)—INJURIES— JURY QUESTION — CONTRIBUTORY NEGLI-GENCE.

In an action by a weaver for injuries caused by being struck by a shuttle, which flew out of the loom near where she was sitting while it was being repaired, plaintiff having left her own loom and sat down at the loom being repaired, whether she was negligent in voluntarily putting herself in a place of danger held for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1106; Dec. Dig. § 289.*]
4. Thial (§ 252*)—Instructions—ApplicaBility to Case.

In an action by a weaver for injuries by being struck by a shuttle, which fiew out of a loom at which she was sitting while it was being repaired, because of the neglect of defendant's loom fixer to take precautions to prevent such an accident, a requested instruction that the case came within the doctrine of furnishing material by the master and the use thereof by servants or those in charge of them was properly refused as inapplicable; the loom fixer not being plaintiff's fellow servant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 603; Dec. Dig. § 252.*]

Exceptions from Superior Court, Providence and Bristol Counties; Charles F. Stearns, Judge.

Action by Catherine Clavin against the William Tinkham Company. Verdict for plaintiff, and defendant excepts. Exceptions overruled, and case remitted for judgment upon verdict.

The fifth exception was to the refusal of the court to charge the jury, as requested by defendant, that this case came practically within the doctrine of the furnishing of materials by the master, and the selection and use thereof by the servants, or those in charge of the servants and workmen in the employment of the master.

John W. Hogan, for plaintiff. Tillinghast & Murdock, for defendant.

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

BLODGETT, J. The case at bar is thus | charge on page 158 of the said transcript. (4) stated on the defendant's brief:

This is an action of trespass on the case for negligence, brought by Catherine Clavin against the William Tinkham Company, a The William Tinkham Comcorporation. pany is engaged in the manufacture of worsted and woolen goods, having a mill at Harrisville. The plaintiff, a weaver, was on the 19th day of June, 1906, operating a loom in the defendant's mill. On that day certain minor repairs were being made by a loom fixer upon a loom in the weaving room, where the plaintiff was working. The loom which was being repaired was the one adjacent to the plaintiff's loom, and was operated by one San Souci. While the work of repairing was in progress, she took the seat at San Souci's loom, and while in this position was injured by a shuttle which flew out of San Souci's loom. A loom fixer was called upon to tighten the picking cam, which is fastened to a shaft running underneath the loom. To get at the picking cam it was necessary to lift the warp beam out of its position and rest it on the framework of the loom. The loom fixer, having made the adjustment, was lowering the warp beam into its position with the assistance of San Souci when he accidentally touched the shipper which engaged the friction clutch and set the loom in motion. The shed through which the shuttle passed being loosened by reason of the warp beam not being in position, the shuttle flew from the loom and caused the injury to the plaintiff. As a result of this injury, the plaintiff lost an eye and claims to have suffered other injuries. A demurrer to the plaintiff's declaration was heard before Mr. Justice Stearns, was overruled, and the defendant's exception was noted thereto.

This case was tried before Mr. Justice Stearns and a jury in the superior court at Providence, on December 8, 9, and 10, 1908, and a verdict returned therein in favor of the plaintiff for the sum of \$4,200. Within seven days after the rendition of said verdict the defendant filed its notice of intention to prosecute a bill of exceptions, and said bill of exceptions was duly filed, and notice thereof duly given to the plaintiff, and the case is now before this court on defendant's bill of exceptions. The bill of exceptions alleges six grounds of exceptions as follows: (1) To the decision of Justice Stearns, entered February 25, 1908, overruling the defendant's demurrer to the declaration filed in said cause, as appears of record. (2) To the refusal of the trial justice to direct a verdict for the defendant, as appears on page 150 of the transcript of testimony in said case. (3) To the charge of the trial justice at the trial of said cause that the loom fixer, in fixing the loom in question, was attending to a duty which the em- | it on others, they will simply occupy his ployer owed to the employe, and that he was | place, and he will remain as responsible for

To a certain ruling of said justice in refusing to charge the jury as requested by the defendant, as shown on star page 162 of said transcript, designated "Exception 1." (5) To a certain ruling of said justice in refusing to charge the jury as requested by the defendant, as appears on star page 162 of the said transcript, designated "Exception 2." (6) To the refusal of the said justice to charge the jury as requested by defendant. as appears on star page 163 of said transcript.

The trial justice instructed the jury, without objection, that "there are several counts in the declaration, which is the statement of the plaintiff's case, and the only count on which you can find a verdict is the last count," thus eliminating all questions arising under any other counts in the declaration. The charge of the trial justice on page 158, to which exception is taken, is as follows: "I charge you, gentlemen, that under the circumstances here that the duty, that the fixing of that loom, that the loom fixer was attending to a duty, which the employer owed to the employé." The instruction was correct. It is in substance the converse of the contention of the defendant in his second ground of demurrer to the third count. "That it appears by said count that the negligence of the loom fixer, if any, was the negligence of a fellow servant," which contention the trial court properly overruled. The cause of the accident in question was the neglect of the loom fixer to remove the belt while the necessary adjustments were being made, so that an accidental moving of the shipper could not prematurely start the loom, or the neglect by the loom fixer to remove the shuttle, so that if the loom were prematurely started the shuttle would not fly from its place and cause damage.

In Crandall v. Stafford Mfg. Co., 24 R. I. 555, 556, 54 Atl. 53, it was said by this court: "The witness John S. Grant, who erected the 'hanger' upon which the pulley shaft was placed, was not, in the doing of that work, a fellow servant with the plaintiff. 'hanger' was part of an appliance in the mill. It was put up under the oversight of the superintendent, and was intended to be used in facilitating the doing of certain work which the defendant corporation was carrying on. The duty of properly constructing and fastening said appliance, therefore, was clearly one which the law devolved upon the defendant as master, and it could not divest itself of this duty by devolving it upon another. As said by this court in Mulvey v. R. I. Locomotive Works, 14 R. L. 204: 'It is the duty of a master, who furnishes machinery for his servants to operate or work about, to see to it that it is reasonably safe. He cannot divest himself of this duty by devolving it on others, and, if he does devolve a vice principal, as appears in the judge's their negligence as if he were personally

guilty of it himself." See cases cited.

So in Jaques v. Great Falls Manufacturing Co., 66 N. H. 482, 22 Atl. 552, 13 L. R. A. 824, which in many respects resembles the case at bar and was upon the following facts:

"Clark, J. The motion for a nonsuit presents the question whether the jury could properly find a verdict for the plaintiff upon the evidence submitted. Paine v. Railway, 58 N. H. 611 The evidence produced by the plaintiff-that the shuttle would not fly out of a loom unless the machinery was defective or out of repair; that the plaintiff had no knowledge of the machinery, and was not allowed to meddle with it, and in case it did not operate properly was required to call on er,' or in the 'picker,' and she again called the employer is accountable. on Burke, who again examined the loom, repaired it, and put it in operation; that short- within the rule exempting the employer ly after, and before 12 o'clock, the shuttle from the consequences of the negligence of flew out and struck her, putting out one of fellow servants, is not ordinarily determinher eyes; and that she had watched the loom more closely than the others because its action made her afraid of it—was evidence tending to show that the plaintiff, exercising reasonable care, was injured by the defendants' negligence in failing to provide a servant, of whatever rank, charged with suitable machinery for her use, and, in the the performance of the master's duty toabsence of rebutting evidence, was sufficient wards his servants, is, as to the discharge to sustain a verdict for the plaintiff. The of that duty, a vice principal, for whose motion for a nonsuit was properly denied.

and chargeable with the negligence of such agent or servant. In many kinds of service the care and keeping of tools and machinery in a condition of safety require merely the attention and repairs occasioned by ordinary use and wear, and are properly a part of the regular business of the servant engaged in the use of such tools and machinery. In such cases the duty of the employer is performed by furnishing safe tools and machinery and the means of making needed repairs, and the duty of making the repairs may be intrusted to servants, and any neglect in the performance of this service is the negligence of a servant. McGee v. Boston Cordage Co., 139 Mass. 445, 1 N. E. 745. Burke, a foom fixer employed by the defend- But in cases where skill and practical knowlants, to look after the looms operated by edge are required in keeping machinery in the plaintiff and keep them in proper re- a reasonable condition as to salety, beyond pair; that the shuttle flew out of one of her what is needed in operating it, it is the looms about 10 o'clock in the forenoon of duty of the employer to supply the necessary the day of the injury, and she notified Burke, intelligence, skill, and experience in the the day of the injury, and she notified Burke, intelligence, skill, and experience in the who examined it, made whatever repairs he care and inspection of the machinery to thought necessary, and set it running; that protect the servant from injury; and for at 11 o'clock the shuttle caught in the 'bind- any failure to exercise proper care and skill

"The question who are fellow servants, ed by rank or grade of service, but by the character of the service performed or acts complained of. As a general rule, those doing the work of a servant are fellow servants, whatever their grade of service; and acts and neglects the master is responsible, "The defendants excepted to the refusal because he has invested him with the reto instruct the jury that Burke, the section sponsibility of doing that which the master hand and loom fixer, being engaged in the is bound to have carefully performed. Moysame common employment and under the nihan v. Hills Co. 146 Mass. 586, 593, 16 same general control, was a fellow servant N. E. 574, 4 Am. St. Rep. 348; Daley v. of the plaintiff, and that the defendants were Railroad, 147 Mass. 101, 114. 16 N. E. 690: not liable for his negligence. As the servant Booth v. Railroad, 73 N. Y. 38, 29 Am. Rep. assumes the ordinary risks of his employ- 97; Fuller v. Jewett, 80 N. Y. 46, 36 Am. ment, including the negligence of his fellow Rep. 575; Davis v. Railroad, 55 Vt. 84, 45 servants, the master is not responsible to Am. Rep. 590; Tierney v. Railway, 33 Minn. the servant for injuries happening from 311. 23 N. W. 229, 53 Am. Rep. 35; Cinthat cause. But the rule of law which exclinati, etc., Railroad Co. v. McMullen, empts the master from responsibility for 117 Ind. 439, 20 N. E. 287, 10 Am. St. Rep. such injuries does not relieve him from the 67; Ell v. Railroad, 1 N. D. 336, 48 N. W. duty which he owes to the servant to pro- 222, 12 L. R. A. 97, 28 Am. St. Rep. 621; vide suitable and safe machinery and appli- Dayharsh v. Railroad, 103 Mo. 570, 15 ances for the use of the servant in his em- S. W. 554, 23 Am. St. Rep. 900. The test ployment. Fifield v. Railroad, 42 N. H. 225; whether the plaintiff and Burke were fellow Hanley v. Railroad, 62 N. H. 274; Ford v. servants was not whether they were en-Railroad, 110 Mass. 240, 260, 14 Am. Rep. gaged in the common employment of manu-598; Hough v. Railroad, 100 U. S. 213, 25 facturing cotton cloth under the same gen-L. Ed. 612. This duty may be, and in case eral control and paid by the same principal, the employer is a corporation must always but whether Burke represented the defendbe, discharged by agents and servants, and ants in the responsibility or performance the agent or servant charged with its per- of any duty which they owed to the plainformance, whatever his rank of service may tiff. It was the duty of the defendants to be, stands in the place of the employer, who furnish suitable machinery and keep it in thereby becomes responsible for the acts suitable condition for the plaintiff's use.



The duty of keeping the looms in proper repair required experience and the exercise of mechanical skill, and was especially intrusted to Burke; and so far as the discharge of that duty was concerned Burke represented the defendants, and any negligence on his part in the performance of that duty was the negligence of the defendants. It is immaterial that Burke exercised no control or authority over the plaintiff. The negligence of the defendants complained of was not in ordering the plaintiff into a place of danger, but in failing to use ordinary care to prevent the exposure of the plaintiff to unusual hazard in her ordinary employment."

The fourth and fifth exceptions are over-The instructions called for were not applicable to the undisputed testimony In the case.

The sixth exception is to the refusal of the court to instruct the jury: "That the plaintiff, having been guilty of contributory negligence in voluntarily placing himself (herself) in a place of danger cannot recover." The charge was properly refused, the judge having properly instructed the jury: "Now, then, that is a question of fact for you whether or not under these circumstances she assumed a risk there which she ought not to assume, whether she put herself in a place of danger. If she did, if she put herself there without any excuse for it, without any reason for it. why then she has got to take the loss that falls on her, if that is the case. • • • That is a question for you to pass on."

The defendant's exceptions are overruled, and the case is remitted to the superior court, with direction to enter judgment on the verdict.

(6 Pen. 556)

VALENTE v. AMERICAN BRIDGE CO. (Superior Court of Delaware. New Castle. June 10, 1907.)

1. MASTER AND SERVANT (§ 134*)—INJURY TO SERVANT—LIABILITY OF MASTER.

The mere fact that the master put an Italian servant who did not understand English to work, under the charge of people who did not work under the charge of people who did not understand Italian would not be negligence, rendering the master liable for an injury to the servant while at work.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 134.*]

MASTER AND SERVANT (§ 177*) — SAF PLACE TO WORK — APPLICATION OF RULE -PLACE MADE UNSAFE BY COEMPLOYÉS.

The rule making a master liable for failure to furnish the servant a safe place to work does not apply to a place made unsafe by acts of coemployés.

[Ed. Note.-For other cases, see Master and Servant, Dec. Dig. § 177.*]

make rules for the conduct of its business, where it does not appear that the injury resulted from the absence of rules.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 289; Dec. Dig. § 141.*]

4. MASTER AND SERVANT (§ 260*) - INJURIES TO SERVANT - PLEADING - SUFFICIENCY OF AVERMENTS.

In an action against a master for injuries to a servant, a count alleging liability of the master for failure to employ a sufficient number of fellow servants to assist in the work need not allege the ignorance of the injured servant of

[Ed. Note.—For other cases, see Master and Servant. Cent. Dig. § 846; Dec. Dig. § 260.*].

5. MASTER AND SERVANT (\$ 101*)—SAFE PLACE TO WORK.

A master must furnish his servant with a place in or upon which to work reusonably safe and adapted to the purpose of the employment, but the place furnished need not be the safest or the best.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 179; Dec. Dig. § 101.*]

MASTER AND SERVANT (§ 141*) - DUTY OF MASTER TO MAKE RULES.

A master must promulgate rules for the government and protection of his servants in operating his business, where the extent of it exceeds the limits of his personal supervision.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 283; Dec. Dig. § 141.*]

7. MASTER AND SERVANT (§§ 103, 133*)-DEL-EGATION OF DUTY.

A master cannot delegate to another his duties to furnish a safe place to work and to make rules for government of his servants, and thereby escape liability for the nonperformance of them.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 175, 268; Dec. Dig. §§ 103, 133.*]

8. MASTEE AND SERVANT (§ 153*)—DUTY TO INSTRUCT SERVANT.

If a servant is inexperienced and unacquainted with the dangers incident to the employment, it is the master's duty to instruct him and warn him against the dangers of the employment; but the master may, in the absence of knowledge to the contrary, assume that the sery-ant has the knowledge and discernment which a person of his age and intelligence ordinarily D08868868

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 314, 317; Dec. Dig. §§

9. MASTER AND SERVANT (§§ 203, 216°)—IN-JURIES TO SERVANT—ASSUMED RISKS.

A servant assumes all the ordinary risks incident to the employment, including the negligence of a fellow servant in the same general employment, but does not assume any risk as to the primary duties imposed upon the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \$\$ 538-543, 567-573; Dec. Dig. \$\$ 203, 216.*]

10. MASTER AND SERVANT (\$\$ 101, 229*)—IN-JURIES TO SERVANT—LIABILITY OF MASTER —INSUBER OF SERVANT'S SAFETY.

A master who has performed the primary duties required of him is not an insurer of the safety of a servant, and the servant must exercise due care to avoid dangers and risks of in-

A master cannot be held liable for an injury to a servant for negligence in failing to 101, 229.

For other cases see same tepic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

11. NEGLIGENCE (\$\frac{1}{2}\$ 121, 184*) — PRESUMPTIONS—PREPONDEBANCE OF EVIDENCE.

Negligence is never presumed, but must be proved by a preponderance of evidence by the party alleging it.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 217-220, 267; Dec. Dig. §§ 121,

12. NEGLIGENCE (§ 1*)—DEFINITION.

Negligence in a legal sense is the failure
to observe, for the protection of the interests of another person, that degree of care which the circumstances justly demand, whereby such other person suffers injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 1; Dec. Dig. § 1.

For other definitions, see Words and Phrases, vol. 5, pp. 4743-4763; vol. 8, pp. 7729-7731.]

18. MASTEE AND SERVANT (\$ 265*)—INJURIES
TO SERVANT—ACTIONS—NEGLIGENCE—BUR-

For a servant to recover for injuries alleged to result from the master's negligence, he must prove that the injuries resulted from the master's negligence and that at the time of the injuries he was without fault or negligence which proximately contributed to them.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908; Dec. Dig. § see Master and

14. TRIAL (§ 140*) — QUESTION FOR JURY —
CREDIBILITY OF WITNESSES.

The jury are the exclusive judges of the credibility of witnesses.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 834, 835; Dec. Dig. § 140.*]

TRIAL (§ 139*) — QUESTION FOR JURY-WEIGHT OF EVIDENCE.

The jury are the exclusive judges of the weight of testimony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.*] 16. Damages (§ 95*) — Measure — Personal

INJURIES.

The measure of damages for personal injuries to a servant is such a reasonable sum as will compensate him for his injuries, including his loss of time and wages, his past pain and suffering, and such as he may undergo in the future, and for such permanent injuries as he may have sustained, as well as any pecuniary loss from disability to earn a living.

[Ed. Note.—For other cases, see Dan Cent. Dig. §§ 222-229; Dec. Dig. § 95.*]

Personal injury action by Francesco Valente against the American Bridge Company. Verdict for plaintiff.

Judgment reversed, 73 Atl. 400.

Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

Leonard E. Wales, for plaintiff. William 8. Hilles, for defendant.

Plaintiff's declaration consisted of four counts. The first count was as follows:

"(1) For that, whereas, heretofore, to wit, at the time of the happening of the grievances hereinafter mentioned, the said defendant was and still is a corporation existing under the laws of the state of New Jersey, and as such corporation operated and carried on a certain mill and manufacturing establishment, in New Castle county and state of

inter alia, of bridges, bridge material, and structural iron work, and the said plaintiff, at the time aforesaid, was employed by the defendant as a workman in its said business; that while so employed it became and was the duty of the said defendant not to subject the said plaintiff, in the course of his employment, to any risks against which he could be guarded by reasonable diligence on the part of the said defendant, yet the said defendant, not regarding its duty in that behalf on the 18th day of July, A. D. 1906, at the county aforesaid, negligently and carelessly ordered and directed the said plaintiff (who was then and there, to the knowledge of said defendant, an Italian, unacquainted with and unable to speak or to understand the English language, and without previous knowledge or instruction in such line of employment), to work on a certain railroad car, commonly known as a 'gondola car,' painting certain long and heavy beams or pieces of structural iron at the same time said car was being loaded with like heavy beams or pieces of structural iron by certain other employes of the said defendant, said last-mentioned employés using, by its order and direction, for such purpose, two certain wheel pulleys or trolley cranes, each with heavy iron chains and a hook thereto attached, composing the sling in which the heavy beams or pieces of structural iron were successively fastened and afterwards moved and conducted over toward and placed upon said car, said pulleys or cranes being suspended from and adjusted to run along a beam or girder in the roof of the defendant's mill; and being operated wholly by hand; that the other said employes then and there engaged in loading said car, by means of the pulleys or cranes, in the manner aforesaid, were unable to speak or to understand the Italian language, all of which said several premises being well known to the said defendant. And the said plaintiff avers that while he was at work as aforesaid on said railroad car, in the diligent discharge of his duties in obedience to the order and direction of the defendant, and while in the exercise of due care and caution on his part, and ignorant of the risk or danger to which he was subjected, he was painting a certain beam or piece of structural iron, with his back toward the other said employes, who were engaged in loading said railroad car in the manner aforesaid, a certain other heavy beam or piece of structural iron, after being by them then and there conducted and carried by means of said pulleys or cranes over said railroad car from a point in the rear of the said plaintiff, escaped from the management and control of the said employés in charge of the same, and without any notice or warning given to the said plaintiff by the said defendant of its approach, and without any opportunity on the part of the plaintiff Delaware aforesaid, for the manufacture, to avoid being injured thereby, said heavy

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

beam or piece of structural iron became and same was being loaded in the manner aforewas suddenly loosened or detached from the slings in which it was fastened, and fell down upon and struck against the right foot of the said plaintiff, and thereby his right foot was so crushed and injured that it was necessary afterwards to amputate the same, and by means of the premises, the said plaintiff was crippled for life, and otherwise crushed and injured, and made sick, sore, lame, and disordered, whereby the said plaintiff also suffered very great pain for a long time thereafter, to wit, hitherto, and by reason of the premises hath been prevented from the time of his injuries aforesaid hitherto, and will be prevented during his life, from doing and performing work and labor for his support, and was obliged to lay out and expend large sums of money, to wit, the sum of five hundred dollars (\$500), and became and was liable for the payment of other sums of money in and about the treatment and endeavoring to be healed of the injuries aforesaid, to the damage of the said plaintiff in the sum of ten thousand dollars (\$10,000), and therefore he brings his suit," etc.

In the second count the negligence of the defendant was alleged as follows:

"That the said defendant then and there owed to the said plaintiff, while in its employ, the duty to furnish him with a reasonably safe place in which to work, yet the said defendant, not regarding its duty in that behalf, negligently and carelessly failed to provide the plaintiff with a reasonably safe place in which to work, but negligently and carelessly placed him in a position of great danger, in that on or about the 18th day of July, A. D. 1906, by the order and direction of the said defendant, the plaintiff was removed and transferred from the work for which he was originally engaged, under an Italian foreman or boss, as a trench digger, and set to work under a foreman or boss who did not know or understand the Italian language, painting long and heavy beams or pieces of structural iron, without any previous instruction being given to said plaintiff as to his duties in connection with such work, and also without having any notice or warning from the defendant of the risks and dangers incident thereto. And the said plaintiff avers that on the day and year aforesaid, while he was at work in the main or 'bridge shop,' in obedience to the order and direction of the defendant, on a railroad car which was of the kind commonly known as a 'gondola car,' ignorant of any risk or danger, and in the exercise of due care and caution on his part was painting a certain hea.; beam or piece of structural iron, certain other employes, by the order and direction of the defendant," etc., was injured as aforesaid.

The third count made the following allegations as to defendant's negligence:

"That to the plaintiff, while so employed

said, the defendant owed the duty of providing an adequate number of competent fellow servants to assist in the proper handling and management of said beams or pieces of structural iron, yet the said defendant, not regarding its said duty in that behalf, negligently and carelessly omitted to employ a sufficient number of competent fellow servants, but had then and there only four men to assist in the work aforesaid, so that on the 18th day of July, A. D. 1906, at the county of New Castle aforesaid, while the plaintiff was at work on said railroad car, in obedience to the order and direction of said defendant, and in the exercise of due care and caution on his part, a certain long and heavy beam or piece of structural iron. of very great size and weight, then and there being conducted, by means of the pulleys or cranes aforesaid, from a point in said mill in the rear of the said plaintiff, and without any notice or knowledge on his part of its approach, by reason of the inadequate number of employés in charge of the same during the time aforesaid, escaped from their control and management when and as soon as it reached a point over said car where the plaintiff was at work, and, suddenly becoming loosened or detached from the slings in which it had been placed or fastened, fell down upon and one end thereof struck against the right foot of the said, plaintiff, badly crushing and injuring the same," etc.

The fourth count alleged the defendant's negligence as follows:

"(4) * * * That to the plaintiff, while so employed, the defendant owed the duty of making and promulgating proper rules and regulations for the government of himself and other fellow servants of the said defendant in the operation of the said business, the same being of such a dangerous and complex nature as to reasonably require such rules and regulations, particularly with respect to the instructions to be given to such employés as were foreigners, and unable to speak or to understand the English language, and also in relation to placing them at work under foremen or bosses and with fellow laborers or employes who could not speak or understand the language familiar to such foreign workmen or employes, yet the said defendant, not regarding its said duty in that behalf, on the 18th day of July, A. D. 1906, had not made or promulgated any such rules as aforesaid, and by reason thereof, on the day and year last aforesaid, at the county aforesaid, the said defendant negligently and carelessly conducted and carried, by means of certain wheel pulleys or trolley cranes, each suspended from and adjusted to run along a beam or girder in the roof of its said mill, a certain long and heavy beam or piece of structural iron, from as aforesaid on said railroad car, while the a point on the floor of said mill, over and

a 'gondola car,' upon which said iron beam was to be loaded, and also upon which he, the said plaintiff, was then and there at work by the order and direction of the said defendant, in the exercise of due care and caution on his part, and unaware of the approach from behind him of the pulleys or cranes aforesaid, supporting and carrying said heavy iron beam; that as said pulleys or cranes carrying said heavy iron beam reached a point over the car on which the said plaintiff was at work, by and through the carelessness and negligence of the said defendant in not making and promulgating proper rules and regulations as aforesaid, the said plaintiff had no notice or warning of approaching danger and an opportunity to avoid being injured, and said iron beam suddenly becoming loosened and detached from the slings in which it was fastened, fell down upon and one end thereof struck against the right foot of the said plaintiff, and thereby it became and was so badly crushed and injured that it was necessary afterwards to amputate the same, and by means of the premises the said plaintiff was crippled for life," etc.

Mr. Hilles, for defendant, filed the following demurrers to the above declaration:

"As to the first and second counts. That it does not appear wherein the said defendant is claimed to have been negligent. (2) There is no charge of negligence against the said defendant set forth in the said count.

"As to the third count: (1) It does not appear therefrom wherein the said defendant is alleged to be negligent. (2) It does not appear therefrom how many employes should have been engaged in the work then being done by the said defendant. It does not appear therefrom how many employes were engaged by the said defendant. (3) It does not appear therefrom that the said plaintiff was ignorant of the risks, if any, to which he was subjected by reason of the alleged insufficiency of the number of employes of the said defendant engaged in the work aforesaid.

"As to the fourth count: (1) That the said count is double. (2) It does not appear therefrom what rules or regulations the said defendant should have promulgated and enforced. (3) It does not appear therefrom that the accident was due to a failure of the · said defendant to promulgate rules and reg-(4) That there is no negligence charged in the said count as against the said defendant."

Mr. Wales, for plaintiff, in support of the narr., contended:

"(1) The first count alleges a distinct breach of duty imposed by law on the defendant, namely, not subjecting the plaintiff to a risk against which he could have been

towards a railroad car, commonly known as | count fully describes the negligent acts connected with the alleged breach. Donohoe v. Railway Co., 4 Pennewill, 55. 55 Atl. 1011; Jones v. Railway Co., 4 Pennewill, 201, 53 Atl. 1065; Coughlin v. Blumenthal (C. C.) 96 Fed. 920.

"(2) The second count charges the defendant with the duty of furnishing the plaintiff a reasonably safe place in which to work, and alleges a violation of this duty by the defendant with the particular facts and circumstances. Negligence is clearly charged. Authorities supra.

"(3) The gravamen of the complaint in the third count is the failure on the part of the defendant to employ a sufficient number of competent fellow servants. It is not necessary for the plaintiff to specify how many employés should have been engaged in the work at the time the injury occurred. A pleader is not bound to set forth facts or circumstances the knowledge of which is more properly or peculiarly in the opposite party, or detail the circumstances minutely. The defendant is informed with reasonable certainty of what is proposed to be proved, and has a fair opportunity to meet facts alleged in preparing its defense. King v. Railway Co., 1 Pennewill, 452, 41 Ati. 975; Jones v. Railway Co., 4 Pennewill, 201, 53 Atl. 1065. The generally accepted doctrine does not require an injured employé, in addition to charging specific negligence, to allege that he was ignorant of the risk or did not know the condition of the defective instrumentality. 2 Labatt on M. & S. § 857, and cases cited.

"(4) A count is double only when it alleges several distinct and independent breaches of duty. Mere diversity of facts will not render it double, when all of the facts taken together tend to the statement of one point or ground of recovery. Mullin v. Blumenthal, 1 Pennewill, 476, 42 Atl. 175; Jarman v. Windsor, 2 Har. 162; 2 Labatt on M. & S. § 861; 7 Ency. of Pl. & Pr. 237, 238. A plaintiff is not required to specify in his declaration any particular rule which in his view should have been made. Coughlin v. Blumenthal (C. C.) 96 Fed. 920. The fourth count alleges the defendant's failure to make and promulgate proper rules, and sets forth in what respect such rules were lacking, and also charges that by reason of such failure and neglect on the part of the defendant injury occurred. Negligence could not be more specifically charged."

After careful considera-LORE, C. J. tion of the demurrers filed to the declaration in this case, and the arguments of counsel, the court have reached the conclusion that the demurrer to the first count of the declaration should be sustained. The averment of negligence therein on the part of the defendant company seems to be simply that the employe, who was an Italian, did guarded by reasonable diligence, and the not understand English and was put under the charge of people who did not understand to work on a gondola car, painting a long

of an unsafe place, and we think the specthat while so engaged, in obedience to his ifications therein are not such employments orders, he being in a stooping posture, other as an unsafe place would enter into at all, employes back of him undertook, without and therefore sustain the demurrer to that notice or warning to him, to remove and count.

there were no sufficient rules published. and upon said car, suddenly striking against In the specifications there the plaintiff does the frame or column which he was painting. not rely broadly upon the fact that there and caused the same to fall over and upon were no proper rules, but upon other mat- his right foot, and so crushed and injured ters, and therefore we think that the speni- it as that it was afterwards necessary to fications fail to show that any injury result- amputate it. It is claimed that the plaintiff ed from the absence of rules. We sustain was, at the time of the accident, in the the demurrer to the fourth count.

that the injury resulted from a failure on incident to the work in which he was then the part of the defendant to employ a suffi-, engaged. cient number of competent fellow servants to assist in the work that was being done. ously injured on the said 18th day of July, We think, with respect to that count, that A. D. 1906, while engaged in painting an iron the demurrer should be overruled. We do column which had been placed on said car not think that it is absolutely necessary that shortly before the plaintiff had been directed the ignorance of the employe of the risk; should be averred.

The declaration was thereupon amended in accordance with the above rulings, and the case was tried at the January term, 1908, before Associate Judges SPRUANCE and BOYCE.

BOYCE, J. (charging the jury). Francesco Valente, the plaintiff in this action, seeks to recover from the American Bridge Company, the defendant, damages for personal injuries which, it is alleged, were occasioned by reason of the negligence of the defeudant company, on the 18th day of July, A. D. 1906, while at work for the defendant company on a gondola car at Edge Moor, near this city. The plaintiff, by the several counts relied on in his declaration, charges substantially (1) that the defendant company negligently subjected him to unnecessary dangers and risks, against which he could have been guarded by reasonable diligence on the part of the company; (2) that it negligently failed to provide him with a reasonably safe place in which to work; (3) that it negligently failed to make and promulgate proper rules for the government and protection of its employes; and (4) that it negligently failed to reasonably instruct him as to his duties and to warn him of the risks and dangers connected therewith.

The plaintiff is an Italian, and it is claimed that he is unable to speak or understand the English language; that originally, and for about a month and half previous to the time of the accident, he had been employed by the defendant as a laborer for outside work under an Italian foreman; that on or about the 18th day of July A. D. 1906, by

and heavy piece of structural iron which The second count embraces the averment had been placed lengthwise on the car; conduct by means of trolley cranes a like In the fourth count the charge is that heavy piece of structural iron towards, over, exercise of due care and caution, and that In the third count it is averred, however, he was ignorant of the risks and dangers

> It is conceded that the plaintiff was serito go on the car. The defendant denies, however, that the said injuries were occasioned by the negligence of the company, and insists that they were caused by one or more of the fellow servants of the plaintiff engaged in a common employment, for which it is contended that the defendant is not legally liable.

> The relation existing between the defendant company and the plaintiff, at the time of the accident, was that of master and servant. The primary duties of the master, so far as the pleadings and evidence in this case require us to enumerate, are these: He must furnish his servant with a reasonably safe place in or upon which to work, and promulgate rules for the government and protection of his servants in operating his lusiness, where the extent of it exceeds the limits of his personal supervision. If the muster fails to observe these primary duties imposed upon him, and injury results to his servant for such failure, without the fault of the servant, he will be liable therefor on the ground of negligence; and he cannot delegate these duties to another, and thereby escape liability for the nonperformance of them. If the servant is inexperienced and unacquainted with the dangers incident to the employment in which he is about to engage, it is the duty of the master to give him proper instructions as to the employment and to warn him against its dangers. The master may, in giving him such instructions and warnings, in the absence of knowledge to the contrary, assume that the servant has the knowledge and discernment which a person of his age and intelligence ordinarily pos-

The place furnished in or upon which to work need not be the safest nor the best. It is sufficient if it be reasonably safe and direction of another foreman, he was set adapted to the purpose of the employment.

The servant assumes no risk whatever as to the primary duties imposed upon the master at the time he enters upon his employment; but he does assume all the ordinary risks incident to the employment, including the negligence of a fellow servant in the same general employment, and the servant is required to exercise due care and caution in the course of his employment, so as to avoid the dangers and risks of injuries incident thereto; for the master, if he has performed the primary duties required of him, is not an insurer of the safety of his servant.

This action is based upon the alleged negligence of the defendant. The burden of proving such negligence is cast upon the plaintiff, and it must be proved to your satisfaction by a preponderance of the evidence; for negligence is never presumed. Whether there was any negligence, at the time of the accident, and whose, must be determined by you from the evidence, under all the facts and circumstances detailed to you by the witnesses. Negligence, in a legal sense, has been defined to be the failure to observe for the protection of the interests of another person that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury. To entitle the plaintiff to recover in this action, he must satisfy you that the injuries complained of resulted from the negligence of the defendant, and that at the time of the accident he was without any fault or negligence which proximately entered into and contributed to his injuries; for, if at that time his negligence did proximately contribute to his injuries, it would defeat his right to recover. The burden of proving negligence on the part of the defendant rests upon the plaintiff, and the burden of proving negligence on the part of the plaintiff rests upon the defendant.

We have been requested to instruct you to render a verdict for the defendant. This we decline to do; and we submit to you the question whether, under the evidence, considered in connection with the law announced to you by the court, your verdict should be for the plaintiff or the defendant. In endeavoring to arrive at a proper verdict, you should determine from the evidence (1) whether the defendant did furnish the plaintiff with a reasonably safe place in and upon which to work, and (2) whether the plaintiff, by reason of inexperience, inability to speak or understand the English language, and from want of proper instructions, was in fact without knowledge of the danger attending his work on the car. If you find that the defendant did not furnish the plaintiff with a reasonably safe place in and upon which to work, or that the defendant did not properly instruct him as to the dangers incident to the employment, and that the injuries to the plaintiff resulted in consequence thereof,

without the fault or negligence of the plaintiff contributing thereto at the time, your verdict should be for the plaintiff. If, on the contrary, you find that the defendant met these legal requirements, or, failing to meet them, or any of them, yet if the plaintiff did appreciate the danger attending his work on the car, and that at the time of the accident he was not in the exercise of that degree of care and caution which a person of ordinary prudence should have exercised under like circumstances, your verdict should be for the defendant. For if the plaintiff knew, or ought to have known by the exercise of reasonable care and attention, that servants of the company were engaged in loading the car on which he was working, and if he knew or ought to have known that the column which he was painting, if struck by another column, was liable to fall, he assumed the risk or danger incident thereto, and cannot recover, regardless of any question of the change in his employment.

Ordinarily, in a case where the jury should find that the defendant had provided suitable and proper appliances and suitable and competent fellow servants, the defendant would not be liable for injuries occasioned by the negligence of a fellow servant in the same general employment. We submit to your determination from the evidence which you have heard whether the persons engaged in loading said car were or were not the fellow servants of the plaintiff, engaged in painting the iron column which was first placed on said car. You have heard the testimony in this case. You are the exclusive judges of the credibility of the witnesses and of the weight and value of their testimony. You should decide this case in favor of the plaintiff or the defendant according as you find the preponderance or greater weight of the evidence.

If you find for the plaintiff, the measure of damages would be such reasonable sum as will compensate him for his injuries, including therein his loss of time and wages, his pain and suffering in the past and such as may come to him in the future, and for such permanent injuries as he may have sustained, as well as any pecuniary loss from disability to earn a living since the accident or in the future as the result of such injuries.

Verdict for plaintiff for \$500.

(7 Pen. 370)

AMERICAN BRIDGE CO. v. VALENTE. (Supreme Court of Delaware. May 24, 1909.) 1. MASTER AND SERVANT (§ 287*) — FELLOW SERVANTS—QUESTION OF LAW.

Where the facts necessary for determining whether certain employes are fellow servants are undisputed, the question is one of law for the court.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1062; Dec. Dig. § 287.*]

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. MASTER AND SERVANT (§ 196*) — FILLOW SERVANTS—EXISTENCE OF RELATION.

If an injured servant and his delinquent co-

employés were at the time of the accident em-ployed by a common master and engaged in a common employment, the relation of fellow servants existed, unless the servant whose negligence caused the injury was at the time engaged in performing one of the primary duties of the

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 486; Dec. Dig. § 196.*]

8. Master and Servant (§ 187*) — Fellow Servants—Common Employment.

Whether an employé is engaged in a common employment with other coemployes, so as to constitute them fellow servants, does not de-pend upon the grade of the servant in the master's employment, nor upon the time he has been engaged in the employment.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. 4 187.*]

MASTER AND SERVANT (§ 196*) - FELLOW SERVANTS.

An employe engaged in painting iron col-umns for shipment, necessitating his going up-on a car where they were being loaded to paint the parts which had rested upon the floor, was a fellow servant of the employes engaged in loading the columns; they all being employed by the same master, upon the same definite object, at the same time, and under the immediate direction of the same foreman.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 486; Dec. Dig. § 196.*]

5. MASTER AND SERVANT (\$ 206*)-ASSUMP-TION OF RISK.

A servant holds himself out as capable of doing the work he undertakes to do, and assumes the risks incident to the employment.

[Ed. Note.-For other cases, see Master Servant, Cent. Dig. § 550; Dec. Dig. § 206.*]

6. MASTER AND SERVANT (§ 155°)—DUTY TO WARN SERVANT—OBVIOUS DANGERS.

The duty of a master to instruct a servant

is based upon the assumption that the master possesses some knowledge concerning the work and its dangers that the servant by reason of igand its dangers that the servant by feason of ig-norance or inexperience does not possess, and where an Italian servant, who, though ignorant of the English language, was of at least ordinary intelligence, was directed to go upon a car and paint iron columns which were being loaded thereon by his fellow servants, with which work he was not entirely unfamiliar, having heap anhe was not entirely unfamiliar, having been engaged in painting different objects in the shop for several days, and was in even a better position than the master to observe the danger from other columns being placed on the car, there being no latent danger in the situation, the master owed him no duty to instruct respecting the work and warn of its dangers.

[Ed. Note.-For other cases, see Master and Servant, Cent. Dig. \$ 310; Dec. Dig. \$ 155.*]

7. MASTER AND SERVANT (§ 216*)—ASSUMPTION OF RISK—NEGLIGENCE OF FELLOW SERV-ANTS.

A servant assumes the risk of the negligence of his fellow servants.

[Ed. Note.-For other cases, see Master and Servant, Cent. Dig. \$6 567-573; Dec. Dig. \$ 216.*1

8. MASTER AND SERVANT (§ 141*)-NECESSITY FOR RULES.

When an employer's business is so large and complicated as to make its personal su-pervision impossible, it is its duty to promulgate rules governing the conduct of the business; but

ing work of a simple character and well understood.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 283; Dec. Dig. § 141.*]

9. MASTER AND SERVANT (§ 141*)—INJUSY TO SERVANT — NEGLIGENCE — FAILURE TO PRO-MULGATE RULES.

A master cannot be held negligent in failing to make rules respecting work in connection with which a servant was injured, in the absence of a showing that the work was of a character necessitating a rule for its safe performance, or a showing as to what rules were necessary, or that the absence of rules was the cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 288; Dec. Dig. § 141.*]

10. MASTER AND SERVANT (\$ 107°) — SAVE
PLACE TO WORK—DUTY TO FURNISH.

A master is required to furnish and maintain a safe place for the servant to work, but is not liable for failure to perform that duty, where a place perfectly safe in itself is made unsafe solely by negligence of fellow servants in carrying out the details of the master's business; and hence, where a car upon which a servant was put to work painting iron columns was safe in itself, the master performed its duty, though the place was rendered dangerous by fellow servants who were loading columns on the low servants who were loading columns on the car while the servant was at work.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. \$ 107.*]

Error to Superior Court, New Castle County. Personal injury action by Francesco Valente against the American Bridge Company. Judgment for plaintiff (73 Atl. 395), and defendant brings error. Reversed.

Argued before NICHOLSON, Ch., LORE, C. J., and GRUBB and PENNEWILL, JJ.

William S. Hilles, for plaintiff in error. Leonard E. Wales, for defendant in error.

PENNEWILL, J. The defendant in error brought an action in the court below to recover damages for personal injuries alleged to have been caused by the negligence of the plaintiff in error. There is practically no dispute respecting the material facts in the case, and the following statement of the testimony is, we think, sufficient for a proper understanding of the questions raised and argued before this court:

The American Bridge Company, the plaintiff in error, was at the time of the accident to the defendant in error engaged in the operation of a plant near Edge Moor, in this state, for the manufacture of bridges and other articles made of structural steel and iron. plaintiff below was employed by the company as a laborer, at first in digging trenches, and a few days before the accident was engaged in rough painting in and about the shop. A number of large columns, each weighing a ton or a ton and a half, had been completed and were ready for loading upon a car. The columns thus completed were painted, except the parts thereof which rested upon the skids, and which could not be painted until the it is not required to promulgate rules relating columns were moved. The floor upon which to the ordinary details of the business, involvible columns were resting was about level columns were moved. The floor upon which

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

with the top of the sides of a gondola car into which they were to be loaded; the car itself running on tracks in a depression along the wall of the shop. In order to load the columns, two chain hoists, each running on movable pulleys near the roof of the shop, were employed. The hook connected with each of these two chain hoists was attached to the column where it lay upon the skids. 't was then raised by means of the chain noists to a height sufficient to enable the projections on the columns to pass over the side of the gondola car, and then, with two or more men pushing on each end, the column thus suspended was pushed along the movable trolleys and loaded into the car. This work was performed by what was known as the "loading gang," which consisted of a foreman and four laborers; the loading being done under the shipping clerk. One of the columns had been placed upon the gondola car, and the loading gang were about to place the second column on the car, when Valente, the plaintiff, was instructed by the general foreman of the company by signs to go upon the car and with a large brush paint the small places on the first column where it had originally rested on the skids. He was doing this in a kneeling position with his back turned towards the men who were loading the second column, in plain view of, and was seen by, the members of the loading gang. When the second column had been raised to a sufficient height, the loading gang, two men at each end, pushed the column on the movable trolleys to a position over the car in order that it might be lowered into place. In so doing, one end of the column struck the column in the car, knocking it down, and thereby injuring Valente's foot, which was caught and crushed between the first column and the floor, and so badly injured as to require amputation. The second column remained suspended in the hoists. The plaintiff below could neither speak nor understand the English language. He was a member of a gang composed of Italians, who worked under the directions of an Italian boss. He had been so working for about a month and a half prior to his injury, but had not done any painting on iron columns. The company, being short of men, ordered this Italian boss to send some of his laborers to do some painting, and the plaintiff below was one of the men sent for the purpose. He received no instructions other than by signs from the foreman, and no warning was given him of any danger connected with the work.

Upon the conclusion of the testimony on both sides the court was asked to instruct the jury to return a verdict in favor of the defendant. This request was refused by the court, and such refusal is assigned as error. It is this assignment of error, and this alone, upon which the plaintiff in error relies for a reversal of the judgment below; its con-

the case which would warrant the submission of any question whatever to the jury. The determination of the assignment of error relied upon by the plaintiff in error necessarily involves a consideration of the following questions: (1) Should the trial court have submitted to the jury the question whether the plaintiff below and his coemployes at the time of the accident were or were not fellow servants? (2) If it was the duty of the court, and not of the jury, to determine the question of fellow service, then were the plaintiff below and his coemployes, the loading gang, fellow servants? (3) Was there any testimony tending to show that it was the duty of the defendant company to instruct the plaintiff respecting the work he was directed to do, and warn him of any dangers incident thereto? (4) Was there any testimony tending to show that it was the duty of the company to have made and promulgated rules governing the work in which the plaintiff below was engaged? (5) Was there any testimony tending to show that the place in which the plaintiff was ordered to paint the column was an unsafe place within the meaning of the law?

No question was raised by the plaintiff below as to suitable and proper appliances, or the sufficiency and competency of fellow servants. It is not necessary, therefore, for us to consider those matters at all. Did the court below err in submitting to the jury the question whether the loading gang were or were not the fellow servants of the plaintiff below when engaged in painting the iron column? We think there can be no difference of opinion respecting the law upon this point. If the facts that are necessary for its determination are not disputed, then clearly it is for the court to decide and not the jury. In Labatt on Master and Servant, at section 494, the rule is stated as follows: "What servants are in a common employment is not a question of fact exclusively, nor is it solely a question of law. It depends for solution upon both law and fact. But when the necessary facts for determining the question are undisputed, it is then simply a question of law. The court, therefore, may nonsuit the plaintiff, or may direct a verdict for the defendant, or set it aside if rendered for the plaintiff, where the only negligence in evidence is that of a fellow servant acting in the performance of his duties as a servant." And at section 511 the learned writer continues: "It has frequently been explicitly declared, and is taken for granted in almost all the cases cited in this chapter, that it is for the court to say whether or not the negligent employé was a vice principal in every case in which the facts are clearly established, and show precisely what were the respective duties of the plaintiff and the delinquent coemployes, and what relation they bore to one another. Under such circumtention being that there was no evidence in stances, it is error to submit to the jury the question whether the defense of coservice is or is not available."

Such has been the principle, or rule, upon which the courts of this state have uniformly acted, and we have known of no exception to the rule prior to the present case. The important question, therefore, is: Was there any conflict in the testimony below respecting those facts that were necessary to determine whether or not the relation of fellow service existed? It is true that the plaintiff below denied certain statements made on behalf of the defendant-such as the time during which he had been working as painter, whether in the shop or yard; that he had been instructed in the work of painting; that he had painted out the skid marks on the second column before getting on the car, and while it was suspended in the hooks; that the general foreman did not bring Valente, the plaintiff below, to shop C, on the morning of the accident, but found him there engaged in painting the second column, when he directed him to get on the car; that after being transferred from the gang of laborers to that of painters Valente did not continue to he under his Italian foreman, and was not kept at work in the yard. But these controverted facts are quite unimportant and immaterial to the main question we are considering, and there is no conflict in the testimony respecting those facts we have stated as undisputed, and which are necessary and sufficient to determine whether the relation of fellow service existed between the plaintiff below and his coemployes—the loading gang-at the time of the accident. We are clearly of the opinion, therefore, that the court below erred in submitting such question to the jury.

2. The assignment of error relied upon by the plaintiff in error makes it necessary for this court to decide whether the plaintiff below and his coemployes were or were not follow servants, because, if they were not, the court below did not err in refusing to direct the jury to return a verdict in favor of the defendant. It is not denied that the plaintiff, Valente, and his coworkers at the time of the accident, were the employes of a common master. Were they not also at such time engaged in a common employment? They were unquestionably engaged upon the same subject-matter, to wit, the column of iron; the loading gang in placing it upon the car, and the plaintiff in fluishing the painting of the column after it was so placed. The work of each was necessary to put the column in proper place and condition for Under the great weight of aushipment. thority we think it must be admitted that the service in which both Valente and the loading gang were engaged was a common employment. It is unquestioned law in this state, and has been since the leading case of Wheatley v. P., W. & B. R. R. Co., 1 Marv. 305, 30 Atl. 660, was decided, that if the in-

jured servant and his delinquent coemployes were at the time of the accident employed by a common master and engaged in a common employment, the relation of fellow servants existed, unless the servant whose negligence caused the injury was at the time engaged in the performance of one of the primary duties of the master. "Where the servant is performing any of these duties, he is the agent and representative of the master. and the master is liable to an injured employé for the negligence of the offending servant therein. When this rule does not apply, the coemployes are fellow servants and the master is not liable. This is the doctrine as it now has become crystallized in the reports of the Supreme Court of the United States; * * indeed, we may say of the overwhelming majority of all the well-considered and well-reasoned cases on this subject." Wheatley Case. It is manifest that no member of the loading gang was performing any of the primary duties of the master at the time of the accident. The apparent conflict in many of the cases has arisen from the differing views of courts as to what is meant by the term "common employment." It certainly does not depend upon the grade of the servant in the master's employment, nor upon the time he has been engaged in the service or employment in which the injury happens.

The defendant seemed to rely largely upon the case of Railroad Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787, in which Justice Field, delivering the opinion of the court, said: "There are in this country many adjudications of courts of great learning, restricting the exemption to cases where the fellow servants are engaged in the same department and act under the same immediate direction." But it should be noted that this case, after being frequently questioned, was distinctly overruled by the Supreme Court in New England R. R. Co. v. Conroy, 175 U S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181, and other cases subsequently decided. But, even if the test recognized in the Ross Case were applied to the present one, it would be fully In the Conroy Case the court said: "Unless we are constrained to accept and follow the decision of this court in the case of Chicago, M. & St. P. R. Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787, we have no hesitation in holding, both upon principle and authority, that the employer is not liable for an injury to one employé occasioned by the negligence of another engaged in the same general undertaking; that it is not necessary that the servants should be engaged in the same operation or particular work: that it is enough, to bring the case within the general rule of exemption, if they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties tending to accomplish the same general purposes, or in other words, if the services of each in his particular sphere or department are directed to the accomplishment of the same general end."

There is no question that the general foreman had the right to put Valente upon the work of painting the column; indeed, he had been sent a few days before by his Italian boss from his former work to do similar work (painting) in and about the shop. ente and the loading gang were employed upon the same definite object, at the same time, and under the immediate direction of the same person. The service in which they were engaged was in the same general line, and the object a common one, to wit, the loading and painting of the same columns of iron for the purpose of shipment and delivery. Such being the case, and the servants who caused the plaintiff's injury not being at the time engaged in the performance of any primary duty of the master, we feel constrained to hold that they were, in the meaning of the law, fellow servants of the plaintiff.

3. Was there any testimony tending to show that it was the duty of the defendant company to instruct the plaintiff below respecting the work he was ordered to do, and warn him of any dangers incident thereto? It is contended by the defendant in error that such duty was imposed upon the company because of Valente's ignorance of the English language and his unfamiliarity with the work he was directed to do, as shown by the evidence. The duty of the master to give instructions to a servant is based upon the assumption that the master possesses some knowledge concerning the work and its dangers that the servant by reason of ignorance or inexperience does not possess. It is a general rule that a servant holds himself out as capable of doing the work he undertakes to do and that he assumes the risks incident to the employment. The objection made by the defendant in error is that he was taken, or changed, from the kind of work he was originally employed to do, and assigned, without any instruction or warning, to a work that he was entirely unfamiliar with.

Now, while Valente was ignorant of the English language, it is not shown that he was not a man of at least ordinary intelligence, or that the company had not the right to change him from the one kind of work to another that he might be supposed to be capable of doing. He was not entirely unfamiliar with the work which he was directed to do, because he had been engaged for several days just prior to the accident in painting different objects in and about the shop. His last employment was not in itself a difficult or dangerous one. He must have realized what was going on in his very presence when the loading gang was placing

his work above referred to, at section 462, says: "In so far, therefore, as he comprehends or ought to comprehend them, he assumes all the ordinary and extraordinary risks of the new duties, whether he be a minor or an adult." And at section 463: "So, also, it is held that no action is maintainable where the servant had, as compared with the master, an equal or better opportunity to see and know the extent of the danger. The law supposes every adult to possess such ordinary intelligence, judgment, and discretion as will enable him to appreciate any obvious danger. The master, therefore, has a right to assume that an adult employé possesses that knowledge which is acquired by common experience; that he knows everything which is a matter of common knowledge or presumed to be within the common experience of all men of common education; that he understands those dangers which are the subject of common knowledge, or which can be readily seen by common observation."

Valente, the plaintiff below, knew the position of the column he was working upon, and knew, as well as any one could know, that if it was struck with sufficient force it would fall. There was no latent or hidden danger in the situation, and any peril that may have existed was as obvious to him, and more so, than to the master. It may be true that the danger of Valente's position was more obvious to the members of the loading gang than to himself; but their relation to him was that of fellow servants, and not of vice principals, and any negligence upon their part, either in the failure to give him notice and warning, or in their carelessness in loading the second column, he of course assumed.

4. Was there any testimony tending to show that the defendant below should have made and promulgated rules governing the service in which the plaintiff below was engaged? There was no evidence whatever tending to show that the work was of such a character that a rule was necessary for its safe performance; that the injury to the plaintiff below was caused by the absence of rules, or what particular rule was required. This court has repeatedly declared that, when the business of the employer is so large and complicated as to make his personal supervision impossible, it is his duty to promulgate rules and regulations governing and controlling the conduct of such busi-But this does not mean that there ness. should be rules governing every detail of the employer's business. Such a requirement would be not only unreasonable, but impossible to comply with. The business in which Valente and his fellow servants were engaged at the time he was injured was one of the ordinary details of the master's large business, and manifestly the master could not be expected, or required, to provide for the second column on the car. Labatt, in | the doing of such things by specific rules and Labatt, in his work above mentioned, at section 211, says: "But, in the absence of evidence showing that rules would be useful or feasible under the circumstances, the master cannot be found negligent in not having promulgated them. It is therefore error to leave the case to the jury, where the plaintiff has offered no evidence which indicates that other employers in the same business had promulgated any such rule, or that the suggested rule was necessary or practicable, or that the necessity and propriety of making such a rule was so obvious as to make the question one of common knowledge and ex-• If the plaintiff relies * * upon the theory that some specific rule should have been promulgated under the circumstances, he must show, not only that the rule suggested was necessary, but that it was reasonable and proper, and, if observed, would have adequately protected the employés. As a master is entitled to conduct his business on the assumption that servants will use ordinary care, he is not under any duty to make rules for the purpose of regulating acts which are in themselves negligent." We think it was not the duty of the defendant below to have made and promulgated rules respecting the work in which the plaintiff below was engaged; such work being of a very simple character, easily understood, and one of mere detail in the business of the company. And it may be also said that there was no evidence whatever showing what kind of rules were required, that rules of any kind were necessary, or that the absence of rules was the cause of the injury to the defendant in error.

5. We come now to the last question raised by the assignment of error, and that is: Was there any evidence at the trial below tending to show that the defendant company failed to furnish for the plaintiff below a safe place in which to do the work he was ordered to do? We have had some difficulty in reaching a satisfactory conclusion upon this point; but we think the one we have reached is in conformity with the well-settled rules of law upon the subject and amply supported by authority. Unquestionably the place—that is, the car—where Valente was painting was safe in itself. It was inherently safe, free from any hidden danger. It is true that the master is required to furnish and maintain a safe place; but we do not think the master may be charged with failing to furnish or maintain a safe place when the place, being perfectly safe in itself, is made unsafe or dangerous solely by the negligent acts of fellow servants in carrying out the details of the master's business.

work on Master and Servant, at section 601, as follows: "The general principle that the master's duty to provide a safe place of work is not deemed to have been violated, where the unsafety is caused solely by the acts of coservants in carrying out the details of the work, clearly involves the corollary that the master is not chargeable with the failure of those servants to warn each other as to the existence of dangerous conditions which have already supervened. Similarly all the authorities, with the exception of the single New Jersey case cited in section 580, ante, seem to agree that a master is not liable for the negligence of a servant in failing to notify a coemployé of the approach of a transitory peril, which, as the work progresses, will render the environment unsafe for a brief period, but which may easily be avoided if due warning is given." The case now before us comes clearly within this rule, and we therefore hold that the defendant below cannot be charged, under the evidence, with having failed to furnish a safe place in which the plaintiff below should do the work he was directed to do.

Our conclusion upon the whole case is that, while the court below in its charge to the jury stated the law upon the various points raised with clearness and accuracy, they did err in submitting to the jury the question of fellow service; and inasmuch as the plaintiff below and his coemployés—the loading gang—were fellow servants, and it was not shown that the defendant below had failed to perform any duty he was required, under the law, to perform, the court erred in refusing to instruct the jury to return a verdict in favor of the defendant.

The judgment of the court below is reversed.

(76 N. H. 290)

CUNNINGHAM V. C. R. PEASE HOUSE FURNISHING CO.

(Supreme Court of New Hampshire. Hillsborough. June 1, 1909.)

EXPLOSIVES (§ 9°) — SALE — ASSURANCE OF SAFETY—QUESTION FOR JURY.

In an action for injuries caused by the explosion of stove blacking, claimed to have been sold on the representation that it could be used on a warm stove, the facts that it contained naphtha, and exploded when used on her warm stove, would authorize the jury to infer that the temperature of the stove was the cause of the explosion, authorizing denial of nonsuit.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 6; Dec. Dig. § 9.*]

Exceptions from Superior Court, Hillsborough County.

made unsafe or dangerous solely by the negligent acts of fellow servants in carrying out the details of the master's business. Defendant excepted to the denial of a mother law upon this point has been very clear-

eFor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Upon a second trial there was a verdict on the request of plaintiff's counsel, on the request of plaintiff. The evidence was substan- ground that plaintiff was not in attendance. for the plaintiff. The evidence was substantially the same as upon the first trial, with the exception that the plaintiff's expert chemist testified on cross-examination that the polish would not explode unless it came in contact with a surface heated to incandescence-a degree of heat which the evidence tended to show the plaintiff's stove did not have. The defendant's motion for a nonsuit was denied, subject to exception.

See, also, 74 N. H. 435, 69 Atl. 120, 124 Am. St. Rep. 979.

Doyle & Lucier, for plaintiff. Burnham, Brown, Jones & Warren, for defendant.

WALKER, J. The ground of the defendant's motion for a nonsuit is that from the testimony of the plaintiff's expert on crossexamination it appears that blacking of the brand used by the plaintiff would not explode when applied to a stove no warmer than her stove was at the time she was injured. From this it might be argued that the explosion was due to some undisclosed cause, and not to the warmth of the stove, and that the plaintiff's injury was not the result of the defendant's negligence. But such a conclusion does not necessarily follow from all the evidence submitted. The facts that the blacking contained naptha, a highly explosive substance, and that it did explode when the plaintiff used it on her warm stove, would authorize the jury to infer that the temperature of the stove, which had contained a fire a short time before, was the cause of the explosion. It cannot be said that reasonable jurymen could not so find, from the mere fact that a different conclusion might be authorized by the testimony of the plaintiff's expert. The case does not differ essentially from what it was upon the former transfer. Cunningham v. Company, 74 N. H. 435, 69 Atl. 120, 124 Am. St. Rep. 979.

Exception overruled. All concurred.

(75 N. H. 294)

LAPOINTE v. BERLIN MILLS CO. (Supreme Court of New Hampshire. Coos. June 1, 1909.)

1. APPEAL AND EBROR (§ 1056*)—HARMLESS ERROR.

Exclusion of evidence, having a bearing only on the question of damages, is harmless, the verdict establishing nonliability.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4190; Dec. Dig. § 1056.*]

2. WITNESSES (§ 265*)—RECALLING WITNESS.
Rule of court No. 44 (71 N. H. 682), providing that, after a witness has been dismissed from the stand, he cannot be recalled without permission of the court on good cause shown, permission of the court on good cause shown, permits plaintiff to testify in person only in the discretion of the court, where his deposition taken by defendant has, under authority of Pub. St. 1901, c. 225, § 11, been read in evidence.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 906; Dec. Dig. § 265.*]

3. Telal (§ 28*)—View and Inspection.
Any right of plaintiff after his right to testify was exhausted to exhibit his injured hand tify was exhausted to exhibit his injured hand to the jury, without testifying under Pub. St. 1901, c. 227, § 19, providing that in the trial of an action, in which the examination of an object may aid the jury in understanding the testimony, the court, on motion, may, in its discretion, direct a view by the jury under such rules as it may prescribe—depends on a finding by the court that justice requires it, without which the right does not exist.

1Ed. Note.—For other cases, see Trial, Cent.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 77-79; Dec. Dig. § 28.•]

4. TRIAL (§ 31*)-QUESTIONS RAISED BY EX-CEPTIONS.

Plaintiff's exception to the ruling of the court against his request to be allowed to exhibit his hand to the jury raises merely the question of his being entitled as a matter of strict law to have the jury view his hand; he not having suggested to the court that the fairness or justice of the trial would be promoted by such inspection as a basis for the court's exercise of discretion.

[Ed. Note.-For other cases, see Trial, Dec. Dig. \$ 31.*]

5. MASTEB AND SERVANT (§ 274*)—INJURIES TO SERVANT — DUTIES OF SERVANT — EVI-DENCE.

Testimony of defendant's superintendent in an action for injury to one while employed by defendant as a sawyer's helper, but, as claimed defendant as a sawyer's helper, but, as claimed by defendant, while not working within the scope of his employment, as to the duties of a sawyer's helper, is admissible, though it does not appear that witness or any one else instructed plaintiff as to what his duties as such helper were, his employment as a helper for several weeks having given him an opportunity to learn what his duties were, so that admission of the testimony does not tend to charge him with knowledge of facts which presumably he did not possess.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 274.*]

Exceptions from Superior Court, Coos County; Chamberlin, Judge.

Action on the case by Archelas Lapointe, Jr., against the Berlin Mills Company. There was a verdict for defendants, and plaintiff excepted. Exceptions overruled.

The plaintiff's hand was injured by coming in contact with a circular saw while he was employed in the defendans' mill as a sawver's helper. The defendants claimed that at the time of his injury he was not working within the scope of his employment. Upon the request of the plaintiff's counsel, the court permitted the plaintiff's deposition, which had been taken by the defendants and placed on file, to be read in evidence upon the ground that the plaintiff was not in attendance, in accordance with section 11, c. 225, Pub. St. 1901. After the deposition was read, the plaintiff came into the courtroom, and his counsel then asked permission to exhibit to the jury the plaintiff's injured hand. The court ruled that as the plainting had testified by his deposition, he could not

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

testify further by showing his hand to the | court that the fairness or justice of the trial jury, and the plaintiff excepted, counsel stating that he did not offer the witness to testify, but for the purpose of having the jury examine his hand. During the rest of the trial the plaintiff sat near his counsel, and it is found that the jury saw the injured hand as fully as they could have seen it from the witness stand, and that he was produced within the bar inclosure and sat beside his counsel for that purpose against the objection of the defendants. The plaintiff had been at work in the mill as a helper for several weeks. The defendants' superintendent was called as a witness by the plaintiff and was permitted to testify on cross-examination, subject to exception, as to a nelper's duties in operating the machine upon which the plaintiff was injured.

Henry F. Hollis, for plaintiff. Samuel W. Emery, Edward C. Stone, Drew, Jordan, Shurtleff & Morris, and Rich & Marble, for defendant.

WALKER, J. The plaintiff's exception to the ruling of the court refusing to allow him to exhibit his injured hand to the jury cannot be sustained under the circumstances disclosed. If the only bearing of the proffered evidence was upon the question of damages, its exclusion, if error at the time, was rendered harmless by the verdict which established the fact of nonliability. If, however, it did have, as claimed, some relevancy upon the question of liability, its exclusion was not necessarily erroneous. The plaintiff, having testified by his deposition upon the suggestion of counsel that he was absent, had no absolute right to testify further. Pub. St. 1901, c. 225, § 11. "After a witness has been dismissed from the stand, he cannot be recalled without the permission of the court upon an application for that purpose and good cause shown." Rule of Court No. 44, 71 N. H. 682. If the offer to exhibit the plaintiff's hand to the jury is to be regarded as a request to recall the witness after he had testified once and to permit him to testify further, it is clear that the refusal of the court to allow him to do so as a matter of right was not error. He did not ask the court to allow him to testify a second time as a matter of discretion, but claimed, and now claims, that the law gave him the right to exhibit his hand to the jury after his testimony was closed. In effect, he asked for a view pending the trial, stating expressly that he did not ask to be allowed to testify. But in this view of the matter he fails to establish his right. Whatever right he might have to a view or inspection of the injured hand at that stage of the trial depended upon a finding by the court that justice required it. Pub. St. 1901, c. 227, § 19. In the absence of such a finding, the right does not exist. The plaintiff submitted no suggestions to the

would be promoted by the proposed inspection as a basis for the court's exercise of discretion, and his exception to the ruling of the court raises merely the question whether he was entitled to have the jury view his hand as a matter of strict law without regard to any discretionary finding by the court. this respect he stands no better than he would if he had offered to testify after his deposition was read, claiming a legal right to do so, excepting to a ruling excluding the evidence as a matter of law, and not desiring, or asking for, or obtaining, a finding of fact that justice would be promoted thereby. Under such circumstances, it does not appear that the ruling was wrong.

The testimony of Burke, the defendant's superintendent, who was familiar with the work the men did in the mill, relating to the duties of a helper to a sawyer on the machine in question, was properly received. The only objection urged against it is that it did not appear that the witness instructed the plaintiff in regard to his duties as a helper, or that the plaintiff was informed by any one that his duties were such as were detailed by the witness. But it is apparent that the plaintiff's employment as a helper for several weeks had given him an opportunity to learn what his duties were; and, if the superintendent's understanding of what they were was correct, it would be a legitimate inference that the plaintiff had the same understanding derived from his practical experience. He had been in a position to know the course of business in the defendants' mill with reference to the work a sawyer's helper was expected to do. Hence it was clearly competent to show by evidence what that course or system of business was. Its admission did not tend to charge him with knowledge which presumably he did not possess. It was as legitimate as it would have been if there had been positive evidence that the superintendent expressly told the plaintiff what his duties were.

Exceptions overruled. All concurred.

(75 N. H. 288)

TUTTLE v. D. W. PINGREE CO. (Supreme Court of New Hampshire. June 1, 1909.)

LOGS AND LOGGING (§ 3*)—SALES—CONTRACTS
—"LUMBER."

A deed of "standing lumber" and "trees suitable to saw into lumber" stipulated that the lumber remaining on the premises at the end of a specified time should revert to the grantor, but did not suggest that the trees were to be sawed on the premises, and any agreement relating thereto was entered into prior to the execution of the deed. *Held*, that the forfeiture clause applied only to standing trees, and the sawed lumber remaining on the premises after the expiration of the specified time did not revert to the grantor, but belonged to the grantee, though the word "lumber," in common use, in-

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

uct into which they are sawed.

[Ed. Note.—For other cases, see Logs and Logging, Dec. Dig. § 3.*

For other definitions, see Words and Phrases, vol. 5, pp. 4257, 4258; vol. 8, p. 7711.]

Exceptions from Superior Court, Belknap County; Stone, Judge.

Action by Owen H. Tuttle against the D. W. Pingree Company. The court ruled in favor of plaintiff, and defendant excepts. Exceptions sustained.

Trespass de bonis. The plaintiff sold to the defendants two lots of "standing lumber." The deed provided that all lumber remaining on the premises at the end of three years should revert to the grantor. The defendants cut and sawed the trees, but did not remove all the boards from the lot within the time limited. They subsequently removed those remaining on the lot at the expiration of three years, and this suit is to recover their value. The court ruled that the boards belonged to the plaintiff, and the defendants excepted.

Felker & Gunnison, for plaintiff. Taggart, Tuttle, Burroughs & Wyman, for defendant.

YOUNG, J. The only question considered is the intent of the parties when they agreed that "whatever lumber remains on said premises at the end of three years reverts to • • said grantors." Did they intend by "lumber" standing trees only, or both standing trees and boards? The word is in common use to describe both trees suitable to saw and the product into which they are sawed, and was used in both senses in this deed; but in every instance in which it was used without modifying words, except in the forfeiture clause, it is clear from the context that only standing trees were intended. It is probable, therefore, it was used in this sense in that clause. The fact that this was a sale of "trees suitable to saw into lumber" tends to strengthen this presumption; for, since such trees were the subject-matter of the sale, it is probable that it was such trees, and not the boards into which they were sawed, which were to revert to the grantor. No facts appear to rebut this presumption.

There is nothing in the deed to suggest that the granted trees were to be sawed on the lot; and, if that was not the intention of the parties at the time the deed was made, it is obvious the forfeiture clause was not intended to include sawed lumber. If, however, it is assumed that the parties had agreed before the conveyance was made that a mill should be installed on the lot, that fact would be incompetent to prove that the forfeiture clause was intended to apply to both boards and standing trees; for, if that

cludes both trees suitable to saw and the prod- | privilege in a separate contract. Consequently, the question of the defendants' right to leave the boards on the premises would depend on the proper construction, not of this conveyance, but of that contract. If that is the fact, it is fair to say that, in so far as this conveyance is concerned, no lumber remained on the lot when the trees it conveyed had been cut and hauled to the mill. In short, it is probable that the purpose of the forfeiture clause was to limit the time within which the defendants were to have the growth of the trees—not to limit their time for clearing the lot; for the plaintiff's loss if the sawed lumber was not removed within that time would be so insignificant, as compared with the defendants', that it is probable, if the parties had intended that boards remaining on the premises at the end of three years should become the plaintiff's property, they would have used apt words to express their intention. It must be held, therefore, that "lumber" was used in the forfeiture clause in the sense of standing trees.

Exceptions sustained. All concurred.

(75 N. H. 291)

KIMBALL v. KIMBALL

(Supreme Court of New Hampshire. Hillsborough. June 1, 1909.)

1. ACTION (§ 12*)-DEFENSES-LAW GOVERN-ING.

The lex loci, rather than the lex fori, governs as to defenses, both in tort and contract.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 12.*]

2. STATUTES (§ 289*)—PROOF OF LAW OF OTH-

The law of another state, a question for the trial cours, must be proved, like any other fact.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 389, 390; Dec. Dig. § 289.*]

3. EVIDENCE (§ 80*)—PRESUMPTION—LAW OF OTHER STATES.

In the absence of proof as to the law of another state, deriving the body of its law from England, the common law, as understood and applied in the state of the forum, is presumed to prevail.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80;* Common Law, Cent. Dig. §§ 14–16.]

4. HUSBAND AND WIFE (§ 39*)—CONTRACTS.

The common law does not recognize contracts between husband and wife.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 220; Dec. Dig. § 39.*]

5. HUSBAND AND WIFE (\$ 39*)—CONTRACTS—RELIEF IN EQUITY.

Relief will be given by equity on a contract between husband and wife, if it be just and fair, and ought equitably to be enforced.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 220; Dec. Dig. § 39.*]

6. ACTION (§ 36*)—EQUITABLE RELIEF.

Though there was a verdict for plaintiff, in an unmaintainable action of assumpsit by is the fact, the parties arranged for the mill | a wife against her husband on their contract,

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

counterclaim.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 36.*]

Transferred from Superior Court, Hillsborough County; Stone, Judge.

Action by Alice E. Kimball against John F. Kimball. Verdict for plaintiff for \$8,250, and case transferred from the superior court. Case discharged.

The farm was once the property of the husband, and was deeded by him to his wife before their lawful marriage, but while they supposed they were husband and wife. After the impediment was removed, they were lawfully married. Her evidence tended to prove that she thereafter deeded the farm, upon his promise to pay over to her the proceeds: while his evidence was to the effect that he never gave the farm to her, but that she held the title in trust for him. He also offered to show in defense, that, after this suit was brought, she broke open his safe and took therefrom \$5,500. This defense was ruled out because it accrued after the suit was brought. The property is situated in Vermont, and the parties lived there and in Massachusetts during the time covered by these transactions. There was no proof of the law of either state. Toward the close of the trial the plaintiff filed a bill in equity in aid of her suit at law. Subject to exception the court denied the defendant's motion for a nonsuit, and submitted the case to the jury upon the issue "Whose farm was thisthe plaintiff's or the defendant's?"

Doyle & Lucier, for plaintiff. Wason & Moran, for defendant.

PEASLEE, J. As between the lex loci and the lex fori, the former governs, both in torts and contracts, in respect to the legal effect and incidents of the acts. Whatever would be a defense to this action if brought in the state where the transactions took place is a defense here. Beacham v. Portsmouth Bridge, 68 N. H. 382, 40 Atl. 1066, 73 Am. St. Rep. 607; MacDonald v. Railway, 71 N. H. 448, 450, 52 Atl. 982, 59 L. R. A. 448, 98 Am. St. Rep. 550. When the law of a sister state becomes material it is to be proved like any other fact. It cannot be assumed, or found without proof. Taylor v. Barron, 30

and though she may have rights enforceable in equity, and tewards the close of the trial filed a bill in equity in aid of her action at law, she will not be given a decree for the amount of the verdict; there being in an equity suit, in addition to the preliminary question of whether the issues shall be tried by court or jury, not only the question of whether there was the contract, which alone is involved in the action of assumpsit, but also the questions whether it was just and fair, and ought equitably to be enforced, and the counterclaim in the assumpsit action having been disallowed because it arose after the action was brought, while the equity suit was not brought till after the inception of the counterclaim.

N. H. 78, 100, 102, 64 Am. Dec. 281; Emery v. Berry, 28 N. H. 473, 486, 61 Am. Dec. 622. The question is determinable in the issues shall be tried by court or jury, not only the question of whether there was the contract, which alone is involved in the action of assumpsit, but also the questions whether it was just and fair, and ought equitably to be enforced, and the counterclaim in the assumpsit action having been disallowed because it arose after the action was brought, while the equity suit was not brought till after the inception of the close of the forum, not only as to the judi-value of the forum, not only as to the judi-value of the forum, not only as to the judi-value of the forum, and only as to the judi-value of the forum, and only as to the judi-value of the forum, and only as to the judi-value of the forum, and only as to the judi-value of the forum, and only as to the judi-value of the forum, and only as to the judi-value of the forum, and only as to the judi-value of the forum and the fair of th enactments, is not followed here. Leach v. Pillsbury, 15 N. H. 137. As the case now stands, the rights of these parties are governed by the common law as understood and applied in this state. The "stubborn and inflexible principle of the common law" (Andrews, J., in Hendricks v. Isaacs, 117 N. Y. 411, 22 N. E. 1029, 6 L. R. A. 559, 15 Am. St. Rep. 524), which refused to recognize contracts between husband and wife, has been, and still is, followed here, except as modified by statute. Patterson v. Patterson, 45 N. H. 164; Burleigh v. Coffin, 22 N. H. 118, 53 Am. Dec. 236. The motion for a nonsuit of the action in assumpsit should have been granted.

But it is urged that, if the wife has no standing in a court of law, she has in equity, that the issues have been tried, and a bill in equity has been filed as an amendment, and that therefore she should now have a decree for the amount of the verdict. That she may proceed in equity is settled by the great weight of authority. "But courts of equity (following in this particular, as in most others, the civil law) have always recognized the wife as possessing a legal entity apart from that of her husband. The moment that the separate existence of the wife was admitted it followed that the impossibility of recognizing any contractual relations between them at once disappeared. Therefore courts of equity have never refused to enforce such contracts merely because of any difficulty springing from the common-law doctrine of the unity of husband and wife. The courts do not enforce all contracts between husband and wife, because the power is an equitable one, and to be used for the best interests of all the parties, including their interests as husband and wife. Sto. Eq. Jur. § 1368; Bisp. Eq. § 114." Garwood v. Garwood, 56 N. J. Eq. 265, 88 Atl. 954. "The unity of husband and wife, by which the legal existence of the wife was merged in that of her husband, preventing them from contracting with each other as if they were two distinct persons, never prevailed in courts of equity. It may be more accurate to say that courts of equity disregarded the fiction upon which the common law proceeded, and are accustomed to lay hold of, and give effect to, transactions

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and agreements between husband and wife, according to the nature and equity of the It does not limit its inquiry to the ascertainment of the fact whether what had taken place would, as between other persons, have constituted a contract, and give relief, as a matter of course, if a formal contract be established, but it further inquires whether the contract was just and fair, and equitably ought to be enforced, and administers relief where both the contract and the circumstances require it." Andrews, J., in Hendricks v. Isaacs, 117 N. Y. 411, 22 N. E. 1029, 6 L. R. A. 559, 15 Am. St. Rep. 524. The contrary holding in Massachusetts finds no support in other jurisdictions, and is opposed by a strong minority of the court. Fowle v. Torrey, 135 Mass. 87. And even in that state the rule is not consistently applied. In a recent case, closely resembling the present one, relief was granted the wife in equity. Frankel v. Frankel, 173 Mass. 214, 53 N. E. 398, 73 Am. St. Rep. 266. Even as to rents and profits, which ordinarily belonged to the husband, the wife may be entitled to relief under some circumstances. Barron v. Barron, 24 Vt. 375, 391.

It does not necessarily follow, however, that because the wife has, or may have, rights enforceable in equity the case has been properly tried in an unmaintainable action of assumpsit. While the form of the proceeding may be unimportant, yet when the substance of the right or of the remedy is different. it is important that the latter be correctly administered. In the action of assumpsit the question was merely whether a contract existed. In equity more than this must be shown. It must appear as to the purchase price that the contract is just and fair, and one that equitably ought to be enforced. And as to the rents and profits a strong case for equitable interference must be made out. In the assumpsit suit the counterclaim was disallowed because it arose after suit was brought. The suit in equity was not begun until the bill was filed (Clark v. Slayton, 63 N. H. 402, 1 Atl. 113), and that was after the inception of the counterclaim. In the suit at law the parties had their jury trial as a matter of constitutional right. In the proceeding in equity there is a preliminary question for the trial court whether the issues shall be tried by the court or sent to a jury. Curtice v. Dixon, 73 N. H. 393, 62 Atl. 492.

A nonsuit should be entered as to the action in assumpsit. If justice requires the allowance of an amendment by filing a bill in equity, that relief should be granted upon such terms as seem just; and, if that is done, the case will then be in order for proceedings on the equity side of the court. Case discharged. All concurred.

THOMPSON v. TRENTON WATER POW-ER CO.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

1. Contracts (\$ 153*)—Construction—Grammatical and Ordinary Sense of Words.

In construing a document, the grammatical and ordinary sense of the words is to be adhered to, unless they would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency, but no further.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 734; Dec. Dig. § 153.*]

2. Waters and Water Courses (§ 158*)-Lease of Water Power-Construction.

A conveyance by the owner of a water power to a millowner of water for the use of the mill, by way of lease and re-lease, provided that the lessor should uphold, maintain, and repair a raceway, and keep up and repair the guard walls and banks, that if a breach should happen to any part of the banks, it would repair the same within as short a time as the nature of the case would admit, and that the rents should abate if the repair was not made within 30 days, and that the lessor should be liable for no other damage by reason of such breach not being repaired, nor for any stoppage of the water to be occasioned by the widening and clearing out or repairing of the raceway, except the abatement of rent after 30 days, and that for 30 days' stoppage in one year there should be no reduction, the right to stop the water for that term for necessary purposes, in their discretion, being expressly reserved; and, if at any time there should be a deficiency of water to supply the lessees with the quantity leased, and such deficiency should be caused or continued after notice by the willful misconduct or neglect of the lessors, the lessees should have a right to recover damages in addition to the rent to be withheld, such additional damages in no case to exceed the amount of rent for the time that such deficiency might continue, held that the lessor was liable for compensatory damages for the stoppage of water caused by its permitting a city to construct a drain under the raceway or canal.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 184; Dec. Dig. § 158.*]

8. WATERS AND WATER COURSES (§ 158*)— LEASE OF WATER POWER—CONSTRUCTION.

By a conveyance of water from a raceway, it was provided that the grantor reserved whatever time in each and every year might be reqvisite to make improvements and repairs to the raceway, dams, gates, aqueducts, and other appurtenances thereof, and that it was not to be held liable for any damages for any stoppage occasioned by such repairs and improvements or by breaks, floods, or drought of summer, nor for any other cause whatever, however long the said stoppage might continue, unless the grantor take more than 30 days in any one year to enlarge or increase the capacity of the raceway, or to make entirely new additions thereto, in which case only it should be liable to an amount of damages not in any case to exceed the rent which would have accrued during such excess over 30 days. Held that the grantor was liable for compensatory damages for the stoppage of water caused by permit-

[•]For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ting a city to construct a drain under the raceway or canal.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 184; Dec. Dig. § 158.*1

(Syllabus by the Court.)

Error to Circuit Court, Mercer County. Action by Andrew Thompson against the Trenton Water Power Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The defendant is the owner of a water power; the plaintiff the grantee of water rights for the use of his mill. The action is brought for damages suffered by the plaintiff by reason of the shutting off of water from his mill from June 17 to July 19, 1906. The case turns wholly upon the construction of the various grants from the defendant and its predecessor, the Trenton Delaware Falls Company, to the plaintiff and his predecessors in title. The earliest grant was by way of lease and re-lease in 1835, for 241 square inches of water. The lease provided that the lessor should uphoid, maintain, and repair the canal or main raceway, and keep up and repair the guard walls and the banks of the canal; that if at any time a breach should happen to any part of the banks, they would repair the same within as short a time as the nature of the case would admit, and that the rent should abate if the repair was not made within 30 days, and that they would be liable to no other damages for such breach not being repaired, nor for any stoppage of the water to be occasioned by their widening, clearing out, or repairing the canal or main raceway, except the abatement of rent after 30 days. The lease further provided that "for thirty days' stoppage in any one year there should be no reduction, the right to stop the water for that term for necessary purposes in their discretion being expressly reserved," and that if at any time there should be a deficiency of water to supply the lessees with the quantity leased, and such deficiency should be caused or continued after notice through the willful neglect or misconduct of the lessor, then the lessees should have a right to recover damages in addition to the rent to be withheld; "such additional damage in no case to exceed the amount of rent for the time that such deficiency may continue."

The next grant was by way of deed of bargain and sale for 100 square inches of in liquidation of its loss of rentals and the water to be drawn under a head of 3 feet, which was granted subject, among other power company took advantage of this periconditions, to the following: "The said par- od of time to make certain repairs. The ty of the first part hereby reserve to themselves, their successors and assigns whatever time in each and every year may be requisite to make improvements and repairs to the said canal or main raceway, the dams, were made if those repairs required the shut-

thereof. And it is hereby covenanted and agreed by and between the said parties that the said party of the first part, their successors and assigns are not to be held liable for damages for any stoppage occasioned by such repairs and improvements or by breaks, floods, the drought of summer, nor for any other cause whatever, however long the said stoppage may continue, unless the said party of the first part shall take more time than thirty days in any one year to enlarge or increase the capacity of said canal or main raceway, or to make entirely new additions thereto, in which case only the said party of the first part, their successors and assigns suall be liable to an amount of damages not in any case to exceed the rent which would have accrued during such cases over thirty days, estimating the rent of the said 100 sq. in. of water to be drawn as aforesaid at \$300 per annum." The grant also provided that, in case the grantee should experience a deficiency of water to supply the 100 square inches, and the deficiency should arise from the neglect of the grantor to make the necessary and needful repairs to the canal or raceway, the grantee might, after 10 days' notice in writing to the grantor, make such repairs, and the grantor was bound to repay the cost thereof to be determined by referees.

The third grant is of 25 square inches of water, and the conditions are the same as in the last-mentioned grant. The printed copy of this grant, however, contains a provision by which the grantor agreed to uphold, maintain, and repair the canal or main raceway, and the guard walls, banks, and other appendages thereof, and in case a breach should happen to be made, or any other casualty should occur to the canal or its appendages, by reason of which the water should not be supplied, that they would repair the same within as short a time as the nature of the case admitted.

The fourth grant is by way of lease for 120 square inches of water under a head of 3 feet, at a rental of \$313. This lease is merely a lease of the water, and contains only a covenant on the part of the lessee to pay the rent.

The water was shut off, at the time of which the plaintiff complains, in order to permit the city of Trenton to construct a drain under the water power canal, for which the city agreed to pay the defendant interruption of its business. The water trial judge charged the jury that the water could be lawfully shut off for repairs and improvements, but that the rights of the defendant were limited to the repairs that . gates, aqueducts and other appurtenances ting off of the water, and was only for such

•For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

time as was required for the repairs, and covery in case there should be a deficiency that for damages caused by the mill being shut down while the repairs were being made the plaintiff could not recover. The defendant insisted that the plaintiff could only recover damages for the number of working days in excess of 30 and that, inasmuch as the water was not shut off for 30 working days, deducting the intervening Sundays, the plaintiff was not entitled to recover.

Malcolm G. Buchanan (James Buchanan, on the brief), for plaintiff in error. Linton Satterthwait, for defendant in error.

SWAYZE, J. (after stating the facts as above). The difficulties of construing the provisions of the grants are very considerable, and are increased by the different language in which the earliest grant by way of lease and re-lease and the subsequent grants by way of deeds of bargain and sale are expressed. The view we have taken of the case relieves us from a further difficulty, which might be presented under conceivable circumstances by reason of the fact that the last lease contains no conditions at all. The question to be decided is whether by the terms of these instruments the water power company had the right to shut off the water from the plaintiff's mill for a purpose foreign to the operations of the water power company itself. We find it convenient to deal first with the provisions of the lease. In substance, the lease allowed the water power company 30 days for the purpose of making repairs in three different contingencies: First, if a breach should happen to the banks; second, if there should be a stoppage of water to be occasioned by widening, clearing out, or repairing the canal; third, in case of a stoppage for 30 days in any one year for necessary purposes in the discretion of the water power company. The present case does not fall within either of these categories. The trial judge allowed the jury to return a verdict only for such stoppage as was caused by the works of the city of Trenton under the contract with the defendants. The building of the drain by the city of Trenton was a contingency not covered by the lease. It was not a case where a breach happened to the banks, nor a case of a stoppage of water occasioned by widening, clearing out, or repairing the canal, nor was it a stoppage of water for necessary purposes; for we think it quite clear that the necessary purposes referred to were such purposes as might be necessary to enable the water power company to carry out its contract to uphold, maintain, and repair the canal or raceway, and that allowing the city to construct a drain was the voluntary act of the water power company, and not necessary. A

of water to supply the lessee with the quantity thereby leased, and the deficiency should be caused or continued after notice through the willful neglect or misconduct of the lessor. It may, of course, be said that an entire stoppage of the water necessarily involves a deficiency, but we think that the words "deficiency of water" in the latter part of the lease are contrasted with the stoppage of water provided for in the clauses immediately preceding. The word "deficiency" naturally conveys the idea that some water is furnished, but not as much as should be; and, when, as in this case, the deficiency is a deficiency of water to supply the lessees with the quantity leased, the argument is still stronger that the parties contemplated a case where the lessor did not fail wholly to supply water, but failed to supply the full quantity.

Another question is presented by the language of the condition in the deeds of bargain and sale. The language of that condition exempts the grantor from damage for any stoppage occasioned by any cause whatever, however long the stoppage may continue. We recognize the correctness of the rule of construction stated by Lord Wensleydale in the famous case of Grey v. Pearson, 6 H. L. C. 61, at page 106, cited in the brief for the defendant, that the grammatical and ordinary sense of the words is to be adhered to; but Lord Wensleydale is careful to add: "Unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, The words "any other but no further." cause whatever, however long said stoppage may continue," if read literally, would exempt the water power company from liability in case they chose to sell the water to the city of Trenton for municipal purposes, and divert it entirely from the purrose of furnishing power to the mills to whom the water was sold or leased. Thus construed, the effect would be that the grant made for a valuable consideration would be only a grant during the will of the grantor, and would be repugnant, for the deed purports to convey an estate in fee simple. If such were the proper construction, it is difficult to explain why the same clause of the deeds should allow an action for damages in case the water power company undertook to enlarge or increase the capacity of the canal, and took more time than 30 days in any one year for that purpose. In that case the company, by the terms of the lease, would be liable to an action for damages where the stoppage of water was due to its effort to enlarge and improve its canal, presumably for the benefit of all concerned. further question arises under the provision and would be exempt from an action for of the lease which limits the amount of re- damages where it stopped the supply of

Falls Company was originally incorporated for the purpose of creating a water power at the city of Trenton, and it was authorized to build a dam in the Delaware river, to cut a raceway, with branch raceways and other works for the purpose of creating and using the said water power for mills, manufacturing, and no other purpose. Act Feb. 16, 1831 (P. L. 1830-31, p. 131). Its successor, the Trenton Water Power Company, was incorporated to hold the same works, franchises, and real estate in the same manner as the original stockholders. Act Feb. 15, 1844 (P. L. 1843-44, p. 85). The construction contended for, if the words are read in their most general and unqualified sense, would enable the defendant to escape liability for an abandonment of the very purpose for which it was chartered. Such a construction is, in the words of Lord Wensleydale, "absurd, repugnant, and inconsistent with the rest of the instrument." We are under no necessity of adopting that construction.

We think that a reading of the entire deed in the light of the charter of the water power company, and of the provisions by which it agreed to uphold, maintain, and repair the canal or raceway, demonstrates that the words were used in a more restricted sense. They are coupled with words exempting the company from liability for damages for a stoppage occasioned by repairs, improvements, breaks, floods, and drought. All of these causes, except the improvements, are causes beyond the control of the company, and the parties evidently had in mind that there might be other causes beyoud the control of the company for which they ought to provide, necessary purposes in the words of the lease, and for such causes it was natural and proper that they should agree that the company should be exempt from liability for damage. they came to the question of a stoppage, due to improvements enlarging or increasing the capacity of the canal, they recognized that such a stoppage was within the control of the water power company, and that in that case it would be proper to allow damages in case the company took an unreasonable time to enlarge or increase the capacity of the canal. This explains the provision which allows them, in such a case, only 30 days in a year, when for other causes they were exempt from liability, however long the stoppage might continue. In short, we think the meaning of the words in question would be more accurately expressed if the instrument read: "Nor for any other cause whatever beyond the control of the water power company, however long the stoppage might continue." The case differs from that of the

all water entirely. The Trenton Delaware | Company, 64 N. J. Law, 240, 45 Atl. 692, 49 L. R. A. 572, 81 Am. St. Rep. 467. In that case the water company had made an absolute agreement to supply water, and it was held by this court that there could not be imported into that agreement an exemption from liability, where the company was prevented from fulfilling its contract by an unforeseen accident. In the present case the water company has undertaken to exempt itself from liability in certain cases, and the contention is that the language is such as to exempt it absolutely, whatever the cause may be. We think such a construction of the exemption is destructive of the conveyance itself. The case differs also from the case in the Supreme Court of Buchanan & Smock Lumber Company v. East Jersey Coast Water Company, 71 N. J. Law, 350, 59 Atl. 81. That was a case of a mere contract to supply water for fire protection, and the contract provided that the company should not be liable for a deficiency or failure in the supply occasioned by any cause whatsoever. The contract there was for an intermittent supply, which might or might not be required. There was nothing absurd or repugnant or inconsistent in the construction there adopted. The present case is a case of a grant in fee of so much water, intended as a continuous supply for the purpose of furnishing power to a mill, and the construction contended for would destroy the grant, instead of merely exempting the defendant from liability. The difference between the two cases is analogous to the difference between an agreement to supply all the crops of a farm, with an exemption from liability in case of a failure of crops from any cause whatever, and a grant of the land itself with a provision that the grantor might prevent the grantee from occupying it at any time he chose.

The counsel for the plaintiff in error seems to have seen the difficulty into which the broad construction for which he contends would lead him, for he urges that the limitation of liability is a limitation only for 30 days in any one year; but the deeds do not couple the provision as to 80 days with any cause except a stoppage caused by enlarging or increasing the capacity of the canal, or making new additions thereto. When the stoppage is for any other cause, the defendant is exempt from liability, however long the stoppage may continue. The evidence in the case showed that the time occupied for repairs was less than the time during which the water was shut off, and we think the trial judge was quite right in allowing the plaintiff to recover for the damages suffered during the period when the water was shut off and repairs were not being made. We find no error in the record, and the judg-Middlesex Water Co. v. Knappmann Whiting ment is therefore affirmed, with costs.

(74 N. J. B. 872) McCARTER, Atty. Gen., v. FIREMEN'S INS. CO. et al.

(Court of Errors and Appeals of New Jersey. July 8, 1909.)

For majority opinion, see 73 Atl. 80.

SWAYZE, J. (dissenting). In ordinary cases little good is done by an expression of the reasons for dissent, but when the principle involved is fundamental, it is a public duty to protest in the hope that the logical consequences may not lead us too far before we are aware of the direction in which we are traveling. This decision is novel. Combinations of insurance companies like the Newark Fire Insurance Exchange are not new. Many such cases are collected in Lewson's Monopoly and Trade Restraint Cases, referred to in the opinion. It is significant that not one of these cases is cited. I shall review them at length hereafter. Our sister states, administering the same system of law that we administer, have been singularly blind, for they have for years been industriously legislating on this subject, and, if the present decision is right, such legislation has been unnecessary, since we have accomplished by judicial decision what in every other state has been thought to require legislative action by the elected representatives of the people. I deprecate judicial legislation regardless of its merits. It confuses the function of the separate branches of the government, and when it results, as in this case, in applying new law to the past conduct of individuals, it has all those evils of ex post facto legislation which led to our constitutional prohibition. I deprecate also the ground upon which the decision is put, for it goes much farther and reaches much deeper than the opinion itself indicates. The court relies on Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77. Munn v. Illinois was decided under provisions of the Iilinois statute which attempted to regulate the charges of individuals owning grain elevators. The importance of the case was in its assertion of this right to regulate charges by private individuals, not corporations. By relying upon that case alone as authority, the court must mean that it is competent for the Legislature to fix rates of insurance by private individual insurers—a very wide departure from established principles. may be conceded that where a virtual monopoly exists, as in the Munn Case, the state, by its Legislature, has the right to regulate Such is the view suggested by charges. Prof. Wyman in a thoughtful article on "The Law of Public Callings," 17 Harvard Law Review, 156. at page 217; and it has much to commend it. But the right to regulate charges when it rests upon the existence of a virtual monopoly must cease as soon as the court has destroyed the monopoly by its injunction. Under this view, to

branch on which the right of public regulation hangs, and this the court attempts to do by its present decree. The opinion rests for its fundamental proposition, not upon the basis of virtual monopoly, but upon the idea that when the public interest is served by the conduct of any business, and that business has become large and successful. the public may at once intervene. The quotation in the opinion, "First the blade, then the ear, after that the full corn in the ear," and the paraphrase of Shakespeare, suggest that one rule applies to a small business and a different rule to a large business. I have never before heard it suggested that the size or success or want of success of a business was a test of its public character. I think a ferryman operating a fintbont with only one passenger a day is engaged in a public calling as truly as the owners of the ferries over the North River with their thousands of passengers daily; that a public expressman just beginning business and carrying his first parcel is engaged in a public calling as truly as the great express companies; and that the railroads were engaged in a public calling in their feeble beginnings as well as in their present development. If size or success is, as the opinion holds, the test by which the existence or nonexistence of a public calling is to be determined. I do not know where to draw the line or when in the course of its growth a business which before was private becomes public. The test of size and success is a very different test from that of a virtual monopoly. The opinion holds that the business of insurance is affected with a public interest, not because of the combination which is to be dissolved. but because it is an important business necessary in modern life. The reasoning applies as well to a single company as to a combination of many companies. In fact, the decision goes upon the ground that the court has the right to regulate the business of each separate company because it is affected with a public interest, and to prevent each separate company from making the contract in question. If this is correct, the Munn Case is authority for the extension of the same regulation to individual insurers. therefore important to determine whether the right to regulate insurance companies, which has long been exercised, rests upon the ground that they are affected with a public interest. The expression "affected with a public interest" is an unfortunate one. Judge Cooley, years ago in discussing Munn v. Illinois, was careful to warn us against the danger of giving too broad a meaning to these words. Cooley's Constitutional Limitations, 736. He says: "The mere fact that the public have an interest in the existence of the business, and are accommodated by it, cannot be sufficient, for that would subject the stock of the merchant. put an end to the monopoly is to cut off the and his charges, to public regulation. The

public have an interest in every business in | L. 156), under which any 20 men of sufficient which an individual offers his wares, his merchandise, his services, or his accommodations to the public; but his offer does not place him at the mercy of the public in respect to charges and prices." He then proceeds to explain Munn v. Illinois as resting upon the virtual monopoly, the very condition which the present decree undertakes to destroy, and he classifies businesses which are affected with the public interest as follows: "(1) Where the business is one the following of which is not of right, but is permitted by the state as a privilege or franchise. Under this head would be comprised the business of setting up lotteries, of giving shows, etc., of keeping billiard tables for hire, and of selling intoxicating drinks when the sale by unlicensed parties is forbidden; also the cases of toll bridges, etc. (2) Where the state, on public grounds, renders to the business special assistance by taxation or otherwise. (3) Where, for the accommodation of the business, some special use is allowed to be made of public property or of the public easement. (4) Where exclusive privileges are granted in consideration of some special return to be made to the public." The business of insurance against fire is said to come within these classes, because it is regulated by the state. and companies which cannot satisfy a certain standard of solvency and comply with certain conditions are not allowed to do business in the state. It sounds rather strange to find that the burdens and requirements imposed by 46 different states, from which insurance companies have made vain attempts to escape since the decision of Paul v. Virgivia, 8 Wall, 168, 19 L. Ed. 357. are really in the nature of privileges and franchises, because they exclude from competition all companies which cannot attain to the legislative standard or comply with the legislative conditions. These regulations might indeed amount to privileges and franchises if the state bound itself not to relax them or not to admit other companies on less onerous terms; but there can be no privilege or franchise where the state grants nothing, and the restriction of competition by means of these salutary regulations does not amount to an agreement on the part of the state to continue them. The Legislature may to-day adopt regulations which would require a company to have a capital of a million dollars, and after the companies that could do so had complied, perhaps with great difficulty, with the legislative requirements, those requirements might be reduced and the companies with large capital would have Indeed, the Legislature, far no redress. from making these regulations amount to the grant of a special privilege, has taken pains to provide for insurance on the mutual plan and for the formation of associations

substance may insure as individuals. The state has been careful not to grant special privileges to what are called the "old-line" insurance companies, such as are concerned in the present case, but has only imposed regulations and restrictions necessary to insure solvency. It is true that the companies having a New Jersey charter have a privilege and franchise, and that the companies of other states which are admitted to do business in this state may also properly be deemed to acquire a privilege by that permission, and I do not deny the state's power of regulation arising from these facts; but that power rests upon the reserved power of the state to control its own corporations, and upon its absolute power to admit or refuse to admit foreign corporations to do business in the state. It does not rest upon the view that these particular corporations known as insurance companies are peculiarly constituted and peculiarly affected with a public interest. Under this power the Legislature has the right to amend the charters of corporations, at least those which have received their charters since the enactment of the act of February 14, 1846 (P. L. p. 16), which now appears as section 4 of the corporation act (Laws 1896, p. 278)—a class which probably includes all of the defendants in this case (although their charters have not been put in evidence); and it has the right to impose additional conditions upon foreign insurance companies. But the right to regulate the business of corporations is very different from the right to regulate the business of individuals. Corporations come within the first of Judge Cooley's classes, but individual insurers, who under the form known as "Lloyds," have become important in England and may become important here, do not exercise their business as one of privilege but as one of constitutional right, by which they may acquire property, and, if they are to be regulated at all, are to be regulated by virtue of the police power, just as the practice of medicine and law may be regulated since the decision of Dent v. West Virginia, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623. The distinction is important, for the police power and the power to regulate corporations must be exercised by the Legislature, and our Legislature has significantly failed to act.

Although our Legislature can determine the conditions on which foreign companies can do business in the state, it cannot prevent them from underwriting New Jersey risks if they choose to do so at their own domicile. Allgeyer v. Louisiana, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832.

The remedy for the evils supposed to be due to the compact now condemned by the court has been in the hands of the Legislature ever since the Newark Fire Insurance Exknown as "Lloyds" (Act March 26. 1896; P. change was formed in 1902. It was simple

and required no litigation to establish its efficacy, but the Legislature has failed to prescribe any additional requirements, and, as far as the foreign companies are concerned, has allowed the superintendent of insurance to renew their licenses in each successive year. It is not for the court to add to the legislative requirements. Such has been the holding of this court with reference to the statutory signals required to be given by railroads; and I think our decision in that respect is applicable to the present situation. The reason why the Legislature has failed to act is probably the same reason which led the Legislature of Missouri, in passing a statute against combinations of this character, to exempt from the operation of the act cities of more than 100,000 inhabitants. State v. Firemen's Fund, 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363. It has a solid basis in the greater fire hazard in the larger and more compactly built cities, many of which are built of frame structures and consist of extraordinarily hazardous risks, where regulations such as those of the Newark Fire Insurance Exchange are peculiarly desirable for the public safety. The failure to exercise the legislative power to forbid the present arrangement is conclusive evidence that, in the view of the Legislature, it was not inimical to the public interest. There is no reason why the Legislature should not have exercised this summary and extreme power which is not applicable to the exercise of the same power by this court. For us to decide that this business has been continued illegally for all these years is to suggest that the Legislature has failed in its duty. I cannot believe that that accusation is just.

The distinction between the power of the Legislature to control corporations and the control by the courts upon the ground that the business is affected with a public interest is an important one in its effects, aside from its application to individuals. One of the most important characteristics of a business affected with a public interest is that those engaged in its conduct must serve all who come, just as the innkeeper or a ferryman or a common carrier must, and it would be quite impossible to hold that this prominent and essential characteristic of a business affected with a public interest applies to an insur-The court in its opinion ance company. shrinks from so holding. An insurance company is certainly at liberty to reject, absolutely, and without assigning a reason, risks which are too hazardous to be insured at all, or in which experience has failed to establish a basis for rates of premium, or in which the moral hazard is bad. In such cases the insurance company must decline to insure if it is to hold itself ready to pay natural losses of honest insurers. The fact that the insurance companies cannot, if the business is to be successfully conducted, insure all who offer, is itself enough to show the error into which the court has fallen in holding that

the business is one affected with a public interest.

The definition given by the court to the expression "affected with a public interest" loses sight entirely of the distinction upon which the cases rest. All of them go back to what Lord Hale says in the passage quoted in Munn v. Illinois. The right to regulate ferries was put upon the ground that they were really a part of a public highway. As to a wharf or crane. Lord Hale says that a man may set up one and take what rates he and his customers can agree upon, "for he doth no more than is lawful for any man to do, viz., makes the most of his own"; but he adds: "When the wharf is one to which all must go, because it is the only wharf licensed by the Queen, or because it is the only wharf at the port (as it may fall out where a port is newly erected), then arbitrary and exclusive charges cannot be taken." is the view that Prof. Wyman advocates in the article referred to, and puts the right to regulation upon the more tenable ground of a virtual monopoly, not upon the size or success of the business. It is the necessity of public regulation in such cases that justifies what would otherwise be an unwarrantable interference with a private business. Whether there can be a virtual monopoly of mere contracts of pecuniary indemnity or not, it is reasoning in a circle to say that, because a combination becomes effected with a public interest by reason of its being a virtual monopoly we can destroy the monopoly and still retain the quality of being affected with a public interest. It is hard to see how the business of insurance can become a virtual monopoly, since, under the decision in Allgeyer v. Louisiana, it is open to all the world, regardless of state regulations, so long as the contracts are not made in the state, and even such monopoly as exists by virtue of the legislative restrictions upon the business is created by the Legislature itself, which has found it wise to restrict the business to certain companies and individuals in the public interest.

Munn v. Illinois has been frequently reviewed, but the diligence of counsel and of this court and my own researches have failed to reveal any case before this in which it has been held that the fact that a business was successful and that it was a useful or necessary adjunct of modern society was sufficient to bring it within the purview of that case. Budd v. New York, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247, certainly explained the earlier case on the view I suggest, and I do not know what other test is to be adopted unless we include all useful employments in the class. It must not be overlooked that what Munn v. Illinois decided was that the charges of individuals might be regulated where their business was affected with a public interest. I think the upright lawyer or even the skillful advocate are essential to the conduct of a civilized society.

and no one would deny the absolute necessity for the proper care of human life by the skillful physician and surgeon. Logically the court must hold that as soon as the lawyer or advocate, the physician or surgeon, becomes so skillful that his services are of the utmost value, then the practice of his profession becomes affected with a public interest, and his fees for a skill which may be quite unique become the matter of public regulation. I cannot conceive the court carrying the reasoning of the opinion to the logical end, but where it is to stop I do not know. I think, therefore, that the court fails in its first proposition that the business of insurance is affected with a public interest within the meaning of the cases. The cases in which a similar result has been reached have been under statutes of the different states. State v. Firemen's Fund, 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363; Hartford Fire Ins. Co. v. State, 76 Ark. 303, 89 S. W. 42; State v. Phipps, 50 Kan. 609, 31 Pac. 1097, 18 L. R. A. 657, 34 Am. St. Rep. 152; People v. Sheldon, 139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221, 36 Am. St. Rep. 690, was not an insurance case, but that also arose under a statute. In states which, like New Jersey, have no statute, a different result has been reached. Thus in Ætna Ins. Co. v. Commonwealth, 106 Ky. 864, 51 S. W. 624, 45 L. R. A. 355, the Kentucky court held that contracts regulating insurance were not within a statute prohibiting combinations to regulate, control, or fix the price of any merchandise, manufactured articles, or property of any kind, and that a combination for the purpose of maintaining rates of insurance, although it might be a void contract, was not an indictable offense at common law. The indictment in that case was for conspiracy to stifle free competition among fire insurance companies and their agents. And in Queen Ins. Co. v. State ex rel. Atty. Gen., 86 Tex. 250, 24 S. W. 397, 22 L. R. A. 483, the Texas court held that the Texas statute did not apply to insurance, and that a combination of fire insurance companies to fix uniform rates and agents' commissions, though possibly unenforceable as an unreasonable restraint of trade at common law, was not enjoinable by the public, nor a ground for forfeiting franchises, "since the business is not one in which the public has an interest, as in that of a common carrier or other corporation having the power of eminent domain, or of a dealer in a staple which is a prime necessity of life; nor is it a professional service to which the public is entitled." In Continental Ins. Co. v. Board of Fire Underwriters (C. C.) 67 Fed. 310, Mr. Justice McKenna held that a board of fire underwriters formed under an agreement providing for the regulation of premium rates, the prevention of rebates, the compensation of agents and nonintercourse with companies not members, was not an illegal

purpose by lawful means would not be enjoined at the instance of a company not a member of the association. In Liverpool, L. & G. Ins. Co. v. Clunie (C. C.) 88 Fed. 160, Circuit Judge Morrow held that the fact that a number of foreign insurance companies doing business in the state were members of an illegal combination to suppress competition would not prevent them from maintaining a suit to enjoin the state insurance commissioner from illegally revoking their certificates to do business, and he quoted the Continental Ins. Co. Case above cited as deciding that the association was lawful and its purpose legal. It will thus be seen that in the cases in which a similar question has arisen, where there was no statute, the courts have uniformly reached a result different from that now entertained by this court. No one would deny the high standing of Mr. Justice Harlan, the senior judge in service of the United States Supreme Court. In his concurring opinion in Carroll v. Greenwich Ins. Co., 199 U. S. 401, 414, 26 Sup. Ct. 66, 69, 50 L. Ed. 246, he touched upon this subject, and his language shows that he was fully sensible of the very considerations now expressed in the opinion of this court, but, instead of suggesting that the matter could be controlled upon common-law principles in the manner that we now adopt, his language shows that he evidently thought that the way to reach it was by legislation. He says: "The business of fire insurance is of such a peculiar character, so intimately connected with the prosperity of the whole community, and so vital to the security of property owners, that it is competent for the state to forbid combinations and agreements among fire insurance companies doing business within its limits in reference to rates, agents' commissions, and the manner of transacting their business. If in the judgment of the state the people who desire insurance upon their property are put at a disadvantage when confronted by a combination or agreement among insurance companies, I do not perceive any sound reason why, preserving the individual right of contracting, it may not forbid such combinations and agreements, and thereby enable the insured and insurer to meet on terms of equality. Surely the state could enact such a regulation with reference to companies organized under its own laws. If that be so, it cannot be that such regulation may not be made applicable to foreign insurance companies doing business in the state only by its consent." The control of corporations by state enactment, as Justice Harlan suggests, is a very different thing from action by the court where the state, through its authorized agents, has persistently for years failed to act.

rates, the prevention of rebates, the compensation of agents and nonintercourse with companies not members, was not an illegal conspiracy, and the accomplishment of its has been supposed to be for the court to re-

fuse to enforce the agreement. The reason | is not far to seek. If the parties to an agreement are all satisfied with it and find it to their interest to conduct their business in harmony and without competition, no power can prevent them from doing so, short of the absolute prohibition of the business. The courts cannot make men compete who are determined not to compete. If, however, they are not satisfied with the agreement and do not desire to conduct their affairs in harmony, but prefer to compete, the agreement will not stand in their way as long as the courts refuse to enforce it. An injunction is either brutum fulmen or is unnecessary. A similar question arose in Meredith v. Zinc & Iron Co., 55 N. J. Eq. 211, 221, 37 Atl. 539, 543, where Vice Chancellor Pitney held that the buying up by one corporation of the property of another, and consolidating the whole into one business to the extent and in the manner provided for in the agreement there in question, was not contrary to public policy, nor did it tend to create a monopoly; and he added:

"By the law of the land these owners have the right to exercise their own judgment as to when, if ever, and how, they will spend their money in preparing their property for market and rendering it fit for use by mankind. Now I am unable to find any foundation either in law or in morals for the notion that the public have the right to have these private owners of this sort of property continue to do business in competition with each other. No doubt the public has reasonable ground to entertain the hope and expectation that its individual members will generally, in their several struggles to acquire means of comfortable existence, compete with each other. But such expectation is based entirely upon the exercise of the free will and choice of the individual, and not upon any legal or moral duty to compete, and can never, from the nature of things, become a matter of right on the part of the public against the individual. In fact, the essential quality of that series of acts or course of conduct which we call competition is that it shall be the result of the free choice of the individual, and not of any legal or moral obligation or duty."

The control of the supply of zinc ore, necessarily limited to the already existing natural deposits, is undoubtedly as important for the public as a partial control of the moneyed capital of the world which is limited only by the wealth of the world and is constantly increasing in amount. The Meredith Case was affirmed by this court on the opinion of Vice Chancellor Pitney, 56 N. J. Ed. 454, 41 Atl. 1116.

Twenty years ago we had occasion to consider a question similar to that which arose in Munn v. Illinois. The Delaware, Lackawanna & Western Railroad Company filed a bill to compel the Central Stockyard & Transit Company to receive cars containing live they are not a public employment within

stock, and Vice Chancellor Van Fleet recognized that the case was similar to Munn v. Illinois; in fact, the stockyard in that case was the only place in Jersey City to which the railroad could deliver live stock. D., L. & W. R. R. Co. v. Central Stockyard & Transit Co., 45 N. J. Eq. 50, 61, 17 Atl. 146, 151, 6 L. R. A. 855, Vice Chancellor Van Fleet said:

"The part of the opinion of the majority of the court which is most pertinent to the question now under consideration is that in which it is said: 'It matters not in this case that these warehousemen had built their warehouses and established their business before the regulations complained of were adopted. What they did was, from the beginning, subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authority for the public good.' From this statement of the law, it would seem to be undeniable that, until the proper public authority intervenes and establishes such regulations as it may deem necessary for the public good, the owners of property devoted to a public use of this character retain complete and absolute dominion over it, and may exclude any part of the public from its use that they see fit. Until the body politic puts in exercise its power to control the use of such property, its owner may use it as he pleases.

He adds that the duty to receive the live stock did not rest upon the stockyard by force of any general rule of law, and "the court; to sustain the complainant's claim, must be able to find evidence of an intention on the face of the statute so clear and strong that it may without fear of usurping legislative power declare that such intention is part of the legislative will."

This opinion was approved in this court, where the decree was affirmed without further reasoning. 46 N. J. Eq. 280, 19 Atl. 185. Justices Dixon and Magie dissented, but upon the ground that the charter of the stockyards required the business to be located upon public navigable waters near the terminus of great trunk lines of railroad, and gave them power to build railroads, to lay tracks across public streets, and invested the company with authority to make police regulations the violations of which would subject the offender to arrest without warrant and to fine and imprisonment, and expressly declared that the business of the company should be that of a general stockyard. They laid stress upon the use of the word "general." The dissenting justices recognized that it followed as a necessary consequence that the company was bound to deal with all members of the community impartially and on reasonable terms. This is, indeed, a necessary consequence of a public employment; and the very fact that it is inapplicable to insurance companies is conclusive that

case goes contrary, therefore, to the captes. decisions of this court, and is unwarranted. as far as I know, by any case in any other No such case is cited. jurisdiction. therefore, it is necessary, as the opinion says, in order to sustain the conclusion of the court, to hold that the business of insurance is a public employment, the basis upon which the result is reached fails.

The contract is said, however, to be ultra vires because it amounts to a delegation by the board of directors of the right and duty to manage the affairs of the corporation. I think it is unnecessary to discuss the general question as to the extent to which the board of directors may delegate to others the execution of acts for the corporation. Obviously, a very large portion of the acts of a corporation must necessarily be done by subordinate agents, and I understand that the rule is that the duty of the directors is only to exercise a general supervision and direction of the affairs of the corporation. Morawetz. § 536. This case does not amount to a delegation of authority at all. It is merely an agreement by the constituent companies that they will not issue insurance in Newark at less than the rates established by the Exchange. I know of no provision of law, nor is any pointed out in the opinion, which requires any one of these insurance companies to issue any insurance whatever in the city of Newark. As far as appears, all of them are at liberty to decline risks in the territory covered by the Exchange. Certainly the foreign companies are under no legal obligation to issue insurance in that locality. If they are free to refuse to issue insurance at all, they must a fortiori be free to refuse to issue except at certain rates. By the agreement the constituent companies do not bind themselves to issue insurance policies at the rates fixed by the Exchange, but merely not to issue them at any lower rates. The power of the directors to manage the affairs of the company, no doubt, includes the determination of the question whether or not the company will issue any particular policy or assume any particular risks, or will do business in any particular place, and it is no abdication of power to decline the business except upon certain terms. It is rather an exercise of the power of general supervision and direction. It is no more an abdication or delegation of power to refuse to issue policies in Newark except at certain rates, than it would be to refuse to issue policies at all in San Francisco. Since the companies are free to decline all risks, I do not see any logical reason why they may not agree in advance upon the rates at which they will accept the risks. In substance, what the insurance companies say is this: The Exchange will establish rates; if we choose to do business in Newark at all, we will do business at those rates, but it is still open to the companies to accept or decline any

the definition. The reasoning of the present | particular policy. But for the respect which I entertain for my Brethren, I should think it absurd to say that an agreement not to do, except on certain conditions, what they are at linerty not to do at all, amounts to a merger of the companies. In fact, as the insurance business is conducted, the question of premium rates must necessarily be left to skilled underwriters familiar with the conditions in the particular locality. All of these companies probably do business in many different localities, in many different states, under widely varying conditions of hazard. It is quite impossible for any board of directors actually to determine the rates in any particular place, and that is not their function, but the function of professional underwriters. Again, the value of property has become so great that perhaps a majority in amount of the insurance issued is upon risks which cannot be assumed by one company alone, without exposing its assets to undue hazard and putting too many eggs in one basket; consequently the practice has grown up of insurance companies uniting and each writing a part of the amount on the same risk. It must be that companies have the right to agree upon the rate on such risks; and, if they have the right to agree, they certainly have the right to agree to insure at a rate to be fixed by a skilled underwriter for a whole city. This is no delegation of the actual function of the directors, which is to make contracts, and not to determine rates. The agreement does not give to any one company any control over the assets and management of another. It merely establishes a convenient way by which uniform rates may be determined, leaving each company free to accept or decline the risk as it chooses, and to manage its own affairs.

The case of Stockton v. Central R. R. Co. is an illustration of an ultra vires act restrained at the suit of the Attorney General. But Chancellor McGill expressly put the case upon the ground that the lease there in question was made, not only without legal sanction, but in defiance of an express prohibitory statute. 50 N. J. Eq. 489, 25 Atl. 942. This case would be analogous to that if the Legislature had enacted a statute forbidding contracts like the present. The failure of the Legislature to do so is, as I have already suggested, in effect a legislative permission.

It is said that the contract is illegal because it is in restraint of trade, and the argument is that the state must have power to restrain corporations from entering into any illegal contract. It has been decided in this state, after most mature consideration, that contracts in restraint of trade are not necessarily illegal. Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612. We have recently reaffirmed this view in Fleckenstein Bros. Co. v. Fleckenstein (N. J.) 71 Atl. 265. Even under the federal anti-trust act of July

2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1 1901, p. 3200), Mr. Justice Brewer, who had concurred with the majority of the court in the early case of United States v. Freight * Association, 166 U.S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, said, in his concurring opinion in Northern Securities Co. v. United States, 193 U. S. 360, 24 Sup. Ct. 436, 48 L. Ed. 679, that the ruling in that case, instead of holding that the anti-trust act included all contracts, reasonable or unreasonable, in restraint of interstate trade, should have been that the contracts there presented were an unreasonable restraint of interstate trade, and as such within the scope of the act. From the very earliest times contracts in restraint of trade, when limited to a particular locality or to a particular time, have been treated as valid. Such is the contract in the present case. It is limited to the city of Newark and the immediately adjacent towns coming within the same fire risk; and it is limited in time, because any of the companies may withdraw from the agreement upon 30 days' notice. I doubt if a case can be found where a contract thus limited in time and place has been held to be an illegal restraint of trade. If I am wrong in that, an examination of the contract itself indicates its real object. That object was First, to prevent rebating by agents of the insurance companies; and, second, to adopt concerted measures to decrease the fire risk. It is probable that there would be little difficulty in the companies themselves agreeing upon rates of insurance. The difficulty is shown to have arisen from the fact that the agents of the companies were allowed a commission on the premiums, and were enabled, by means of surrendering a portion of their commission by way of rebate to the assured, to compete not only with each other, but to compete even with the companies they represented, and to write insurance at lower rates than the company itself offered over its counter. We have been at pains in this state to pass an act making it criminal to allow rebates from the premium in the case of life insurance; and the federal government during the last few years has made strenuous efforts, by means of legislation and litigation, to prevent what have been considered the evils of rebating in interstate commerce. The evil, of course, is that one man is enabled, by his greater skill or influence, to secure service at a lower rate than his neighbor. It seems to have been considered by our Legislature in the case of life insurance, by the federal government in the case of contracts of carriers. that uniformity of rates was even more desirable than low rates. I cannot think that it is illegal for fire insurance companies to attempt to prevent, by common agreement, what the Legislature in the case of life insurance companies has made criminal by

practically conceded at the argument that this was the real complaint of the Attorney General, and that it was not that the rates fixed by the companies were extortionate. but that the agreement was so drawn as to prevent any discount from those rates to favored insurers. Another prime object of the agreement was to secure improvement in the fire hazard by allowing deductions from the premium in case various precautions were taken by the assured. The natural tendency of this effort by the concerted action of the companies to decrease the fire loss is not detrimental to the public, but, on the contrary, beneficial; and there is no reason to doubt the evidence, which was uncontradicted, that the rates of insurance in the United States are less in states where compacts of this kind exist than in states where such compacts do not exist. It was proved that this laudable effort to decrease fire loss could not be accomplished except by the concerted action of the companies and an agreement upon rates. It may be true that such an agreement also has a tendency to maintain rates, but every agreement by which two men unite and conduct their business together instead of competing one with the other has the same tendency; and while an agreement, the only object of which was to stifle competition, might well be declared illegal, it is going much farther to hold that an agreement, the main object of which is for proper purposes beneficial to the public, becomes illegal because, as an incidental result, it may by possibility tend to prevent competition. The proof in the case shows that the rates in Newark are lower than in most places, and there is a total failure to show that the rates are more than enough to make good the losses insured against. pay the expenses of conducting the business, and a reasonable return upon the capital invested. The evidence shows that in some localities near by, where rates are lower, the business has been conducted at a loss. Indeed, the complaint at the original argument was not that the companies were making unreasonable profits on their whole business, but that they were using profits made in Newark to recoup losses in San Francisco. This argument overlooked the whole theory of insurance, which is to distribute the hazard. It is for the public benefit that the business should not be conducted at a loss, for insolvency sooner or later is the necessary consequence, and it is to the public interest that men who invest their money in the business of insurance against loss by fire should be compensated by a proper return, for otherwise there would be no inducement to engage in this highly useful employment, which serves the admirable purpose of distributing through society at large the shock of the loss by fire which might prove ruinous to any single man or association. It is said that there statute. It even seems meritorious. It was is no provision in the contract which requires

the company to set aside any portion of the | premium in order to increase the security of the assured, but the desire of the companies for the continued successful conduct of their business is sufficient motive to accomplish this end. We must assume that the companies are honestly managed with a view to a continuance in business (as is the ordinary case), and that they will be careful not only to comply with the law but to lay aside, as most of them do except in cases of unexpectedly great conflagrations, a sufficient surplus to meet the unusual hazards of the business.

The question, however, seems to me to be entirely set at rest by the decision in this court, in the case of Raritan River Railroad Co. v. Traction Co., 70 N. J. Law, 732, 743, 58 Atl. 332. There a railroad company agreed with a traction company which paralleled its line that during a limited period the railroad company would not reduce its present rates of fare unless required by law. It was held that this agreement was valid and not contrary to public policy as established in this state. I fail to see how an agreement between common carriers, everywhere conceded to be engaged in a public calling, which is intended purely for the purpose of preventing competition, is valid where the right of the company is limited to a maximum rate fixed by law, and an agreement which has merely a tendency to prevent competition as a mere incident of lawful purposes becomes invalid when the company is not limited by any maximum but is free to charge any rate that it pleases. The case seems stronger to me in favor of the validity of an agreement in the latter case, where the company is unhampered by restrictions of statute. The legislative permission in the railroad act is not to charge three cents per mile absolutely, but such rate as the company shall think reasonable and proper, provided it is not more than three cents per mile. So, in this case, the companies are entitled to charge such rates as are reasonable and proper without any limitation, except by the court, which, upon the theory of the opinion, would be entitled to determine what are reasonable and proper rates. What difference in principle can there be between an agreement to prevent competition where there is a fixed statutory limit which cannot be exceeded, and a similar agreement where the limit is what the court determines to be reasonable and proper? The fact that the railroad act authorizes the company to charge what it thinks reasonable and proper does not alter the case, for insurance companies also may charge such rates as they think are reasonable and proper. In the case cited, competition between two common carriers was absolutely stopped by the agreement which we said was valid. In neither case is the question of the the more stable landmarks of established reasonableness and the propriety of the law.

charges within the control and discretion of the company; that is, in case the insurance companies are subject to judicial regulation in this respect, as is the necessary result of this decision. If the case is to be distinguished, it can only be upon proof that the rates charged in the present case were unreasonable and improper, and there is an entire failure of such proof. The opinion of the court does not venture to suggest that the rates are higher than are required to pay losses, the expenses of conducting the business, and a reasonable profit; that is, higher than suffices to induce men to enter the business of insurance and to maintain sol-

Even if the contract were invalid, I agree with the learned vice chancellor that the only effect is that it is unenforceable. It is sufficient to justify that view to quote from the famous opinion of Judge Taft, upon which the learned vice chancellor relied (United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122), where the court said that contracts that were in unreasonable restraint of trade at common law were not unlawful in the sense of being criminal or giving rights to a civil action for damages in favor of one prejudicially affected thereby, but were simply void and were not enforced by the courts, and that the effect of the act of 1890 (the act of Congress to protect trade and commerce against unlawful restraints and monopolies) is to render such contracts unlawful in an affirmative or positive sense and punishable as a misdemeanor, and to create the right of civil action in damages in favor of those injured thereby, and a civil remedy by injunction in favor of both private persons and the public against the execution of such contracts and the maintenance of such trade restraints. Judge Taft, in this passage, distinctly calls attention to the fact that the civil remedy by injunction was introduced into the federal jurisprudence by the act of 1890, and that it did not exist at common law. If this decision is good law-and no one questions it-there is no remedy by injunction in this state, for the reason that we have no such statute. Courts of equity do not issue injunctions unless for the purpose of preventing irreparable injury. Such a result cannot be had by this injunction. If the companies choose to continue the present rates, the injunction cannot prevent them. If they do not choose to do so, the compact is no obstacle. only probable effect of this decision is to make it difficult for the companies to prevent rebating by their agents. The question of the public policy of rebating is outside my province; it is for the Legislature, and not for the court. I am unwilling to assent to judicial legislation; I prefer to stand by ST. JOHN THE BAPTIST GREEK CATHO-LIC CHURCH v. BARON et al.

(Court of Chancery of New Jersey. May 27, 1909.)

1. Specific Performance (§ 8*)—Nature in General — Equitable Jurisdiction — Dis-CRETION OF COURT.

An action for specific performance is purely equitable, and the relief awarded rests in the sound judicial discretion of the court.

[Ed. Note.-For other cases, see Specific Performance, Cent. Dig. §§ 17, 18; Dec. Dig. § 8.*]

2. Religious Societies (§ 4*)—De Facto CORPORATION.

Where a religious society is incorporated under the wrong statute, and is not incorporated under the religious societies act, it becomes a de facto, if not a de jure, corporation, and persons dealing with it are barred from questioning the authority of such corporation.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. \$2 10, 11; Dec. Dig. \$4.*]

3. Specific Performance (§ 127*)-Relief

8. Specific Performance (§ 127*)—Relief Awarded.

Where the vendor's failure to complete a contract for the sale of real estate is due to the failure of the purchaser to make a payment at the proper time, whereby the vendor is obliged to borrow money and pay interest thereon, and incur other expenses, the court, on awarding specific performance of the contract, will decree that the purchaser, in addition to paying the amount due on the purchase price, should pay the vendor the interest incurred on the loans made by it, and the insurance premiums and water rents on the property paid by the vendor, and the necessary attorney's fees paid by the vendor because of the purchaser's paid by the vendor because of the purchaser's failure to make payment.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 406-411; Dec. Dig. § 127.*]

Action between St. John the Baptist Greek Catholic Church and Michael Baron and oth-Judgment for plaintiff.

William J. Kearns, for complainant. Arthur R. Denman, for defendant First Church in Newark of the Evangelical Association.

HOWELL, V. C. (orally). This suit is brought by a religious corporation known by the name of the St. John the Baptist Greek Catholic Church for the purpose of enforcing the specific performance of a contract for the purchase of lands. The contract was made on February 23, 1907, and the vendor named therein is the First Church in Newark, N. J., of the Evangelical Association.

I may perhaps begin my judgment by reminding counsel of the equitable character of this proceeding. There is no proceeding, no jurisdiction, no form of remedy that is administered by a court of equity that is quite so much within the purely sound equitable discretion of the court as is the action of specific performance of contracts. I do not mean to say that it rests in the capricious discretion of the court, but in the sound. judicial discretion of the court, whether in the law because it was organized under a

any case the decree of specific performance will be awarded or not. It is a purely equitable jurisdiction. It will not be used for the purpose of inflicting hardship upon anybody upon either party to the suit. It will not be used for the purpose of forcing an unmarketable title or a title about which there is any doubt, or, if there is any equitable circumstance which would militate against the decree, the court would consider that equitable circumstance and give judgment accordingly, and it may grant the relief upon such terms and conditions as it may deem to be equitable and just. Now having premised that much about the jurisdiction and its extent and its character, I will get down to the facts in this case.

The consideration money of this contract was \$17,500. Seven thousand five him 'red dollars was agreed to be paid in installments, beginning at the time of the execution of the contract, and running down to the 2d day of December, 1907, up to which time the contract required that there should be paid \$7.500 in cash. The contract also provided that just one month later, on January 2, 1908, the remainder of the purchase money, \$10,000, should be paid in cash. It is my opinion that the vendee knew and should therefore he chargeable with knowledge of the fact that the vendor was about to build a new church, and it must be charged, also, with knowledge of the fact that the installments mentioned in this contract were made with reference to its requirements for money to meet its payments to its contractors for its new building. The installment payments were all made, some of them, perhaps most of them, after the time agreed upon; but when it came to January, 1908. and the payment of the \$10,000 on the second of that month, the vendee made default. Ιt was testified to that they were late in rearly all the payments of the \$7,500 that was to be paid in installments. The day for the performance of the contract was extended from January 2d by four separate and distinct agreements in writing until the 1st day of June. That was the final day on which the final payment was to be made, and reyond that time there has been no extension granted on the part of the vendor, and the reason for the default at that time or a great reason for it at least was the fact that there were dissensions in the church, that there was a faction which was led by Mr. Baron and his friend or his friends who eventually seceded from the church, and formed a church of their own on College Place in this city. Now, I take it to be a fact that the old corporation, namely, the vendee mentioned in this contract, is now a corporation and has been since the date of its organization in 1906. It may be that its existence is not exactly in accordance with the provisions of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

corporations not for pecuniary profit, whereas under the case of Richards v. Dover, 61 N. J. Law, 400, 39 Atl. 705, it might be held in quo warranto proceedings that it was not properly organized under that law, but should have been organized under the religious societies act. However, it is a corporation, and under a long line of cases in New Jersey, of which Vanneman v. Young, 52 N. J. Law, 403, 20 Atl. 53. is one, the corporation if not a de jure corporation is a de facto corporation, and it is well settled that persons dealing with a de facto corporation are barred from questioning the authority of the corporation with which they deal. The corporation is, as I say, in existence. It is affiliated with the Roman Catholic Church. It is supervised by a bishop who is appointed by the Roman See, and in all respects is a constituent part of the Roman Catholic Church; the only difference being, as I understand the testimony, that the members of this church worship according to what is known as the Greek rite, that differing from the Latin rite only in ceremonials, and not in essentials. I likewise find that there has been a regular succession of trustees, and, under the statute under which this corporation is organized, the trustees are the governing body. The congregational committee of 12 concerning which there was some testimony is a mere voluntary committee, and has no right or authority to interfere in the government of the affairs of the corporation. Now, it appears and is explained by counsel for the vendee in his argument that there was a new corporation organized or attempted to be organized, or perhaps I ought not to go so far as that—there was a certificate of incorporation executed under the religious societies act by three of the gentlemen who occupied the position of trustees of this corporation, together with Bishop O'Connor and Bishop Ortynsky, who signed the same as Vicar General. That certificate was filed in the office of the county clerk, but no further proceedings appear to have been taken under it. There does not appear to have been any organization of a corporation, any membership, any place of worship, nor anything in the world that would give it vitality as a religious corporation. As explained by counsel for the vendee in his argument, it was organized for the purpose of curing any possible irregularity that there might have been in the organization of the complainant corporation, so I put the new corporation, which goes by the name of St. John the Baptist Catholic Church according to the Greek rite, of Newark, N. J., out of the case altogether.

Now, we come back to what took place in June or during the months that elapsed between January 2, 1908, and the 1st day of June. 1908. I think that it must have appeared to the vendor that there were rival parties in this church at that time during

statute which authorizes the organization of | party which claimed to be the board of trustees legally elected; and that there were other people who likewise claimed to be the ruling people of the church. I think the vendor was justified in declining to deal with either party until the rights of both parties had been actually settled by some court of competent jurisdiction. I do not see how it would have been safe for the vendor to have mixed in with the situation, as it was on the 1st day of June, 1908, and it was all the fault of the vendee. They permitted Baron and Hrycej to appear as two of the ruling people of the church, permitted them to take the money of the church, permitted Hrycej to be elected treasurer, permitted them to represent themselves to the vendors as people who had the say about what should be done, therefore wholly the fault of the vendee, because I find that Baron was neither a trustee nor an officer of the church. So far as he interfered with the business in hand he was a mere intruder. Now, that is one of the reasons, as it appears to me, why the matter was not closed up, and the other reason was because the vendees did not have any money. Now, that was not the fault of the vendor at all. The vendor was always ready to perform. They went so far as to prepare a deed in accordance with the contract, and that deed was shaken in the faces of the vendees a number of times, and finally was made the subjectmatter of a formal tender. And still there was no response to it. That was not the fault of the vendors either. Now the complainants say, notwithstanding all these circumstances, "We think that we are entitled to a decree of specific performance"; and by their bill they offer to perform upon such terms and conditions as the court may prescribe, and that offer is repeated by counsel in the argument to-day. In the bill the complainant says: "Your orator being ready and willing and hereby offering specifically to perform the agreement in all things on its part and behalf." Now, I need not cite to counsel for the vendee the old equitable maxim that he who comes into the court of equity must do equity. He would be bound to do equity whether he made the offer to do it or not. He would not be permitted to take an equitable stand without having superadded to whatever he might say the further statement: "With all my offers I must do equity." On the other hand, I do not think it would be equitable to permit the claim in the answer of the vendors to prevail, namely, that the vendees should forfeit the \$7,500 that they have already paid. Equity never favors forfeitures. So we get down to a point finally, which is this: Whether the complainant ought to be allowed to have this contract specifically performed. I think so. I think that contract should be performed specifically; but the complainant in taking a decree for specific those various meetings; that there was one performance must take a decree which will

make the other side whole, completely whole, | friend, Levi S. Landis, against the Curtis All the expenses incurred by the vendor which can be properly chargeable to the default of the vendee in the payment of this \$10,000 must be charged up to the vendee, and the vendee may take a decree for specific performance, subject to all those payments. Now, they are as I recollect them, first, interest. The vendor was obliged to pay interest on loans which they had to have in order to make the payments on their own contract. It was not as if they were a moneyed corporation loaning money, but they had to have this money on the day for the purpose of meeting their own payments, and it appears they were put to trouble and expense and annoyance about it, and the vendee will have to pay whatever interest was actually paid out by the vendor for loans of money which were necessary for the completion of its contracts up to June 1, 1907, and interest on the whole sum of \$10,-000 from that date to the day of payment. I fancy that counsel may be able to agree upon that amount. If not, I will endeavor to fix it.

The next item which must be accounted for is the insurance premium, next the water rents. I must also charge up against the vendee the amount of money paid for the attorneys' expenses in the district court and in procuring the loans. Then, I think they also ought to pay all the costs of this suit, together with a counsel fee of \$250. Now, if the vendee desires to have a decree of specific performance, it may have a decree upon the payment of those amounts within 30 days from the date of the signing of the decree. Of course, they must pay the \$10,000 purchase money also.

(224 Pa. 400)

LANDIS v. CURTIS & JONES CO., Inc. (Supreme Court of Pennsylvania. April 12, 1909.)

1. MASTEE AND SERVANT (§ 289*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.
In an action by a 15 year old boy against

a corporation to recover for injuries to his hand while working at a dangerous machine, where plaintiff's testimony shows that the danger he incurred in putting his hand into the machine was so apparent as not to require specific in-structions, directing verdict for defendant was proper.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1112; Dec. Dig. § 289.*]

2. MASTER AND SERVANT (§ 287*)—INJURY TO SERVANT—NEGLIGENCE OF FELLOW SERVANT. Where the evidence shows that an injury to plaintiff was caused by the negligence of a fellow servant, it is proper to direct a verdict for defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1061; Dec. Dig. § 287.*]

Appeal from Court of Common Pleas. Berks County.

& Jones Company, Incorporated. Judgment for defendant, and plaintiff appeals.

On rule for a new trial Endlich, P. J., filed the following opinion:

"At the close of the evidence on the trial of this cause before the late President Judge Ermentrout, he affirmed a point submitted by defendant that 'under all the evidence in the case the verdict must befor the defendant,' and directed a verdict accordingly. The plaintiff in support of this rule for a new trial contends that there was evidence requiring the submission of the case to the jury on the question of defendant's neglect properly to instruct the plaintiff concerning the dangers incident to the operation of the machine at which he was put to work and by which he was injured; that being the ground whereon, according to the declaration, his case rested.

"Putting upon the evidence of the plaintiff the construction most favorable to him, it appears that he was a little over 15 years old; that he was put to work at the machine in question on Monday morning, June 25 1906; that he worked at it until late on Tuesday afternoon, when the accident occurred; that his business about it was to receive, take away, and keep a tally of paper boxes formed by the machine, expelled by it automatically, and sliding down an inclined plane to a table at which plaintiff was to stand; that the machine was operated, fed, started, stopped, and controlled by an operator; that occasionally a box would be spoiled and lodge in the machine, which would then be stopped by the operator while plaintiff removed the obstruction; that on the occasion in question a box thus caught in the machine; that the same was stopped; that plaintiff pulled part of the obstructing box out of the machine, and reached in again to get the rest; that at that moment the machine was started by the operator, caught the plaintiff and cut off four of his fingers; that he had had no specific instructions concerning the dangers incident to the operation of the machine or concerning his conduct and duties about it; and that on this occasion, when the machine was stopped, the operator motioned to him to remove the obstruction (an allegation explicitly denied by the operator). It is, however, perfectly clear from plaintiff's own testimony that, when he was put to work at the machine, all he was directed to do about it was to remove the boxes as they were expelled by it, and that in so doing at the place assigned him he was in a position of perfect safety beyond the possibility of any harm or danger and too far from the machine to reach into it. Whatever other orders he took, if any, he took from the op-Action by Stuart R. Landis, by his next erator, a mere fellow servant, and not at all

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the representative of the employer. Neither can there be any doubt that the risk of injury from reaching into the machine was manifest to any person possessed of the ordinary intelligence of one of plaintiff's age. It is conceded that an employe's knowledge that a machine is dangerous does not in itself relieve the employer of the duty of instruction where there may be a safe and unsafe way of working at it. Welsh v. Butz, 202 Pa. 59, 51 Atl. 591. But, as declared in Vant v. Roelofs, 217 Pa. 535, 66 Atl. 749, as regards a danger 'obvious to any one with reasonable intelligence,' 'perfectly obvious to any one,' there is no requirement of warning or instruction. It would thus appear by the plaintiff's own testimony, accepted as verity, that the danger he incurred in putting his hand into the machine (1) was not one involved in the work to which he was put by defendant or any one representing it; (2) was one so apparent as not to require specific instructions in order to observe and avoid it: and (3) became the occasion of plaintiff's injury through the act of a fellow employé in prematurely starting the machine. these circumstances it needs no discussion to show that the plaintiff was not entitled to re-

Pa.)

"But the correctness of the direction of the verdict for defendant is not to be judged of exclusively by the evidence adduced by the plaintiff. It was not based upon that, but upon the defendant's right to a verdict under 'all the evidence in the case.' An impartial view of the evidence in the case shows it to be overwhelmingly to the effect that the plaintiff was amply instructed and warned over and over again to keep his bands out of the machine and stay at the place assigned him at the table; that at the time when he put his hand into the machine and got caught the machine was running and had not been stopped at all; and that there was no obstruction of it nor anything to indicate the recent removal of an obstruction which might have caused a stop or accounted for plaintiff's leaving his proper place and reaching into the machine. On all these points the testimony is so abundant in quantity and so persuasive in character that it would seem to have been imperative upon the court to accept it. It is true that, where the plaintiff's evidence in support of his right to recover amounts to more than a scintilla, it is bound to be submitted to the jury. But whether it amounts to more than a scintilla is sometimes a question to be decided with reference to the character and degree of the evidence opposing it (Mead v. Conroe, 113 Pa. 220, 228, 8 Atl. 374; Hauser v. Railroad Co., 147 Pa. 440, 447, 23 Atl. 766), and in connection with the admitted facts in the case and those established by undisputed evidence | ELKIN, and STEWART, JJ.

(Fisher v. Scharadin, 186 Pa. 565, 568, 40 Atl. 1091). As pointed out in Newhard v. Railroad Co., 153 Pa. 417, 420, 26 Atl. 105, 19 L. R. A. 563, the controlling facts may thus be so clearly made out that a court in the due administration of justice must treat them as facts, for the same reason that it assumes the fact of plaintiff's injury-because of proof that convinces an unprejudiced mind beyond a reasonable doubt. Such is the state of the evidence here, looked at as a whole, and, however unfortunately for the plaintiff. it leaves him without a claim upon the defendant.

"The rule to show cause is discharged." Argued before FELL, BROWN, MESTRE-ZAT, POTTER, and STEWART, JJ.

Cyrus G. Derr and Edward S. Kremp, for appellant. C. H. Ruhl and G. B. & J. B. Stevens, for appellee.

PER CURIAM. It is demonstrated by the opinion of the learned judge of the common pleas that the plaintiff failed to make out a

The judgment is affirmed.

(224 Pa. 228)

COMMONWEALTH ex rel. CARSON v. CITY TRUST SAFE DEPOSIT & SURETY CO.

(Supreme Court of Pennsylvania. March 29, 1909.)

PRINCIPAL AND SUBETY (\$ 66*)—LIABILITY OF SUBETY-EXTENT.

The liability of a surety to a subcontractor establishing a claim, which, together with
the amount previously paid by the surety, exceeds the penal sum of a bond securing all persons supplying labor and materials to the contractor, will not be limited to the difference between the penal sum and the amount previously
naid but will be determined by securiously paid, but will be determined by ascertaining the per centum the creditors would be entitled to on an equal distribution among all, notwithstanding the result is a payment by the surety of an aggregate amount in excess of the penal

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 111; Dec. Dig. § 66.*]

Appeal from Court of Common Pleas. Philadelphia County.

From an order dismissing exceptions to the auditor's report in the matter of the claim of the United States to the use of the Harrisburg Trust Company, receiver of the Dauphin Bridge Company, in a suit by the Commonwealth of Pennsylvania on relation of Hampton L. Carson, Attorney General against the City Trust Safe Deposit & Surety Company, J. Hampton Moore, receiver of the City Trust Safe Deposit & Surety Company, appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER.

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Staake & Patton, and Murdock Kendrick, for is renewed here by this appeal. appellant. John Douglass Brown, Henry Wolf Bikle, and Wolfe & Bailey, for appel- covery to the difference between the amount

decree of distribution of the assets in the equal distribution between all, and as a rehands of the receiver of the City Trust Safe sult awarded to the bridge company the sum Deposit & Surety Company of Philadelphia. of \$4,536.5%. The report of the auditor was The Penn Erecting Company, having been approved by the court below, and it meets awarded by the United States a contract with our approval as well. for the erection of a public building, gave surety company will have paid on this conbond, as required by the act of Congress, tract of suretyship in excess of its legal in a penal sum conditioned that it would liability therein must be regarded as a vol-"promptly make payment to all persons supplying labor and materials in the prosecu- with the government, was exclusively for the tion of the work provided for in the afore- protection of the contractors under the Penn said contract." The obligee named in the Erecting Company. When the surety combond is the United States, the penal sum is pany entered into the covenant, it did not \$6,695, and the surety the City Trust Safe know, and could not have known, the parties Deposit & Surety Company. The Penn Erecting Company completed the building it had tract, the amounts that would be due each. contracted to erect, but in the end was large- or the times of payment, but it must have ly indebted to various parties who had supplied it with the required materials. Default having been made in the payment each was to share in the protection of the of this indebtedness, separate suits were covenant on an equitable basis. brought on the bond by the individual claim- it did so or not it is the plain and manifest ants, and judgment against principal and surety followed in each case, except in the suit of the Dauphin Bridge Company. While the suit of the bridge company was brought quite as promptly as the others, though in a different court, it alone was halted by a defense set up, and its suit was undetermined when the distribution, which is here appealed from, was made. The surety company without delay paid in full the judgment obtained against it, amounting to \$3,625.70, and, in addition, paid an uncontested account of \$219.83 in full, thus making its entire payment on account of its liability \$3,845.53. Some time thereafter the surety company passed into the hands of a receiver, as did also the bridge company. At the audit of the account of the receiver of the surety company the claim of the bridge company was submitted, and proved to the amount of \$8,082.27, by the Harrisburg Trust Company, its receiver. Its right to participate in the distribution was not denied. Not only was there no attempt to dispute the honesty and accuracy of this claim, but it was distinctly admitted that the defense set up to the action brought by the bridge company by way of set-off could not be sustained. The other defense to the action was that the surety company, having paid on account of its liability on the bond the sum of \$3,845.53, was entitled to a credit for this sum, and in no event could be required to pay to the plaintiff anything in excess of the difference between its credits and the penal sum in the bond. And this states the whole controversy appellants.

Joseph H. Slattery, John Kent Kane, which was before the auditor, and which

The auditor, instead of limiting the repreviously paid by the surety company and the penal sum, ascertained the per centum STEWART, J. This is an appeal from a the creditors would be entitled to on an Whatever the untary payment by it. Its covenant, while with whom the erecting company would conunderstood its covenant to be for the protection of all alike; that is to say, that meaning of the bond. The subcontractors, not a selected few, but all embraced in the class, are the real use parties. It matters not that their names are not written in the bond. They could not have been because the bond was a condition precedent to the awarding the contract: but the use is as clearly defined as though their names appeared. Besides, to allow the surety, either through favoritism or neglect, to work out a result which would give priority to some creditor or creditors over others, would be to defeat the very purpose the government has in view in requiring bonds for the protection of subcontractors. The surety company is without the slighest equity. It paid the judgments obtained against it with full knowledge of the fact that there was then an outstanding and unsatisfied claim of the bridge company, then in suit, for an amount which, together with the claims already liquldated, much exceeded the limit of its own liability. Yet, with knowledge of this fact, it proceeded to pay some of the creditors in full. It is no excuse to say that these payments were made to avoid execution. Threatened execution could and should have been met by appeal to the court to put its restraining hand upon the creditor who would attempt to use its process, not for the collection of his own debt solely, but in part to defeat some one else in equal right with himself, in the fund to be subjected, and that too at the cost of the surety.

> We see no merit in the appeal, and it is accordingly dismissed, at the costs of the

(224 Pa. 362)
COMMONWEALTH v. McDERMOTT.

(No. 1.)

(Supreme Court of Pennsylvania, April 12, 1909.)

FOOD (§ 1*)—MANUFACTURE OF OLEOMARGA-RINE.

Act May 29, 1901 (P. L. 327), prohibiting the manufacture and sale of oleomargarine and other products when colored in imitation of butter, is constitutional.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. § 1.*]

Appeal from Superior Court.

M. M. McDermott was convicted of a violation of the oleomargarine law, and from a judgment of the superior court affirming the same, he appeals. Affirmed.

Argued before MITCHELL, O. J., and FELL, BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

John M. Haverty and R. H. Meloy, for appellant. Alex. M. Templeton, C. L. V. Acheson, Dist. Atty., and Cyrus Gordon, for the Commonwealth.

BROWN, J. These appeals were manifestly taken for the purpose of rearguing the question of the constitutionality of the act of May 29, 1901 (P. L. 327), prohibiting the manufacture and sale of oleomargarine, butterine, and other similar products when colored in imitation of yellow butter. We ought hardly to be again called upon to declare that act constitutional. In Commonwealth v. Caufield, 211 Pa. 644, 61 Atl. 243, we said there was no reason "why we should stuff the reports" with a repetition of the decisions sustaining it.

The assignments of error are overruled, and the judgments of the superior court are affirmed.

(224 Pa. 863)

COMMONWEALTH v. McDERMOTT. (No. 2.) (Supreme Court of Pennsylvania. April 12, 1909.)

CBIMINAL LAW (§ 1211*)—SENTENCE—SECOND OFFENSE—"CONVICTION."

Where a person is found guilty of violating Act May 29, 1901 (P. L. 327), prohibiting the coloring of oleomargarine, but is not sentenced, there is no "conviction" within section 7 of the act; so that, if he commits a second offense before he has been sentenced for the first offense, and is tried therefor, he cannot be sentenced to the penalties imposed for a second conviction.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1211.*

For other definitions, see Words and Phrases, vol. 2, pp. 1584-1591.]

Appeal from Superior Court.

M. M. McDermott was convicted of a violation of the oleomargarine act, and on affirmance of the conviction by the superior court, he appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

Owen C. Underwood, John M. Haverty, and R. H. Meloy, for appellant. Alex. M. Templeton, C. L. V. Acheson, Dist. Atty., and Cyrus Gordon, for the Commonwealth.

BROWN, J. M. M. McDermott was tried and found guilty in the court of quarter sessions of Washington county on November 21, 1907, on an indictment charging him with having sold oleomargarine in violation of the act of assembly of May 29, 1901 (P. L. 327). Motions were made in arrest of judgment and for a new trial, which were overrused on January 31, 1908, and on February 10, 1908, he was sentenced for a first offense under the statute. On January 30, 1908, complaint was made against him charging him with having unlawfully sold oleomargarine on December 11, 1907, in violation of the act of 1901, and averring that he had previously been convicted of a similar offense at the preceding November term of the court of quarter sessions of the county. On February 11, 1908, a true bill was returned against him, containing a count that his sale of oleomargarine on December 11, 1907, was his second offense under the statute, as he had been found guilty of having unlawfully sold that article on November 21, 1907, and, on the verdict of the jury, had been sentenced on February 10, 1908, to pay a fine of \$200 and costs. On the indictment charging the second offense the appellant was found guilty, and, after a motion in arrest of judgment was overruled, was sentenced to pay a fine and undergo imprisonment in accordance with the provisions of section 7 of the act of 1901. The court below was of opinion that the verdict of guilty, returned November 21, 1907, was, in itself, without judgment upon it, a conviction within the meaning of the act of assembly, and if the defendant subsequently, before judgment on the verdict, unlawfully sold oleomargarine, he was guilty of a second offense within the meaning of the statute, but that, even if this was not correct, he had been sentenced the day before the bill was returned, charging him with the commission of the second offense. On appeal to the superior court this view was sustained, and, on the appeal to us, the question for our consideration is whether one can be convicted of a second offense, under the act of 1901, if, before the time of the alleged commission of that offense, he had not been subjected to judgment on a verdict finding him guilty of a first offense of the same kind.

The sale of oleomargarine, when colored in imitation of butter is made a misdemeanor by the act of 1901, carrying with it punishment by a fine or imprisonment. A distinct and substantive offense under that act is

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1997 to date, & Reporter Indexes

the sale of colored oleomargarine by one who | er and distinct one-the unlawful sale of had previously so offended against the law, and the punishment for this offense is fine and imprisonment. This, of course, means a sale after a former conviction of the same offense, for a law can never be judicially said to have been offended against until the offense against it is established in a court of competent jurisdiction.

The word "conviction" has a popular and a legal meaning. In common parlance a verdict of guilty is said to be a conviction (Smith v. Com., 14 Serg. & R. 69; Wilmoth v. Hensel, 151 Pa. 200, 25 Atl. 86, 31 Am. St. Rep. 738), and this popular meaning has been given to it when rights other than those of the one who has been found guilty have been before the courts. Such are the cases relied upon by the superior court in affirming the judgment below. In York County v. Dalhousen et al., 45 Pa. 372, the question was as to the liability of the county to pay costs after there had been a verdict of guilty against a defendant who was pardoned before sentence; and so of Wright v. Donaldson et al., 158 Pa. 88, 27 Atl. 867, in which Wright, the plaintiff, sued for his fees as a witness on behalf of the commonwealth upon a trial of a prisoner found guilty of a misdemeanor. But a very different situation is presented when one is confronted with an indictment charging him with a prior conviction of a similar offense, and the statute makes his alleged repetition of it a distinct crime, for which, upon conviction of it, severer penalties are to be imposed. In such a case the word "conviction" must be given its strict legal meaning of judgment on a plea or verdict of guilty. The severer penalty is imposed by the Legislature because that imposed for the first offense was ineffectual. The second offense, carrying with it severer penalties, is therefore not committed in law until there has been judgment for "When a statute makes a second offense felony, or subject to a greater punishment than the first, it is always implied that such second offense ought to be committed after a conviction for the first; for the gentler method shall first be tried, which, perhaps, may prove effectual." Hawkins' "Clearly Pleas of the Crown, c. 40, § 8. the substantive offense, which draws to itself the greater punishment, is the unlawful sale after a former conviction. This, therefore, is the very offense he is called upon to defend against. He cannot complain if, after suffering a former conviction and sentence, he commits a second offense of the same kind." Rauch v. Com., 78 Pa. 490.

The offense of which the appellant was convicted on this indictment was committed on December 11, 1907. It is not to be doubted, for the jury have so found, that on that day he unlawfully sold oleomargarine, and offended against the act of 1901 in selling it; but this indictment does not charge him with

the article after having been once before convicted on the charge of having unlawfully sold it. If he was guilty of this separate. substantive offense, his guilt was complete on December 11, 1907. Nothing that he subsequently did, nor anything that was subsequently done in a prosecution then pending against him, could have made his simple sale of colored oleomargarine on December 11, 1907, the separate and distinct offense for which he was indicted. Unless at that time it had been judicially determined that he had sinned once before, he was not guilty of a second offense. On that day there was no such determination. On the contrary, his motion for a new trial and in arrest of judgment were in the hands of the court, which, later on, might have awarded him another trial, to be followed by an acquittal. If he had been tried on the second indictment, with the motion for a new trial pending, could the court have allowed him to be convicted on the count charging him with the second offense? It is no answer to this that before he was tried sentence had been passed on the first indictment, for, in the end, he was tried for what he did on December 11, 1907, when, if at all, his offense was committed, and that was just two months before the court finally disposed of the first indictment against him by entering judgment upon the verdict. Before that time no one could tell whether he had been guilty of a first offense.

In Com. v. Kiley, 150 Mass. 325, 23 N. E. 55. the court had before it for consideration a statute which provided that the conviction by a court of competent jurisdiction of a person licensed to sell intoxicating liquors should, in itself, make his license void, and it was said: "Nothing less than a final judgment, conclusively establishing guilt, will satisfy the meaning of the word 'conviction' as here used. At any time before a final judgment of the court, a motion in arrest of judgment may be made, or the verdict may be set aside upon a motion for a new trial, on the ground of newly discovered evidence, or for other good cause; and upon further proceedings it may turn out that the defendant is not guilty. At the time of the sale relied on in the present case, the verdict of the jury in the former trial had not been followed by a judgment, and the defendant had not been convicted within the meaning of this statute." In the very recent case of People v. Fabian, 192 N. Y. 443, 85 N. E. 672, 18 L. R. A. (N. S.) 684, the indictment charged the defendant with the crime of knowingly voting at an election, "not being qualified therefor." By the election laws of the state of New York no person who has been "convicted" of a felony shall register or vote, unless he shall have been pardoned and restored to the rights of citizenship. The indictment against Fabian set forth the fact that he had been prethat mere offense. He is charged with anoth- viously indicted for burglary in the first dehad been rendered against him, but it did not appear that judgment had ever been entered upon the verdict. The Court of Appeals, in sustaining the demurrer to the indictment, said: "Where the reference is to the ascertainment of guilt in another proceeding, in its bearing upon the status or rights of the individual in a subsequent case, then a broader meaning attaches to the expressions, and a 'conviction' is not established, or a person deemed to have been 'convicted.' unless it is shown that a judgment has been pronounced upon the verdict." At common law one convicted of an infamous crime was disqualified from testifying, but he was not deemed to have been convicted unless the record showed the rendition of judgment upon the verdict. It was the judgment, and that alone, which was received as legal and conclusive evidence of the party's guilt for the purpose of rendering him incompetent to testify. 1 Greenleaf on Evidence, § 375. "When the law speaks of conviction, it means a judgment, and not merely a verdict, which, in common parlance, is called a conviction." Tilghman, C. J., in Smith v. Com., 14 Serg. & R. 69. "When conviction is made the ground of some disability or special penalty, a final adjudication by judgment is essential." Com. v. Miller, 6 Pa. Super. Ct. 35.

As the judgment of the court of quarter sessions on the second count of the indictment must be reversed for the reasons stated, the other questions raised by the assignments of error need not be considered. So much of the sixteenth assignment as complains of the sentence imposed upon the appellant is sustained, and said sentence or judgment is reversed.

(224 Pa. 240)

DELAWARE, L. & W. R. CO.'S TAX AS-SESSMENT. (No. 1.)

(Supreme Court of Pennsylvania. March 29, 1909.)

1. Taxation (§ 493*)—Assessment—Appeal.

On appeal from the board of revision to the court of common pleas by a railroad company under Act April 19, 1889 (P. L. 37), the proceeding is de novo, and the court must hear and determine the questions in dispute in the same manner as if the controversy were between private litigants.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 493.*]

2. TAXATION (§ 348*)—ASSESSMENT—ACTUAL VALUE.

Under Const. art. 9, § 1, providing that all taxes shall be uniform on the same class of subjects within the same territorial limits, the courts in determining the valuation of coal lands must consider that the assessed value of other real estate within the district is below its actual value and assess such land according to the ratio of the actual value to the assessed value of other lands in the district.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. \$ 348.]

gree, and, upon his trial, a verdict of guilty 3. Taxation (§ 348*)—Assessment of Coal had been rendered against him but it did LANDS.

In determining the valuation of coal lands, where the court considered the fact that other lands in the district were assessed below their actual value, but in determining what the proper ratio was included the personal property of the owners of the coal lands so as to increase the percentage of the ratio to the disadvantage of such owners, the assessment was invalid.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 348.*]

Appeal from Court of Common Pleas, Lackawanna County.

In the matter of the assessment of the Delaware, Lackawanna & Western Railway Company in the Borough of Taylor. From the assessment the railroad company appeals. Reversed and remitted.

This appeal was tried with several others under the following agreement: "For the purpose only of these appeals, appellants waive the claim that every coal property should be separately assessed at its individual value and consent that the court may adopt for the purpose of flxing the value of coal lands a uniform average rate per foot acre of all coal which can be mined at a profit. The quantities of such minable coal to be fixed either by agreement of the parties or their engineers, or, so far as such agreement cannot be reached, to be ascertained by the court upon evidence. Evidence to be received applicable to all appeals so fr as relevant upon the ratio of actual to assessed value of other real estate in the county and its several municipal divisions in which the coal lands are situated. It is understood by this agreement that no right of appellants to appeal from the values fixed by the court, excepting as expressly waived in the agreement, shall be construed to be waived." The court after hearing fixed the assessment at \$150 per acre as actual value, from which 40 per cent. was to be deducted so as to make the assessment uniform with that of other real estate in the county.

On motion for rehearing the court filed the following opinion: "In our order of July 13, 1908, the majority of the court fixed the sum of \$60 as the assessment rate per foot acre of coal in the county. Since handing down the order our attention has been called to what is termed by appellants' counsel as 'clear error.' We stated in the order that the average ratio to actual value of surface assessments is 40 per cent. We based this conclusion on a tabulation of surface assessments submitted to us by respondents. It appears now that this tabulation included personal property. In a strict and technical sense, the criticism of appellants' counsel is justified. The correct tabulation would reduce the ratio of surface assessments to about 35 per cent. of the actual value, and we are asked now to change the assessment ratio per foot

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

acre accordingly. We decline to do this, because we are not disposed to treat the question along mathematical lines. The problem submitted to us should be considered on broader grounds. We therefore, reaffirm the order of July 13, 1908, fixing the assessment on coal per foot acre through the county at \$60."

Argued before FELL, BROWN, POTTER, ELKIN, and STEWART, JJ.

Everett Warren and D. R. Reese, for appellant. John P. Kelly, John J. Toohey, County Sol., and Clarence Balentine, for appellees.

ELKIN, J. Controversies growing out of the assessment and collection of taxes are as old as civilization. To question the assessment, to doubt the levy, and to delay the collector may be classed among those inalienable rights of mankind not guaranteed by any Constitution, but very generally asserted under the law of human nature. From time immemorial the people have resisted all attempts to increase the burdens of taxation and have yielded only when convinced of the governmental necessity demanding such increase. Each person, natural or artificial, must bear his share of the public burdens, and the burden of each is measured by the ratio ascertained by dividing the total amount of taxes necessary to meet the public burdens in a given district by the whole valuation of property within the territorial limits of that district, and, when the ratio is thus fixed, the amount of tax to be paid by each individual property owner is determined by multiplying the assessed value of his property by this ratio. This rule has result ed from the demands made by the people upon legislative bodies for equality of taxation. The large property owner and the small holder pay upon the same ratio, and when the valuation has been ascertained and fixed upon a fair basis, which means that the valuation should be based as nearly as practicable upon market value, and, if not on market value, then upon the relative value of each property to market value, there results what is known in organic and statute law as uniformity, which is the desideratum to be attained in any just system of taxation. While every tax is a burden, it is more cheerfully borne when the citizen feels that he is only required to bear his proportionate share of that burden measured by the value of his property to that of his neighbor. This is not an idle thought in the mind of the taxpayer, nor is it a mere speculative theory advocated by learned writers on the subject; but it is a fundamental principle written into the Constitutions and statutes of almost every state in this country. In Pennsylvania the framers of the new Constitution embodied this principle in our organic law in terms so plain that no one should misunderstand its

people by the adoption of that instrument placed the seal of their approval upon a system of taxation which has for its corner stone uniformity in the valuation, levy, and collection of all taxes. Section 1, of article 9 provides that: "All taxes shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." There is, perhaps, no other section of the Constitution upon which the courts above and below have been so frequently required to pass in the administration of their duties. The central thought running through all the opinions is that the principle of uniformity is a constitutional mandate to the courts, to the Legislature, and to the taxing authorities, in the levy and assessment of taxes which cannot be disregarded. The purpose of requiring all tax laws to be uniform is to produce equality of taxation. Absolute equality is difficult of attainment, and approximate equality is all that can reasonably be expected. Hence it has been held that where there is substantial uniformity the constitutional requirement has been met. Kelly v. Pittsburgh, 85 Pa. 170, 27 Am. Rep. 633; Fox's Appeal, 112 Pa. 337, 4 Atl. 149; Commonwealth v. Canal Company, 123 Pa. 594, 16 Atl. 584, 2 L. R. A. 798. But all these cases hold there must be substantial uniformity, which means as nearly uniform as practicable in view of the instrumentalities with which and subjects upon which tax laws operate. It is the duty of the courts in dealing with this subject to enforce as nearly as may be equality of burden and uniformity of method in determining what share of the burden each taxable subject must bear.

With this thought for our guide, we must now inquire as to the facts and the situation of the parties in the case at bar under the law and the pleadings. The right of appeal from the decision of the county commissioners, or board of revision, to the court of common pleas, is given by the act of April 19, 1889 (P. L. 37). When an owner of real estate or other taxable property has taken an appeal as authorized by the act, it is the duty of the court to proceed to hear and determine the questions raised and make such order or decree touching the same as may seem just and equitable, "having due regard to the valuation and assessment made of other real estate in such county or city." It will be observed that the courts in dealing with this subject under the provisions of the statute act under their general equity powers, with the single limitation that in arriving at a just conclusion "due regard to the valuation and assessment made of other real estate" must be given. This is the legislative expression of the principle that all taxes shall be uniform upon the same class of subjects, and is a direction to the courts, when hearing such cases, that the valuation and assessmeaning or doubt its application, and the ment of the same class of taxable subjects

belonging to other owners in the same district must be considered. In other words, the valuation of the property of one owner is so closely related to the valuation of the property of all other owners in the same district that the court must be advised as to the general valuation of other properties in order to determine what is a just and uniform valuation of the property in question. Each taxpayer, no matter how great or small, has a right to demand that his property shall be assessed upon the basis of a uniform valuation of other properties belonging to the same class and within the territorial limits of the authority levying the tax, and it is the duty of all the authorities dealing with this subject to administer the law in a spirit to produce as nearly as may be uniformity of result. Coal lands are the taxable subjects dealt with in this proceeding. They are real estate, and for purposes of taxation must be treated as belonging to the same class of subjects as other real estate located within the same district and being subject to the same tax authorities. It is apparent therefore that, in determining what the assessed value of the coal lands of appellant should be, due regard must be had for the valuation of all other real estate in the same district. It is true that the act of 1889 does not prescribe any method of procedure to guide the courts in such cases; but, in the absence of any statutory requirement, we can see no reason why the parties should not proceed, and the courts hear and determine the questions involved, in the same manner as other controversies are heard and determined between private litigants. When the appeal is perfected in the court of common pleas, the whole proceeding is de novo, and the facts must be found and the law applied as in any other case. The parties appear by counsel, and the court sitting as a chancellor hears and determines upon the proofs offered, or it may be that the parties through their counsel may agree with the consent of the court as to the facts, or as to the method of procedure by which the necessary facts may be ascertained. This is what was done in the present proceeding. In order to arrive at a uniform valuation of the coal lands of appellant for purposes of taxation, and in view of the almost endless amount of detail required if each tract should be treated separately, at the suggestion of the court, counsel submitted a method of arriving at a proper valuation of the lands in question, and the hearing then proceeded along the lines agreed upon in order to determine the assessable value. The court, the counsel, and the parties assumed as a fact, and it is a fact, that the assessed value of real estate in the district is far below its actual value. It was also assumed, and properly so, that, in order to make the valuation of appellant's property uniform with the valuation of other real es-

actual to assessed value should be the same upon all real estate, including coal lands, within any district whose authorities were attempting to levy the tax. Evidence was then introduced to show the ratio of actual to assessed value of other real estate, and this for the purpose of enabling the court to find as a fact what that ratio was, so that, when the actual value of appellant's property should be determined, the ratio thus found could be applied. The parties through their counsel, and with the approval of the court, proceeded along these lines to offer proofs and try their case.

After the hearing the court took the papers and in due time found as facts the actual value of the coal lands returned for assessment, and the ratio of actual to assessed value, and then determined the amount of the assessment upon this basis. We think it was clearly within the rights of the parties and the powers of the court to so hear and determine the controversy. It happened, however, in determining what the proper ratio was, the court included personal property which did not belong to the same class of subjects, and this made considerable difference in the percentage of ratio to the disadvantage of appellant. The court was then asked to correct the error by fixing the proper ratio, which it refused to do, because, while conceding the error on the whole record it was thought the evidence was sufficient to sustain the valuation originally fixed. In this we think there was error. We agree that the desired result to be obtained was a uniform valuation of coal lands, and that it was within the power of the court to receive all proofs bearing on this question and to determine the same upon a just basis having due regard for the valuation of other real estate in the district. The court and the parties were not required to adopt any particular method of determining the assessable value; but when a particular method was adopted, and that method a fair one, it was binding upon the parties, and the court should have so regarded it. To hear the case on one theory and after all the proofs are in to de ide it upon another, would be to disregard orderly methods of procedure and might do violence to the rights of parties. When the parties, at the suggestion and with the approval of the court, agreed upon a method of procedure to determine the question involved, it should have been followed. The method adopted was reasonable and fair, and there is no sufficient reason why it should have been disregarded after the hear-

sumed as a fact, and it is a fact, that the assessed value of real estate in the district is far below its actual value. It was also assumed, and properly so, that, in order to make the valuation of appellant's property uniform with the valuation of other real estate, it would be necessary that the ratio of we have this power; but, in the exercise of it,

the pleadings and the course of procedure in the court below should be our guide, and, unless manifestly wrong under the law, would be followed here. The court below acted clearly within its authority in every step taken and only erred because it failed to apply the rule adopted at the hearing for the determination of the assessable value. There is no error in any other respect, so far as disclosed by the record.

The learned counsel for appellees have also invoked the act of July 27, 1842 (P. L. p. 446), in aid of their contention that the valuation fixed by the court in the present case should be sustained. This act indicates that the board of revision shall inquire whether all property returned for taxation has been valued at a sum or price not less than the same would bring after notice at public sale. There can be no doubt of the legislative intention, which finds expression in the act of 1842 and the earlier statutes, that actual selling value shall be the standard to determine assessable value, and if the question could be squarely raised as to the proper value to be placed upon real estate in any district, or in all districts, the courts would necessarily hold that actual selling value was the proper standard for fixing assessable value. However, the Constitution and the act of 1889 have emphasized the principle of uniformity as more important than the standard of valuation. The assessed valuation should as nearly as possible represent the actual value; but it must be uniform no matter whether the proper standard is followed or not. It is a well-known fact that from the beginning of our state government to the present time in nearly every section of the commonwealth the assessed value of property is ridiculously low as compared with actual value. No doubt the framers of the Constitution had this thought in mind when they wrote into the fundamental law that all taxes must be uniform on the same class of subjects. It will not do to assess farm lands at one-fifth their actual value, dwelling houses at one-third, manufacturing establishments at one-half, and coal lands at full value. The Constitution says the valuation must be uniform on the same class of taxable subjects, and real estate is a taxable subject of a particular class, and coal lands are real estate. Hence the rule of uniformity must be applied to all kinds of real estate as a class.

Decree reversed, and record remitted to the court below, with instructions to determine the proper ratio, without including personal property, and, when the ratio is so determined, then to fix the proper valuation of the coal lands in question upon this basis; costs on the appeal to this court to be paid by appellees.

(224 Pa. 248)
DELAWARE, L. & W. R. CO.'S TAX
ASSESSMENT. (No. 2.)

(Supreme Court of Pennsylvania. March 29, 1909.)

Appeal from Court of Common Pleas, Lack-awanna County.

In the matter of the assessment of the lands of the Delaware, Lackawanna & Western Railway Company. From an order on appeal from the assessment, the railroad company appeals. Reversed.

Argued before FELL, BROWN, POTTER, ELKIN, and STEWART, JJ.

Everett Warren and D. R. Reese, for appellant. John P. Kelly, John J. Toohey, County Sol., and Clarence Balentine, for appellees.

ELKIN, J. For the reasons stated in the opinion handed down at No. 370, January term, 1908 (73 Atl. 429) the decree in this case is reversed, and record remitted to the court below, with instructions to determine the proper ratio without including personal property, and when the ratio is so determined then to fix the proper valuation of the coal lands in question upon this basis; costs on the appeal to this court to be paid by appellees.

(224 Pa. 249, 250, 251, 252, 253)

DELAWARE, L. & WESTERN R. CO.'S TAX ASSESSMENT. (Nos. 3-11.)

(Supreme Court of Pennsylvania. March 29, 1909.)

Appeals from Court of Common Pleas, Lackawanna County.

In the matter of nine certain assessments of lands of the Delaware, Lackawanna & Western Railroad Company. From orders on appeals from the assessments, the railroad company appeals. Reversed.

peals. Reversed.
Argued before FELL, BROWN, POTTER, ELKIN, and STEWART, JJ.

Everett Warren and D. R. Reese, for appellant. John P. Kelly, John J. Toohey, County Sol., and Clarence Balentine, for appellees.

ELKIN, J. Decrees reversed, and records remitted to the court below, with same instructions as given at No. 371, January term, 1908, 224 Pa. —, supra; costs on the appeal to this court to be paid by appellees.

(224 Pa. 346)

CARR v. GENERAL FIRE EXTINGUISH-ER CO.

(Supreme Court of Pennsylvania. April 12, 1909.)

1. MASTER AND SERVANT (§ 103*)—DUTY TO FURNISH SAFE APPLIANCES—DELEGATION.

An absolute duty is upon the employer to

An absolute duty is upon the employer to see that his employes are supplied with reasonably safe instruments for the work given them, and he cannot relieve himself from responsibility by delegating this duty to another.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. § 103.*]
2. MASTER AND SERVANT (§ 189*)—INJUBIES TO SERVANT—FELLOW SERVANTS.

A company, engaged in manufacturing ap-

A company, engaged in manufacturing apparatus for the extinguishment of fires in buildings, sent tools and appliances, including ladders, to equip a factory in another city. The assistant superintendent of the company placed a foreman in charge of the work, and did not again return. Thereafter a shorter ladder than any of those supplied by the company was re-

quired for the particular work of one of the men, and he so reported to the foreman, who found one of suitable length not belonging to the company, and furnished it to the workman, with directions to use it, and while doing so, it broke, and he fell and was injured. Held, that the foreman in furnishing the ladder, and directing the workman to use it, was the representative of the company, and not simply a fellow servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 427; Dec. Dig. § 189.*]

Appeal from Court of Common Pleas, Delaware County.

Personal injury action by Edward Carr against the General Fire Extinguisher Company. Judgment for plaintiff for \$10,632.12, and defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

J. B. Hannum, for appellant. O. B. Dickinson and Jos. H. Hinkson, for appellee.

STEWART, J. The several assignments of error raise but a single question. plaintiff, an employé of the defendant company, was injured while engaged in his appointed work. He was standing upon a ladder, at an elevation of some 60 feet. The ladder broke under his weight, with the result that he fell the entire distance to the floor beneath. It is needless to say that he was seriously injured. The proximate cause of the accident was the insufficiency of the ladder for the purpose for which it was being used. It had been furnished plaintiff by McMinn, the defendant's foreman, who had directed plaintiff to use it. Was Mc-Minn in so doing discharging a delegated duty of the employer, or was he simply a fellow workman with the plaintiff? Upon the state of the evidence as presented this was a mixed question of law and fact. The facts having been found for us by the jury, the question of law is easily resolved. The contention of appellant is that, conceding the facts to be as the jury found, McMinn stood in no other relation to the plaintiff than that of fellow workman, and that the court below should have so held as matter of law.

The facts are these: The defendant company is engaged in manufacturing and supplying an improved apparatus for the extinguishment of fires in buildings. Through its Philadelphia departments it had contracted to equip a factory in Chester, Pa., with this apparatus. The material for the work was prepared at the shops of the company, and shipped thence to Chester. Such tools and appliances as were regarded necessary for the erection of the apparatus, including ladders, were sent from the department at Philadelphia, where the company kept a store of supplies of this character. McMinn was placed in charge as foreman of the job, and employed the plaintiff. The assistant superintendent or general foreman of the company went from Philadelphia to Chester the day the work there was commenced, taking with him two workmen. He testified that on that day he "examined the work to see if it was up all right, and gave him (McMinn) directions how to put up other work he was a little bit stuck on.' This was on Thursday, and he was not there again until after the accident. On the following Saturday a shorter ladder than any of those supplied by the company was required for the particular work plaintiff was then engaged upon, and he so reported to McMinn. The latter found one of suitable length, not belonging to the defendant, however, on the factory premises, and furnished it to the plaintiff, with instructions to use it. This was the defective ladder that caused the accident.

We then have the fact that the supply of tools and appliances sent by the defendant to its workmen at Chester was deficient to this extent that it did not have a ladder of the length required for the work. That it was the duty of McMinn to supply this deficiency is manifest; indeed, it was not disputed. There was no other representative of the company on the ground who had authority to supply anything, and his instructions were to draw upon the company's storehouse at Philadelphia, for what supplies in the way of tools and appliances were necessary. What matters it that the company had a supply of such instruments in its storehouse in Philadelphia? The case would not have been different in principle had the storehouse been a hundred miles away. It was not plaintiff's duty to go to Philadelphia to get a ladder. He had not even that privilege. His duty was to report the want to the foreman, McMinn. It was for McMinn to say whether the ladder asked for was needed, and, if so, to supply it. Such were his instructions; and to this extent he stood as the representative of the company.

It is argued that, because he disregarded these instructions, and procured this defective ladder elsewhere, no responsibility attaches to the defendant in connection therewith; but this position is wholly untenable. An absolute duty was upon the defendant to see that its employes were supplied with reasonably safe instruments for the work they were given to do. It could not relieve itself of responsibility by delegating this duty to another. When an employer delegates the performance of an absolute duty. he must see to it at his peril that the duty is performed. Failure on the part of the representative or substitute because of disregard of instructions is the failure of the principal. The case was properly disposed of in the court below.

Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(224 Pa. 352)

MEITZNER v. BALTIMORE & O. R. CO. (Supreme Court of Pennsylvania. April 12, 1909.)

1. RAILROADS (§ 350*)-ACCIDENTS AT CROSS-

INGS—ACTIONS—QUESTIONS FOR JURY.

In an action for the death of plaintiff's husband who was struck at a railroad crossing, the irreconcilability of the two statements of the witness who alone had opportunity to see the whole occurrence, one that decedent made no attempt to cross the tracks until the last car of a freight train on the track nearest him was from 150 to 200 feet from where he stood, and the other that decedent stepped upon the and the other that decedent stepped upon the second track just as the engine of the express train was passing the last car of the freight train, did not make it a case for binding instructions for the railroad company, but it was for the jury to decide what credit they would give the witness, and which of the statements if either they would accent ments, if either, they would accept.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

2. TRIAL (§ 165*)-NONSUIT.

In passing upon a motion for nonsuit, where the evidence for plaintiff is contradictory, it is the duty of the court to allow it the significance most favorable to him.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

3. RAILROADS (§ 300*)—ACCIDENT AT CROSS-INGS—PRIVATE CROSSING OF RAILROAD COM-PANY.

Where a crossing on the property of a rail-road company and made by it for the convenience of passengers passing between the stations on opposite sides of the tracks had been used by the general public as well for many years, not only with the knowledge of the com-pany, but by its encouragement, a person not a passenger using the crossing was not a trespasser, and the company owed him the same duty that it owed passengers using the crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 955; Dec. Dig. § 300.*]

A. CORPORATIONS (§ 516*)—AMENDMENT—DE-SCRIPTION OF PARTY.

An amendment of plaintiff's statement so as to correctly describe defendant corporation as a corporation of the state of Maryland; in-stead of the state of Pennsylvania, as alleged, was properly allowed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2029; Dec. Dig. § 516.*]

Appeal from Court of Common Pleas, Delaware County.

Action by Annie L. Meitzner for the death of her husband against the Baltimore & Ohio Railroad Company. Judgment for plaintiff for \$7,725, and defendant appeals. Affirmed.

Argued before FELL, BROWN, MESTRE-ZAT, ELKIN, and STEWART, JJ.

Kingsley Montgomery, for appellant. John M. Broomall, for appellee.

STEWART, J. At the place where this accident occurred the defendant company maintains two tracks, one used for eastbound, the other for west-bound, trains. Louis A. Meitzner, the plaintiff's husband, approached the crossing from the north. At that moment a freight train was moving west on the track nearest him.

cleared the crossing, he attempted to cross over, and was struck and killed by the engine of a passing express train moving east on the south track. If, without waiting for the freight train to move far enough away to admit of his seeing more of the second track than was immediately in his front, he started forward and was accidently struck by the engine on the second track moving east, the law would unquestionably refer the accident to his own want of care. On the other hand if he waited until the freight train had so far proceeded that it no longer obstructed his view of the second track before attempting to cross, he did all that could be reasonably required of him in that regard. Which course does the evidence on the part of plaintiff show that he pursued? If the former, the case called for a nonsuit or binding instructions for the defendant. If the latter, it was for the jury. The peculiarity of the case is that because of the conflicting statements which appear in the testimony of the witness Bishop, who alone had opportunity to see the whole occurrence from beginning to end, and upon whose testimony plaintiff's case must largely rest, this question is left debatable. In one part of his testimony the witness says that Meitzner made no attempt to cross the tracks until the last car of the freight train was from 150 to 200 feet west of where he stood. In another part he says that Meltzner stepped upon the second track just as the engine of the express train was passing the last car of the freight train. The two statements are wholly irreconcilable; but that fact did not make it a case for binding instructions for the defendant. It was for the jury to decide what credit they would give the witness, and which of his statements, if either, they would accept. The result of the trial shows that they credited him as a witness, and accepted his statement that, when Meltzner started to cross, the freight train had moved from 150 to 200 feet west of the crossing. Whether with this much of the second track in view, while what was beyond was hidden by the moving freight train, he was negligent in attempting to cross when he did, and whether after he committed himself to the act of crossing he exercised due care as he proceeded, are questions which could only be resolved as other contradictory statements of Bishop's were reconciled, or as some of them were allowed to prevail. This witness, who saw the occurrence from the opposite side of the tracks, says in one place that, when he first saw the express train coming from the west, it was three-quarters of a mile from the crossing; that it could not then have been seen by Meitzner from where he was then standing on the platform, because of the position of the freight train at that time; that he, After it had the witness, had the approaching train in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sight continuously up to the time it met the freight train; and that at this point he saw Meitzner standing between the two tracks and looking in the direction of the advancing train and listening, but that the train was then lost to his view, and Meitzner's as well, because of the dense smoke from the engine of the freight train. If this state of the facts gave rise to an inference of negligence on the part of the plaintiff, the jury only could derive it. In passing upon a motion for nonsuit, where the evidence for plaintiff is contradictory, it is the duty of the court to allow it the significance most favorable to plaintiff, since for all the court can know that view may prevail with the jury.

The crossing where Meitzner was killed was not a public crossing; that is, it had not been laid out or adopted pursuant to municipal authority. It was on the property of the defendant company and made by it for the convenience of passengers in passing between the stations on opposite sides of the tracks. But there was evidence that for many years it had been used by the general public as well, not only with the knowledge of the defendant company, but by its encouragement. The court properly instructed the jury that, if they believed this evidence, Meltzrer was not a trespasser, and that the defendant company owed him the same duty that it owed passengers using the crossing.

In plaintiff's statement the defendant company was described as a corporation of the state of Pennsylvania. An amendment was allowed déscribing it as a corporation of the state of Maryland. The defendant was in court, and the change brought no new party on the record. The amendment was properly allowed. Wright v. Copper Co., 208 Pa. 274, 55 Atl. 978.

In what we have said the several assignments of error have been considered. They are overruled, and the judgment is affirmed.

(224 Pa. 303)

ASCHENBACH V. CAREY.

(Supreme Court of Pennsylvania. April 12, 1909.)

1. Executors and Administrators (§ 43*) DUTY OF PERSONAL REPRESENTATIVE-LIQ-UOB LICENSE.

UOR LICENSE.

Though a liquor license is not in itself marketable, yet, as it is granted for a particular place, it may add materially to the value of the fixtures, good will, and unexpired term of the lease, and those a personal representative has for sale, and they form a part of the assets of decedent's estate for which it is his duty to obtain the best possible price, either by public or private sale.

[Ed.] Note—For other cases see Frequence.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 43.*]

2. EXECUTORS AND ADMINISTRATORS (§ 43°)—ASSETS OF ESTATE—LIQUOR LICENSE.

Though a liquor license is not per se an asset of the estate of a decedent to whom is-

no personal profit through it, and, if he chooses to make of it a valuable asset for the estate, it cannot be taken from the estate and made an asset of his own to satisfy his creditors.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 43.*]

3. Executors and Administrators (§ 43°)— Liquor License — Liability to Adminis-trator's Creditors.

An administrator caused a liquor license which had been issued to his intestate to be transferred to himself individually, but paid the transfer charges and subsequent renewals out of moneys of the estate, and deposited the proceeds of the business in a bank to the credit of the estate, and paid the expenses of the business therefrom and reserved nothing to himself, not even commissions. Held, that a creditor of the administrator individually could not attach such moneys or the proceeds of a sale of the license as the administrator's individual property.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 43.*]

Appeal from Court of Common Pleas. Philadelphia County.

Annie E. Aschenbach, having obtained a judgment against Michael F. Carey, procured an attachment ad lev. deb. to be issued against John Byrne, Jr., as garnishee. From a judgment for the garnishee, Annie E. Aschenbach appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Henry Spalding (David N. Fell, Jr., on the brief), for appellant. Walter Thos. Fahy (Frank A. McManus, Samuel P. Tull, and Thomas A. Fahy, on the brief), for appellees.

BROWN, J. On February 4, 1901, the appellant obtained a judgment against Michael F. Carey for \$1,186.06. In February, 1906, she procured an attachment ad lev. deb. to be assued on it against John Byrne, Jr., as garnishee, to recover from him a debt alleged to be due by him to Carey. The facts under which the appellant claims to be entitled to a judgment against the garnishee are either undisputed or uncontradicted.

Laurence J. Carey, who died December 2, 1903, was at that time the proprietor of a saloon and the holder of a retail license for the sale of liquor from the court of quarter sessions of the county of Philadelphia. Letters of administration on his estate were granted to his brother, Michael F. Carey, the appellee, who filed an inventory, in which the value of the license, stock, fixtures, etc., was appraised at \$8,616.50. The appellee had this license transferred to himself as an individual, and the same was renewed in his name in 1904 and 1905. Under the transfer and renewals of the license, he carried on business for the benefit of the estate of his brother. He paid for the transfer and renewals of the license out of the estate's sued, the representative of such estate can make money. He deposited all receipts from the

•For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

business in his name as administrator, and himself. It is true that in his applications out of the same paid all expenses. In 1905 he had a private bid for the license of \$13,-500, but was directed by the orphans' court to sell it at public sale. He did so, and Byrne, the garnishee, became the purchaser of it for \$16,000. The attachment of the appellant was issued to reach this purchase money. The jury were instructed that, if they believed the foregoing undisputed facts, the verdict should be for the garnishee, and they so found. The plaintiff asked that a verdict be directed for her, on the ground that, when the license was transferred to Carey and renewed in his name, it became under the circumstances stated, his individual property, and the price bid for it by Byrne was payable to him as an individual and liable to attachment for his debts. In support of this, the appellant relies upon the clause in section 5 of the act of May 13, 1887 (P. L. 109), which provides that an applicant for a liquor license must set forth in his petition for it that he "is the only person in any manner pecuniarily interested in the business so asked to be licensed, and that no other person shall be in any manner pecuniarily interested therein, during the continuance of the license." This averment is found in the application of Carey for the transfer of the license and in each of the petitions for a renewal of it. Assuming that the court of quarter sessions may have been imposed upon, and that it would not have granted the license if it had been fully informed as to what he intended to do under it, that is not a matter for consideration in this proceeding. The sole question is whether in view of the Act of 1887, or any rule of law, the learned court below erred in its instructions to the jury and in refusing the judgment for the plaintiff n. o. v.

In procuring the transfer of the license to himself and having it renewed Michael F. Carey expended none of his own money. The transfer and renewals were paid for out of moneys of the estate of his brother, and the appellant is first confronted with the fact that no money that she ought to have, as a creditor of the appellee, was used for the benefit of the estate of his brother. What rule of law or of public policy was violated by Michael in husbanding the estate of Laurence? As just stated, he did nothing that took anything from the appellant as one of his creditors. He merely conserved the estate of his brother for its creditors. He had no right, under any guise, to use it or anything of value to it for his own benefit, and he did not attempt to do so. On the contrary, he did not retain a dollar for himself, not even commissions for his services as administrator. All of the receipts from the saloon were placed in bank for the benefit of the estate, and out of them all of the expenses of the business were paid, including the license fees. The lease was for the transfer and renewals of the license he stated he was the only person in any manner pecuniarily interested in the business; but the only conclusion to be reached from the testimony is that he did not intentionally impose upon the court. But, even if the legal conclusion is that he did, how can that avail the appellant when what he did was done in perfect good faith for the benefit of his brother's estate? Upon what principle ought the appellant to be permitted to take from that estate what has been made for it by a faithful administrator? The answer to this, in substance, is that we have held that a license to sell liquor is not an asset of a decedent's estate. We have used that expression, but what was decided in two of the cases in which it is used-Buck's Estate, 185 Pa. 57, 39 Atl. 821, 64 Am. St. Rep. 816, and Mueller's Estate, 190 Pa. 601, 42 Atl. 1021-would clearly make the appellee surchargeable with what he has voluntarily accounted for to the estate, and, in the third -Grimm's Estate, 181 Pa. 233, 37 Atl. 403the question involved was not the one now before us.

In Buck's Estate the administrator took possession of the premises in which the business had been carried on and procured a transfer of the license to himself, using the stock and fixtures of which the decedent had been the owner, and charging himself with their appraised value of \$200. The uncontradicted testimony was that the unexpired term, good will, and opportunity of getting a license were worth, without the stock or fixtures, from \$2,000 to \$2,500, and as the accountant made no effort to procure a purchaser, but appropriated the whole to himself, he was surcharged the highest price fixed by the witnesses as the value of the business at the time of decedent's death. In sustaining this surcharge, while we said that a license to sell liquor is a personal privilege, and upon the death of the holder does not go to his personal representative, we further said: "But the fact that a license had been granted to sell liquor at a particular place may increase the value of that which the executor or administrator may have to sell. On the hearing of an application for a retail license the court considers the public necessity of the place as well as the personal fitness of the applicant, and the granting of a license is the finding that the place in its location and appointments is a suitable place for the sale of liquor. The opportunity to secure a transfer of the license and a renewal at the end of the year may materially affect the value of the fixtures, good will, and unexpired term of the lease. When this is shown to be the case, and the accountant has failed in the performance of a plain duty, there is ground for surcharge." In Mueiler's Estate, in which the expression is used that a liquor license not transerred to him. He kept nothing for is not per se an asset of the estate, the question was as to the surcharge of one of the sale and they form part of the assets of the executors, who continued to occupy the licensed premises for the unexpired term of the lease and obtained a renewal of the license in her individual name. She reopened the tavern on the day succeeding the decedent's funeral, and thereafter continued the business as her own. She made no effort to procure a purchaser, and simply charged herself with the amount at which the stock and fixtures were appraised. The court below surcharged her, holding that the good will of the business was an element which could not with propriety be ignored, and it, in turn, derived its value from the license, without which a legal trade could not have been conducted. In dismissing the exceptions to the adjudication by which she was surcharged the orphans' court of Philadelphia county said, through Penrose, J., what we approved in affirming the decree: "Such a place has necessarily a greatly enhanced market value-just as it may also have by reason of good will arising from the mere carrying on of a prosperous business during a time sufficiently long to give it a reputation. If the occupancy of the licensee is under a lease having some time to run, the unexpired term in case of his death is an asset of his estate, of which good will and the opportunity of obtaining a transfer or grant of a license are inseparable incidents. No executor or person acting in a fiduciary capacity is permitted to appropriate to his individual benefit any profit or advantage derived, directly or indirectly, from his connection with the trust estate, even if it would be lost altogether if he did not receive it. This is an elementary principle of equity (Keech v. Sandford, 1 Lead. Cas. in Eq. 44; Davoue v. Fanning, 2 Johns. Ch. [N. Y.] 252; In re Heager's Executors, 15 Serg. & R. [Pa.] 65; Johnson's Appeal 115 Pa. 129, 8 Atl. 36, 2 Am. St. Rep. 539) and, if such a person could find a purchaser for an unexpired license, he would be required to account for what he received, even though the purchaser acquired no right by reason of the sale. Nor can an executor who is also legatee sever the license from the unexpired term to which it is incident, and thus prejudice the value of the latter as an asset, in order to gain some advantage to himself as legatee. His rights as legatee do not begin until he has fully performed his duties as executor, and his allegiance in the first instance is to the creditors of the estate." While a license for the sale of liquor is not in itself marketable, yet, as it is granted for a particular place, it may add materially to the value of the fixtures, good will, and unexpired term of the lease, if there be any. These an executor or administrator has for

decedent's estate, for which it is his duty to obtain the best price possible, either by public or private sale. Immendorf's Estate, 190 Pa. 590, 42 Atl. 959. The learned trial judge below would have erred if he had not held that, under our cases, the money realized by the appellee from the license belonged to the estate of which he was administrator.

Instead of attempting to profit personally from the fixtures of the saloon, the stock of liquors on hand at the death of his brother and the opportunity of procuring a transfer of the license, as was attempted by the administrator in Buck's estate and the executor in Mueller's, this appellee, as administrator, felt from the very beginning that everything belonged to the estate he represented, and, with exceptional fidelity, carried on the business as trustee for it through a license in his individual name. Though a liquor license is not per se an asset of the estate of a decedent to whom it was issued, the representative of such estate can make no personal profit through it, and, if he chooses to make of it a valuable asset for the estate, on no principle ought it to be taken from the estate and made an asset of his own to satisfy his creditors. If a license is not per se an asset of an estate, it certainly is not an asset of anyone else.

The appellee did not, as counsel for appellant seem to think, enter into a contract with those interested in the estate to do what he did for its benefit, and no one has attempted to compel him to perform a contract which might not be enforceable as being in violation of some positive law or a rule of public policy. He voluntarily brings to the estate what he made for it when acting for it, and no one else is entitled to what was so made. As to this the learned trial judge, in his opinion refusing judgment for the plaintiff upon the whole record, very properly said: "We have the fact that the defendant recognized his fiduciary relation and made no effort to reap any personal advantage from the licenses which actually stood in his name. If, then, the law would compel him, in case the money in question had voluntarily been paid to, and received by him personally to account for the same for the benefit of the estate, would it not be an incongruous view which would permit his judgment creditor by attachment to reach and take the money from the debtor? It appears to us that it would, and that the anomaly would be made worse by considering that the defendant made no claim individually to the money, but, on the contrary, openly avowed his trust relation to it."

Judgment affirmed.

(224 Pa. 369)

SELTZER v. BOYER et al.

(Supreme Court of Pennsylvania. April 12, 1909.)

1. APPEAL AND EBBOB (\$ 839*)—ASSIGNMENTS OF ERROR.

An assignment of error to the opinion of the court is improper.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 839.*]

2. APPEAL AND ERROR (§ 734*)—Assignments OF ERROR-DISMISSAL OF EXCEPTIONS.

An assignment of error to dismissal of exceptions to a sheriff's sale and to a refusal to set it aside is improper where the exceptions are not set forth.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 734.*]

3. Appeal and Ebbor (§ 875*)—Review—Assignments of Error.

On appeal from dismissal of exceptions to a sheriff's sale on foreclosure against a married woman, a decree appointing a committee ad litem for an insane defendant, or the dismissal of a motion to set aside such appointment, cannot be reviewed where no appeal was taken from such decree or dismissal, and the question of their validity is not raised by the assignments of error.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 875.*]

Appeal from Court of Common Pleas, Lebanon County.

Action by Rebecca H. Seltzer against Ellen B. Boyer and others. From an order dismissing exceptions to sheriff's sale of real estate, defendants appeal. Affirmed.

First specification of error: "The court erred in its finding and holding in its opinion dismissing the exceptions to the confirmation of the sheriff's sale, overruling the motion to set aside the sale, confirming the sale, and ordering and directing the sheriff 'to execute and deliver a deed to the purchaser, in accordance with the act of assembly,' by saying as follows: 'In this proceeding judgment upon which the Levári Facias was issued was entered prior to the time when the said Ellen B. Boyer became insane, and subsequently Bassler Boyer, her husband, was appointed her committee ad litem under the act of June 26, 1895 (P. L. 381), to whom notice of the intended sale was given."

Second specification of error: "The court erred in its finding and holding in its opinion dismissing the exceptions to the confirmation of the sheriff's sale, overruling the motion to set aside the sale, confirming the sale, and ordering and directing the sheriff 'to execute and deliver a deed to the purchaser, in accordance with the Act of Assembly,' by saying as follows: 'In this proceeding judgment upon which the Levari Facias was issued was entered prior to the time when Ellen B. Boyer became insane, and subsequently Bassler Boyer, her husband, was appointed her committee ad litem under the act of June 26, 1895 (P. L. 381), to whom notice of the intended sale was given. The

notice given to Bassler Boyer, committee ad litem, was a sufficient notice to Ellen B. Boyer, the lunatic."

Third specification of error: "The court erred in its finding and holding in its opinion dismissing the exceptions to the confirmation of the sheriff's sale, overruling the motion to set aside the sale, confirming the sale, and ordering and directing the sheriff 'to execute and deliver a deed to the purchaser. in accordance with the act of assembly,' by saying as follows: 'As to inadequacy price at which the property was sold by the sheriff, it is only necessary to carefully consider the testimony of Mr. Reinoehl, a witness produced and examined by the exceptant, to show that such exception cannot be sustained."

Fourth specification of error: "The court erred in entering its order and decree, dismissing the exceptions to the confirmation of the sheriff's sale, overruling the motion to set aside the sale, confirming the sale, and ordering and directing the sheriff 'to execute and deliver a deed to the purchaser, in accordance with the act of assembly,' by saying as follows: 'And now, July 9, 1908, the exceptions to the confirmation of the sheriff's sale are dismissed, the motion to set aside said sale is overruled, the sale is confirmed, and the sheriff is ordered and directed to execute and deliver a deed to the purchaser in accorance with the act of assembly.' "

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Bassler Boyer and Charles T. Hickernell, for appellants. Gobin & McCurdy and H. Rank Bickel, for appellee.

POTTER, J. This appeal is from the order of the court below dismissing exceptions to the confirmation of a sheriff's sale of real estate, confirming the sale and directing the sheriff to execute and deliver to the purchaser a deed for the premises sold. Rebecca H. Seltzer issued a scire facias upor a mortgage of Ellen B. Boyer and her husband, Bassler Boyer, and obtained judgment against the defendants for want of an affdavit of defense. On February 5, 1908, a pluries levari facias was issued upon this judgment, and the sheriff levied thereunder upon the mortgaged premises and advertised them for sale. On February 12th the defendant, Bassler Boyer, filed a petition alleging that his wife and codefendant. Ellen B. Boyer, was insane, and had been so for over a year, and was confined under due process of law as an insane person in the Pennsylvania Hospital for the Insane at Philadelphia, and that a commission in lunacy had been awarded against her by the court of common pleas of Lebanon county, but that no committee in lunacy had been appointed

[•]For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

for her, and no person was authorized to represent or act for her in regard to her estate or receive notice, as required by law, of the intended sale of her real estate under the execution issued against it. Upon presentation of this petition, the court granted a rule to show cause why the writ of pluries levari facias should not be stayed and set aside. Thereupon, before hearing upon the rule, the plaintiff stayed the pluries levari facias. On February 27th the plaintiff filed a petition, averring that Ellen B. Boyer, one of the defendants, had been insane for upwards of a year and was an inmate of the Pennsylvania Hospital for the Insane at Philadelphia, and that no committee had been appointed to take charge of her estate, and praying that the court appoint a committee ad litem for her, upon whom might be served all process, notice, and pleadings in relation to the judgment and pluries levari To this petition was appended a facias. sworn statement by the physician in charge of the hospital that Mrs. Boyer was committed according to law, and was insane. Thereupon the court appointed Bassler Boyer, husband of Ellen B. Boyer, and also a defendant, committee ad litem as prayed for in the petition. On February 27th the sheriff served on Bassler Boyer a certificate of the order of court, appointing him committee ad litem of Ellen B. Boyer, and on March 2d Boyer filed a protest and exceptions to such appointment, and the jurisdiction of the court to make it, and moved the court to set aside the appointment. On March 4th the motion to set aside the appointment was refused. On February 28th another pluries levari facias was issued, and on March 28th the mortgaged premises were sold by the sheriff in pursuance of such writ. The sheriff returned that he had given "due notice of said sale to Bassler Boyer, one of the defendants, to Bassler Boyer, committee ad litem of Ellen B. Boyer, the other defendant (said Bassler Boyer being designated on the record of this proceeding as having been appointed by the court of common pleas as such committee al litem of Ellen B. Boyer), to Ellen Boyer, terre tenant, * * * by serving upon each of the above named personally, more than 10 days prior to the sale, a printed handbill giving notice of said sale, the day and hour when and the place where the same shall be, and what lands and tenements are to be sold, where they lie, and a proper description of the premises." also returned that he had served a handbill as above described more than 10 days prior to the date of the sale on John B. Chapin, an adult in charge of the place of residence of the defendant, Ellen B. Boyer, and upon Ellen B. Boyer personally. The sheriff's sale took place, Bassler Boyer giving notice that the requirements of the law as to notice of the sale had not been complied with,

and therefore the sale would be without authority of law and void. The property was sold to Christian Gingrich for \$5.700, and the sheriff so returned. Bassler Boyer as a defendant and as husband of Ellen B. Boyer moved to set aside the sheriff's sale on the grounds of insufficient notice and inadequacy of price, and filed exceptions to its confirmation. The court dismissed the exceptions and confirmed the sale. Defendants have taken this appeal.

The first three assignments of error are to the opinion of the court below. It has been repeatedly pointed out that it is the decree of the court below, which is assignable as error, and not the opinion. Johnston's Estate, 222 Pa. 514, 71 Atl. 1053; Fullerton's Estate, 146 Pa. 61, 23 Atl. 321. These specifications will therefore be disregarded.

The fourth assignment is to the dismissal of appellants' exceptions to the sheriff's sale. and the refusal of the motion to set the sale But none of the exceptions are set aside. forth. The dismissal of each exception which appellants desire to press should have been set forth by a separate assignment. The decree of the court below does, however, appear in this assignment. In his argument counsel for appellants complain of the appointment of a committee ad litem. The appointment was made under the provisions of Act June 10, 1901 (P. L. 553) § 1. The fact of the insanity of the defendant, Mrs. Boyer, was first put upon the record by the petition filed by her husband for the purpose of having the prior pluries levari facias set aside on that express ground, and subsequently by the petition of the plaintiff and the affidavit of the physician.

Neither the appointment of the committee ad litem, nor the dismissal of the action to set aside such appointment, is here assigned for error. The record shows an appointment made under authority of the act of assembly, and the refusal of a motion to set such appointment aside, both unappealed from. On this appeal, and under the assignments of error filed, the validity of the appointment of the committee ad litem cannot be questioned. That question could be raised only by a direct attack on the decree making the appointment. Counsel further complains that the action of the judge in appointing the committee was taken in chambers. But the record does not show that such was the fact.

We find nothing in the record of this case to justify the claim that there was any failure to comply with all the requirements of the law as to notice of the sale, and as to the manner of serving the notice. Nor is there anything in the evidence to show any abuse of discretion by the court below in its refusal to set aside the sale because of alleged inadequacy of price.

The judgment is affirmed.

(224 Pa. 276) LEHMAN v. CHAMBERSBURG & G. ELEC-TRIC RY. CO.

(Supreme Court of Pennsylvania. March 29, 1909.)

1. Eminent Domain (§ 169*)—Street Rail-BOADS — CONSTRUCTION IN STREETS — CON-

BOADS — CONSTRUCTION IN STREETS — CONSENT OF ABUTTING OWNERS.

Under Act June 1, 1907 (P. L. 368), providing that, before the right of eminent domain therein conferred on street railway companies shall be exercised upon any highway in any township, the consents of the owners of at least 51 per cent. of the foot frontage of the entire distance to be traversed shall be obtained, the 51 per cent. of the foot frontage refers to the entire distance to be traversed upon the highway in any township, and not to a particular portion of it represented by the foot frontage of a complaining property owner. complaining property owner.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 169.*]

main, Dec. Dig. § 169.*]

2. EMINENT DOMAIN (§ 169*)—STREET RAILBOADS—CONSTRUCTION IN STREETS—CONSENT OF ABUTTING OWNERS.

A street railway company which prior to
Act June 1, 1907 (P. L. 368), giving street railway companies the right of eminent domain,
laid its tracks along one side of a highway, except at one place, where it made a jog to the
other side of the highway to avoid the property of an abutting owner whose consent had not
been obtained, and who had procured an iniuncbeen obtained, and who had procured an injunc-tion, may, after the taking effect of that act, exercise the right of eminent domain to straighten its line by taking out the jog, without again procuring the consents of a sufficient number of abutting owners to meet the requirement of that act, and the consents obtained prior to the act are sufficient.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 169.*]

8. Costs (§ 236*)-APPEAL AND ERROR-LIA-BILITY.

Where prior to Act June 1, 1907 (P. L. 868), giving street railway companies the right of eminent domain, an injunction was properof eminent domain, an injunction was properly granted to restrain a street railway company from laying its tracks in front of an abutting owner's premises, and where, after the taking effect of that act, and the company had declared its intention to straighten its line by taking out the jog in front of the complaining owner's premises, the injunction was improperly continued, in reversing the decree the Supreme Court will impose the costs upon the street railway company, as the injunction was properly issued in the first instance.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 236.*]

Appeal from Court of Common Pleas, Franklin County.

Bill for an injunction by Amos B. Lehman against the Chambersburg & Gettysburg Electric Railway Company. Decree for plaintiff, and defendant appeals. Reversed. Argued before FELL, BROWN, MES-TREZAT, ELKIN, and STEWART, JJ.

Walter K. Sharpe, O. C. Bowers, and Charles Walter, for appellant. J. A. Strite and D. Edward Long, for appellee.

ELKIN, J. Some confusion arises in the consideration of the questions here involved because of changed conditions since the preliminary injunction was granted.

when the bill was filed, the street railway company could not construct its lines upon the highway without the consent of abutting landowners. The consent of the complainant was not obtained, and he stood upon his legal rights in asking a court of equity to restrain the threatened invasion. The restraining order was issued and the whole matter remained in statu quo for several years. The street railway company secured the consents of the other abutting property owners along the highway, made a jog in its line so as to avoid the property of appellee, laid its tracks, and for several years has operated its lines with the approval of the supervisors and of the people very generally. In 1907 street railway companies were given the right of eminent domain, and, in order to exercise this power, it became necessary to have the injunction dissolved. At the hearing for the dissolution of the injunction, court and counsel adopted a method of procedure which broadly considered all questions affecting the rights of street railway companies and abutting owners in a condemnation proceeding. The right to condemn was denied so long as the injunction continued, and the power to discontinue the injunction was made to depend upon the status of the street railway company in the assertion of its right of eminent domain. In other words, the burden of establishing all the antecedent facts necessary to the exercise of the power of eminent domain in a condemnation proceeding was placed on appellant in a proceeding to dissolve the injunction granted several years before the right of eminent domain was conferred. If the law and the facts now existing could have been made to appear in 1903, the injunction then granted could not have been sustained, and the parties would have been required to assert and protect their rights in a condemnation proceeding. What would have resulted then had the right of eminent domain been conferred, which it was not, should now result when this right does exist. Under the circumstances, it seems wise to follow the course of procedure adopted in the court below for the purpose of determining the essential questions involved upon their merits. The learned court below found as a fact that the appellant company, having first obtained the consents of the supervisors and abutting landowners, had constructed its line of street railway on the southern side of the turnpike road, except where it had deviated from its course to avoid the property of appellee, and for several years had operated thereon. After the passage of the act of 1907, it was deemed expedient to straighten the line by taking out the jog in front of the property of appellee and laying the railway tracks at the southern side of the turnpike road In 1903, through his lands, so that the tracks at this

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

point would be in alignment with other portions of the railway already constructed. There can be no doubt that the situation here presented was the kind of mischief permissible under the old law which the new act was intended to remedy. If a construction shall now be placed upon it to defeat this intention, the act will fail of its purpose. This legislation was passed as a result of the demands of the people to secure the greater convenience of rural transportation by street railway, and to encourage companies already incorporated and those subsequently to be formed to increase their facilities and extend their usefulness. Any proper construction of the act must give due consideration to its intendment.

Keeping in view this thought, let us examine the requirements of the statute in order to ascertain whether appellant is in a position to assert its right to adversely and against the wish of appellee lay its tracks upon that portion of the turnpike included in the fee of those represented by complainant. It is provided in the act that: "Before the right of eminent domain herein conferred shall be exercised upon any highway, in any township, excepting for the purpose of crossing such highway, the consent of the owners of at least fifty-one per centum of the foot frontage of the entire distance to be traversed longitudinally, on such highway in said township, shall be obtained." It will be observed that the statute does not in terms specify the nature and character of the consent to be obtained, but it is supplemental to an act providing for the incorporation and regulation of street railway companies, and deals with the method of condemning lands for the use intend-The use intended is the construction and operation of lines of street railway, and, when a consent in writing has been obtained from an abutting owner which grants the right and privilege of constructing, maintaining, and operating a street railway upon the public highway in front of his property and over his fee, it would be sticking in the bark to hold that this is insufficient for the purpose of asserting the right of eminent domain conferred by the act. The right to condemn is based on the public use, which is to construct and operate a street railway. It necessarily follows, therefore, that, when 51 per centum of the foot frontage represented by the abutting owners to construct, maintain, and operate a street railway has been obtained, the precedent condition required by the act in order to exercise the right of eminent domain has been met. The 51 per centum of foot frontage refers to the entire distance to be traversed longitudinally upon the highway in any township, and not to a particular portion of it represented by the foot frontage of a complaining property owner. If the latter construction should be adopted, the purpose of the act would be defeated. tendment of the act of 1907, or under its

It was intended to prevent one or several property owners from hindering and delaying public improvements, but, in order that the rights of abutting owners should not be disregarded, it was provided that the owners of at least 51 per centum of the foot frontage should consent to the construction of the street railway upon the public highway before the right of eminent domain should be exercised against a nonconsenting owner.

The real question here is: Does the street railway company have the consents of the owners of 51 per centum of the foot frontage along the turnpike in the township? It is conceded that it has the consents of a sufficient number of abutting owners to meet the requirement; but it is contended that these consents were obtained prior to the passage of the act of 1907, and therefore not within its provisions. This is too technical to be substantial. The law looks at the substance, not the shadow. By what has already been said it is clear that, if appellant since the act of 1907 had secured the very same kind of consents it now has, the requirements of the act in this respect would have been met. It would be an idle thing and an unnecessary burden to say to this company: You must now go out, and again obtain what you already have before the right of eminent domain can be exercised. The consents of property owners representing the necessary foot frontage whether obtained before or after the act is sufficient. The consents obtained before the passage of the act must be regarded as applicable to the general location of the line then made and now existing. In the case at bar the consents must be understood to refer to the location of the street railway on the southern side of the turnpike, and with reference to this location they may be treated as valid consents under the act of June 1, 1907 (P. L. 868). If the general line of street railway should be relocated so as to occupy the center or northern side of the turnpike, it would be necessary to obtain consents for this purpose, because this would introduce new locations and new conditions not contemplated when the original consents were obtained. The act did not modify or change the established rule that only the owners of the fee, or those representing them, had to be consulted in obtaining con-. sents. If the line of street railway does not invade the fee of an abutting owner, his consent is not required, and his right to be included in the foot frontage does not exist. In all these respects the law stands as it did before the passage of the act. It is a misapprehension to treat what is attempted to be done in this case as a new location of the line of the street railway system. It is a widening or perhaps a relocation of the tracks on the turnpike over the land of appellee at a particular point, and is certainly within the reasonable inexpress provisions. If by any construction that part of the public highway upon which it is now proposed to lay the tracks could be considered as within the curtilage appurtenant to dwelling house of appellee, and such an interpretation is strained and doubtful even in such event, it is sufficient to say the act in express terms gives the right to appropriate within the limitations and upon the conditions therein contained. Of course, the owner of the fee may recover damages on the ground that an additional servitude has been imposed upon the highway already dedicated to public use, and such damages, if any, may be assessed in a proceeding to condemn, and cannot be inquired of here. We think the learned court below was right in the first view of the case, and erred in entering the final decree.

Decree reversed, injunction dissolved, and bill dismissed. Under the circumstances and because the injunction was properly issued in the first instance, we think the costs should be paid by appellant, and they are so imposed.

(224 Pa. 217)

SOMERSET COAL CO. v. DIAMOND STATE STEEL CO.

(Supreme Court of Pennsylvania. March 29, 1909.)

1. GARNISHMENT (§ 110*)—PROPERTY SUBJECT
—PROPERTY COMING INTO HANDS OF GARNISHEE AFTER SERVICE.

An attachment binds all funds of the defendant debtor coming into the hands of the garnishee after service of the writ and before judgment.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 231; Dec. Dig. § 110.*]

2. Gabnishment (§ 58*)—Property Subject to—Money in Hands of Foreign Receivers.

Money which is a part of an insolvent estate being administered upon in another state through receivers appointed in that state is exempt from attachment in Pennsylvania, where placed in the hands of the garnishee in that state in compliance with the order of the court having jurisdiction over them.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 113; Dec. Dig. § 58.*]

Appeal from Court of Common Pleas, Philadelphia County.

The Somerset Coal Company, having obtained a judgment against the Diamond State Steel Company, caused an attachment execution sur judgment to issue, summoning the Philadelphia Warehouse Company as garnishee. From an order discharging rule for judgment against the garnishee, the coal company appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN. MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

H. S. P. Nichols, for appellant. Ruby R. Vale and Ward & Gray, for appellees. John Douglass Brown, for garnishee.

STEWART, J. The Somerset Coal Company, a corporation of this state. having here obtained judgment against the Diamond State Steel Company, a corporation of the state of Delaware, caused a writ of attachment execution sur judgment to issue, summoning the Philadelphia Warehouse Company as garnishee. The writ when first served held nothing within its grasp. The warehouse company was not indebted in any way to the defendant debtor, and held no property belonging to the latter which was subject to the attachment process. On the contrary, the Diamond State Steel Company was largely in debt to the warehouse company, and for this indebtedness it had pledged and had delivered to the warehouse company, upon the latter's storage yards in Delaware, a lot of iron and steel in various forms. The property thus pledged was beyond the reach of process issuing from a court within this state. As to it, the attachment was without effect, and the warehouse company could do with it what it pleased without incurring responsibility to the attaching creditor. The effect of an attachment, however, is to bind all funds of the defendant debtor that come into the hands of the garnishee after service of the writ and before judgment is entered. Subsequent to the service of the writ, and before answer was made, the Diamond State Steel Company passed into the hands of receivers. By arrangement between the warehouse company and the receivers, approved by the court in Delaware having jurisdiction, the iron and steel held in pledge by the former were surrendered to the receivers on the stipulation that the warehouse company should be paid its claim first from the proceeds of the sale of the same, and, in addition, the sum of \$5,000 "to abide the determination of the attachment issued out of the court of common pleas No. 3 of the city and county of Philadelphia, with the right on the part of the receivers to apply for leave to intervene in the cause in which the aforesaid attachment issued, and to take such steps as they may be advised by counsel to secure the dissolution of the said attachment, the warehouse company to account to the receivers for any surplus portion of said \$5,000 which may remain after the said attachment has been disposed of."

There is nothing in the mere circumstance that the money was placed in the hands of the garnishee to abide the result of the attachment that gives the appellant any right to it. The object of so placing it was not to benefit the creditor, but to protect and indemnify the garnishee. In no sense can the latter be said to hold as trustee of the former. The one question in the case is: Was this money in the hands of the garnishee within this state exempt from the attachment from the

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

suit of creditors here, because of the fact that | it is part of an insolvent estate being administered upon in the state of Delaware by a court of equity through receivers appointed by the court, brought here for special purpose by the receivers under the sanction of the court that appointed them? The contention on the part of the appellant is that, the court of Delaware having no jurisdiction beyoud the limits of that state, the money when it came into this state came released of all the right and title which the receivers had to it in the state of Delaware. question thus raised is not a new one, though it seems never to have been expressly decided in our state. In several other jurisdictions it has been squarely met and decided and in a way adverse to appellant's contention. If the decisions are not numerous, they are uniformly consistent both in their reasoning and conclusions, and have been accepted without challenge. In Crapo v. Kelly, 83 U. S. 610, 21 L. Ed. 430, personal property located in Massachusetts was transferred to an assignee in insolvency proceedings. The property, afterwards being in New York, was attached by a creditor of the insolvent residing there. It was held that the assignee had the prior right. In Pond v. Cooke, 45 Conn. 126, 29 Am. Rep. 668, the receiver of an insolvent concern appointed by a court in New Jersey, where it was located, took possession of its assets, and for the purpose of completing a bridge in Connecticut, which the concern had contracted to build, bought some iron with the funds of the estate, and sent it into Connecticut, where it was attached at a suit of a creditor there. It was held that the property having once vested as the property of a receiver by the law of the state where the property was situated, the law of another state would not divest the receiver of his right to it if he should take it into such state in the performance of his duty. The court there said: "When property has once vested in a trustee, assignee or receiver, by the law of the state where the property is situated, it makes no difference whether it is done under the local law of the state or the common law. The laws of another state will not divest the trustee, assignee, or receiver of his right to the property, should he take it into said state in performance of his duty. The courts of said state will inquire whether he has such right to the property when it comes into the state as between himself and their own citizens, but, when the fact that he has such right is ascertained, they will not regard it as important by what mode the right was acquired." In Chicago, etc., Railway Company v. Keokuk Northern Line Packet Company, 108 Ill. 317, 48 Am. Rep. 557, it was held that a receiver who

property within the jurisdiction of his appointment will not be deprived of his possession, though he takes it in the performance of his duty into a foreign jurisdiction; that it cannot there be taken by creditors of the debtor residing within such foreign jurisdiction. The present case cannot be distinguished from those we have cited in any material respect. The money in this case was derived from the sale of goods in Delaware which had passed into the possession of the receivers. The money stood in the place of the goods. The receivers, in compliance with the order of the court having jurisdiction over them and the assets, placed it in the hands of the garnishee in this state. The money thereafter continued to be the property of the receivers, and as such was as exempt from attachment here as it would have been had it remained in Delaware. The debtor himself could have asserted no right to it as against the receiver; and it is a recognized rule that the rights of the attaching creditor are simply those of the debtor. In the adjudged cases above referred to the controlling fact was that the property sought to be held by the attachment had already passed into the possession of the receivers. Once in their hands, it was thereafter subject only to the control and disposition of the court having jurisdiction over them and their accounts. Comity in such cases prevails to exempt the property from attachment in a foreign jurisdiction when taken there under authority from the proper court. Judgment affirmed.

(224 Pa. 292)

WIENER V. AMERICAN INS. CO. OF BOS-TON.

(Supreme Court of Pennsylvania. April 12, 1909.)

1. PAYMENT (\$ 6*)-DEBTS-PLACE OF PAY-

All debts are payable everywhere, in the absence of some special provision; the rule being that debts as such have no locus or situs, but accompany the creditor everywhere.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 9, 10; Dec. Dig. § 6.*]

2. GARNISHMENT (§ 81*)-PROPERTY SUBJECT-

CHOSES IN ACTION.

The rule that, to give a court jurisdiction in garnishment, the res must be within the territorial jurisdiction of the court applies only to tangible assets, capable of actual seizure, and does not apply to choses in action.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 146, 147; Dec. Dig. § 81.*]

GARNISHMENT (\$ 77*)—PROPERTY SUBJECT-CHOSES IN ACTION.

Jurisdiction to fasten choses in action by garnishee process depends upon the ability to serve the debtor of defendant within the jurisdiction of the court.

Rep. 557, it was held that a receiver who [Ed. Note.—For other cases, see Garnishment, had obtained rightful possession of personal Cent. Dig. § 143; Dec. Dig. § 77.*]

4. GARNISHMENT (§ 81°)—JURISDICTION—DEET of his creditor, is bound by the attachment DUE FROM FOREIGN CORPORATION. from the time it is served. "All debts are

A debt by a foreign corporation to another foreign corporation may be garnisheed in an action against the creditor in Pennsylvania. [Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 146, 147; Dec. Dig. § 81.*]

Appeal from Court of Common Pleas, Philadelphia County.

Foreign attachment by Louis Wiener, to the use of J. R. Pringle, against the American Insurance Company of Boston, in which action the Phœnix Insurance Company of New York was made garnishee. From an order making absolute rule for judgment against the garnishee, it appeals. Affirmed. Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Francis S. Laws and John F. Lewis, for appellant. Theodore F. Jenkins and G. Heide Norris, for appellee.

BROWN, J. This foreign attachment was issued against the American Insurance Company of Boston, a Massachusetts corporation, as defendant, and the Phœnix Insurance Company of New York, a New York corporation, as garnishee. The defendant appeared, and judgment was entered against it for want of a sufficient affidavit of defense. Subsequently judgment was entered against the garnishee on its answers to the interrogatories filed, and from that judgment it has appealed. What was attached was a debt due from the garnishee to the defendant in the attachment, and we are asked to say that this was not attachable, because it was not in contemplation of law within the jurisdiction of the court at the time the writ issued. Authorities are not wanting to sustain this contention of the appellant, but we cannot follow them.

If, under the attachment in his hands, the sheriff had undertaken to seize tangible property of the defendant in the possession of the garnishee beyond the jurisdiction of the court, such property would not have been bound by the attachment. Pennsylvania Railroad Company v. Pennock, 51 Pa. 244. By the act of June 13, 1836 (P. L. 568), the goods and effects of a defendant, in a foreign attachment, in the hands of the garnishee shall, after service of the writ, be bound by it, and be in the officer's power, and, if susceptible of seizure or manual occupation, the officer shall proceed to secure the same. to answer and abide the judgment of the court in the case. If tangible goods are not in the possession of the garnisnee within the jurisdiction of the court out of which the writ of attachment issued, they cannot be touched by that writ, and are therefore not bound by it. An intangible thing-a debt due from the garnishee to the defendant -cannot be actually seized anywhere, but, from the time it is served. "All debts are payable everywhere, unless there be some special limitation or provision in respect to the payment; the rule being that debts as such have no locus or situs, but accompany the creditor everywhere." 2 Parsons on Contracts (8th Ed.) 702.

It does not appear from the answers to the interrogatories that the debt due by the garnishee to the defendant had imposed upon it any "special limitation or provision in respect to the payment." It was payable generally, and unquestionably could have been sued on here in Pennsylvania, and therefore was attachable here. "This is the principle and effect of the best-considered cases—the inevitable effect from the nature of transitory actions and the purpose of foreign attachment laws if we would enforce that purpose." Chicago, Rock Island, etc., Railway v. Sturm, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. Ed. 1144. The rule that, to give a court jurisdiction in foreign attachment, the res must be within the territorial jurisdiction of the court applies only to tangible assets, capable of actual seizure, and does not apply to choses in action. Jurisdiction to fasten choses in action by garnishee process depends upon the ability to serve that process upon the debtor of the absent defendant, within the jurisdiction of the court. National Fire Insurance Co. v. Chambers, 53 N. J. Eq. 468, 32 Atl. 663. This case is cited with approval in Harris v. Balk, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. Ed. 1023. In that case a citizen of North Carolina, indebted to another citizen of that state, was, while temporarily in Maryland, garnisheed by a creditor of the man to whom he owed the money, and judgment was duly entered according to the Maryland practice, and paid. Subsequently the original creditor of the garnishee sued him in North Carolina, and the defense was set up of judgment against the garnishee and its payment by him, but the North Carolina courts held that, as the situs of the debt was in North Carolina, the Maryland judgment was not a bar to a recovery by the North Carolina creditor, and judgment was awarded against the debtor. On a writ of error to the Supreme Court of the United States that court, in reversing the judgment, held that, as under the laws of Maryland the garnishee could have been sued by his creditor in the courts of that state, he was subject to a garnishee process if found and served there, even though there only temporarily, no matter where the situs of the debt was originally, and it was said: "The cases holding that the state court obtains no jurisdiction over the garnishee if he be but temporarily within the state proceed upon the theory that the situs of the debt is at the domicile either being an effect of the defendant in the hands of the creditor or of the debtor, and that it

eFor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

does not follow the debtor in his casual or out appearing, a judgment by default may temporary journey into another state, and the garnishee has no possession of any property or credit of the principal debtor in the foreign state. We regard the contention of the plaintiff in error as the correct one. The authorities in the various state courts upon this question are not at all in harmony. They have been collected by counsel, and will be found in their respective briefs, and it is not necessary to here enlarge upon them. Attachment is the creature of the local law; that is, unless there is a law of the state providing for and permitting the attachment, it cannot be levied there. there be a law of the state providing for the attachment of the debt, then if the garnishee be found in that state, and process be personally served upon him therein, we think the court thereby acquires jurisdiction over him, and can garnish the debt due from him to the debtor of the plaintiff, and condemn it, provided the garnishee could himself be sued by his creditor in that state. We do not see how the question of jurisdiction vel non can properly be made to depend upon the so-called original situs of the debt, or upon the character of the stay of the garnishee, whether temporary or permanent, in the state where the attachment is issued. Power over the person of the garnishee confers jurisdiction on the courts of the state where the writ issues. Blackstone v. Miller, 188 U. S. 189, 206, 23 Sup. Ct. 277, 47 L. Ed. 439. If, while temporarily there, his creditor might sue him there and recover the debt, then he is liable to process of garnishment, no matter where the situs of the debt was originally. We do not see the materiality of the expression 'situs of the debt,' when used in connection with attachment proceedings. If by situs is meant the place of the creation of the debt, that fact is immaterial. If it be meant that the obligation to pay the debt can only be enforced at the situs thus fixed, we think it plainly untrue. The obligation of the debtor to pay his debt clings to and accompanies him wherever he goes. He is as much bound to pay his debt in a foreign state, when therein sued upon his obligation by his creditor, as he was in the state where the debt was contracted. speak of ordinary debts, such as the one in this case. It would be no defense to such suit for the debtor to plead that he was only in the foreign state casually or temporarily. His obligation to pay would be the same whether he was there in that way or with an intention to remain. It is nothing but the obligation to pay which is garnished or attached. This obligation can be enforced by the courts of the foreign state after personal service or process therein, just as well as by the courts of the domicile of the debtor. If the debtor leave the foreign state with-

be entered, upon which execution may issue, or the judgment may be sued upon in any other state where the debtor might be found. In such case the situs is unimportant. It is not a question of possession in the foreign state, for possession cannot be taken of a debt or of the obligation to pay it, as tangible property might be taken possession of. Notice to the debtor (garnishee) of the commencement of the suit, and notice not to pay to his creditor, is all that can be given, whether the garnishee be a mere casual and temporary comer, or a resident of the state where the attachment is laid. His obligation to pay to his creditor is thereby arrested, and a lien created upon the debt itself. Cahoon v. Morgan, 38 Vt. 234, 236; National Fire Ins. Co. v. Chambers, 53 N. J. Eq. 468, 483, 32 Atl. 663. We can see no reason why the attachment could not be thus laid, provided the creditor of the garnishee could himself sue in that state, and its laws permitted the attachment."

The foregoing is in accord with what was held in Fithian et al. v. New York & Erie R. R. Co., 81 Pa. 114, where the question was whether a debt due by a foreign corporation, which was evidenced by a judgment obtained against it in a foreign state, was attachable here at the instance of a creditor of the corporation's creditor, and we decided that such debt could be attached, and that the garnishee was not protected by paying over the amount of the judgment against it to the attorneys of its judgment creditor in the state of New York in disregard of the attachment. The attachment, it is true, was one in execution under the act of June 13, 1836, but that act, directing that a debt due to a defendant may be attached, provides that it is to be attached in the manner allowed in the case of a foreign attachment. If the debt was attachable in the attachment execution, it clearly would have been so in a foreign attachment.

The assignment of error is overruled, and the judgment is affirmed.

(224 Pa. 415)

In re HOWELL'S ESTATE. Appeal of RICE et al.

(Supreme Court of Pennsylvania. April 12, 1909.)

VENDOR AND PURCHASER (§ 172*)—SALE OF REAL ESTATE—LIABILITIES OF VENDEE—IN-TEREST.

A contract for the sale of land required the A contract for the sale of land required the vendor to give a deed clear of incumbrances. It also provided for immediate possession of the land by the vendee. *Held*, if no interest is stipulated to be paid in the meantime by the vendee, none is payable until the incumbrance is removed and the deed tendered.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 349-351; Dec. Dig. § 172.*]

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Orphans' Court, Northamppany delivered to the said David W. Howell ton County.

| pany delivered to the said David W. Howell a check for \$1,000, as provided in said con-

' In the matter of the estate of D. W. Howell. From decree on petition for specific performance, George O. Rice and Stanley Howell, administrators, appeal. Affirmed.

The petition was, in substance, as follows: George O. Rice and Stanley Howell were appointed administrators of the estate of David W. Howell, deceased. In his lifetime said David W. Howell was the owner of a tract of land situated in Northampton county, Pa. He entered into articles of agreement, on August 4, 1902, to grant, bargain, and sell said land to the Northampton Railroad Company. The agreement provided that an annual ground rent of \$250 shall be paid by said Northampton Railroad Company, and that within 30 days from the date of the agreement a ground rent deed should be executed and delivered by the vendor. The agreement also gave the purchaser the option at any time to extinguish the said ground rent upon the payment of \$5,000 and all arrearages of rent. Permission was given to the vendee to immediately enter upon said land and construct its railroad thereon. A further provision gave the vendor the privilege, within 30 days, of accepting \$5,000 in the 5 per cent. bonds of the said railroad company in lieu of the said ground rent, and, upon his accepting the said bonds, to deliver within said 30 days a deed in fee simple, clear of incumbrances, to the said railroad company. In pursuance of said permission to enter the vendee took possession of said land, and has used and enjoyed the same from the date of its entry. The vendor in his lifetime accepted the privilege of said bonds of the railroad company in lieu of the annual ground rent, and tendered a deed in fee simple, which deed the said railroad company refused to accept because of the existence of a public road upon and over a part of the land, which it claimed was an incumbrance thereon. This contention was sustained by the court below and the Supreme Court upon appeal. The said public road was formally vacated upon petition of the vendor, with notice to the vendee at the time of its vacation. The vendor died, having made no provision for the performance of said contract during his lifetime. The administrators, therefore, presented this petition to the orphans' court, praying said contract shall be specifically performed, and that the vendee shall pay interest on the purchase money from the time of entry.

Scott, P. J., filed the following opinion: "There is no substantial dispute about the facts. They are admitted as pleaded in the bill. Some additions thereto are averred by answer and admitted or proven, which are embraced in specific findings, as follows:

"Contemporaneously with the execution of stands resaid contract the Northampton Railroad Cominterest.

a check for \$1,000, as provided in said contract, who thereupon delivered to the said company a receipt in these words: 'Received, Martins Creek, Aug. 4, 1902, from Northampton Railroad Company, draft of William Jay Turner for one thousand dollars in pursuance of agreement bearing even date herewith, same to be held as in said agreement provided, and returned upon delivery of deed. In consideration whereof said Northampton Railroad Company is privileged to enter at once on the premises covered by said agreement and proceed with its work of construction.' Inat said draft was found by the administrators of David W. Howell among decedent's papers after his death, was produced in court at the time of hearing, and tendered to defendant.

"The railroad company, in the work of constitution immediately after the execution of the agreement between the parties, occupied a portion of the public road, since vacated (hereinafter mentioned). The part over which its tracks were laid was not traveled by the public.

"A bill for specific performance of this agreement was filed in the common pleas by David W. Howell in his lifetime (No. 10, December term, 1903), and execution of it resisted. A deed was tendered to vendee March 31, 1903, but refused, because the vendor could not make title 'clear of incumbrance,' which incumbrance consisted of a public road over, and longitudinally along, its tracks for some distance. The bill was dismissed September 12, 1904, and judgment affirmed March 20, 1895. Howell v. R. R. Co., 211 Pa. 284, 60 Atl. 793.

"The public road to which reference is above made was thereafter, by final confirmation on June 12, 1905, vacated by viewers appointed upon petition of David W. Howell. The defendant had notice of the fact.

"David W. Howell died November 10, 1905, without having previously made provision for performance of the contract. and letters of administration were granted by the register on November 16th. This bill was exhibited by the administration July 13, 1908. From the 1st of April prior to this last date, through the period intervening, there were negotiations pending between opposing counsel relative to amicable adjustment of this demand.

"The bonds of the railroad company have all been sold; are not listed for sale at any exchange; have no fixed and definite market value; are held chiefly as investment securities; and upon application to a broker for the purchase of them the administrators were informed he did not know where they could be bought. The president of the defendant company asserts his ability to procure them, if required, and by his answer stands ready to deliver them now without interest.

"Conclusions of Law.

"When the vendor in articles of agreement for sale of land is to give vendee a deed 'clear of incumbrances,' and the contract provides for immediate possession of the land by the vendee, as part of the benefit for the consideration to be paid, if no interest is stipulated for in the meantime by the vendee, none is payable until after the incumbrance is removed by the vendor and deed tendered.

"While the answer denies jurisdiction of the court to decree specific execution of the contract by asserting an adequate remedy at law, and suggests laches of the complainants and their deceased intestate, the real contention is whether payment shall be delivery of the bonds with interest value from the date of the execution of the agreement (August 4, 1902), or without it.

"In the eleventh paragraph of the answer to the whole petition 'the respondent avers that it has been ready and willing at all times, both during the lifetime of said David W. Howell and since his decease, to deliver the bonds of the Northampton Railroad Company, referred to in the contract annexed to said petition, immediately upon the delivery to it of a proper deed conveying to it the premises described in said petition in fee simple, clear of incumbrances, together with the return of the check for \$1,000, and is now ready and willing to deliver said bonds, bearing interest from the date when such deed shall be delivered and said check returned.' But few observations, therefore, are necessary beyond discussion of this single question of the right to interest, for the others may well be treated as waived by the pleadings.

"The principles which apply to specific performance of the contracts of decedents in the orphans' court under the act of assembly of February 24, 1834 (P. L. 75) § 15, are the same as those which control a chancellor in equity. Brady's Appeal, 66 Pa. 277. No doubt the petitioners, after diligent pursuit, might be able to purchase these bonds by advertisement or other methods. although not listed upon the exchanges. It is a familiar rule that equity will not entertain jurisdiction to decree execution of a contract by a vendee which contemplates only the payment of money, nor generally where the consideration consists of goods or chattels, stock or bonds, for which differences in market values after purchase thereof may be adequately compensated, but it is not universal. There are many exceptional cases. It is not applicable where some specific chattel bargained for has a personal value, or which the defendant only can supply, nor where the whole issue of bonds is held by one or a few persons for investment; when they have no definite value in the general market; when the difficulty of acquisition by the complainant would be great, or practically impossible.

"This agreement contemplated immediate possession by the vendee of the land to be conveyed, with a covenant that a railroad should be constructed upon it and operated. The tract was surrounded by other lands of the vendor. He exercised within 30 days the option to take these bonds, instead of the annual ground rent of 5 per cent. upon a capitalization of \$5,000, and it is therefore evident that his purpose had in view larger possibilities than seemed then to be measured by this percentage on investment. Jurisdiction in equity is often assumed upon the ground that relief by bill is the most convenient, although there be a remedy at law. Bierbower's Appeal. 107 Pa. 14; Appeal of Brush Electric Light Co. et al., 114 Pa. 574, 7 Atl. 794. And if the question was more doubtful than it seems to me, as no demurrer was interposed, the bill will not be dismissed. Dorff v. Schmunk, 197 Pa 298, 47 Atl. 113. When time is not of the essence of the contract, delay in tendering title, especially if acquiesced in by the defendant, or occasioned by his objections, is no bar to specific execution of it, unless there has been gross and inexcusable laches, or such a change in the situation of the parties or property that suitable compensation cannot be made by payment of interest to one party, or its correlative loss to the other. Morgan v. Scott, 26 Pa. 51; Sylvester v. Born, 132 Pa. 467, 19 Atl. 337; Waterman, Spec. Perf. \$ 478; Tiernan et al. v. Roland & Blackstone, 15 Pa. 429. Time is not usually of the essence of a real contract, but it may become so, although not expressly stipulated for, when the consideration for it consists of securities, the value of which, in periods of business activity or depression, is subject to enhancement or depreciation. Waterman, Spec. Perf. § 460. In 1904 these bonds were 'a trifle above par.' But their price now has not been proven. But I need say no more upon these two propositions. They have not been pressed by argument, except to urge that by delay the complainants in equity have forfeited interest, if otherwise they might have been entitled to receive it.

"The case relating to interest demands on real contracts are divided into two classes with a distinction between them which is not plain until after close examination, for all of them do not seem to be harmonious at first view. The question seldom arises in suits for specific performance by a vendor except by petition to execute the contracts of decedents in the orphans' court, as bills for that purpose are predicated upon the fact that they cannot be maintained for payment of the consideration in money. It is sometimes presented on a vendee's bill after tender, but more frequently in actions of covenant or ejectment to enforce the payment stipulated for in articles of a reement. When the contract has not been executed by delivery of a deed at the time appointed,

and possession has not been given, the general rule upon the subject is thus stated: 'The vendor is regarded as trustee of the land for the benefit of the purchaser, and liable to account to him for rents and profits, or for the value of the use and occupation, and the purchaser is treated as trustee of the purchase money unpaid and charged with interest thereon, unless the purchase money has been appropriated, and no benefit has accrued from it to the purchaser. 2 Beach, Eq. Jur. § 633. When possession of the land, however, has been taken by the vendee (otherwise than as part of the contract), who then holds and enjoys it without disturbance, the situation is reversed, and it has been held under these circumstances that, as the purchaser has the profits of his use and occupation, that will be deemed equivalent to the interest on the price to be paid which then belongs to the vendor. Fasholt v. Reed, 16 Serg. & R. 266 (ejectment); Minard v. Beans, 64 Pa. 411 (covenant); Blair's Estate, 178 Pa. 582, 36 Atl. 179 (bill by vendee); Hershey's Estate, 213 Pa. 601, 63 Atl. 296 (bill by executors of vendor in orphans' court).

"The class of cases to which this principle applies are those in which there is a certain time appointed for delivery of the deed and payment of the purchase price, but the vendee fails to receive his deed at the designated period, either because the vendor is not ready, or is unable to give a clear title. or remove incumbrances at once. these instances the purchase money is legally 'due' by the terms of the vendee's covenant at the day set for payment. Although he gets no deed immediately, he has an equitable title in the land, and continued undisturbed possession of it makes him responsible for the interest from that date. provided the vendor is vigilant in removing the disability, and the vendee has not kept his money uninvested and unproductive, but appropriated to this anticipated and future payment.

"The other class of cases is where the mutual covenants between the parties are treated as dependent. Adams v. Williams, 2 Watts & S. 227; Keeler & Co. v. Schmertz et al., 46 Pa. 135. If the consideration is to be paid only upon receipt of deed for a clear title, or one free from incumbrances. the money is not 'due' until such a conveyance is tendered, for the vendor may never be able to comply; and as interest, when not expressly contracted for, is the legal and uniform rate of damages for detention of money after it becomes due, it is not charged against the vendee willing to comply with the condition, who is in possession under the contract itself, until the event happens upon which payment depends. It may be said of this rule what Judge Sharswood said of the distinction between sharing in profits and receiving a certain percentage of them as com-

ship existence: 'It must be admitted to be of a very refined and shadowy character, but it has been authoritatively established. It will be found supported and illustrated by great variety of facts in McKennan v. Sterrett, 6 Watts, 162; Minard v. Beans, 64 Pa. 411; Robbins v. Coal Co., 198 Pa. 301, 47 Atl. 873; Nettleton v. Caryl, 14 Pa. Super. Ct. 443. In this last-cited case it is said by Judge Rice (page 445): 'It is contended that, where the vendee of land is put into possession, he must pay interest on the purchase money, whether the articles call for it or not. It is not to be denied that expressions can be found in text-books and reports which, read by themselves and apart from the facts of the cases in which they are used, would seem to sustain this contention. • • But (page 447) where the contract expressly provides that he shall have immediate possession of the land, and that the purchase money shall not be due and payable until a future day, and is silent upon the subject of interest, no such equitable consideration enters into the case, and we understand the law to be that he is not chargeable with interest until the debt is due.' In Robbins v. Coal Co., 198 Pa. 301, 304, 47 Atl. 873, 874, it was declared, with respect to a condition in the agreement similar to the one here that, 'The first installment of the unpaid purchase money, therefore, was not "due" and payable until White had delivered, not only a deed, but one clear of incumbrances. Until both of these conditions had been complied with the defendant was not required to pay the money, and was in no default in not paying it.' Even in Blair's Estate, 178 Pa. 582, 36 Atl. 179. the authority of which was strongly put by re me by the petitioning counsel, it will be seen, upon examination of the facts, that the money upon which interest was charged from October 17, 1887, was due and payable on that date by the contract, and the vendee, whose bill it was for performance, wished to evade it for the equitable considerations therein discussed, but which were adjudged untenable. The present contract, it has been expressly decided by judgment on appeal, belongs to this class. Howell v. Northampton R. R. Co., 211 Pa. 284, 60 Atl. 793.

"The defendant has been in undisturbed possession of this land since August, 1902, has constructed, and is now operating, its railroad over it, and thus enjoyed the profits of its use and occupation without compensation. But this is not so inequitable as it seems from the statement of the fact. was put into immediate possession, not unlawfully nor by mere acquiescence of the vendor, but by virtue of the contract, and the use of it, pending a conveyance as required, was part of the benefit to be received for the consideration then named, as will be seen from the receipt given for the draft of pensation, in the determination of a partner- \$1,000, as well as from the written agree-

ment. The only default about the execution | ly affect the company. The complainants of the deed was that of the decedent. Under these circumstances no action at law would lie for the rents and profits, or use and occupation. He tendered no deed at all until March 31, 1903. The objection to it was not capricious. When declined because the incumbrance of the highway existed, the vendor did not proceed to remove it, but filed his bill in equity to compel the defendant to accept it with this defect, and continued the litigation through the appellate court, where it did not reach final decision before March 20, 1905. I do not say that, having thus made an election of remedy with full knowledge of the facts, there is none left to his representatives here, in the absence of rescission by the defendant, but they can have no cause of complaint on behalf of his estate, which was not a legal grievance to him in his own lifetime.

"The expenses of this protracted litigation to the defendant, although the amount is not shown, must have fairly equaled or exceeded the ground rent valuation up to the time of his death, put upon the occupancy of the land by the vendor in his agreement. While counsel fees and expenses incurred in a suit may not be recovered in an action at law, it must not be forgotten that specific performance is decreed only as a matter of grace, and a strict legal right is not sufficient to move a chancellor if it will be inequitable or unfair, nor without indemnification for a loss occasioned by the acts of the plaintiff. Waterman, Spec. Perf. § 176. This subject-matter is pleaded as a defense against the prayer of the bill.

"The incumbrance was lifted on June 12. 1905, and the decedent, living for five months afterward, made no tender of conveyance. The defendant knew of the vacation of the road; but, as it did not intend to rescind the contract, was not required to tender performance on its own behalf. After the decedent's death his own deed, if yet in existence, would have conveyed no title. Karmane v. Hoober, 3 Watts & S. 253. But his administrators at once, or after short delay incident to examination of his business papers, could have made proof of the contract under Act March 31, 1792, 3 Smith's Laws, p. 66 (1 Purd. Dig. 738); and, as the defendant had always pleaded its readiness to take the title when clear of incumbrances and pay the consideration, conveyance by them under an order of court would have been attended by no material loss. Hagerty's Case, 4 Watts, 305; Chess' Appeal, 4 Pa. 52, 45 Am. Dec. 668. The defendant was still holding possession and enjoying the profits pending delivery of this deed, as part of the consideration of the decedent's contract. That this period was longer or shorter than had been originally anticipated did not legal-

here had the power to terminate the difficulty, but took no steps to comply with the stipulated conditions for conveyance until 21/2 years more had expired.

"The defendant is entitled to a fee-simple deed, pursuant to the terms of the agreement and return of the draft, for which it will make payment in bonds of the Northampton Railroad Company, guaranteed as therein specified, of the par value of \$5,000, with coupons attached, bearing interest from the date of delivery of the deed and draft. The plaintiffs will pay the costs. Let a decree be prepared in accordance with this opinion, submitted and settled sec. reg."

Argued before FELL, BROWN, MESTRE-ZAT, ELKIN, and STEWART, JJ.

Aaron Goldsmith, for appellants. Edward J. Fox and James W. Fox, for appellee.

PER CURIAM. The decree is affirmed on the opinion of the learned president judge of the orphans' court.

(224 Pa. 391)

BONNER V. JENNINGS.

(Supreme Court of Pennsylvania. April 12, 1909.)

MUNICIPAL CORPORATIONS (§ 129*)—BOROUGE SOLICITOR—MODE OF FILLING OFFICE.

A borough employed an attorney at law for one year. About six weeks thereafter, Act April 25, 1907 (P. L. 103), was passed, creating the office of borough solicitor, and fixing his term for three years. Held, that the attorney did not become, at the end of his employment, borough solicitor without an election, and an ordinance fixing the amount of his bond was not an equivalent thereof.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 303; Dec. Dig. § 129.*]

Appeal from Court of Common Pleas. Lackawanna County.

Quo warranto by the Commonwealth, on the relation of J. H. Bonner, against W. A. Jennings. Judgment for defendant, and plaintiff appeals. Affirmed.

Newcomb, J., of the court below filed the following opinion:

"The relator asserts title to the office of solicitor for the borough of Old Forge in this county. The writ was issued at his instance, for the purpose of ousting the defendant. who is alleged to be unlawfully holding and exercising the office. The cause being at issue on a traverse of the averments of relator's petition, it was submitted to the court for trial without a jury, under the act of April 22, 1874 (P. L. 109), and its supplements, by stipulation of counsel filed May 4th instant. The trial thereupon proceeded, and from the evidence I find the following:

"Findings of Fact.

"(1) How and when the borough of Old Forge was created is not shown. The case was tried on the assumption that before the inception of the cause it had been organized under the general borough laws, and was governed accordingly, at all times with which the case is concerned.

"(2) March 4, 1907, being the first Monday in the month, the annual reorganization of the town council was effected. Among other things, action was then taken for the appointment of a solicitor. As recorded on the minutes the action was as follows: next order of business was the election of borough solicitor. The following names were presented: John H. Bonner and W. A. Jennings. On roll call the following voted for J. H. Bonner [The names follow]. For W. A. Jennings [The names follow]. The result was as follows: Bonner 7, Jennings 3. John Bonner was declared the borough solicitor for the ensuing year.'

"(3) From that time until the first Monday of March this year the relator served as the attorney or solicitor for the borough. June 24, 1907, action was taken with respect to his salary. The minute of the action is as follows: 'Motion of Patrick Burke that the borough solicitor's salary be \$350 a year for his term. Motion carried.' At the same meeting action was taken with reference to the solicitor's bond. The minute is as follows: 'An ordinance fixing the borough solicitor's bond at \$1.000 a year was offered, and passed final reading.' The minutes of the meeting further show that his bond in that sum was accepted and filed.

"(4) The ordinance providing for the bond was recorded on the ordinance book, and is as follows: 'An ordinance fixing the amount of the borough solicitor's bond in the borough of Old Forge, county of Lackawanna and state of Pennsylvania. Be it ordained by the council of Old Forge, and it is hereby enacted by authority of the same, that in compliance with the act of assembly of 1907 requiring the borough solicitor to give a bond for the faithful performance of his duties the same be fixed at one thousand dollars.' The 'act of assembly of 1907' therein referred to is the act of April 25, 1907 (P. L 103).

"(5) This act is entitled a supplement to the general borough act of April 3, 1851 (P. L. 320), 'providing for the election of a borough solicitor, fixing his term of office, and prescribing his duties, and authorizing the town council to fix his compensation.' tion 1 is as follows: 'That the town council of each of said boroughs on the first Monday of March, 1907, or as soon thereafter as practicable, may elect, by a vote of a majority of the members, one person, learned in the law, who shall be styled the "borough solicitor," and shall serve for the term of three years from the first Monday of March | cannot recover possession.

succeeding his election, and until his successor shall be duly qualified; and the town council shall also fix the compensation he shall be allowed for said term. Vacancies in said office shall be filled by the town council for the unexpired term. He shall give bond to the corporation with two or more sufficient sureties, to be approved by the town council, in such sum as they shall by ordinance direct, conditioned,' etc. The remaining sections relate to the solicitor's duties.

"(6) In connection with the record of the ordinance of June 24th in the ordinance book the clerk certified: 'That the foregoing ordinance was given to the burgess, Ed. Garvin, at least ten days before the next regular meeting, that he returned the same to the next regular meeting without his signature or his veto.' Under the clerk's testimony it could be found that in respect to the action of the burgess the certificate is inaccurate, and thus the validity of the ordinance might be open to question. As the point is not essential to the proper disposition of the case, we do not at this time undertake to decide it.

"(7) At the reorganization of the council the first Monday of March this year, the defendant was appointed borough solicitor for one year, and from that time has been acting and recognized as such although he gave no bond; none being required by the council. At the meeting of March 23d action was taken with reference to his salary, as shown by the following minute: 'Motion of Hapgood that the rest of the officers receive the same salary as last year, the officers being clerk, treasurer, solicitor and janitor. Motion carried.'

"(8) Excepting the ordinance fixing the amount of the relator's bond in June, 1907, no action appears to have been at any time taken by the council with reference to the act of April 25, 1907.

"The defendant presented several requests for findings of fact; but, as they are substantially covered by the foregoing findings, they need not be specifically answered.

"As applicable to the facts I state the following:

"Conclusions of Law.

"(1) At the time of relator's appointment the office of borough solicitor did not exist. His election was nothing more or less than an employment, the term of which expired by limitation on the first Monday of March, 1908.

"(2) The subsequent attempt to change the character of his appointment by merely requiring a bond, in accordance with the act of April 25, 1907 (P. L. 103), was of no ef-

"(3) Hence the relator never took title to the office in question, and for that reason



"(4) Whether defendant has any title to the office is at least questionable. But that need not now be decided, as the relator must recover, if at all, on the strength of his own

"(5) Judgment should accordingly be entered for defendant, with costs.

"The defendant presented certain requests for conclusions of law, which are practically covered by the foregoing, and more specific answers are deemed unnecessary.

"Discussion.

"Prior to the act of April 25, 1907, there was no express legislative authority for the election of a borough solicitor. There was no statute either creating or recognizing such office. That the town council was clothed with implied power to employ an attorney by the year, if in its discretion it saw fit, has never been doubted, and, indeed, would hardly seem to admit of a doubt. That, however, will not sustain the theory that the attorney so appointed became a public official, and his position a public office. Such office can only be created by the Legislature or by municipal action in pursuance of express legislative authority. When the relator was appointed in March, 1907, he was at liberty to accept or reject an employment tendered him by the borough. Having accepted, he took it with the limitations annexed, namely, for the term of one year. That fixed the status of the parties to the appointment. The status was not changed by the act of April 25, 1907. It may, at least for the purpose of this case, be assumed that the effect of the act was to create the office of borough solicitor with a tenure of three years. The office, however, could only be filled by an election in pursuance of the act. That did not pretend to make the borough attorney the incumbent of the newly created office. Neither does it purport to give the town council power to make him the incumbent otherwise than by election. Such election has never been held, unless the one of this year could be so construed, which we do not undertake to decide. It is not sound legal reasoning to say that the subsequent ordinance requiring a-bond from relator and fixing its amount was equivalent to his election under the act. Like all statutory proceedings, to be effective, the statute must be followed with substantial strictness. Here the statute was not in existence when the relator was appointed in March, 1907. There has been no attempt to rescind that action, nor to proceed with another election until the end of the year for which the appointment was made. Then the defendant was elected. If the case turned on the validity of his title, a different judgment might have to be rendered.

"It may be the act does not make the election of a solicitor compulsory on the borough. But there is ground for the argument that, if the town council sees fit to have a solicitor, they must now elect in accordance with the act. The defendant is confronted with the fact that there was no attempt in his case to conform to the statute, but his appointment was apparently made on the theory that it is optional with the borough whether to elect according to the act, or to appoint an attorney from year to year as heretofore. While we may have power to pass on the defendant's title, and, if neither party is found to have title, to declare the office vacant, we do not think the case is of such character as to call for that, and it is accordingly decided against the relator on the want of title in him. We cannot see how he has any standing to claim an office which did not exist at the time of his appointment, especially in view of the limitation of his term of service to 'the ensuing year.'

"Let judgment be entered for the defendant, with costs, unless exceptions be filed within 30 days after notice to the parties or their respective attorneys, which is to be forthwith served by the prothonotary or his clerk, as provided by the act of April 22, 1874 (P. L. 109)."

Argued before FELL, BROWN, POTTER, ELKIN, and STEWART, JJ.

A. A. Vosburg and Chas. W. Dawson, for appellant. M. J. Martin and Robt. J. Murray, for appellee.

PER CURIAM. The judgment is affirmed on the opinion of Judge Newcomb.

(224 Pa. 879)

PELLIO V. BULLS HEAD COAL CO.

(Supreme Court of Pennsylvania. April 12, 1909.)

CORPORATIONS (§ 186*)—FRAUD BY DIRECTORS—PURCHASE OF STOCK BY DIRECTORS—CAN-CELLATION.

A stockholder was induced by the fraudulent representations of the officers of the corpolent representations of the officers of the corpo-ration to sell his stock to the company for much less than its real value. Held, that equity would direct a reassignment on repayment of the price, but will not in the same suit order an ac-counting and a repayment of the money fraud-ulently taken from the company by its officers under the guise of salary.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 695-701; Dec. Dig. § 186.*]

Appeal from Court of Common Pleas, Lackawanna County.

Bill by John W. Pellio against the Bulls Head Coal Company and David J. Whiteford. From the decree, defendant appeals, and plaintiff files cross-appeal. and cross-appeal dismissed.

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Edwards, P. J., filed the following opin- about worked out and that \$300 would be ion in the court below:

a good price for his stock. This informa-

"Findings of Fact.

"(1) The Bulls Head Coal Company was organized and incorporated in January, 1901, for the purpose of mining coal in the city of Scranton. The authorized capital stock was \$25,000, divided into 250 shares each of the par value of \$100. The evidence shows that \$22,500 of the stock was issued, and that some time after the organization of the company the stock was held as follows:

Charles A. Burr	.100	shares.
David J. Whiteford		
William M. Whiteford		
W. E. Stibbs		
Ira T. Brown		
Eugene F. Marsh		
J. W. Pellio (plaintiff)	. 5	shares.

"(2) The company after its incorporation proceeded to mine coal. Charles A. Burr was president of the company, and David J. Whiteford was secretary and treasurer. The company had directors-Burr, William M. Whiteford, David J. Whiteford, Marsh, and Pellio-but the business of the company was carried on in a very informal way, the president and the secretary (Burr and D. J. Whiteford) being in charge of the business and conducting it as they saw fit. There were no stated meetings of the board of directors except the annual meeting held when the parties met as stockholders. Mr. Burr died in June, 1904, and from that time to September, 1906, the business of the company was managed by David J. Whiteford. aided in an informal way by Mrs. Burr who became the owner of the Burr stock-100 shares.

"(3) The plaintiff at the solicitation of David J. Whiteford sold his five shares of stock to the Bulls Head Coal Company for the sum of \$1,000 on August 17, 1906. The plaintiff himself does not know whether Whiteford or the company was the purchaser, the transfer of the stock certificate having been signed in blank; but the evidence shows that the stock was paid for with the company's check, signed by Whiteford as treasurer. The plaintiff, claiming that fraud had been practiced upon him, and that he had been deceived as to the financial condition of the company and as to the value of the stock, demanded a reassignment of his stock, tendering to Whiteford, and through him to the company, on March 18, 1907, the sum of \$1,000 and interest from August 17, 1906. The reassignment of the stock was refused.

"(4) The offer to buy plaintiff's stock came from Mr. Bradbury, who was acting for one or both of defendants. Before agreeing to sell his stock, plaintiff consulted Whiteford as to the condition of the mine and the value of the stock. The substance of the information given plaintiff was that the mine was

about worked out and that \$300 would be a good price for his stock. This information was not only misleading, it was false; and the evidence pointing to this conclusion is of a very convincing character, as will be seen from our next finding.

"(5) The mining operation carried on by the defendant company was a small one. When the operation was started, the president and treasurer each had a salary of \$75 per month as compensation for managing the affairs of the company. Some time afterwards these two officers each received \$500 per month. Up to April, 1904, they had drawn from the treasury of the company in salaries the sum of \$25,000. In April. 1904, the salary of each of the two persons named was \$1,000 per month, and we find that the sum of \$49,000 was paid out in this way from May, 1904, to July 10, 1906. The \$1,000 per month was paid to Mr. Burr a month or two before he died, and the same sum was continued to his widow. Whiteford received the same sum. The payment of these large sums in the guise of salaries was without the authority of the board of directors, and without the knowledge of some of the directors. The evidence shows further that at the time Whiteford was arranging to buy plaintiff's stock, and, when Whiteford said the stock was worth only \$300, the company had a large amount of cash in the treasury; that is, on July 31, 1906, the cash balance was \$14,496.01, and on August 81, 1906, it was \$13,278.38.

"(6) It is established by the evidence that the defendants, one or the other of them, purchased the stock of Mr. Marsh, five shares, and that an effort was made to buy the stock of Ira T. Brown, five shares, from the executor of Brown, through Mr. Reynolds, attorney for the estate. Whiteford made the same kind of representations to Mr. Marsh and Mr. Reynolds that he had made to the plaintiff. He said that the property of the company was exhausted, and that the assets of the company consisted of some old mine cars, some mine mules, and some worn-out machinery. There seems to have been a systematic effort on the part of the defendant Whiteford to buy out the small stockholders at as low a price as possible, and, to accomplish this purpose, that the property was, to say the least, unduly depreciated and the actual condition of the company concealed. Nothing was said as to the distribution of \$49,000 in salaries in about two years to two of the officers of the company without authority of law.

"(7) It is not necessary for us to ascertain the precise value of plaintiff's stock when he sold it to the company. It is sufficient to state that the value of the stock was much in excess of the amount paid for it, and that the plaintiff was induced to part with his stock by means of false representations made by the defendant who was acting in his own



interest and in the interest of the other large [Head Coal Company, through its proper of-

"(8) About November, 1906, David Spruks became interested in the Bulls Head Coal Company. He bought 100 shares of stock from the Burr estate, paying \$15,000 for them, 5 shares from E. F. Marsh, and 5 shares from the Brown estate. For the 110 shares he paid altogether over \$19,000. He knew that the company had purchased the plaintiff's five shares, because he saw the certificate of stock, marked 'Canceled' in the treasury. Spruks reorganized the company in the sense that the company had new stockholders, a new board of directors and new officers, and the company continued to mine coal. The company, as a corporation, was the same.

"(9) When Spruks and his fellow stockholders took charge of the company, the money in the treasury was a part of the assets. The new stockholders had the benefit of all the assets, and the testimony of Spruks is that there was about \$13,000 in the treasury.

"(10) I can find no laches on the part of the plaintiff in the assertion of his rights. As soon as he discovered the unlawful acts of the officers of the company, he proceeded with reasonable diligence to secure a reassignment of his stock.

"Conclusions of Law.

"The only question that can be considered in this case is the right of the plaintiff to a return of his stock to him on payment to the company of the sum tendered to it on March 18, 1907. Having found as a matter of fact that plaintiff was deceived by an officer of the company as to the value of the stock, and that an intentional fraud was committed by the company upon the plaintiff, I have no hesitation in concluding that the plaintiff is entitled to a reassignment of his Plaintiff's counsel claims that the court has the power in the present case to inquire into the business of the company, to order an accounting, and to compel the repayment into the company's treasury of the large sums of money fraudulently taken therefrom under the guise of salaries. This position is untenable. These questions may arise as soon as the plaintiff becomes again a stockholder. The defendant company at the instance of a stockholder may be compelled to take legal measures to recover moneys unlawfully appropriated by its officers; and on the failure of the company to do so, after notice, a stockholder possibly may do so. But this question is not before us now. "The prayer of the plaintiff for such re-

lief is denied." The final decree was as follows: "Now,

September 22, 1908, this cause came on to be heard, and was argued by counsel, and on consideration thereof, it is ordered, adjudgficers, is directed and commanded to transfer and reassign or issue to John W. Pellio five shares of the capital stock of said company exsigned or surrendered to said company by the plaintiff on August 17, 1906, on the payment by the plaintiff to said company of \$1,000, with interest from August 17, 1906, to March 18, 1907. A decree is refused against said David J. Whiteford: (2) An injunction is awarded against the Bulls Head Coal Company, restraining said company and its officers from selling, transferring, or issuing the five shares of stock aforesaid to any other person than the plaintiff. Bond required in the sum of \$500. (3) The Bulls Head Coal Company, defendant, is di-, rected to pay the costs of these proceedings.

Argued before FELL, BROWN, POTTER, ELKIN, and STEWART, JJ.

C. Comegys and L. H. Burns, for the Bulls Head Coal Company. Samuel B. Price, for. John W. Pellio.

PER CURIAM. The decree directing the issue of shares of stock to the plaintiff is affirmed, and his cross-appeal is dismissed on the findings of fact and conclusions of law by the learned judge of the common pleas.

(224 Pa. 253)

McCABE et al. v. WATT et al. (Supreme Court of Pennsylvania. March 29, 1909.)

1. Injunction (§ 5*) - Mandatoby Injunc-TION.

A mandatory injunction should only be applied when legal rights are unlawfully invaded, or legal duties wantonly neglected.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 4; Dec. Dig. § 5.*]

2. Injunction (§ 21*)—Mandatoby Injunction—Burning Mine.

A mandatory injunction will not be granted against the lessee of a burning mine at the instance of a city within whose limits it is situated where defendant has tried for a year and a half to put out the fire, and in so doing has spent a sum equal to its entire capital stock.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 21.*]

3. NUISANCE (§ 61*)—ABATEMENT—DEFENSES.

A mine within the limits of a city and which is being consumed by a fire which has existed for two or three years, and which has got beyond the control of the lessee who has. expended its entire capital stock in an effort to extinguish it, is not a legal nuisance which the lessee can be ordered to abate.

Note.—For other cases, see Nuisance, Ed. Dec. Dig. § 61.*]

4. Injunction (§ 21*)-Mandatory Injunc-TION-SUPERVISION.

Where the extinguishment of a fire in a burning mine within the limits of a city would require expenditure of about \$75,000, the employment and supervision of a large force of men for a long time, and necessitate employment of skilled men to direct the work, involving labor from day to day for an indefinite period mendatory injunction would not be great. ed and decreed as follows: (1) That the Bulls | riod, mandatory injunction would not be granted to compel extinguishment because requiring rant a court in issuing its mandate to re-toe great amount of supervision by the court. move the destructive agency. [Ed. Note.—For other cases, see Injunction, Dec. Dig. § 21.*]

5. MINES AND MINERALS (§ 106*)—COBPORA-TIONS—MAINTENANCE OF NUISANCE. A corporation lessee of a mine in which was

a continuing fire alleged to constitute a nui-sance could at most only be compelled to use its corporate assets and funds in an effort to put qut the fire, and, this having been done, a court of equity would not compel it to do more.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 106.*]

Appeal from Court of Common Pleas, Lackawanna County.

Bill by John McCabe and others against W. W. Watt and the Finn Coal Company. From a decree awarding a mandatory injunction, defendant Finn Coal Company appeals. Reversed.

The court below in an opinion by Edwards, P. J., entered the following final

"This cause came on to be heard at a regular term of equity court, and was argued by counsel, and upon consideration thereof it is ordered, adjudged, and decreed as follows:

"(1) The bill of complaint is hereby dismissed as to W. W. Watt, one of the defendants.

"(2) A mandatory injunction is directed to be issued against the Finn Coal Company, the other defendant, commanding the said the Finn Coal Company to extinguish and suppress the fire and to abate the nuisance described in plaintiffs' bill.

"(3) The said the Finn Coal Company is ordered to pay the costs of the case.

Argued before FELL, BROWN, POTTER, ELKIN, and STEWART, JJ.

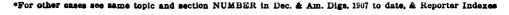
M. J. Martin and R. W. Rymer, for appellant. A. A. Vosburg, I. H. Burns, R. D. Stuart, Gramer & Horton, and C. W. Dawson, for appellee.

ELKIN, J. A mandatory injunction is a proper remedy in a proper case, and may lie to compel the abatement of a nuisance in some instances. No one questions the power of a court of equity to afford the relief intended to be secured by the interposition of this strong arm of the law if the facts warrant the application of such a It is an extreme remedy, and remedy. should only be applied when legal rights are unlawfully invaded or legal duties are willfully or wantonly neglected. This should be the controlling thought in the mind of a chancellor in the consideration of the respective rights and duties of the parties in a proceeding where a bill is filed praying for such relief. Hence the record presented on this appeal must be examined to ascertain whether under the facts found and not disputed such a case is made out as to war-

move the destructive agency.

A coal mine fire was started in 1902, when Barton was the lessee, by dumping hot ashes and cinders into the opening or depression of the surface near the engine room. The smouldering ashes ignited some refuse matter, and the fire gradually spread until it came in contact with an old culm bank. The fire at first was scarcely noticed, and no danger was apprehended by reason of In July, 1903, appellant became the owner and operator of the mine. Barton, who was the owner at the time the fire started, sold out and retired from the business. It is apparent that at the time appellant purchased the mine and property the smouldering fire was either unnoticed or not considered serious because it cannot be assumed that any company would be willing to invest large sums of money in a property being consumed by fire. It was not until 1904 that the fire began to spread and to assume a somewhat serious aspect. Later it developed into a dangerous mine fire and now covers an area of many acres, and shows no signs of abating. In 1905 the lessee adopted such measures as were deemed sufficient to extinguish the fire, but these efforts were unavailing. In the summer of 1906 the lessors contributed \$2,000 for the purpose, and the appellant consulted a mining engineer as to the best means of putting out the fire, or of confining it within certain limits. A plan was adopted, and work on a comprehensive and expensive scale was started in order to meet the emergency and protect the mine property which was being destroyed by the fire. A large force of men was employed and upwards of \$35,000 were expended by appellant on this work, which continued for about one year and a half, when it was abandoned. The fire continued to spread, and has now reached such proportions as to menace the health and property of adjacent owners. It should be observed that ail of these things have happened within the municipal limits of the city of Carbondale. The complainants now ask a court of equity to compel appellant to do under its decree what it has failed to do after a year and a half of continuous effort and the expenditure of an amount of money equal to its entire capitalization. This, too, in the face of the fact that appellees have stood idly by and done nothing while the property of appellant was being destroyed by a consuming fire beyond its ability to control, and in its efforts to do so has become insolvent. Under these circumstances, it must now be determined whether the decree of the court below directing a mandatory injunction to issue should be affirmed. After careful consideration, we have concluded it should not be.

There are four reasons why the decree



entered in the court below should not be ration, and, so far as is disclosed by this recaffirmed, any one of which should be persuasive and all of which are conclusive. First. The injunction is asked for and allowed on the ground that appellant is maintaining a nuisance by failure to put out the fire. This is a misapprehension of the situation. It is a nuisance only in the sense that it is working hurt and damage. In this sense any building on fire would be a nuisance. How can appellant be said to be maintaining a nuisance when it has expended its entire capital stock in an effort to abate it? If the fire ever was a nuisance in the legal sense, it has long ago spread beyond any such limitation, and should now be regarded and treated as a public enemy. The common interests of all citizens should be united in an effort to subdue it. Second. To warrant the granting of a mandatory injunction it must clearly appear that the legal rights of the complaining party are being invaded, or that the legal duties of the party against whom the writ is directed have been willfully and wantonly disregarded to the prejudice of the complainants. In the proceeding at bar we have to deal with the latter proposition. The proof does not measure up to this standard. It does not clearly appear that appellant has willfully and wantonly neglected or refused to perform its duty, but, on the other hand, the whole record shows diligent and persistent effort to cope with the situation. This appellant stands before the court with its property burned or burning, its assets all consumed, and its treasury exhausted by the efforts made to control the fire. How can it be said under these circumstances that there has been any such clear failure or neglect of duty as the law requires to sustain a writ of mandatory injunction? Third. A mandatory injunction should never be granted when its enforcement will require too great an amount of supervision by the court. It needs no citation of authorities to sustain this proposition. It is a fundamental principle and of general application in this and other jurisdictions. The principle is conceded, but its application is denied in this proceeding. A statement of the facts is the best answer to this position. The enforcement of the decree entered in the court below will necessitate, according to the evidence, the expenditure of \$75,000. It will require the employment and supervision of a large force of men for a long period of time. Skillful and experienced men must be employed to direct the work, all of which involves the doing of something from day to day for an indefinite period, and this is what the courts have said will not be undertaken in the enforcement of their decrees, and, if foreseen, no such decree will be entered. Fourth. The decree en-

ord, neither the officers nor the stockholders can be subjected to any individual liability. At most, the corporation could only be compelled to use its corporate assets and funds in an effort to put out the fire, and the testimony shows that this has already been done. Under these circumstances a court of equity will not compel it to do more.

Decree reversed, injunction dissolved, and bill dismissed, at cost of appellees.

(224 Pa. 259)

McCABE et al. v. WATT et al. (Supreme Court of Pennsylvania. March 29, 1909.)

Nuisance (§ \$2*) — Public Nuisance — In-junction—Burning Mine.

Where a burning coal mine threatens a city within whose limits it is situated, the owner of the surface, in no way responsible for the fire, cannot be compelled by injunction to take measures at his own expense to extinguish the fire. [Ed. Note.-For other cases, see Nuisance, Dec. Dig. § 82.*]

Appeal from Court of Common Pleas, Lackawanna County.

Bill by John McCabe and others against W. W. Watt and the Finn Coal Company. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

Argued before FELL, BROWN, MESTRE-ZAT, POTTER, ELKIN, and STEWART, JJ.

A. A. Vosburg, I. H. Burns, R. D. Stuart, Gramer & Norton, and C. W. Dawson, for appellants. H. A. Knapp and O'Brien & Kelly, for appellees.

ELKIN, J. What was said in the opinion. filed in the appeal of Finn Coal Company (at No. 25, January term, 1909) 73 Atl. 453, applies generally to this case. In addition, it may be said that the appellee Watt is not at fault. He did not start the fire and is in no way responsible for its burning. He, an owner of the surface, in common with other adjacent owners of the soil, may and no doubt will suffer great loss on account of the burning coal stratum. But what has he done or left undone to be subjected to the burdens imposed by a mandatory injunction? Nothing. No one would seriously contend that a mandatory injunction should be issued against an adjacent owner under the circumstances of this case, and we do not see why a distinction should be made and a different rule applied as to the owner of the superincumbent strata who is without fault and owes no duty to appellants except that in the use and enjoyment of his own property he must not willfully and wantonly do injury to his neighbors. There is nothing in this proceeding to bring appellee within the rule of willful and wanton negligence, nor is there anything to sustain a writ of tered in the court below is against the corpo- mandatory injunction against him. If the

lives and property of the citizens of Carbon- was tried by the court without a jury. It dale are menaced by the burning coal mine and the efforts of the owner are unavailing to extinguish the fire, the municipality should take hold of the situation with a strong hand, and abate the so-called nuisance just as it would stop the flames of a surface conflagration. The right to protect in such an emergency is not limited by the location of the destructive agency, and the power of the municipality to act is the same whether the fire is in the cellar, or upon the roof, or above or below the surface of the ground. This fire has reached the public enemy stage, and it should be so regarded and treated by the public authorities. To hold that a state or county or other municipal division, each or all of them, cannot provide protection to the lives and property of citizens threatened with destruction by fire, would be to place the seal of impotency on governmental functions, and to deny that protection the law should afford an enlightened people. To fiddle on broker strings while Rome is burning is not in keeping with the spirit and purpose of the present generation.

Appeal dismissed, at cost of appellants.

(224 Pa. 285)

DAY v. ALLEN et al.

(Supreme Court of Pennsylvania. April 12, 1909.)

JUDGMENT (§ 503*) - COLLATERAL ATTACK-GROUNDS.

Where a bill of partition, filed under the equity rules of 1865, was indorsed by all the par-ties defendant, admitting service and consenting to a decree pro confesso and the appointment of a master, the decree cannot be subsequently at-tacked on the ground that the bill was not print-ed when served, or that it did not set forth the interest of the parties, and that an unprinted amendment containing more than 100 words was filed and not served in violation of the rules.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 503.*]

Appeal from Court of Common Pleas, Wyoming County.

Bill by John P. Day against F. E. Allen and George Robinson. Judgment for defendants. Plaintiff appeals. Affirmed.

Argued before FELL, BROWN, POTTER, ELKIN, and STEWART, JJ.

Ernest K. Little and H. S. Harding, for appellant. James Wilson Piatt and Joseph Wood Platt, for appellees.

PER CURIAM. This was an ejectment to recover an undivided interest in land sold under proceedings in partition, instituted in 1893. The defendant was the grantee of the purchaser at the master's sale. Before the proceedings were begun, the plaintiff had been adjudged a lunatic and his estate was in the hands of his committee, who represented his interest in the partition. The case

appears from the facts found by the court that on the plaintiff's restoration to reason he took possession of his property, settled with his committee, and has since exercised exclusive ownership in respect to the land allotted to his committee in the partition; that "he has not reconveyed, nor repaid, nor restored, nor offered to do so"; and that "in the ejectment he virtually asks that the partition be ignored so far as it operated to transfer his interest to his coheirs, while it is sustained so far as it operated to transfer their interest to him."

The plaintiff sought to recover on the ground that the partition was void because of irregularities in the proceeding. The irregularities pointed out were the failure to comply strictly with the equity rules of 1865, then in force. The principal irregularities were that the bill was not printed nor served, nor was there indorsed on it a notice to appear and answer, nor did it set forth the interests of the parties; that after the entry of a decree pro confesso the case was not placed on the equity argument list before the appointment of a master; and that an unprinted amendment containing more than 100 words was filed and not served. How unsubstantial in point of merit these technical objections were appears from the fact that the bill filed bore an indorsement, signed by all parties defendant, admitting service, consenting to a decree pro confesso and the appointment of a master without further delay or notice. The court held that the irregularities were curable and were cured by the concurrence of all the parties in interest. In this there was no error. There were no defects in the proceeding that would invalidate the deed.

The judgment is affirmed.

(224 Pa. 405)

ROWE v. WESTERN MARYLAND R. CO.

(Supreme Court of Pennsylvania. April 12, 1909.)

1. RAILBOADS (§ \$50*)—ACCIDENT AT CROSS-ING—QUESTION FOR JURY.

In an action to recover for death of plain-tiff's husband, killed at a grade crossing, the question is for the jury, where the evidence shows that the accident happened before sunrise on a cloudy morning and that the cars made very little sound.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. \$ 350.*]

2. RAILROADS (§ 346*)—ACCIDENT AT CROSS-ING—NEGLIGENCE OF DEFENDANT—BURDEN OF PROOF.

Where cars under the exclusive care of a

railroad company are run with no one in charge over a public crossing at high speed, and an accident results, the burden is on defendant to show due care.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1117, 1119; Dec. Dig. § 346.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

8. RAILEOADS (§ 346*)—ACCIDENT AT CROSS-ING—CONTRIBUTORY NEGLIGENCE—PRE-

SUMPTIONS.

The rule that one going on a railroad track immediately in front of a moving train, which he saw or could have seen, will be conclusively presumed to have been negligent, does not apply where the facts or inferences to be drawn from them are not clear.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1121; Dec. Dig. § 346.*]

Appeal from Court of Common Pleas, Franklin County.

Action by Elizabeth Rowe against the Western Maryland Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before FELL, BROWN, MES-TREZAT, ELKIN, and STEWART, JJ.

J. R. Ruthrauff, O. C. Bowers, and W. O. Nicklas, for appellant. Charles D. Wagaman, Frank G. Wagaman, Abraham C. Strite, and J. A. Strite, for appellee.

PER CURIAM. The plaintiff's husband was killed on the second track at a crossing of the defendant's road, in a collision between freight cars running wild at a very high speed and the wagon in which he was riding. No witness at the trial saw the ac-The appellant's first contention is that the presumption that the deceased exercised the care that the law requires before attempting to cross is overcome by the fact that at the edge of the tracks there was an unobstructed view for some 2,000 feet in the direction of the cars. The accident happened before sunrise on a damp, cloudy morning, when it was so dark that objects could not be readily distinguished, and there was testimony that the cars made only a low rumbling sound. The rule that one who goes on a railroad track immediately in front of a moving train, which he saw or must have seen if he had looked, will be conclusively presumed to have been negligent, is from its nature applicable only to clear cases, where neither the facts nor the inferences to be drawn from them are in doubt. It could not be applied to this case.

The second contention is that there was no evidence that the accident was caused by any negligent act or the omission of any duty by the appellant's employes. It was not necessary to the plaintiff's case that there should be proof of a specific act of negligence by which the cars were allowed to pass from the siding on which they had been placed to the main track. It was shown that cars owned by the appellant or under its exclusive care ran, with no one in charge of them, over a public crossing at a high speed. The circumstances connected with the accident amounted to evidence from which negligence in the management of the cars might be inferred by the jury, and

placed on the appellant the burden of showing the exercise of due care. Whether that was done was for the jury.

The judgment is affirmed.

(224 Pa. 411)

SMITH et al. v. COFFMAN et al. (Supreme Court of Pennsylvania. April 12, 1909.)

WILLS (\$ 602*)—CONSTRUCTION—NATURE OF ESTATE.

Testator gave to his wife and son the homestead; the widow to remain on the farm as long as she remained his widow, and the son to provide for the widow as long as she lived. If the widow married again, she was debarred from having a home with the son; if the son married, he should build himself a house and live in the same; if he should die before son married, he should build himself a house and live in the same; if he should die before the widow, not being married at the widow's death, the property to go to his two other sons and two daughters; and if the son outlived the widow, the property to be his at her death. The son died, unmarried, before the widow. Held, that he took only a life estate, subject to be enlarged to a fee simple if he survived the widow.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1358; Dec. Dig. § 602.*]

Appeal from Court of Common Pleas, Monroe County.

Action by Davis Smith and Charles Eberle. guardian of Chester Smith, against Thomas Coffman and Bertha Coffman. Judgment for plaintiffs, and defendants appeal. Affirmed.

Argued before FELL, BROWN, MESTRE-ZAT, ELKIN, and STEWART, JJ.

Rogers L. Burnett and Henry J. Kotz, for appellants. Wilton A. Erdman and Stewart S. Shafer, for appellees.

PER CURIAM. The defendant Bertha Coffman claimed title to the land, for which ejectment was brought, by devise from William E. Smith. Whatever estate he had was derived under the following paragraph of his father's will:

"I give unto my wife Fanna and son William E. Smith the old Home Stead, the widow to remain on the farm as long as she William E. Smith to remains my widow. provide and care for the widow as long as she lives. If the widow should marrie again, she will be debared from having a home with William E. Smith, Everything that remains on the farm, at my death is to stay on the farm, William E. Smith allways to keep two (2) cows for the widow. The old Home Stead lines is to run from a small rock Oak-it stands on a rock from rock Oak near George Bushes. If William E. Smith should marry and if the couldent agree, William E. Smith is to build himself a new house and to live in the same. If William E. Smith should die before the widow and not being married at the widows death, the whole property to fall back again to my two sons and two daughters, and if William E. Smith outlives the wi-

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

dow, the whole of the property is his at her i the lessees to assign the lease to the plaindeath-Selda Lesher to remain with William E. Smith, until he becomes twenty-one years of age. William to provide and care for him."

William E. Smith died unmarried, before the testator's widow. At the trial a verdict was directed for the plaintiffs on the ground that he took only a life estate under the will, subject to be enlarged to a fee-simple estate on a contingency which never happened. Although the first clause of the sentence at the beginning of the paragraph imports an absolute devise, it is clear from what follows that the testator's intention was to provide for his wife for life and to make the estate of the son contingent upon his sur-

The judgment is affirmed.

(224 Pa. 387)

DELAWARE & HUDSON CO. v. OLY-PHANT BOROUGH.

(Supreme Court of Pennsylvania. April 12, 1909.)

1. APPEAL AND ERROR (§ 954*)—Review—Dis-CRETION OF COURT.

On appeal from a decree awarding a pre-liminary injunction, the court will only determine whether there was reasonable ground for the action of the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3818; Dec. Dig. § 954.*] 2. EASEMENTS (§ 61*)—OBSTRUCTION—INJUNC-

TION.

An owner of coal leased the same with a An owner of coal leased the same with a right of way over the surface for mining purposes, and thereafter laid out a plan of lots with streets which were adopted by a borough as public streets. *Held*, that the borough will be restrained from interfering with the owner of the coal in its enjoyment of the right of way.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 135; Dec. Dig. § 61.*]

Appeal from Court of Common Pleas. Lackawanna County.

Bill by the Delaware & Hudson Company against Olyphant Borough. From a decree awarding a preliminary injunction, defendant appeals. Affirmed.

Newcomb, J., of the court below, found the material facts to be as follows:

"(7) It is not disputed that the plaintiff and its immediate predecessor in title have since 1858 held, and been engaged in mining, the coal under the Pierce warranty tract in the township of Blakely-now the borough of Olyphant-together with surface rights exercised in connection with the mining operations; that these rights were acquired by grant from William Hull, the former owner; that in 1858 he demised the coal to Abel Barker and others to be held until 'all veins of suitable character' were mined out; that by its terms the lease was made subordinate to a contract which the lessees then had to furnish the coal to the plaintiff company; and that the right of has ever been taken by the borough."

tiff was therein expressly mentioned. leasehold rights were so assigned in 1864. Both papers were duly recorded in Luzerne county. As between the parties to it the lease is still operative. The grant from Hull includes the 'right of way across said tract for every description of necessary road and also the use and enjoyment in the fullest manner of such portion of the surface of said tract as may be required for the erection of all necessary shops, barns, offices, engine houses, etc., and for the deposit of props, culm or other material accumulated in their business,' etc. The area of the tract is not shown, but it is believed to be about 400 acres.

"(8) Some years after the demise to Barker and others. Hull plotted a portion of the surface into village lots with streets and ways. Two of these were Short and Thirteenth, also called, respectively, Second and Third streets. What, if anything, was ever done by him to open or define the streets on the ground does not appear. There is evidence that some work, indefinite in character, was done some years ago on a portion of Thirteenth street by a street commissioner of the borough. The neighborhood is only sparsely built up, and at the point in question nothing appears to have ever been done to lay out or improve the streets. Indeed, such travel as there is in that direction leaves the course of Thirteenth street before reaching that point and takes its way across the open fields, apparently because that is the line of least resistance.

"(9) The trestle in question was projected by the plaintiff's engineers upwards of a year ago in connection with a new opening deemed necessary to get out a portion of the coal. It is designed to cross Thirteenth street, as plotted, diagonally at an elevation of about 15 feet in order to carry cars conveying the rock and other waste from the new opening to the dumping grounds on another portion of the tract. The work of construction was stopped in August by the borough officials acting by authority of the council. The workmen were arrested and prevented from going on with the work by being threatened with further arrest, the borough claiming the structure was a nuisance. This claim is based on the effect of a borough ordinance of April 7th this year. The ordinance is as follows: '\$ 1. That Second street, between Valley avenue and Agnes avenue, in the First ward of the borough of Olyphant, and Third street, between Valley avenue and Avenue E, in the First ward of the borough of Olyphant, be and they are hereby adopted as public streets of the borough of Olyphant.'

"No other corporate action in the premises

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Argued before FELL, BROWN, POTTER, ELKIN, and STEWART, JJ.

A. A. Vosburg and P. L. Walsh (I. H. Burns, on the brief), for appellant. James H. Torrey, for appellee.

PER CURIAM. The appeal is from a decree awarding a preliminary injunction restraining the defendant from interfering with the plaintiff in the exercise of a right acquired by grant from the owner of the fee to use the surface in mining and removing coal. As pointedly stated by the learned judge who heard the case: "The right which it asserts here is the right to the use and enjoyment of certain of its land and tenements in accordance with the terms and purposes of the grant under which they are held. The injury which it seeks to prevent is the taking of some part of the property for public use without due process of law and just compensation." On an appeal from a decree awarding or refusing a preliminary injunction, we do not consider the merits of the case except to determine whether there was reasonable ground for the action of the court. The only claim of right by the defendant that is open for consideration at this time is that by ordinance it has adopted certain streets plotted by the owner of the fee after his grant of surface rights. This ordinance gave it no right as against the plaintiff.

The decree is affirmed, at the cost of the appellant.

(224 Pa. 404)

FLEISHMAN v. SWENTEK.

(Supreme Court of Pennsylvania. April 12, 1909.)

LANDLORD AND TENANT (§ 274*)—ILLEGAL DISTRESS—EVIDENCE.

Plaintiff purchased a stock of goods from a former tenant, and went into possession of the building. In an action to recover for illegal distraint there was evidence that the landlord made a new lease with plaintiff, and that no rent was due at the time of a distress by the landlord, and there was evidence of an intent by the landlord to accept plaintiff as a tenant from month to month. The landlord testified that he had refused to make any arrangement with plaintiff. Held, that a verdict for defendant would not be disturbed.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig § 1162; Dec. Dig. § 274.*]

Appeal from Court of Common Pleas, Montour County.

Action by Simon Fleishman against Paul P. Swentek. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before FELL, BROWN, MESTRE-ZAT, POTTER, and STEWART, JJ.

H. M. Hinckley and Edward Sayre Gearhart, for appellant. Grant Herring, William Kase West, S. P. Wolverton, and S. P. Wolverton, Jr., for appellee.

PER CURIAM. This action was to recover damages for illegal distress and sale of the plaintiff's goods. The defendant leased a store building to Dreifuss, who during the term sold his stock of goods to the plaintiff, who went into possession of the building. It was not disputed that under the terms of the lease to Dreifuss the goods were liable to distress. The plaintiff's contention at the trial was that he was not bound by the Dreifuss lease, but that he had made a new arrangement with the defendant, and had become a tenant under a verbal lease by the terms of which no rent was due. Upon this issue the case was submitted to the jury. The assignments of error are based on the proposition that there was not sufficient evidence that the plaintiff occupied the building under Dreifuss to warrant the submission of that question to the jury. This contention is not sustained by the record. There was testimony tending to show that a new lease was made and proof of facts consistent with an intention on the part of the defendant to accept the plaintiff as a tenant from month to month; but the defendant testified that he had made no new arrangement, and that he had refused to do so. This raised an issue that was necessarily for the jury.

The judgment is affirmed.

(224 Pa. 407)

GREEN v. CENTRAL R. CO. OF NEW JERSEY.

(Supreme Court of Pennsylvania. April 12, 1909.)

SALES (§ 53°) — EVIDENCE — QUESTIONS FOR JURY.

In an action to recover the value of stone and earth taken from plaintiff's land by a railroad company in repairing its roadbed, the question is for the jury, where the evidence is conflicting as to whether there was an existing agreement by which the company was allowed to take the same at a fixed price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 146; Dec. Dig. § 53.*]

Appeal from Court of Common Pleas, Carbon County.

Action by Adam A. Green against the Central Railroad Company of New Jersey. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before FELL, BROWN, MESTRE-ZAT, ELKIN, and STEWART, JJ.

Laird H. Barber, Frederick Bertolette, and Jackson E. Reynolds, for appellant. E. O. Nothstein and Wm. G. Freyman, for appellee.

PER CURIAM. This action was to recover the value of stone and earth taken from the surface of the plaintiff's land by the defendant for use in repairing its roadbed. The dispute at the trial was whether the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

materials had been taken without authority or under a standing verbal agreement between the parties, by which the defendant was allowed to take all the stone it might need at a fixed price for each year. The issue was purely one of fact, and we find no error in its submission.

The judgment is affirmed.

(224 Pa. 390)

FREY V. STIPP.

(Supreme Court of Pennsylvania. April 12, 1909.)

CORPORATIONS (§ 116*) — SALE OF STOCK—
CONTRACTS—FRAUD—EVIDENCE.

Bill to set aside for fraud a written contract for the purchase of stock held properly dismissed for want of proof of the allegations of the bill.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 116.*]

Appeal from Court of Common Pleas, Lackawanna County.

Bill by Henry Frey against Mathlas Stipp. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Argued before FELL, BROWN, POT-TER, ELKIN, and STEWART, JJ.

S. B. Price and T. F. Wells, for appellant. John P. Kelly and R. A. Zimmerman, for appellee.

PER CURIAM. The plaintiff sought by bill to have set aside on the ground of fraud a written contract for the purchase of stock, into which he had entered with the defendant. It was found by the judge who heard the testimony that the plaintiff had failed to substantiate the material allegations of his bill; that his testimony was far from being clear and precise, and was substantially nullified by his admissions on cross-examination; that it was uncorroborated by other evidence, direct or circumstantial. was not alleged that the defendant made any statement in relation to the organization of the company at the time the contract was entered into, and no question as to the manner of its organization was involved in the issue raised. The offers of testimony in relation to it were properly rejected. In Luther v. Luther, 216 Pa. 1, 64 Atl. 868, it was said by our Brother Brown: "The relief afforded by a decree in equity must conform to the case made out by the pleadings, as well as to the proofs. Every fact essential to entitle a plaintiff to the relief which he seeks must be averred in his bill. Neither unproved allegations nor proof of matters not alleged can be made a basis for equitable relief."

. The decree is affirmed, at the cost of the appellant.

(111 Md. 163)

STEWART et al. v. MAY.

(Court of Appeals of Maryland. June 1, 1909.) 1. QUIETING TITLE (§ 12*)—RIGHT OF ACTION—Possession of Plaintiff.

Possession by a tenant is sufficient to en-

able the landlord to maintain a bill to remove a cloud on his title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 44; Dec. Dig. § 12.*]

2. QUIETING TITLE (§ 44*)-TITLE TO MAIN-TAIN.

A bill to remove a cloud on the title to property cannot as a general rule be maintained without clear proof of both possession and legal title in plaintiff.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 91, 92; Dec. Dig. § 44.*]

3. BOUNDARIES (\$ 3*) — EVIDENCE — MONU-MENTS—COURSES AND DISTANCES. In locating lands, calls for monuments pre-vail over courses and distances.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 18; Dec. Dig. § 3.*]

4. QUIETING TITLE (\$ 7*)—RIGHT TO RELIEF.
Though plaintiff had a clear title to land, he was entitled to maintain an action to remove an apparent cloud cast on his title by an invalid deed and mortgage and acts of defendant calculated to cast doubt on his title and to embedded the property of the prop barrass him in maintaining his rights.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 14-33; Dec. Dig. § 7.*]

Appeal from Circuit Court of Baltimore City; Charles W. Henisler, Judge.

Action by William May against, Hyland P. Stewart and others. From the decree defendants appeal. Affirmed.

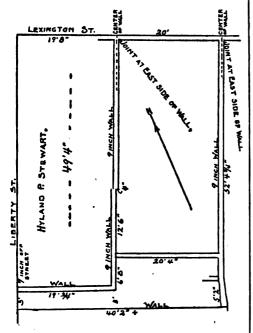
Argued before BOYD, C. J., and BRISCOE, SCHMUCKER, WORTHINGTON, THOMAS, and HENRY, JJ.

Charles F. Harley, for appellants. J. Bannister Hall and Francis K. Carey, for appel-

THOMAS, J. It appears from the bill of complaint in this case, and the exhibits filed therewith, that Maria E. Weise, of Baltimore City, died in 1881, leaving a last will and testament by which she devised to Thomas Hill "all that piece or parcel of ground situate at the southeast corner of Liberty and Lexington streets in the city of Baltimore aforesaid, together with the improvements and appurtenances" in trust for her aunt, Maria M. Johnson during her natural life, and after her de...th to her cousin, William Worthington Johnson, his heirs and assigns, "but in case he died without leaving a child or descendants of a child living at the time of his death, then to her cousin, Emma Maria C. Johnson, absolutely." By the next item of her will she devised her "house and lot of ground and premises on Lexington street adjoining the property described in the aforegoing item of" her will to Thomas Hill in trust for her cousin, Emma Maria C. Johnson, for life, and after her death to her children. but in case she died "without leaving a child or children or descendants of a child living

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

at the time of her decease" "then to" her | "cousin, William Worthington Johnson, absolutely." The following copy of the plat filed with the bill shows the location of these two lots. The lot on the corner of Lexington and Liberty streets is the one now owned by the appellant, and the adjoining lot is now owned by the appellee:



The title to the lot on the corner of Lexington and Liberty streets, mentioned in the first item of Maria E. Weise's will, and now owned by appellant, was acquired by Mary De Charms Garrison as only heir at law of Maria M. Johnson, who was the sole devisee under the will of Emma Maria C. Johnson, and in 1893 she and her husband brought suit in ejectment to recover the adjoining lot, now owned by the appellee, claiming title to it also as the heir at law of Maria M. Johnson, devisee under the will of Emma Maria C. Johnson, who it was claimed acquired it as only heir at law of William Worthington Johnson. In the declaration filed in that case the lot was described as follows: "Beginning for the same on the southernmost side of Lexington street at the distance of 19 feet and 8 inches southeasterly from the southeast corner of Lexington and Liberty streets, and which place of beginning is designed to be in the center of the division wall between the house erected on the lot now being described and the house next adjoining on the west, and running thence southeasterly, bounding on Lexington street, 20 feet and 3 inches to the center of the wall between the house erected on the lot now being described and the house next adjoining on the east; thence southwesterly through the center of said wall, 52 feet more or less, to the north

south: thence northwesterly, along said wall 40 feet to the easternmost side of Liberty street; thence northeasterly, bounding on Liberty street, 8 feet to the southwest corner of the house adjoining on the north; thence southeasterly along the south end wall of said house, 18 feet and 6 inches, until it intersects a line drawn southwesterly through the center of the division wall first above mentioned; thence northeasterly through the center of said wall 49 feet, more or less, to the place of beginning." That suit resulted in a judgment in favor of the defendant in that case, and on appeal the judgment was affirmed in the case of Garrison v. Hill, 79 Md. 75, 28 Atl. 1062, 47 Am. St. Rep. 363, when the court held that, as William Worthington Johnson died intestate before Emma Maria C. Johnson, the property passed to those of his heirs "alive at the happening of the contingency, viz., the death of Emma M. C. Johnson, unmarried and without issue."

Appellee claims title to this lot under a deed from Thomas Ireland Elliott and wife and Philip H. Hoffman and wife, who acquired title as follows: Thomas Ireland Elliott by deed from Eliza P. Johnson, only heir at law of William Worthington Johnson, and Luther Johnson, her husband: Philip H. Hoffman by deed from Belle Clare Sprague and others, devisees of Eliza P. Johnson-in each of which deeds appellee's lot is described as it is in the declaration in the case of Garrison v. Hill. In 1893 Mary De Charms Garrison and husband conveyed to the appellant "one undivided half part" of all their interest in the respective estates of Maria E. Weise, Maria M. Johnson, and Emma M. C. Johnson, and in 1894, by a confirmatory deed, conveyed to the appellant an undivided one-half interest in the lot on the corner of Lexington and Liberty streets, and described in said deed as follows: ning for the same at the southeast corner of Lexington and Liberty streets and running thence southeasterly, bounding on Lexington street nineteen feet and eight inches to the center of the division wall between the house on the lot now being described and the house next adjoining on the east, thence southwesterly bounding on the center of said wall'fortynine feet to the end thereof, thence northwesterly along the south end wall of said house on the north side of an alley three feet wide, eighteen feet and six inches to the easternmost side of Liberty street, thence northeasterly bounding on Liberty street forty-nine feet, more or less, to the place of beginning. In this deed the second line of appellant's lot follows the center of the division wall between his lot and the lot of the appellee 49 feet to the end of said division wall, and the third line follows the south end wall of the building on appellant's lot to Liberty street, and corresponds with the fifth and sixth end lines of the appellee's lot, leaving what is called in this deed an "alley," three feet wide, end wall of the house next adjoining on the between the lot of the appellant and the property on the south, but which is included gage from the appellant to Mary De Charms in the ejectment suit and in appellee's deed Garrison may be declared void as to the part as part of his lot.

On the appellant's lot included therein, and

In 1903 the then owners of appellee's lot leased it to Sigmund Salomon, trading as S. Salomon & Co., for the term of five years, accounting from the 1st day of February, 1904, which lease, with the consent of the owners of the lot, was subsequently assigned to Max Philipsborn and Gerson Nordlinger, trading as M. Philipsborn & Co., who have continued to pay rent to the appellee since he acquired the lot. Prior to the execution of the lease to Salomon, which was a renewal of a previous lease, he leased the property south of appellee's lot and also the property of the appellant, and with the consent of the owners of the three lots so changed the improvements thereon as to make them practically one building. On the 10th of October, 1907, the appellant purchased from Mrs. Garrison and her husband the remaining undivided one-half interest in the corner lot, and on the same day executed to Mrs. Garrison a mortgage on the property to secure the payment of \$20,000, in which deed and mortgage the lines of the lot, instead of running to the end of the division wall between appellant's and appellee's lot, 49 feet, and thence along the south wall of appellant's building to Liberty street, as in the deed of 1894, are made to run "52 feet, more or less, to the northern wall of the property adjoining on the south as now situate; thence northwesterly along the north side of said wall 18 feet, 6 inches, more or less, to Liberty street," so as to include in appellant's lot that portion of appellee's lot fronting 3 feet on Liberty street. between the south wall of appellant's building as it originally stood and the property on the

The bill further states: That the appellee is informed and believes that Philipsborn and Nordlinger have renewed the leases from the owners of the adjoining properties; that the appellant is claiming title to that part of appellee's lot included in appellant's deed of 1907; that Philipsborn and Nordlinger are desirous of renewing the lease for appellee's lot; but that inasmuch as the appellant is claiming title to a part of appellee's lot, and has color of title thereto under said deed, he refused to renew the lease to them unless the lease contains a full description of his property; that Philipsborn and Nordlinger, acting under the advice of appellant, their counsel, have refused to execute a lease containing a full description of appellee's property; and that the claims of the appellant and his advice to appellee's tenants cast a cloud on the appellee's title to that part of his lot included in appellee's deed of 1907, to the great damage of the appellee. The prayer of the bill is that the appellee's title to that part of his lot included in the appellant's deed may be quieted, and that the cloud cast thereon by said deed and the claims and actions of the gage from the appellant to Mary De Charms Garrison may be declared void as to the part of the appellant's lot included therein, and for general relief. The defendants, Hyland P. Stewart, Esq., and Mary De Charms Garrison, mortgagee, demurred to the bill. and this appeal is taken by the defendant Stewart from the order of the circuit court of Baltimore City overruling their demurrer.

The appellant contends: (1) That there is no allegation that the plaintiff was in actual possession of the property, "but, on the contrary, the bill and exhibits show that he is not in actual possession," and that possession by a tenant is not sufficient; (2) that, this court having already determined the question of title to plaintiff's lot, "no further adjudication is necessary or proper"; and (3) that the allegations of the bill, together with the exhibits, show so clearly that the alleged claim of the defendant is invalid, that the deed and acts of the defendants do not constitute a cloud on plaintiff's title.

The averments of the bill, which was filed February 29, 1908, that appeliee's property was leased in 1903, for five years, accounting from the 1st day of February, 1904, to Sigmund Salomon, and that he, with the consent of the owners, assigned the lease to Philipsborn and Nordlinger, who have continued to pay rent to the appellee since he acquired the property, and who, at the time of the filing of the bill, were desirous of entering into a contract with the appellee for a renewal of the lease, show that the property was in possession of appellee's tenants, and counsel for the appellant, relying on the case of Oppenheimer v. Levi, 96 Md. 296, 54 Atl. 74, 60 L. R. A. 729, insists that the possession of Philipsborn and Nordlinger is not sufficient.

In Oppenheimer v. Levi, the court held that it was not necessary in that case to allege and show possession by the plaintiff. The learned judge who wrote the opinion, after stating the general rule "that those only who have a clear title and equitable title to the land, connected with the possession, have -a right to claim the interposition of a court of equity to give them peace, or to dissipate a cloud on title," does say, in passing to the grounds on which relief should be granted in that case, that the cases elsewhere holding that actual possession by a tenant is equivalent to possession by the landlord "are not consistent with the decision in" Steuart v. Meyer, 54 Md. 467, as explained in Textor v. Shipley, 77 Md. 473, 26 Atl. 1019, 28 Atl. 1060. It will be found, however, upon careful examination of these cases, that they do not support the contention of the appellant.

appellee's title to that part of his lot included in appellee's deed of 1907, to the great damage of the appellee. The prayer of the bill is that the appellee's title to that part of his lot included in the appellant's deed may be quieted, and that the cloud cast thereon by said deed and the claims and actions of the appellant may be removed, and that the mort.

recovery of the property. Under the circum-1 that the possession of a tenant is the possession stances of this case, without resort to proceedings like the present, the parties would be without adequate remedy for relief against the effect of the prima facie title in the purchaser. In such cases equity asserts complete jurisdiction to remove the cloud from the title of the property involved, and to prevent unnecessary and vexatious litigation."

In Textor v. Shipley the property had been sold for taxes and purchased by Shipley, who leased it for 99 years to Elizabeth Black, and three years after the sale Textor, the former owner of the reversion, brought suit for the purpose of removing the cloud cast on his title by the tax sale and conveyances. The court, after holding that there was no averment in the amended or original bill that plaintiff was in possession of the property at the time the bill was filed, says: "He does aver in the amended bill that he entered into possession of the annual rent or reversion, and that the assignee of the leasehold interest duly attorned to him by the payment of the annual rent accruing under the lease. These averments may be true. The appellant may have acquired the legal title to the property by the deed from Rennert and wife to him, and he may have been at one time in possession through Black, the assignee of the leasehold interest, because the possession of the lessee was the possession of the lessor or reversioner; but the several deeds filed by the appellant as exhibits and part of his bill show that the entire fee in the property had been sold for the payment of city taxes, which were paramount liens on the property before the appellant acquired the legal title under Rennert's deed. The title of the appellant to the reversion was subject to this lien, and, when the lien was enforced by due and proper proceedings, the title of the appellant in the reversion and the title of the owner of the term of years or leasehold interest were both gone; and, this being so, the appellant had neither the legal title, nor had he possession. The legal effect of the tax sale, which was reported and ratified by the circuit court, was to vest, prima facie, the fee-simple title in Hopkins, the purchaser, and his grantees. * * If the proceedings under the tax sale be defective and irregular, as alleged, the remedy for the appellant is by an action of ejectment."

In Oppenheimer v. Levi the defendant, Levi, was in possession, claiming the fee by virtue of a tax sale and subsequent assignment to him, when the bill was filed by the owners of the reversion.

So in neither of these cases was the property in possession of the lessee of the plaintiff, and they cannot therefore be regarded as authority for the proposition that possession by a tenant is not sufficient to enable the landlord to maintain a bill to remove a cloud on his title. On the contrary, in Tex-

sion of his landlord, says: "The appellant may have acquired the legal title to the property by the deed from Rennert and wife to him, and he may have been, at one time, in possession through Black, the assignee of the leasehold interest, because the possession of the lessee was the possession of the lessor or reversioner." And in the case of Polk v. Rose, 25 Md. 153, 89 Am. Dec. 773, cited by Judge Alvey in Steuart. v. Meyer. the suit was brought by the owners of certain houses and lots in Baltimore City, then in possession of their tenants, against the defendant, who claimed under a tax sale, made prior to the enactment of the provisions of the Code making them, when ratified by the court, prima facie valid. court, after stating that: "The onus is upon the purchaser at a tax sale. He must establish affirmatively that the officers acted strictly in conformity with the law"-held the sale void, and then disposed of the question of jurisdiction as follows: "The bill in this case is a bill quia timet. The complainants allege that the defendant is vexatiously using his pretended deed and title thereunder against them, not only interfering with their tenants by demanding rent from them, but in throwing a cloud or suspicion over their title. In such a case a court of equity may decree that the deed of the party thus acting be canceled. See 1 Story's Eq. \$ 694; also, Holland v. Baltimore, 11 Md. 197, 69 Am. Dec. 195. In this case this court fully recognized the jurisdiction of courts of equity, because it will prevent a multiplicity of suits, and will not allow a title otherwise clear to be clouded by a claim which cannot be enforced either at law or in equity. In the case at bar the appellees could not resort to an action at law, because they had not been dispossessed. * Though there is no special prayer in the bill for a cancellation of the appellant's deed, we think the court below had authority to extend that relief under the general prayer for relief." In 17 Ency. of Pl. & Prac. 317, under the title "Quieting Title-Removal of Cloud," a long list of authorities is given in support of the statement that "actual possession by a tenant or agent is equivalent to actual possession by the landlord or principal for the purposes of the suit, and the statutes of some states expressly provide that such possession shall In this case, as in Polk v. be sufficient." Rose, the appellee, being in possession through his tenants, cannot resort to an action of ejectment, and there is no reason why a court of equity should withhold its aid if his bill, in other respects, presents a proper case for relief.

In regard to the second contention of the appellant, very little need be said. As a bill quia timet, or to remove a cloud upon the title to property, cannot, as a general tor v. Shipley the court, recognizing the rule rule, be maintained without clear proof of

both possession and legal title in the plaintiff (Polk v. Pendleton, 31 Md. 118; Textor v. Shipley, supra), the fact that the plaintiff's title has already been determined in a court of law would seem to strengthen his claim to the aid of a court of equity to remove a cloud subsequently cast on it. We do not regard the case of Clayton v. Barr, 34 W. Va. 290, 12 S. E. 704, referred to by counsel for the appellant, as an authority to the contrary. The bill in that case was demurred to on the ground that, plaintiff not being in possession, the suit was in effect a suit to try the legal title to land, for which there was an adequate remedy at law, and the court sustained the demurrer on that ground.

The remaining contention of the appellant, viz., that the bill and exhibits show such a clear title in the appellee that the deed and mortgage of 1907 and the acts of the appellant do not cast a cloud on his title, is sufficiently answered by the case of Polk v. Rose, supra, where the court held that, notwithstanding the burden was on the defendant to show a valid title under the tax sale, his tax deed and his conduct in interfering with plaintiffs' tenants cast a cloud on their title. In the case of Houghtaling v. Walling, 48 Hun (N. Y.) 104, relied on by the appeilant, the deed was from a stranger to the title, and the grantee, the court said, had never set up or claimed title to the property, and it was under such circumstances that the court held that "the mere existence of a deed purporting to convey certain premises, but accompanied by no circumstances giving it apparent validity, would not operate as such a cloud upon the title as to justify the interposition of a court of equity.' In this case the plaintiff alleges that the appellant is not only claiming title under his deed, but is interfering with his tenants.

But there is another reason why the court should grant relief. The appellant is not making claim to the whole of the appellee's lot, but is claiming that it does not include the strip of land between the south wall of

his building, as it formerly stood, and the property on the south. The fourth line in the appellee's deed runs to the corner of appellant's building, and the fifth line follows the south end wall of said building, and the averment of the bill is that the improvements on said lots have been so altered as to make them all practically one building. The well-established rule in this state and elsewhere is that in locating lands calls for monuments prevail over the courses and distances. Rogers' Lessee v. Raborg et al., 2 Gill & J. 54; Heck v. Remka, 47 Md. 68; 4 Am. & Eng. Ency. of Law (2d Ed.) 764. As the buildings have been changed so as to make the improvements on appellee's and appellant's lots and the lot on the south "practically one building," it would probably be necessary, as the appellant is claiming title to the strip of land between the wall of his building and the wall of the building on the south, to offer evidence as to the identity or location of the monuments called for in the description of appellee's property, in order to establish his title to the strip of land in question, and the rule, as stated in 6 Am. & Eng. Ency. of Law (2d Ed.) 157. is that: "Where there is a defense in law and which rests upon evidence which may be lost by lapse of time or the imperfections of memory, the court will entertain the litigation without waiting for the assertion of the claim."

"Anything is a cloud which is calculated to cast doubt or suspicion on the title, or seriously to embarrass the owner, either in maintaining his rights or in disposing of the property." (17 Cyc. 256), and we think that the deed and mortgage of 1907, and the acts of the appellant, are calculated to cast a doubt on appellee's title, and to embarrass him in maintaining his rights, and that under the averments of his bill he is entitled to rellef, and will therefore affirm the order overruling the demurrer.

Decree affirmed, with costs, and case remanded.

TIFFANY v. MORGAN.

(Supreme Court of Rhode Island. July 7, 1909.)

1. EVIDENCE (§ 271°)—DECLARATIONS—SELF-SERVING STATEMENTS — STATEMENTS AS TO INTENT.

In an action for compensation for legal services performed for testator, statements by testator to third persons in plaintiff's absence that testator gave plaintiff business merely to bring him into prominence as a practitioner without any intention of paying him were inadmissible, being self-serving statements, objectionable under the hearsay rule.

[Ed. Note—Wor other cases see Evidence.

[Ed. Note.—For other cases, see Ev Cent. Dig. § 1094; Dec. Dig. § 271.*] Evidence,

2. ATTORNEY AND CLIENT (§ 166*)-ACTIONS FOR COMPENSATION-ADMISSIBILITY OF EVI-DENCE.

In an action for legal services performed for testator, where the executor claimed that testator gave plaintiff the work without any intention of paying him, letters of testator, stating that plaintiff needed practice and that testator was willing to give him a chance to practice, were not inconsistent with an intention to pay plaintiff for his services, and were immaterial, as was testimony that testator was making his headquarters at plaintiff's office.

[Ed. Note.—For other cases, see Attorney and lient, Cent. Dig. §§ 368-370; Dec. Dig. § Client, 166.*1

8. EVIDENCE (§ 276*)—DECLARATIONS AGAINST

Interest.

In an action for compensation for legal services claimed to have been rendered testator under a promise to pay therefor, testimony as to a statement by testator to another that he intended to pay plaintiff for his services was admissible as a declaration against interest, to corroborate plaintiff's testimony to the same effect.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1135; Dec. Dig. § 276.*]

4. Executors and Administrators (§ 451*) ACTION ON CLAIM-INSTRUCTIONS.

ACTION ON CLAIM—INSTRUCTIONS.

In an action for compensation for legal services rendered testator, for which plaintiff testified testator promised to pay, but the executor claimed that testator permitted plaintiff to do the work merely to bring him into legal prominence, without any intention of paying him therefor, a requested charge that the jury should consider, from testator's habits and the other circumstances, whether his language as stated by plaintiff's witnesses was intended as an express promise to pay plaintiff, was properly modified to read that the question of whether there was an express promise was one whether there was an express promise was one of veracity, and in determining it the jury of veracity, and in determining it the jury could consider testator's express statements, as well as the other circumstances, including testator's habits of mind and business.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1880; Dec. Dig. § 451.*]

5. Executors and Administrators (§ 256*)—Appeal from Allowance of Claim—In-STRUCTIONS - REQUESTS-APPLICABILITY OF

On appeal from the decree of the probate On appeal from the decree of the probate court allowing plaintiff's claim after a hearing in which evidence was introduced, an instruction, requested by defendant, that what happened in the probate court was purely a formal matter, was properly refused; the court having already instructed that the jury should decide the case on the avidence before them as decide the case on the evidence before them as if it was before them in the first instance.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 918; Dec. Dig. § 256.*]

6. EVIDENCE (§ 594*)—WEIGHT (UNCONTRADICTED TESTIMONY. -Weight of Evidence-

The court properly instructed that positive testimony as to a fact must be accepted by the jury as true, if it is not disputed by direct or circumstantial evidence, or by the appearance of witnesses, or other proper evidence going to its credibility.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2431; Dec. Dig. § 594.*]

7. TRIAL (§ 260*)—INSTRUCTIONS—REQUEST—INSTRUCTIONS ALBEADY GIVEN.
Requested charges relating to matters already sufficiently presented in the charge are properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.*]

Exceptions from Superior Court, Providence and Bristol Counties: Charles F. Stearns, Judge.

Action by William A. Morgan against Henry L. Tiffany, executor. Verdict for plaintiff, and defendant excepts. Exceptions overruled, and cause remanded for judgment on verdict and for further proceedings.

The executor disallowed plaintiff's claim; but on trial in the municipal court, after full hearing, the claim was substantially al-

Exception No. 8, was to the refusal to charge that the jury are to consider, from testator's habits and other circumstances surrounding the matter, whether or not his language as stated by the witnesses for claimant was intended by him to make an express contract with the claimant; the court charging in its place that the question of whether an express promise was made was a question of veracity, and in determining that question the jury could consider. not only his statement expressly given, but also all the other evidence in the case, including testator's habits of mind and of busi-

The charge to which exception No. 10, was taken was, in substance, that where there is positive testimony as to a fact, in the absence of other evidence, circumstantial or direct, or evidence which the jury might take from the appearance of the witness, or from any other proper element, as already charged, discrediting any such testimony, in such a case, having in mind the presumption of the law that each witness testifies to the truth, they must accept the testimony of such witness as true.

Henry W. Hayes and John Henshaw, for appellant. Irving Champlin, for appellee.

PER CURIAM. This case comes before this court upon the appellant's bill of exceptions. The exceptions are 14 in number and may be grouped as follows:

Exceptions Nos. 1, 4, 5, 6, and 7 relate to evidence attempted to be introduced by the appellant as to declarations in writing or tatements by James Tiffany to third par-

•For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to contradict the evidence of the appellee and his witnesses as to an express promise by the deceased to pay the appellee for his professional services. The letters and statements were offered in the endeavor to show that James Tiffany, the deceased, had in mind only that the business which he requested Mr. Morgan to do would be good practice for him, would bring him into prominence, and would advertise him, and that Mr. Tiffany had no intention of paying for such services. The court rightly excluded such evidence, on the ground that self-serving statements, made to third parties and not in presence of Mr. Morgan, were inadmissible under the hearsay rule.

Furthermore, the evidence offered from two letters written by James Tiffany to his son, James F. Tiffany (Exhibit 1), was immaterial and incompetent, because it d. not show that Mr. Tiffany did not intend to pay Mr. Morgan for services. It merely showed that Mr. Morgan had "to economize" and needed practice, and that Mr. Tiffany felt "like giving him all the chance to practice," and was entirely consistent, not only with a desire to give Mr. Morgan prominence at the bar, but also with an intention to benefit him financially by paying him for his work. So the testimony regarding any statement by Mr. Tiffany that he was making his headquarters at Mr. Morgan's office, which was excluded and formed the basis of exceptions 4 and 5, would, if admitted, have been immaterial, as the fact, if proved, was in no way inconsistent with an intention and promise to pay for services rendered.

The second and third exceptions are not pressed in the brief or argument of the ar pellant's counsel. But we have examined them and find that the testimony admitted to which the second exception was taken, related to a statement made by Mr. Tiffany to the witness Hicks that he intended to pa-Mr. Morgan for his services. The testimony was properly admitted in corroboration o. Mr. Morgan's own testimony in this regard, as being a declaration against interest, and so an exception to the rule excluding hearsay evidence. The third exception related to testimony which was strictly immaterial, but was properly admitted in redirect examination, in view of certain questions asked by appellant's counsel in cross-examination. Its admission or exclusion could not have benefited or injured either party.

Exception No. 8 relates to the refusal of the court to charge the jury as requested by the appellant's attorney. The modification of the request to charge which is the subject of this exception was entirely proper, and the court did not err in such modifica- for further proceedings.

ties, not in presence of Mr. Morgan, tending | tion, but fully and fairly submitted the question to the jury.

> Exception No. 9 relates to a request by appellant's counsel to charge the jury "that what happened in the probate court was purely a formal matter." This was properly refused. The proceedings before the probate court were not purely formal, because the record shows that evidence was there introduced, and the probate court made its determination and entered its decree from which this appeal was taken, and the court had already fully instructed the jury that they were to regard this case on the evidence before them as if it was brought before them for the first time anew. Furthermore, the record shows that the jury acted independently of the probate court's proceedings, because the jury found a different amount from that determined by the probate court.

> Exception No. 10 relates to a charge of the court as to the weight to be given by the jury to the positive testimony of witnesses, not contradicted or discredited by evidence, either direct or circumstantial, or by the appearance of the witnesses. The charge was proper, as was held by this court in Savage v. R. I. Co., 28 R. I. 391, 404, 67 Atl. 633 et seq.

> Exception No. 11, being based upon the refusal of the last request of the appellant's attorney to the court to charge the jury, is so uncertain and indefinite in the transcript that it is unintelligible, and we think it was properly refused. So far as we can gather its meaning from the brief filed on behalf of the appellant, it related to matters already sufficiently charged.

> Exceptions Nos. 12, 13, and 14 are based upon the refusal of the appellant's motion for a new trial, on the ground that the verdict was against the evidence, against the law, and was excessive. A careful reading of all the evidence convinces the court that the verdict is amply supported in all respects. There was ample evidence, practically uncontradicted, that the services for which compensation is claimed, were rendered by Mr. Morgan at the express instance and request of Mr. Tiffany, that such services were necessary for the ascertainment and protection of Mr. Tiffany's rights, that the charges made by Mr. Morgan were reasonable in view of the nature of the services and of the time spent therein, and that there was an express understanding between Mr. Morgan and Mr. Tiffany that such services should be paid for by Mr. Tiffany. We see no ground upon which this court would be justified in setting aside the verdict.

> The exceptions are overruled, and the case is remitted to the superior court, with direction to enter its decree upon the verdict and

(30 R. I. 107)

TYLER V. SUPERIOR COURT.

(Supreme Court of Rhode Island. July 7, 1909.)

1. CHAMPERTY AND MAINTENANCE (§ 5*)-Ac-TION FOR DAMAGES-UNLIQUIDATED CLAIM-ASSIGNMENT TO ATTORNEY.

The assignment of an unliquidated claim for damages for assault and battery and fals imprisonment, prior to the entry of judgment, to plaintiff's attorney, is contrary to public policy and void.

Maintenance, Cent. Dig. §§ 4-11; Dec. Dig. § 5.*] 2. ATTORNEY AND CLIENT (§ 181*)-CHARGING LIEN.

The charging lien of an attorney extends only to his taxable fees and disbursements, and not to his general claim for compensation for his services.

[Ed. Note.—For other cases, see Attorney and lient, Cent. Dig. §§ 394-398; Dec. Dig. § 181.*1

3. ATTORNEY AND CLIENT (§ 183*)-LIEN-AT-TACHMENT.

The charging lien of an attorney does not attach until after judgment entered.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. \$ 385; Dec. Dig. \$ 183.*]

4. ATTORNEY AND CLIENT (\$ 168*)-FEES-SE-CRET SETTLEMENT.

Where, after plaintiff had made an invalid assignment of an unliquidated claim for dam-ages to his attorney, and before the attorney's lien had attached by the entry of judgment, a secret settlement was made between the parties. it was error to issue an execution against de-fendant in the action for the purpose of recovering the fees of plaintiff's attorney.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 168.*]

Sweetland, J., dissenting.

Petition by Thomas D. Tyler for a writ of certiorari to quash the record of the superior court in issuing an execution against petitioner. Writ granted.

Gardner, Pirce & Thornley (Hugh B. Baker, of counsel), for petitioner. James Harris and Irving Champlin, for respondent.

BLODGETT, J. The petitioner seeks a writ of certiorari to quash the record of the superior court in issuing an execution against the petitioner for the sum of \$312.95, in the name of Patrick Concannon, plaintiff in an action for assault and battery and false imprisonment in said court, \$212.95 thereof to the use of Irving Champlin and \$100 thereof to the use of James Harris, in satisfaction of their respective claims for services as counsel for said Concannon, who, pending the hearing on exceptions after verdict in his favor on June 18, 1906, for \$375.83 and costs, thereafter on July 12, 1906, executed a release under seal to petitioner in payment of the sum of \$100, and signed an agreement that the case might be entered "settled," both of which acts were done without the knowledge of his counsel, the said Champlin and Harris. The release and agreement of set-

until May 31, 1907, two days after the decision of this court overruling the exceptions of the petitioner and directing the entry of judgment for Concannon on the verdict on May 29, 1907, as of the date of said verdict on June 18, 1906.

The counsel for Concannon, alleging that his settlement of the action with Tyler without their knowledge was collusive and for the purpose of depriving them of their fees, and claiming a charging lien in that behalf upon the judgment in Concannon v. Tyler, have respectively reduced their claims for services to judgment as against Concannon, and on their motion the superior court has ordered execution to issue against Tyler, as above set forth, after the alleged settlement by the parties, who severally deny all collusion, and one of whom, Tyler, the petitioner here, has instituted this proceeding and avers that the superior court is without jurisdiction to order execution to issue in the premises as aforesaid. The question so presented is whether counsel have a charging lien against the petitioner for their services upon these facts.

It is important to note in the first place that, unlike many other states, we have no statute regulating this matter. It is also necessary to say that on February 12, 1906, and before trial in the superior court, Mr. Champlin took an assignment of Concannon's right of action to any judgment which might be rendered in said action for assault in favor of his client, Concannon, and against Tyler, now petitioner here, as security for his fees, and gave notice thereof to Tyler. In Rice v. Stone et al., 1 Allen (Mass.) 566, it was held that an assignment for damages for an injury to the person was void at common law, even after verdict, on grounds of public policy. It was there said by Chapman, J. (page 568): "No case is cited where it has been held that an assignment of a claim for damages for an injury to the person has been held good, when the assignment was made before judgment in an action for the tort. Such claims were not assignable at common law. On the contrary, a possibility, right of entry, thing in action, cause of suit, or title for condition broken, could not be granted or assigned over at common law. * * But in respect to all claims for personal injuries the questions put by Lord Abinger in Howard v. Crowther, 8 M. & W. 603, are applicable. 'Has it even been contended that the assignees of a bankrupt can recover for his wife's adultery, or for an assault? How can they represent his aggravated feelings?' And we may add the broader inquiry: Has any court of law or equity ever sanctioned a claim by an assignee to compensation for wounded feelings, injured reputation, or bodily pain, suffered by an assignor? There were two principal reasons tlement were not filed in the superior court | why the assignments above mentioned were

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

held to be invalid at common law. One was to avoid maintenance. In early times maintenance was regarded as an evil principally because it would enable the rich and powerful to oppress the poor. This reason has in modern times lost much, but not the whole. of its force. It would still be in the power of litigious persons, whether rich or poor, to harass and annoy others, if they were allowed to purchase claims for pain and suffering and prosecute them in courts as assignees; and as there are no counterbalancing reasons in favor of such purchases, growing out of the convenience of business, there is no good ground for a change of the law in respect to such claims. * * * A claim to damages for a personal tort, before it is established by agreement or adjudication, has no value that can be so estimated as to form a proper consideration for a sale. Until it is thus established, it has no elements of property sufficient to make it the subject of a grant or assignment. The considerations which are urged to a jury in behalf of one whose reputation or domestic peace has been destroyed. whose feelings have been outraged, or who has suffered bodily pain and danger, are of a nature so strictly personal that an assignee cannot urge them with any force. The character of this class of claims is not changed in this respect by a verdict before judgment. It must be made the subject of a definite judgment before it is assignable; a judgment upon which a suit may be brought. Stone v. Boston & Maine Railroad, 7 Gra (Mass.) 539. It is said in Langford v. Ellis, 14 East, 203, note, that the moment the verdict comes the damages are liquidated. This was an action of slander. But the principal case of Ex parte Charles, 14 East, 197, in which the other was cited, is regarded as overturning it. Buss v. Gilbert, 2 M. & S. And these cases hold that neither an action for breach of promise of marriage nor for seduction passes to an assignee in bankruptcy before judgment. In our practice, where the points in controversy are seldom raised by the pleading, but are brought out in later stages of the case, the claim remains in great uncertainty till the judgment is rendered. And the case of Stone v. Boston & Maine Railroad, cited above, follows the ancient case of Benson v. Flower, Sir W. Jones, 215, where it was held that an action of the case is not assignable till after judgment, when it is reduced to a certainty.

• • In view of these and many other authorities to which we have referred, we are of the opinion that the ancient doctrine of the common law on this subject is still in force, and that the reasons on which it was originally founded are still valid. As an assignment of a claim for a personal injury is void, though it is made after verdict in an action to recover damages for the injury, the claim of the defendant Perrin cannot prevail." And this decision was affirmed in the

75 N. E. 730 (1908). And see Linton v. Hurley, 104 Mass. 353; Bennett v. Sweet, 171 Mass. 601, 51 N. E. 183.

So in Weller v. Jersey City, H. & P. St. R. Co., 68 N. J. Eq. 659, 662, 61 Atl. 459, 460 (1905), it was said by Gummere, C. J.: "A right of action for personal injuries cannot be made the subject of assignment before judgment, in the absence of a statutory provision to the contrary." And see cases cited. And in Hanna v. Island Coal Company, 5 Ind. App. 163, 167, 31 N. E. 846, 848, 51 Am. St. Rep. 246, it is said: "Ordinarily, however, an attorney acquires no lien for fees until after judgment. Therefore, until after judgment, the client may settle and compromise and release the cause of action in any manner he pleases without consulting his attorney, and the attorney has no power to prevent it. Simmons v. Almy, 103 Mass. 33; Parker v. Blighton, 32 Mich. 266; Pulver v. Harris, 52 N. Y. 73; Roberts v. Doty, 31 Hun (N. Y.) 128; Connor v. Boyd, 73 Ala, 385; Swanston v. Morning Star Mining Co. (C. C.) 13 Fed. 215; Young v. Dearborn, 27 N. H. 324. In such a case a lien cannot be acquired before judgment, even by agreement between the attorney and client that will prevent the client from compromising and releasing the cause of action without the consent of the attorney, although the defendant may have notice of the agreement. Coughlin v. New York, etc., R. R. Co., 71 N. Y. 443, 27 Am. Rep. 75; Kusterer v. City of Beaver Dam, 56 Wis. 471, 14 N. W. 617, 43 Am. Rep. 725; Pulver v. Harris, supra. If the cause of action is one for unliquidated damages, and is not assignable, the client cannot give his attorney any lien upon it that will prevent a settlement or compromise by the parties before judgment, even if the amount is definitely fixed, and an agreement made that the same shall become a lien, and the adverse party notified of the fact. Jones. Liens, §§ 206, 207. Actions for slander and libel, assault and battery, personal injuries, resulting from the negligent conduct of others, are within the rule. * * The charge of fraudulent collusion in the second paragraph of the complaint in no wise aids the appellant. Characterizing a transaction as fraudulent does not make it so in law, unless it is so in fact. Therefore, when the appellant charged that the appellee was guilty of a fraudulent collusion for the purpose of cheating him 'out of his fees and expenses,' it was incumbent upon him to state facts sufficient to support the charge. Conant v. National, etc., Bank, 121 Ind. 323, 22 N. E. 250; Bodkin v. Merit, 102 Ind. 293, 1 N. E. 625; Joest v. Williams, 42 Ind. 565, 13 Am. Rep. 377; Ham v. Greve, 34 Ind. 18. When Stark compromised his claim with the appellee, and dismissed the action without the consent of his attorney, he did what he had the lawful right to do. The contract to bring the action was made with Stark by the recent case of Flynn v. Butler, 189 Mass. 377, appellant. The appellee had nothing to do

with it. Stark was the owner of the cause of action, and as such, under the circumstances, had the absolute control of it until it passed into a judgment. Having settled and compromised it before judgment, the appellee was released. The appellant, having acquired no lien upon or interest in such cause of action, no obligation in his favor was created by the transaction against the appellee." And see St. Joseph Mfg. Co. v. Miller. 69 Wis. 391, 34 N. W. 235.

To these decisions may be added the authority of Averill v. Longfellow, 66 Me. 237, in which it was said by Appleton, C. J. (page 238): "This was an action to recover damages for an assault upon the female plain-The plaintiffs obtained a verdict, and the defendant filed a motion for a new trial, and the cause was continued. After the continuance, and before judgment, the parties settled; and the plaintiffs' claim was discharged. The attorney, by whom the suit had been successfully prosecuted, claims that the demand had been assigned to him, and that this assignment was made before or at the commencement of the suit. But the demand was not assignable. It has been repeatedly held that a claim for damages for a personal assault cannot be assigned before final judgment. McGlinchy v. Hall, 58 Me. 152: Rice v. Stone, 1 Allen (Mass.) 566. The lien of an attorney does not attach until the rendition of judgment. Young v. Dearborn, 27 N. H. 324, 331. Before that, the parties may settle and disregard the claims of the attorney. Newbert v. Cunningham, 50 Me. 231, 79 Am. Dec. 612; Simmons v. Almy, 103 Mass. 33. No lien in this case had attached. The court has no authority to set aside a settlement which the parties have deliberately made. In accordance with their agreement, the entry must be 'neither party.' "

It thus appears that the assignment by Concannon to his counsel is void, and that the rights of the parties are to be considered as though it had not been made, and this leads to a consideration of the question what those rights are. The citations heretofore made indicate the nature of the first ground urged by the petitioner here against the jurisdiction of the superior court in issuing said execution, viz., that, whatever may be the right of counsel to a charging lien after judgment, no such lien exists until judgment, and parties may at will settle their own cases without the knowledge or consent, and even against the will, of their counsel until that time. The nature and extent of the right of counsel in this state after judgment are thus set forth by Durfee, C. J., in Horton v. Champlin, 12 R. I. 550, 552, 34 Am. Rep. 722: "Primarily, without doubt, the lien originates in the control which the attorney has by his retainer over the judgment and the processes for its enforcement. This enables him to collect the judgment and reimburse himself out of the proceeds. It gives him no right, however, to exceed the law as lately amended, a fee is taxed to the

authority conferred by his retainer. But inasmuch as the attorney has the right, or at least is induced, to rely on his retainer to secure him in this way for his fees and disbursements, he thereby acquires a sort of equity, to the extent of his fees and disbursements, to control the judgment and its incidental processes, against his client and the adverse party colluding with his client, which the court will, in the exercise of a reasonable discretion, protect and enforce; and on the same ground the court will, when it can, protect the attorney in matters of equitable setoff. We think this is the full scope of the lien, if lien it can be called."

The opinion of Potter, J., in the above case, concurring in the dismissal of the action by the attorney, rests upon the ground that the attorney has no lien in this state save for his taxable fees and taxable disbursements as for officers' and other fees: "The plaintiff evidently supposes that he has a lien, not only for the costs taxed to the attorney of the successful party, but for his charges and for all his services, sometimes called fees, as he claims a lien for costs in cases where a party recovers debt or damages only and no costs. It might possibly be for the public good if this was the law. If a man, when he began a lawsuit, knew that, having employed an attorney, he could not dismiss him, and that after he had gained his case he would be obliged to have another lawsuit with his own attorney to get his money from him, and so on again, it would tend very much to diminish litigation, and a defendant would get out of such a suit as quick as possible. * * * If any attorney should be entitled to a lien upon a judgment for money for anything beyond his taxable costs, it would seem that he ought to have the same lien where the recovery is for land. See this question decided and a great number of cases quoted in Humphrey v. Browning, 46 Ill. 476, 95 Am. Dec. 446. The lien claimed for the attorney is no part of the old common law. See Getchell v. Clark, 5 Mass. 309; Baker v. Cook, 11 Mass. 236, 238; Simmons v. Almy, 103 Mass. 33. A great deal of confusion may arise from not distinguishing between the costs taxed to the attorney and his charges for services. In many states there are costs taxed as between attorney and client, whereas we have none such here. And in countries or states where such a lien is held to exist the cases generally recognize that it extends not to counsel fees proper, but to the taxed costs only. Ocean Insurance Co. v. Rider, 22 Pick. (Mass.) 210; Wright v. Cobleigh, 21 N. H. 339. * * * In this state costs are taxed generally only to the party recovering, and no costs are taxed as between attorney and client. It is the party who recovers the judgment, and not the attorney. By the old law a fee was taxed for the attorney, evidently intending it as an allowance for the pay of his attorney. By the attorney, thus giving countenance to the claim that, when recovered, it belongs to him. If there is any lien, therefore, it should be only for this fee, unless he has paid the officers' fees or other fees. The travel and attendance is expressly taxed for the party, and how any attorney can have any claim for this it is hard to see." And see Cozzens v. Whitney, 3 R. I. 79, 82; Whitcomb v. Straw, 62 N. H. 651; Hill v Brinkley, 10 Ind. 102; Ex parte Kyle, 1 Cal. 331, affirmed in Mansfield v. Dorland, 2 Cal. 507; Currier v. Boston & Maine Railroad, 37 N. H. 223.

In construing the phrase "fees and disbursements," above referred to, in Ocean Insurance Co. v. Rider, the court said: "We think the statute does not refer to counsel fees but only to the taxable costs." And in Wright v. Cobleigh, supra, it is said of the attorney's lien: "This right is limited to the fees and disbursements of the attorney on that cause, and cannot be extended to 'commissions' or other charges, however proper in themselves." And see cases cited. In Humphrey v. Browning, supra, the court say (pages 477, 485 of 46 Ill. [95 Am. Dec. 446]): "The only important question presented by this record which we propose to examine is, has an attorney at law a lien upon the real estate recovered in an action of ejectment, prosecuted by him? This is a new question in this court, and if it rests upon a great preponderance of authority in its favor, as argued by appellees, it would seem to be no difficult matter to produce the authority. If it does exist in any country in the world, where the common law prevails, or equity jurisprudence obtains, the books ought to be full of such cases. Not a single case has been referred to by appellees sustaining their position. * * * A careful review of the authorities cited satisfies us that no such lien, as claimed by appellees, has ever been allowed in any court in England or in any of the states of this Union. No case directly on the point has been cited, for while, as in England, New York, Massachusetts, Georgia, and Florida, attorneys have a lien on the judgments recovered, for their costs, nearly all the cases show the judgments were money judgments, and the lien allowed was for taxable costs only, and not where a quantum meruit compensation was claimed."

That an attorney's lien, in the absence of statutory provision, does not attach until after judgment is settled by Potter, J., in Horton v. Champlin, 12 R. I. 557, 34 Am. Rep. 722: "In Pulver v. Harris, 52 N. Y. 73, 76, the court held that the suit was subject to the control of the party; that the attorney had a lien after judgment, but not before. The latter would prevent the party from settling his case. And see Simmons v. Almy, 103 Mass. 33; Averill v. Longfellow, 66 Me. 237." And the doctrine is supported by abundant authority. In Parker v. Blighton, 32 Mich. 266, the defendant settled with the plaintiff in a replevin suit, and it was said

by Cooley, J. (page 266): "This was an action of replevin in which the defendant in error was plaintiff. The defendant below relied, among other things, on a settlement which he claimed had been made with plaintiff, and which was evidenced by a writing. It was claimed on the part of the plaintiff that the writing was obtained by duress. It was also claimed that, as the writing was obtained from the plaintiff in the absence of and without the knowledge of his attorney, it was void as depriving him of his lien for his services. If this were so, it was necessarily conclusive, as the amount in controversy was so insignificant that the most moderate charge would exceed it. The circuit judge instructed the jury that the plaintiff could not thus settle the case without the consent of his attorney. This ruling was erroneous. The attorney had no lien whatever on the suit."

In Henchey, Adm'x, v. City of Chicago, 41 Ill. 136, which was an action for causing the death of plaintiff's husband by reason of insufficiently lighting and guarding an open drawbridge, the plaintiff settled the case and executed a release to the city pending the action and without the knowledge of her counsel, and the court dismissed the case and denied the plaintiff's motion to reinstate made upon several grounds of which the fourth ground was: "The attorney for the plaintiff insists that he had an attorney's lien on the claim for damages which could not be defeated by the act of his client." The Supreme Court of Illinois said (page 140): "The counsel for appellant also insists that he had an attorney's lien on the claim for damages which could not be defeated by the act of his client, and which gave him a right to prosecute the suit to judgment. The extent of an attorney's lien is not very well defined, and the cases in the New York Reports are especially conflicting. We are not, however, inclined to hold, that the lien attaches to a claim for unliquidated damages prior to the judgment. In Getchell v. Clark, 5 Mass. 309, on an application similar to the present, the court. refusing the motion, said: 'Before judgment it was very clear the plaintiff might settle the action and discharge the defendant, without or against the consent of his attorney, who had no lien on the cause for his fees.' A similar rule is laid down in Foot v. Tewksbury, 2 Vt. 97, Shank v. Shoemaker, 18 N. Y. 489, and Sweet v. Bartlett, 4 Sandf. (N. Y.) 661, and we regard it as by far the sounder principle. To hold that the lien attaches to a claim for unliquidated damages before judgment would embarrass parties in all attempts to settle their suits amicably. and thereby greatly tend to prevent a result always held to be desirable. Especially would this be the case under a system of practice like ours, where the compensation of attorneys is not fixed by law. Under such a rule, attorneys, by making a demand for

unreasonable fees, would be able to prevent a settlement whenever they should desire. Highly as we think of our profession, we do not deem it desirable that they should thus be able to control the most important interests of their clients, independently of the wishes of the latter. It is better that clients should be at liberty to adjust their diffi culties if they can. In the particular case before us we have no doubt it would be most equitable to allow the lien. But we cannot establish the rule in reference to the merits of a particular case. 'Hard cases make bad law.' We think such an application of the lien as is here asked would be against the current of authorities and the general interests of society."

In Alexander v. Grand Ave. Ry. Co., 54 Mo. App. 66, the plaintiff settled with the defendant an action for personal injuries sustained while a passenger on one of its cable street cars, and did so while the action was pending and without the knowledge of her counsel, and after notice from her counsel to the defendant company that "said attorneys for their services in said cause have taken an interest in whatever judgment or compromise may be obtained." The court refused to set aside the order of dismissal, made later upon the plaintiff's own motion, one of the grounds of which was "that the settlement was in violation of the rights of plaintiff's attorneys of which defendant had notice," saying (page 73): "The claim to which these papers refer must have for its foundation either a lien in favor of the attorneys or an assignment of a part of the claim. That an attorney has no lien for his services on a judgment obtained by him was long since determined in this state. Frissell v. Haile, 18 Mo. 18; Roberts v. Nelson, 22 Mo. App. 28. And it could scarcely be pretended that an attorney, merely as such, would have a lien on the claim before it became a judgment, in the absence of a statute conferring such a lien, as the attorney can have no lien on the suit. Parker v. Blighton, 32 Mich. 266; Coughlin v. Railroad, 71 N. Y. 448, 27 Am. Rep. 75; Henchey v. Chicago, 41 Ill. 136. Though there seems to have been a rule or practice adopted arbitrarily by some of the courts enforcing such liens. The court said in the foregoing case from New York that 'the courts invented this practice and assumed this extraordinary power to defeat attempts to cheat the attorneys out of their costs.' But, as stated in that case and in he case cited from 18 Mo. 18, attorney's fees in those jurisdictions were fixed sums, easily determined by taxation,' and this power was exercised to secure them their fees."

In the recent case of Boogren v. St. Paul City Ry. Co., 97 Minn. 51, 52, 106 N. W. 104, 105, 3 L. R. A. (N. S.) 379, 114 Am. St. Rep. 691 (1906), the facts present some similarity to the facts in the case at bar: "This is an ap-

an order discharging an order to show cause why the attorney should not be permitted to continue the action for the purpose of determining and enforcing his alleged interest therein. Some time prior to July, 1904, the plaintiff, Charles L. Boogren, claimed to have a cause of action against the St. Paul City Railway Company for damages for personal injuries alleged to have been occasioned by the negligence of the company. On July 15, 1904, Boogren entered into a contract with the petitioner, Joel E. Gregory, an attorney at law, by the terms of which Gregory agreed to prosecute the action as the plaintiff's attorney and to pay all expenses of the suit, and in consideration therefor Boogren agreed to pay said party of the second part [Gregory], after the expenses of said suit and other expenses have been paid, 50 per cent. of all moneys received from the St. Paul City Railway Company by party of the first part as compensation for said injuries in said case of Charles L. Boogren v. St. Paul City Railway Company. An action to recover damages in the sum of \$10,350 was thereafter brought in Ramsey county. On the trial the jury disagreed, and the case was continued to the January, 1905, term. On the defendant's motion the case was continued till the February term, and set for trial on February 14th. When the case was called for trial, the plaintiff did not appear, and his attorney stated that he was not able to find his client. The defendant's attorney stated to the court that the defendant had its witnesses subpoenaed and in court ready for the trial, but that he would consent to a continuance of the case until the April term of court. It was subsequently continued to the May term of court, and then to the June term, by agreement of the attorneys. On the call of the calendar on June 5th, the defendant objected to any further continuance, and the case was set for trial on June 9th. On June 8th the defendant filed a written dismissal of the action on the merits. This instrument bore date of January 24, 1905, and was signed by the plaintiff and defendant's attorneys. When the case was called for trial on June 9th, the defendant informed the court that the action had been settled and that a dismissal had been filed. The petitioner then stated to the court that he knew nothing of said dismissal, and asked that the action be held open to allow him to present a petition to be allowed to continue the action for the purpose of recovering his attorney's fees and expenses. This petition was granted, and petitioner thereafter made the petition herein, and the same came on for hearing on an order to show cause. The petition stated that the settlement between the defendant and plaintiff was made with the full notice and knowledge of the lien and rights of the petitioner and for the purpose of defrauding and cheating him out of his attorney's fees and expenditures, that his expenditures were \$328.peal by the attorney for the plaintiff from 75, that the plaintiff's damages were \$5,000,

and that plaintiff was insolvent. The defendant moved to dismiss the petition upon the grounds (1) that it did not state facts sufficient to warrant the court in granting the petitioner the relief prayed for; (2) because the court had no jurisdiction of the subject-matter. The appeal is from an order dismissing the petition. * * * The petitioner bases his right to continue the action for the protection of his alleged interests upon the theory (1) that he has a lien which it is the duty of the court to protect, and (2) that he is the equitable assignee of an interest in the cause of action by reason of the contract between him and the plaintiff. The order of the trial court was correct. breach of professional ethics involved cannot affect the legal rights of the parties. The petitioner had no lien upon the cause of action. He had acquired no statutory attorney's lien (Forbush v. Leonard, 8 Minn. 303 [Gil. 267]; Nielsen v. City of Albert Lea, 91 Minn. 888, 98 N. W. 195), and it is the settled law of this state that a lien cannot be created by such a contract upon a right of action arising out of personal tort. As said in Hammons v. Great Northern Ry. Co., 53 Minn. 249, 54 N. W. 1108: 'The plaintiff had no lien-could not have any-on the cause of action. cause of action for a personal tort is strictly personal. It is not in the nature of property. in the sense that any one but the injured party can have any right in it. * * * See. also, Anderson v. Itasca Lumber Co., 86 Minn. 480, 91 N. W. 12, 291, and Nielsen v. City.of Albert Lea, supra. • • • It has been said that the court will protect the attorney of a party to an action against a collusive settlement in fraud of his rights. This rule applies when the attorney has acquired a lien. Weicher v. Cargill, 86 Minn. 271, 90 N. W. 402. The language used in the New York and Georgia cases must be construed in the light of the statutes of those states, which give the attorney a fien upon the client's cause of action. 3 Am. & Eng. Enc. (2d Ed.) 468. There are also serious practical difficulties in the way of such a procedure when the action is to recover unliquidated damages. The power to arrest or rescind the effect of a settlement is cautiously exercised in respect to suits for debts actually owing: and the power would be more cautious.y applied to actions for torts, where it would be impracticable for the court, upon the opposing representations of the parties and without hearing the proofs to ascertain whether there was a just cause of action, or whether there was ground to distrust the justness of the set-The whole case would have to be tlement. tried before the court could pronounce that the suit was properly instituted and that it afforded prima facie ground for the award of costs. * * * The policy of the law favors the adjustment of claims and the termination of litigation, and the courts are not disposed to limit the right of parties in this respect.

ship upon attorneys, but it is nevertheless a salutary rule. An attorney whose rights are prejudiced must look to his client for relief, or in a proper case proceed directly against the party by whose fraudulent conduct he has been injured. The order appealed from is affirmed."

Likewise in Lamont v. Railroad Co., 2 Mackey (D. C.) 502, 47 Am. Rep. 268, the facts closely resemble the case at bar and are as follows: "This case, as is very well known, was an action brought to recover damages for injuries alleged to have been suffered by the plaintiff in being forcibly and wrongfully expelled from the cars of the defendant. The case was tried three times, and on the last trial the jury rendered a verdict for the plaintiff for \$15,000. The case came, in the usual form, before this court on a motion for a new trial on bills of exceptions. It was argued by counsel, and while under advisement the defendant settled with the plaintiff by paying him \$2,000, and received from him a release of all claims and demands, and an order to the clerk of this court to enter the case dismissed. This was done without the knowledge of the plaintiff's attorneys. After this was done, the court rendered its opinion, setting aside the verdict in the case below and ordering a new trial. and then this order to dismiss was filed, and after that the attorneys for the plaintiff came into court and moved the court to set the cause down for trial, notwithstanding the paper filed by the defendant, purporting to be an acknowledgment that the case had been settled, on the ground that said pretended settlement between the plaintiff and the defendant was collusive, and with knowledge on the part of the defendant that the plaintiff's attorneys were interested in the case to the extent of their fees for services, and that knowledge of such settlement was being concealed from them by the plaintiff. The motion was accompanied with an affidavit showing that the plaintiff had agreed to pay his attorney, Mr. McPherson, a contingent fee of 33 per cent. of the amount that should be recovered. The court thereupon passed a peremptory order that the defendant should pay to plaintiff's attorneys one-third of the sum of \$2,000, and that, in default thereof, the entry of dismissal should be struck out and the case set down for trial. That order was appealed from, and that appeal has been the subject of discussion before us. In the argument here it was claimed, on the part of the attorneys for the plaintiff, that they had a lien on the cause of action, and that the court could enforce it by allowing the suit to proceed to trial for the benefit of the attorneys, where it had been adjusted between the parties collusively, with a view to cheat the attorneys out of their compensation. Upon the other hand, it was claimed by the defendant that, before judgment, the parties to a pending suit have entire control of the sub-This practice may occasionally work a hard- | ject-matter, and may settle it between themselves, without preference to either the wishes or the interests of the attorneys. The common law recognizes the lien of an attorney upon moneys of his client in his hands, and also upon papers and documents in his hands, whether they be muniments of title, or causes of action, or evidence; but there is no such thing as the lien of an attorney upon a mere claim or cause of action which his client has against a third person, apart from the tangible vonchers of the claim which may be in the attorney's possession. The very essence of the common law is possession. The party who has a lien loses it the moment he surrenders possession; and possession cannot be predicated of a mere abstract right in another person. It is conceded on all hands that the parties before judgment, may compromise and settle between themselves without reference to the attorney, which could not be the case if the attorney could be regarded as having possession of his client's cause of action. * * * The present case illustrates the distinction particularly. Here is a claim for unliquidated damages, which is, in its very nature, incapable of being assigned in whole or in part to the attorney; and in fact the agreement which is relied upon here does not purport to assign it in any part, but is simply an engagement on the part of the plaintiff to pay his attorney a contingent fee of 83 per cent. of the amount of the recovery-that is, he agrees that in case of recovery he personally will pay to his counsel a sum equivalent to 33 per cent. of the amount recovered. It is clear, therefore, that he might as well agree to pay a gross sum of \$1,000, or any other gross sum, or to convey a house and lot in case of success in the suit. Now, in no sense can that collateral engagement of the client to his attorney be said to be involved in this suit. Here in an action for damages suffered by the client. It is not a suit to recover money stipulated in a collateral agreement to be paid by client to attorney, but it is to recover damages for injuries alleged to have been suffered by the client, and quoad that the attorney cannot be interested as a party in the suit. It might as well be said that, where the client had agreed to do some collateral thing in case of the recovery of judgment, to convey a house and lot, for example, the court could, after this settlement, hold the defendant responsible for the plaintiff's engagement to convey that house and lot to his attorney. You could maintain that proposition with as much reason as that the court could compel the defendant to pay to the attorney of the plaintiff the moneys or considerations which the client had collaterally engaged to pay to his attorney. The courts will not enforce such a claim in that way. They leave the attorney to his common-law remedy on the contract. We think the whole course of the authorities is in that direction. The law is stated in the first place in Parsons on Contracts, vol. 1, p. 116, as follows: 'He

[the attorney] has no claim for unliquidated damages in court until after judgment.' The case of Wood v. Anders, 5 Bush (Ky.) 601, is cited, which fully sustains this proposition. Again in Parsons (volume 3, p. 269): 'But the lien on the cause for his fees does not attach until the judgment is rendered. Therefore, where in a case reserved, after the opinion of the court was pronounced in favor of the plaintiff, he forthwith assigned his interest in the judgment, and the defendant, during the term and before the judgment was actually entered, paid the whole amount to the assignee, it was held that the attorney's lien was thereby defeated.' In support of this several cases are cited, all of which fully sustain the position in the text. * * * 'It is therefore beyond dispute that the plaintiff's attorney had neither a legal nor an equitable interest by way of assignment or lien on the cause of action. The defendant was not asking any favor of the court. It was in court simply insisting upon its settlement with the plaintiff as a defense to his cause of action. Therefore, if the attorneys are entitled to the protection they now seek, it is only by the exercise of the extraordinary power of the court, to which I have first above alluded, and I am prepared to say that such power should not be exercised in a case like this. It has not been conferred upon the courts by statute, usage, or common law. Its exercise to secure to an attorney the statutory fees, small in amount and easily ascertainable, was just and proper, and could lead to no abuse. But to exercise it so far as to enforce all contracts between clients and attorneys, however extraordinary, is quite another thing. Here the attorneys were contractors. They took the job to carry this suit through, and to furnish all the labor and money needed for that purpose, and they are no more entitled to the protection which they now seek than any other person not a lawyer would have been if he had taken the same contract. When a party has the whole legal and equitable title to a cause of action, public policy and private right are best subserved by permitting him to settle and discharge that, if he desires to, without the intervention of his attorneys' (quoted from People v. Tioga, C. P. 19 Wend. [N. Y.] 73, Cowen, J.). * * * But enough has been said to show that all the cases hold uniformly that the court will not interfere to enforce in a summary way, through the original suit, the collateral engagements of a client for the compensation of his attorney. We are certainly as desirous as any court could be to protect the members of the bar in their relations with their clients; but it clearly seems to be, if not beyond the power of the court, certainly a practice not sustained by any authority or precedent, to enforce an engagement of this character in a summary way. The court will leave the attorney to his common-law remedy, and, therefore, we are compelled to reverse the order of the court below

and to allow the order of settlement to any description that could be called properstand."

Again in Swanston v. Morning Star Mining Co. (C. C.) 13 Fed. 215, 4 McCrary, 241, an action to recover damages for a personal injury was settled by the plaintiff without the knowledge of his counsel, and the court held, upon the motion to dismiss the action, as follows (page 242): "The motion to dismiss upon this agreement is resisted, not by the plaintiff himself, but by his attorneys, who say that they had a contract with the plaintiff whereby, in the event of their success in this suit, they were to receive as their compensation for services one-third of the amount which might be recovered. The question is made as to whether this is a champertous agreement, but we are not disposed to go into that question. It is one, perhaps, of some difficulty, and about which there is a considerable conflict of authority. It would undoubtedly be champertous if either of the attorneys had agreed to pay the costs of the proceeding; but whether a mere contract for a contingent fee of one-third of the amount recovered is champertous is a question not entirely settled. We do not think it necessary, at all events, to pass upon it in this case. It is, perhaps, not improper to remark, however, that it is not a contract which commends itself very much to the favor of the courts, and this court would not be disposed to go any further than the law requires to uphold it. But, even assuming that it is a valid contract as between the plaintiff and his attorneys, the question arises, how can we, by any order of ours, continue this case and carry it on to judgment, after the plaintiff himself has sold the cause of action and received a sum which, he says, is in full satisfaction. The attorneys are not parties to the record. No judgment could be rendered in their favor, and, if we were to go on to trial, I do not see how it is possible that any judgment at all could be rendered upon the record in the face of this dismissal, this acknowledgment of payment in full by the plaintiff himself. If the counsel for the plaintiff had any lien upon anything, the court would protect them, perhaps, by some form of proceeding in this case; that is to say, the counsel might, perhaps, be allowed under your statute to intervene, if you have a statute authorizing such a proceeding as that, and to assert their rights in this suit. But it is very clear that the attorneys of the plaintiff have no lien upon anything in a case of this character. I believe it is well settled that an attorney has no lien even upon a judgment recovered by him for his client in an action, unless the statute gives it. It has never been claimed that an attorney would have a lien upon a claim for unliquidated damages, and there can be no foundation for a lien of any kind or description upon anything in controversy here. If the attorneys had in their hands a and to pay all his own costs, and, further, that contract, a promissory note, or instrument of said attorneys should be at no court costs

ty, and had rendered services in prosecuting a suit upon it, perhaps they might, by proper proceeding, be allowed to enforce a claim or lien upon it. It is enough to say that there is no doubt of the right of the plaintiff to settle the suit without the consent of his attorneys, and that, having done so, the controversy must be regarded as at an end, and the suit must be dismissed. If the attorneys have any claim against the parties who have made the settlement, they must assert it in some other mode of proceeding. It is not open for consideration here. The doctrine I have announced is supported by the cases of Coughlin v. Railroad Company, 71 N. Y. 443, 27 Am. Rep. 75, and Hooper v. Welch, 43 Vt. 169, 5 Am. Rep. 267."

In Wood v. Anders, 5 Bush (Ky.) 601, the Court of Appeals of Kentucky say (page 602): "The lien secured by the act of 1866 to attorneys is upon claims arising on contracts, either express or implied, which are put in their hands for collection, and on 'Judgments' recovered in actions prosecuted by attorneys, without regard to the nature of the claim on which the action was prosecuted. But we do not understand the statute as going to the extent that for a claim for unliquidated damage in cases of tort, before judgment is obtained, the defendant or defendants are to be made liable for the fee of the attorney of the plaintiff, where the parties compromise and adjust their litigation before judgment. Such cases are not embraced by the letter of the act certainly, nor does it appear from the language that such was the intention of the Legislature; and courts should not give to it a meaning and operation more comprehensive than was intended. Such an interpretation would discourage compromises, and conflict with the divine precept, to 'agree with thine adversary quickly, whiles thou art in the way with him; lest at any time the adversary deliver thee to the judge,' etc. Nor do we understand the common law as authorizing the relief sought. Wherefore the judgment is affirmed.' See, also, Brewery Co. v. Donovan, Circuit Judge, 103 Mich. 190, 61 N. W. 343; Randall v. Van Wagenen, 115 N. Y. 527, 22 N. E. 361, 12 Am. St. Rep. 828; Frissell v. Haile, 18 Mo. 18; Paulson v. Lyson, 12 N. D. 354, 97 N. W. 533; Shank v. Shoemaker, 18 N. Y. 489; Mosely v. Jamison, 71 Miss. 456, 14 South. 529.

In Kusterer v. City of Beaver Dam, 56 Wis. 471, 14 N. W. 617, 43 Am. Rep. 725, which was an action for damages for personal injuries suffered by reason of a defective sidewalk, the plaintiff settled with the defendant pending the trial and without the knowledge of her counsel, and the court dismissed the action, although the plaintiff had made an agreement with her counsel "to give them one-half of the damages recovered in said action, and all the taxable attorney's fees, to discontinue the action nor settle the same without the consent of said attorneys." copy of this agreement had been served on the mayor of the city before the day assigned for the trial and before the settlement by the parties, and the Supreme Court of Wisconsin held, following the rule laid down by the Court of Appeals of New York, that "a party having a cause of action in its nature not assignable cannot, by an agreement before judgment or a verdict thereon, give his attorney any interest therein," saying (page 477 of 56 Wis., and page 619 of 14 N. W. [43 Am. Rep. 725]): "For the reasons given, we adopt and follow the rule above quoted from 71 N. Y. 443. The question above put must, therefore, be answered in the affirmative. Impressed with the equity of the claim on the part of the attorneys for the plaintiff, we have carefully reviewed many decisions, with the view, if possible, to protect them, at least to the extent of the taxable costs; but as the cause of action was not assignable, and hence remained, prior to judgment, under the absolute control of the plaintiff, and since costs were merely incident to recovery upon the cause of action, it logically follows that the attorneys had no vested interest, even in such costs, which could survive the settlement of the cause of action. Whatever claim they had for services was against their client on their contract with him."

In Tillman v. Reynolds, 48 Ala. 365, which was a suit on a promissory note, a settlement was made by the parties pending the action, and without the knowledge of the plaintiff's attorney, who claimed a lien for his services, which was denied by the Supreme Court of Alabama, which held (page 367): "It is presumed that the purpose of the proceeding in the court below was to compel the defendant to pay the plaintiff's attorney's fee for instituting the suit out of the plaintiff's debt in his hands, before he paid the plaintiff the amount of the note in suit, or to make him liable for the fee, if he failed or refused to do so, because the attorney had a 'claim or lien' on the note in his possession, and the plaintiff herself was insolvent. In such a case as this, such a principle would make the defendant, in the event the plaintiff was entitled to a judgment at least to the amount of the fee due the attorney for the institution of the suit, security of the plaintiff for the payment of the fee. I am not aware of any principle governing the relation of client and attorney that goes so far. The defendant's liability is discharged when he pays the debt he owes to the plaintiff; and, whether this be done before or after the institution of the suit, its effect is the same, except as to costs of suit. Payment of the debt in suit, in either instance, is a good defense. If the payment is made before action brought, it is a good plea in bar of the action and and before judgment, it is also a good plea object of the provision, we shall arrive at

whatever, and the plaintiff further agreed not | in bar of the action, except costs up to the plea pleaded, as a plea puis darrein continuance. 1 Chitt. Pl. 657, 658, marg.; 7 Bac. Abr. (Bouv.) p. 685; Rev. Code 1867, §§ The proofs in this case show 2651, 2685. that the debt had been paid before the trial, but after suit brought. This being admitted, the court was bound to charge the jury to find for the defendant. Besides, the attorney for the plaintiff is not a party to the record in the court below. No judgment could be rendered in his favor, except a judgment by confession. His lien, when he has a lien, cannot be enforced in this way by an involuntary judgment against the defendant in a court of law. McCaa v. Grant, 43 Ala. 262." See, also, Connor v. Boyd, 73 Ala. 385.

> In Weller v. Jersey City, Hoboken & Patterson St. Ry. Co., 66 N. J. Eq. 11, 19, 57 Atl. 730, 733, it was said by Chancellor Magie: "But the contention on the part of complainants is that the attorney holding such an agreement or assignment of a share of the damages received may, by giving notice thereof to the tort-feasor, impose on the latter an obligation to account to him for such share of the compensation for such injuries as may be agreed upon between him and the person he has injured. To give such effect to a notice of such assignment would obviously operate to practically prohibit any comp siti between a tort-feasor and the person he has wronged, when the composition consists of a cash payment to the latter for a release. It would introduce into the negotiation for settlement, on the basis of a present payment to the injured person, the claim of one who was not injured, and whose only interest in the claim is what Lord Tenterden, in dealing with actions prosecuted in forma pauperis, called the 'spes spolii.' Nor will such assignment fall within the reason of the doctrine respecting equitable assignments of choses in action under the circumstances disclosed in this bill. Such assignments admitadly operate only where some fund or property comes into existence arising out of a previous possibility. He who holds such : fund may then be liable to account to the assignee thereof. Where a composition is made between the tort-feasor and the person wronged, on the basis of a payment for a release, the fund does not come into existence until the payments and the release are simultaneously exchanged. Then the fund thus created is in the hands of the releasor, and the assignee may follow it there; but it never existed in the hands of the releasee."

In construing the Maine statute in Potter, Judge, etc., v. Mayo et al., 3 Greenl. (Me.) 34, 37, 14 Am. Dec. 211, Mellen, C. J., thus stated the policy of the law in this behalf: "According to the language of the statute, then, it appears that an attorney's lien does not exist until judgment. The lien is upon that, and on the execution issued on such the costs. If it is made after action brought | judgment. If we attend to the design and the same conclusion. stated, the intention of the Legislature was to protect the attorney's interests from the control of his client. It was to give to him the security of the judgment debtor, in addition to the original responsibility of his client. Now it is perfectly clear that, until a judgment is rendered, such additional security cannot exist, because until then no coercive power is given to the creditor, and it was against this power that the statute provision was intended as a guard."

We have thus reviewed at considerable length the decisions of the courts in other jurisdictions that the nature and extent of the rights of counsel in this behalf might the more clearly appear. We therefore hold that the assignment of this cause of action was void as against public policy, and that Concannon could not grant, nor could his counsel receive, any interest therein, legal or equitable, by any form of contract or agreement between them in relation to an action for a personal tort before the entry of judgment; that the ruling of the justice of the superior court in issuing the execution, in which, conceding the invalidity of such assignment, he held that it was nevertheless valid as notice of a right which the law does not permit to exist, was erroneous; that the so-called charging lien of an attorney extends, as was heretofore determined in the case of Horton v. Champlin, 12 R. I. 550, 34 Am. Rep. 722, only to his taxable fees and taxable disbursements, and does not extend to his general claim for compensation; and that such lien does not attach until after judgment entered. Whether it may properly and wisely be extended is a question for the consideration of the lawmaking body. Our duty is to declare the law as it exists. Since there had been no judgment entered at the time of the settlement of the case by the parties, no lien had then attached, and it is not necessary to consider whether the settlement was or was not collusion. All collusion is denied by affidavits of both Concannon and Tyler; nor does either of them seek to avoid the settlement thus made. Having been made at a time when they were lawfully competent to make it, and when no lien of counsel had attached, the settlement should stand and must stand as the parties have agreed. It is the duty and the purpose of this court to protect and enforce the rights of counsel in all cases before it, but in so doing we cannot detract from the rights of their clients, nor give to counsel rights which the law does not confer. The petitioner here may well object to being burdened with these judgments, and may well contend that Concannon's counsel should not be allowed to visit upon the petitioner, who owed Concannon's counsel no duty, the consequences of Concannon's failure to inform his own counsel of the settlement he had made with the An election was held according to the notice,

As we have above petitioner. Neither should he be allowed to impose upon the petitioner the payment of a sum which is not only in excess of the sum for which Concannon was and still is satisfied to release the petitioner from all liability, but is also a sum which is in excess of the entire judgment in the cause when the payment in settlement is considered.

The record of the superior court ordering the issue of the execution is therefore ordered to be quashed.

SWEETLAND, J., dissents.

(78 N. J. L. 107) .

FULLER et al. v. BOARD OF EDUCATION OF BOROUGH OF CHATHAM et al. (Supreme Court of New Jersey. June 22, 1909.)

EMINENT DOMAIN (§ 169*) — PURCHASE OF SCHOOL GROUNDS — POWER TO CONDEMN IMN D8.

vote of the majority of legal voters in A vote of the majority of legal voters in a school district in accordance with subdivision 4 of paragraph 86 of the school act of October 19, 1903, published in Laws 2d Sp. Sess. 1903 (P. L. p. 32), authorizing the Board of Education to purchase school grounds, does not empower the Board of Education to condemn grounds for school purposes.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 169.*]

(Syllabus by the Court.)

Certiorari by Frank Fuller and others against the Board of Education of the Borough of Chatham and others to review an order appointing condemnation commissioners. Proceedings set aside.

Argued February term, 1909, before REED, TRENCHARD, and MINTURN, JJ.

Edward K. Mills, for prosecutor. Lawrence Day and Willard W., Cutler, for the Board of Education. Elias Bertram Mott, pro se.

REED, J. On May 8, 1908, the Board of Education of the borough of Chatham passed a resolution reciting that the school accommodations provided in that borough were inadequate, and that a plot of ground should be secured and a schoolhouse should be erected; and resolving that a meeting of the local voters of the school district of the borough of Chatham should be held on May 23, 1908, and that a notice of such meeting should be posted in certain public places. It was resolved that there should be stated in said notices that the following items of business would be acted upon at said meeting: To authorize the Board of Education to purchase as a lot on which to erect a schoolhouse a plot of land particularly described in said notice, the cost of said plot not to exceed \$7,-000; to authorize the Board of Education to erect a schoolhouse on said plot of land, and to furnish school furniture for said house.

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

chase the said plot at a cost not to exceed At an adjourned meeting of the Board \$7,000. of Education held on May 26, 1908, a resolution was adopted to purchase the land in question, at a cost not to exceed the sum of \$7,000. Then followed reports to subsequent meeting of the Board, of negotiations for the purchase of the lot, which negotiations turned out to be fruitless; and finally, at a regular meeting held September 29, 1908, counsel for the Board reported that he had filed a petition for condemnation of the said plot of land. and reported at the meeting held November 24th, that the commissioners appointed to condemn had awarded \$7,000 for the land. and \$500 damages to the remaining land of the landowners. At a special meeting held December 1, 1908, it was reported that \$500 had been raised by subscription, and it was ordered that a warrant should be drawn for the \$7,000 and another for the \$500. No appeal from the award of the commissioners was taken by any one within the time limited by the statute. The prosecutor now challenges the power of the Board of Education to condemn this land.

The power to provide land for school purposes is conferred by paragraph 86 of the act to establish a system of public schools, which act was approved October 19, 1903, and published with the laws of the Second Special Session of 1903. P. L. p. 32. Subdivision 4 of paragraph 86 of this act authorizes the Board of Education to purchase, sell, and improve school grounds provided that for such act it shall have the previous authority of the vote of the legal voters of the district. Subdivision 5 of this act authorizes the Board to take and condemn lands and other property for school purposes, in the manner provided by law regulating the ascertainment and payment of compensation for the property condemned and taken for public use. If either party shall feel aggrieved by any proceeding and award thereunder, said party may appeal in the manner provided by law for appeals from such proceedings and award; provided that before beginning any proceedings for taking and condemning land and other property, the Board of Education shall have the authority of the vote of the legal voters of the district. It is to be observed that the power to purchase school grounds, and the power to take and condemn lands for school purposes, are treated as distinct powers. The exertion of each power must have the approval of the majority of the voters of the school district. The approval of the voters of the school district in this instance was to purchase, and not to condemn, the plot of land indicated in the notices. Now, the power to purchase does not include the power to condemn. This not only appears from the separation of the

and the voters adopted a resolution to purchase the said plot at a cost not to exceed \$7,000. At an adjourned meeting of the Board of Education held on May 26, 1908, a resolution was adopted to purchase the land in question, at a cost not to exceed the sum of

> It is argued by the counsel for the Board of Education that unless the delegation of power to purchase by the public vote carries with it the power to condemn, there must be two submissions to the public vote before condemnation can be effected; first a submission for the power to purchase, and then a submission for the power to condemn. If the power to purchase is included in the power to condemn, this position is not sound; but, whether it is or not, there is no difficulty in combining in one submission the question of power to purchase coupled with a condition that upon failure to agree with the landowners, there may be condemnation of the designated land. It is to be observed, however, that the limitation of the price to be expended to \$7,000 did not prevent the taking of the land merely because some one else was willing to increase the compensation to the landowners to \$500 more.

The proceedings must be set aside.

(78 N. J. L. 108)

DUNIGAN v. WOODBRIDGE TP. IN MID-DLESEX COUNTY et al.

(Supreme Court of New Jersey. July 6, 1909.) Highways (§ 113*) — Contracts — Award — Abuse of Discretion.

A township committee invited bids for the macadamizing of a part of a road, and at a subsequent meeting awarded the contract to C., the highest of three bidders, A. being the lowest. At the same meeting the committee awarded another contract for similar work on another street to A., the highest bidder, although C. was a lower bidder for that work. It also appears that the award of the first contract was made to

C. for reasons personal to the committee.

Held, that although no statute required the award to be made to the lowest responsible bidder, yet the committee so abused its discretion in awarding the contract as to invalidate the award.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 113.*]

(Syllabus by the Court.)

Certiorari by Thomas F. Dunigan to review a contract made by the Township of Woodbridge, in the County of Middlesex, with W. R. Thompson for the macadamizing of a portion of a road. Contract set aside.

Argued February term, 1909, before REED, TRENCHARD, and MINTURN, JJ.

Robert Adrain, for prosecutor. Ephraim Cutter, for defendant Woodbridge Tp. Allen H. Strong, for defendant W. R. Thompson.

the notices. Now, the power to purchase does not include the power to condemn. This committee of Woodbridge township directed not only appears from the separation of the two powers in the statute itself, but it was bids for macadamizing a portion of Wood-

ment, propositions for executing the work were received, one from the prosecutor, Mr. T. F. Dunigan, one from Liddle & Pfeiffer, and one from W. R. Thompson. Mr. Dunigan, proposed to execute the work for the price of 93 cents per square yard. Messrs. Liddle & Pfeiffer proposed to do the work for 98 cents per square yard. Mr. W. R. Thompson's bid was to execute the work for \$1.18 per square yard. On June 12th the township committee awarded the contract to the lastnamed bidder, Mr. W. R. Thompson. At a meeting of the committee held on June 22d, Mr. Dunigan, the prosecutor, appeared and protested against the award of the contract to Mr. Thompson. No action was taken by the committee upon his protest; but at a meeting held on June 27th it was resolved that the clerk and chairman be authorized to execute a contract, for the macadamizing of this portion of the avenue, with Mr. Thompson, in accordance with the plans upon which the bid was made; and upon July 4th the contract was executed.

It is admitted that the township committee, in awarding the contract for the execution of this work, was not restrained by any statute requiring competitive bidding, and therefore the committee was not controlled by the usual and useful requirement that the award for such work and such amounts should be awarded to the lowest responsible bidder. The inquiry, therefore, is confined to the question whether the award of the contract to Mr. Thompson was such an abuse of discretion as to justify the interference of this court. Van Reipen v. Jersey City, 58 N. J. Law, 262, 33 Atl. 740; Ryan v. Paterson, 66 N. J. Law, 533, 49 Atl. 587; Hicks v. Long Branch Commissioners, 69 N. J. Law, 300, 54 Atl. 568, 55 Atl. 250.

It is perceived that this contract was awarded to Mr. Thompson, who was to be paid at the rate of \$1.18 per square yard, while Mr. Dunigan proposed to execute the same work for a compensation of 93 cents per square yard, and Liddle & Pfeiffer for a compensation of 98 cents per square yard. The selection of Mr. Thompson rather than Mr. Dunigan cannot be vindicated upon the ground that the former was the more experienced and the more responsible bidder. This appears from the single fact that, at the same meeting at which the bids were opened for the execution of this work, bids were also opened by the same committee for macadamizing William street in the township of Woodbridge. For the execution of this work, both Mr. Thompson and Mr. Dunigan were bidders; the bid of Mr. Thompson being 69 cents per square yard, and that of Mr. Dunigan being 97 cents per square yard. The contract for this work was awarded to Mr. Dunigan. So it appears that on the same evening the committee awarded a contract to Mr. Thompson at the rate of \$1.18 per square yard for work which Mr. Dunigan proposed was a determination for personal reasons to

bridge avenue. In response to the advertise- | to execute for 93 cents per square yard, and then awarded a contract to Mr. Dunigan at the rate of 97 cents per square yard for similar work which Mr. Thompson proposed to do for 69 cents per square yard. The difference in the conditions under which the twocontracts were to be executed, which the township committee claims to exist, has no substantial foundation. So that it cannot be said that Mr. Dunigan was not responsible and capable of executing the contract for work on Woodbridge avenue, in the face of the fact that the very same evening he was selected to do similar work on William street.

> The defendants called two members of the township committee to explain their inconsistent action. Mr. Lee's explanation was that his attention had been called by some taxpayers to the fact that they did not think Mr. Dunigan, in executing a previous contract to improve New and Second streets. was putting on the required amount of stone; and that he himself noticed what he regarded as some defects. Yet it appears that the contract price for that very work was paid by the approval of the committee, of which Lee was a member, without any dissent by any member of the committee indicating his disapproval of the work.

> Mr. Lee says the contract was not given to Liddle & Pfeiffer, whose proposal was to do the work for 98 cents per square yard, because the committee did not think they could do a good job at that price; and because they were men from out of town, and they-the committee-would consider a bidder in the township before a bidder out of the township. He says they did not give the contract to Mr. Dunigan because they thought he could not do the work for 93 cents per square yard. He admits, however, that the contractor had to give a bond for the execution of his contract. In answer to the question why the contract for the William street work was not given him as the lowest bidder, Mr. Lee said: "We considered the giving of this contract a matter for the township committee; that we had the right to give the contracts to whom we wanted to." He was asked: "Q. You were bound to see that Tom Dunigan would get that William street contract? A. Yes. Q. Were you friendly to him? A. Yes, I was. Q. And on Woodbridge avenue; you were bound to have Raymond Thompson have that street for \$1.18? A. Yes." Again, he said: "We had determined to give that bid (the William street bid) to Tom Dunigan, irrespective of what the bids were."

> Mr. Dooley, the other examined member of the committee, says that: "Some persons were kicking about the way the former work had been done by Dunigan; but I never said anything to Dunigan, and approved of his payment and voted for the William street contract."

> This testimony, in fact, shows that there

divide the work to be done upon the two streets, by giving one to Mr. Dunigan and the other to Mr. Thompson, and to see that each got a price in excess of other bids. I think there was a clear abuse of discretion.

Nor can laches be imputed to the prosecutor. The award was made on June 12th, a remonstrance was made by Mr. Dunigan on June 22d, and nothing was done by the committee at that time. The final resolution to execute the contract was passed on June 27th, and the contract was executed on July 4th. A rule to show cause why a certiorari should not be allowed was obtained July 11th. This certainly exhibited due diligence.

The contract must be set aside.

SYNNOTT V. FROELICH.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

APPEAL AND ERROR (\$ 554*)-RECORD-EXCEP-TIONS-NECESSITY.

Where, on a writ of error, the case dis-closes no exceptions sealed by the trial judge, the judgment will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2472; Dec. Dig. § 554.*]

Error to Supreme Court.

Action by Thomas W. Synnott against Frederick Froelich. Judgment for plaintiff, and defendant brings error. Affirmed.

Louis H. Schenck, for plaintiff in error. Gaskill & Gaskill, for defendant in error.

PER CURIAM. The judgment brought up by this writ is sought to be reversed upon sundry assignments of trial errors. case furnished the court discloses no exceptions sealed by the trial judge. There being nothing for us to review, the judgment must be affirmed. McLaughlin v. Davis, 64 N. J. Law, 860, 45 Atl. 967.

FEIST et al. v. JEROLAMON.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

APPEAL AND ERROR (§ 512*)—RECORD—PRINT-ED BOOK-REQUISITES.

Where, on error to the Court of Errors and Appeals, there is nothing to show that a writ of error has been issued, nor to show the record and proceedings in the Supreme Court, and the printed book wholly fails to show that the Court of Errors and Appeals has acquired jurisdiction over any controversy between the parties, no question is presented for consideration. ation.

[Ed. Note.—For other cases, see Appeal and Error. Dec. Dig. § 512.*]

Error to Supreme Court.

Action by Abe Feist and others against Henry Jerolamon. Judgment for plaintiffs, and defendant alleges error. Dismissed.

S. Howell Jones and Frank E. Bradner, for plaintiff in error. Leo Stein and Jacob Fischel, for defendants in error.

PER CURIAM. The parties have submitted to the court assignments of error indicating a purpose to review a judgment of the Supreme Court, but have not submitted to us anything to show that a writ of error has been issued out of this court, nor even to show the record and proceedings in the Supreme Court. The printed book wholly fails to show that this court has acquired jurisdiction over any controversy between the parties. No question, therefore, is presented for our consideration.

(77 N. J. L. 649)

TIMES SQUARE AUTOMOBILE CO. v. BUTHERFORD NAT. BANK.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

1. BANKS AND BANKING (§ 145*)—CERTIFICATION OF CHECK—EFFECT.

The certification of a bank check at request of the drawer does not discharge the drawer; but where it is certified at request of the holder, the drawer is discharged from further liability thereon under the correct now. further liability thereon under the express provisions of Negotiable Instrument Act April 4, 1902, § 188 (P. L. p. 614), and a new contract is substituted between the holder and the bank, under which the money called for by the check is transferred from the drawer's ac-count to the account of the holder, and the ob-ligation of the bank is the same as if the funds had been actually paid to the holder, by him redeposited to his own credit, and a certificate of deposit issued to him therefor, and the bank could not avoid liability by showing that the holder had obtained the check by false pre-

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 421; Dec. Dig. § 145.*]

2. BILLS AND NOTES (§ 101*) — ACTION ON CHECK—DEFENSES—FALSE PRETENSES.

So long as the drawer of a bank check remains undischarged, the defense that the check was obtained by false pretenses would be open either to the drawer or to the bank in an action to recover thereon.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 214; Dec. Dig. § 101.*]

Error to Circuit Court, Bergen County.

Action by the Times Square Automobile Company against the Rutherford National Bank. Judgment for defendant, and plaintiff brings error. Reversed.

Guy L. Fake, for plaintiff in error. Luther Shafer, for defendant in error.

GUMMERE, C. J. One Purdy, being desirous of purchasing a secondhand automobile, employed Millard Ashton, an automobile salesman, to assist him in making a proper selection. Ashton took him to the salesroom of the Times Square Automobile Company, and, after looking over its stock, Purdy, with Ashton's approval, selected a car, the price of which was \$600, and gave his check on the

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Rutherford National Bank for the purchase, price. The check was drawn to the order of Ashton, who indorsed it and delivered it to the manager of the automobile company. Immediately after receiving it, the automobile company sent it by special messenger to the banking house of the Rutherford National Bank with a request that it be certified. This request was complied with. Afterward, when the check was presented for payment, the bank refused to honor it, upon the ground that it had received instructions from Purdy not to pay it. The automobile company thereupon brought suit against the bank on its contract of certification. The defendant admitted that it had certified the check, and that it did so at the request of the plaintiff, the holder thereof, but sought to justify its refusal to pay upon the ground that Purdy had been induced to purchase the car by false representations made by the manager of the plaintiff as to its condition and value. It was contended on behalf of the plaintiff that this defense was not open to the defendant. It was, however, admitted over its objection. At the close of the case plaintiff asked for a direction of a verdict in his favor. This request was refused, the case was sent to the jury, and a verdict in favor of the defendant was rendered. The plaintiff now seeks a reversal of the judgment entered upon that verdict, on the ground that its request for a direction in its favor should have been complied with.

The effect of the certification of a check by the bank upon which it is drawn depends upon whether it is done at the request of the drawer or of the holder. When a check is presented by the drawer for certification, the bank knows that it has not yet been negotiated, and that the drawer wishes the obligation of the bank to pay it to the holder, when it is negotiated, in addition to his own obliga-A certification under such circumstances does not operate to discharge the drawer (Minot v. Russ, 156 Mass. 460, 31 N. E. 489, 16 L. R. A. 510, 32 Am. St. Rep. 472; 5 Amer. & Eng. Ency. of Law, 1056); and so long as the drawer remains undischarged, such a defense as that set up in the present case is open both to him and to the bank. But when the certification by the bank is done at the request of the holder, the effect is radically different. The transaction, then, is virtually this: The bank says: "That check is good; we have the money of the drawer here ready to pay it; we will pay it now, if you will receive it." The holder says: "No, I will not take the money now; you may retain it for me until the check is presented for payment." The bank replies,

1902, § 188 [P. L. p. 614]), and to substitute a new contract between the holder and the bank by the terms of which the money called for by the check is transferred from the account of the drawer to the account of the holder. In contemplation of law the obligation of the bank to the holder, when the certification is at his request, is the same as if the funds had been actually paid out by the bank to him, by him redeposited to his own credit, and a certificate of deposit issued to him therefor. 5 mer. & Eng. Ency. of Law, 1055; Dan. on Neg. Inst. § 1603.

The defendant, in refusing payment of Purdy's check, apparently considered that its obligation to the holder was no greater than if its certification had been made at Purdy's request. It failed to realize that its act operated as a payment of the check, so far as Purdy was concerned, and transferred the moneys which it called for to the account of the plaintiff. The situation was the same, so far as the defendant was concerned, as if Purdy had paid cash to the plaintiff for the car which he had purchased, and the plaintiff had then deposited the cash in the defendant's bank. Having accepted the plaintiff's money, and issued to him a certificate of deposit therefor, it did not concern the defendant from whom, or how, or under what circumstances the money had been obtained. Its contract required it to pay the amount of the deposit to the plaintiff, or its order, and it could not avoid its obligation to do so by showing that the plaintiff had fraudulently obtained the money which it had deposited with the defendant.

The defense interposed should have been overruled, and a verdict directed for the plaintiff. The judgment under review will be reversed.

(77 N. J. L. 664)

VANDERBEEK et al. v. TIERNEY-CON-NELLY CONST. CO. et al.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

1. PRINCIPAL AND SUBETY (§ 97*) — DISCHARGE OF SUBETY—CHANGE IN CONTRACT.

One who has agreed to indemnify a creditor with respect to a specific debt is not discharged by a mere deduction in the amount demanded of the debtor where such deduction has not resulted from or been accompanied by any alteration in the contractual obligation that was the subject of indemnification.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 146, 147; Dec. Dig. § 97.*]

2. PRINCIPAL AND SURETY (§ 97*) — DISCHARGE OF SURETY — INJURY WITHOUT CHANGE IN CONTRACT.

presented for payment." The bank replies, "Very well, we will do so." First Nat. Bank of Jersey City v. Leach, 52 N. Y. 353, 11 Am. Rep. 708. The result is to discharge the drawer from any further liability on the check (Negotiable Instrument Act April 4.

[•]For other cases see same topic and section NUMBER in Dec. & 1.71. Digs. 1907 to date, & Reporter Indexes

whereas, the alteration of the contract entitles him to be discharged whether he was injured or not.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. § 97.*] (Syllabus by the Court.)

Error to Supreme Court.

Action by Isaac P. Vanderbeek and others against the Tierney-Connelly Construction Company and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

Waiter L. McDermott, for plaintiffs in error. Pierre F. Cook and Collins & Corbin, for defendants in error.

GARRISON, J. The Tierney-Connelly Construction Company (which we shall call the "construction company"), having a contract with the board of chosen freeholders of Hudson county for the construction of the almshouse at Snake Hill, agreed to purchase of Vanderbeek. & Sons certain required materials, and, in order to secure the payment of the purchase price, executed and delivered to them a bond with the defendants Connelly and Ross as sureties, the condition of which was as follows:

Whereas, the said the Tierney & Connelly Construction Company has agreed to purchase from the said Isaac P. Vanderbeek, Stuart M. Vanderbeek and S. Henry Baldwin, partners as aforesaid, certain materials more specifically mentioned and described in the schedule hereto annexed for the sum or price of eight thousand three hundred and fifty-five dollars and fifty-seven cents, and the said Isaac P. Vanderbeek, Stuart M. Vanderbeek and S. Henry Baldwin, partners as aforesaid, have agreed to sell and deliver to the said the Tierney & Connelly Construction Company at the new county almshouse at Snake Hill in the county of Hudson aforesaid, said materials for the price aforesaid, the window frames therein included to be delivered within twenty days from the date hereof; the sash therein included to be delivered on or about June 1, 1906, if required, and the remainder of said materials, including such sash as shall not be required by said company before June 1, 1906, to be delivered after June 1, 1906, or before said last mentioned date if required by said company; proportionate payments for said materials to be made within sixty days after each delivery thereof.

"Now the condition of the above obligation is such that if the above bounden the Tierney & Connelly Construction Company, its successors or assigns, shall and do well and truly pay or cause to be paid unto the said Isaac P. Vanderbeek, Stuart M. Vanderbeek and S. Henry Baldwin, partners as aforesaid, the survivors or survivor of them, or to their executors, administrators or assigns, the full and just sum of eight thousand three hundred and fifty-five dollars and fifty-seven

cents at the times and in the manner aforesaid, then this obligation to be void, otherwise to remain in full force and virtue."

The schedule annexed contains as one of its items "405 set Tabor sash fixtures, attached," which in the written proposal on which the contract of sale was based was estimated at \$1,012.50.

This item is the main ground of substantial dispute between the parties to the present litigation, which was instituted by Vanderbeek & Sons bringing suit on the bond for \$3,094.69, which they claimed to be the balance due thereon, whereas the plaintiffs in error claimed that such sum, although unpaid, was a reduction to which they were entitled by reason of the failure of Vanderbeek & Sons to furnish the Tabor sash fixtures attached and the consequent cost to the construction company in obtaining such fixtures directly from the Tabor Sash Company. The sureties also claimed that, by reason of the premises, they were discharged in law.

The matter thus in dispute arose in this way: The glazed sashes that Vanderbeek & Sons agreed to deliver to the construction company with Tabor sash fixtures attached had to have such fixtures attached by the Tabor people before the sashes were glazed. For this purpose, they were sent by Vanderbeek & Sons to the Tabor people who because they themselves had a large contract with the construction company for other materials and fixtures refused to deal with Vanderbeek & Sons, but nevertheless attached the required fixtures to the sashes, and sent them back to Vanderbeek & Sons, who then glazed them and delivered them on their own trucks to the construction company who incorporated them in the building with full knowledge of what had occurred, and that the charges of the Tabor Company would be made under its contract.

On this state of facts Vanderbeek & Sons claimed that the only deduction from the sum secured by the bond to which the debtor was entitled was the Tabor Company's price for 405 set of its fixtures, viz., \$1,012.-50, and that the making of such reduction did not operate to discharge the sureties.

Whether such deduction of the amount paid directly by the construction company to the Tabor Company would release the sureties if such payment had resulted from a change in the contract between the construction company and Vanderbeek & Sons need not be decided, for the reason that the case shows conclusively that no change in the contract, and, in fact, no contract at all respecting the matter, was made. On the contrary, the construction company expressly and in writing refused to alter its existing contract or to make any new one. Whatever the construction company did was a matter of complaisance, not of contract. It may be

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes 73 A.—31

that if the construction company had obligated itself to alter its contract with the Vanderbeeks, and to make this payment on their behalf directly to the Tabor concern, such change of contract obligation would discharge the sureties without regard to whether or not they were injured by it, but the mere fact that such payment was made, there being no change in the contract, would discharge the sureties only to the extent they were actually injured by such diversion of the fund that was primarily liable for the contract debt.

In fine, one who has agreed to indemnify a creditor is not discharged by the mere reduction of the amount demanded of the debtor where such reduction has not resulted from any alteration in the contractual obligation which was the subject of indemnification. The debtor by no act of his can discharge his sureties. Some act of the creditor is required to do that. If by some act of his, but without altering the contract indemnified against, the creditor has deprived the surety of the benefit of the primary fund for the payment of the debt, the surety is released only to the extent he is injured. "In such cases," says Mr. Brandt, "it is the fact that he is injured which entitles him to his discharge" (Brandt S. & G. § 373)—a statement cited with approval in this court in the case of Guttenberg v. Vassel, 74 N. J. Law, 553, 65 Atl. 994. Of the fact of such injury in the present case there is, however, no proof and no suggestion. The law, while zealous that sureties shall not remain bound where changes in their contractual obligation have been made by the principals, will not fabricate such changes where none have in fact been made either formally or in legal effect. What actually happened in the present case was that Vanderbeek & Sons, notwithstanding the refusal of the Tabor Company to deal with them, performed their contract with the construction company to the letter by delivering to it the glazed sashes in the exact condition called for by the schedule to the bond, and then deducted from the indemnified debt the price of the Tabor fixtures. The legal result of this deduction, as far as the release of the sureties is concerned, is precisely the same as if the Tabor Company had made Vanderbeek & Sons a present of the fixtures, unless the sureties were, in fact, injured by the circumstance that the price of such fixtures was paid by the debtor on its Tabor contract, instead of on its Vanderbeek contract, of which there is no suggestion in the testimony. The sureties were not therefore discharged by operation of law.

The substantial merits of the controversy developed on the trial turned not upon any legal rule, but solely on a question of fact which arose in this way:

The Tabor Company under its contract with the construction company, in addition to furnishing the fixtures to the Vanderbeek sashes, furnished many other things called for by the specifications of the contract of the construction company with the board of freeholders, including the attachment of Tabor weather strips and casement fixtures. These fixtures were shown to cost \$20 per window, whereas the price of the sash fixtures called for in the schedule to the bond was \$2.50 per window. The offer of Vanderbeek & Sons to deduct the price of 405 sets of such fixtures at \$2.50 per set amounting to \$1,012.50 was rejected by the construction company, which claimed a deduction for what it had paid the Tabor Company for such of its fixtures as were called for by the specifications amounting to some \$4,000. This claim involved the question whether the fixtures the Vanderbeeks had agreed to furnish in the \$1,012.50 item, were the same as those for which the construction company had paid the Tabor Company \$4,000, and hence ultimately turned upon whether the "Tabor sash fixtures attached" mentioned in the schedule to the bond were the \$2.50 sort, or whether such term included also the \$20 casement fixtures called for in the specifications of the construction contract.

This was the question that was finally submitted to the jury, and the question to which most of the testimony in the case was addressed. Our examination of the case discloses no error in the charge of the court upon this point or in its rulings upon the admission of testimony respecting it. brief for the plaintiff in error is directed mainly at the refusal of the court below to nonsuit or to direct a verdict. In as far as this contention rests upon the release of the sureties it has been already covered. failure of the plaintiffs to set up window frames and to deliver the glazed sashes upon the precise days mentioned in the recital of the bond should not have led to a nonsuit, in view of the acceptance of such articles under conditions that were mutually satisfactory and in view of the fact that as to the sash the times mentioned were not of the essence of the contract as is shown by the words "if required," which should be read in the light of the construction company's practical acquiescence in the modus vivendi to which the attitude of the Tabor Company gave rise. The failure to deliver door jambs covered with zinc was no ground for a nonsuit for such was not the contract.

On the whole, we discover no ground upon which the trial court should have taken the case from the jury. Finding no error in the charge or in rulings upon evidence, the judgment of the Supreme Court is affirmed.



(77 N. J. L. 727)

VOSLER v. DELAWARE, L. & W. R. CO. (Court of Errors and Appeals of New Jersey. June 14, 1909.)

June 14, 1909.)

1. CARRIERS (§ 320*)—INJURIES TO PASSENGER—DEFECTS IN PLATFORM.

Where a railroad company in providing a platform to be used by passengers going from its station waiting room to its railroad trains left an opening in such platform for the purpose of a stairway from the platform to a cellar under the waiting room, the opening being unprotected and within six feet of the exit from the waiting room, it is the duty of the company to see that its passengers using the platform have some notice or warning of the opening, and, where at night a sufficient light would fulfill that duty, it becomes a jury question whether sufficient warning was given when the sufficiency of the lights provided is rendered doubtful by the testimony.

[Ed. Note.—For other cases, see Carriers,

[Ed. Note.—For other cases, see Cent. Dig. § 1153; Dec. Dig. § 320.*] Carriers,

2. CARRIERS (§ 318*)—INJURIES TO PASSENGERS—OPENING IN PLATFORM.

In an action brought to recover damages for the death of plaintif's intestate, it appeared for the death of plaintiff's intestate, it appeared that he was last seen leaving the waiting room of defendant's railway station by a side door for the apparent purpose of taking a passage on one of its trains, and, after a few hours, was found dead at the bottom of a stairway leading from the station platform with his neck broken; that the entrance to the stairway was unprotected, and within six feet of the exit door; and that the opening for the stairway occupied at least one-half of the platform. Held, that an inference might reasonably be drawn that the passenger fell down the stairway while on his way to take a train then at the station.

[Ed. Note.—For other cases, see Carriers.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 318.*]

(Syllabus by the Court.)

Error to Circuit Court, Hunterdon County. Action by Emma K. Vosler against the Delaware, Lackawanna & Western Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

M. M. Stallman and William D. Edwards, for plaintiff in error. William C. Gebhardt, for defendant in error.

BERGEN, J. On the night of December 20, 1907, Uriah Vosler was in the waiting room of the defendant's railway station at Washington, N. J., and, when a train for New York City leaving Washington at 5:46 p. m. was called, he started towards the platform of the station through a side door, and was never seen again until his dead body was found, between three and four hours afterwards, at the foot of a stairway leading from the platform to a cellar under the waiting room, the apparent cause of his death being a broken neck. That part of the passenger station of the defendant company at Washington which it is necessary to consider in determining this case is constructed with a platform in front of, and another connecting with it, running at right angles thereto, along the side of the station. A part of the side platform has an opening for a stairway gage door?

which leads from the platform to the cellar. Three sides of this opening are protected, but the entrance to the steps is open and unprotected. The waiting room has two exits; one leading to the platform parallel with the track, and another which opens on the side platform between five and six feet from the stairway, which is so located that, if a person leaving that door should turn and walk towards the place where a train for New York would stand, he would, after walking a distance of about six feet, reach the head of the stairway, unless he should walk more than three feet away from the side of the building, that being the width of the stairway. A suit was instituted by his administratrix to recover damages resulting from his death, the negligence charged being the unprotected stairway. There was a motion for a nonsuit at the close of the plaintiff's case, and also a motion for a direction in favor of the defendant at the close of the whole case. As these motions raise the same questions they will be considered together.

The first point argued is insufficient proof of the failure of the defendant company to use due and proper care that the deceased should have a safe way or platform to walk on from the passenger station to the train. The only substantial ground upon which the plaintiff rested this part of her case was the want of sufficient light. From the plaintiff's case it appeared that there were two windows opening from the waiting room to the side platform; that the waiting room was well lighted, there being nine lights, and some light was cast upon part of the stairway regarding which plaintiff's witness Schamp, on cross-examination, testified as follows: "Q. When you went out of the waiting room and walked out to the Phillipsburg end. and turned around, was there any light shining through the windows? A. It was not shining right at the top of the steps. Q. When you went out there to go down the stairway, could you not see the railing? A. You could not see all of it. You could see it just- Q. (interrupting) You could see the railing? A. You could see the railing; yes. Q. Were the lights shining? A. Not on all of it. Q. Some parts of it? A. Yes-from where the lights came out of the window, but not electric lights-the end of the railing it does not shine on." Regarding the lights outside of the waiting room the same witness was asked, and testified, as follows: "Q. Are there any other lights on the outside of the waiting room over in that corner? A. There was no lights that night; no, sir. Q. Do you positively swear that there was none or that you did not notice any? A. I did not notice them. There was a place for them to be there, but that one was not there. Q. Which one? A. That one right there. Q. The one over the door. A. Yes. Q. Is that the baggage door? A. Yes. Q. Is that the one

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

nearest the stairway? A. Yes. Q. It was | not burning? A. It was not burning." This witness also testified that it was dark, but that he could distinguish things; that, in passing along this place, he had his hand on the railing to guide himself, but that he knew where it was and grabbed for it. It also appeared that a lamp had been provided and put up on the outside of the building near this stairway, but that it was not burning on the night in question. We think that a fair jury question was presented whether the defendant was not negligent in having failed to provide sufficient lights to warn passengers of the dangerous opening in a platform which they had been invited to use for the purpose of reaching defendant's trains, and that the trial court would not have been justified in withdrawing that question from the jury.

Another ground urged in support of the motions was that upon the evidence there was no causal connection between the condition shown and the death of the decedent; the contention of the defendant being that the plaintiff must present such a train of circumstances as offer a logical basis for an inference of negligence, and must remove the cause from the realm of speculation, that the mere fact that the decedent was last seen alive in the waiting room, and found four hours afterwards dead at the foot of the stairway, "requires a conjecture or guess' that he walked into the stairway because of inefficient lights and guards. The fact that the deceased left the waiting room by the side door, and if he turned along the platform towards the train after leaving the door, walking within three feet of the wall of the station, he would fall into the stairway, is not a conjecture, but, on the contrary, a reasonable inference, which is supported by the fact that his dead body was found at the foot of the stairway, a logical sequence of what would be likely to happen under the conditions stated. There is no evidence that the deceased was ever seen alive after he left the side door for the purpose of passing along the platform to take the train, and, if he had no intention of taking the train at that time, and, leaving the station, had gone back later and fallen into the stairway, it is reasonable to presume that he would have been seen by some one. On this point it is also urged that between the time the deceased left the side door and the hour when his body was found at the foot of the stairway one of the employes of the defendant had gone down the stairway and into the cellar without discovering the body, and that this is convincing evidence that the deceased did not come to his death while using the platform for the purpose of taking the train.

In order to legally convict a person for attempting to deliver less than 2,000 pounds of coal for a net ton, under said statute, it placed himself where the body was found,

and that another descended the stairway and entered the cellar without stepping on him, and while this experiment is fairly subject to the criticism made, that the person descending the stairway knew that the other was at the bottom, and would, therefore, in furtherance of the experiment, naturally avoid him, it would only affect the weight which the jury should give to the result of such an experiment, and it was for them to say whether the employé could not have gone down the stairway, and entered the cellar without discovering the body.

The next point urged is that the deceased was guilty of contributory negligence. This is based upon the fact that the deceased had often been at this station; that he had used the waiting room a number of times, and therefore will be presumed to have known of the existence of this stairway. The deceased was a member of the police force of the city of New York. He did not live in Washington, but came there as a visitor, and there is no evidence that he left the station by the side door in order to take the train on any other occasion. What he did was to use a platform provided for the use of passengers, which reasonable care required the defendant to keep lighted in such a way as to disclose a pitfall placed within a very few feet of a regular exit provided for passengers. Under the circumstances, the question of the defendant's contributory negligence was properly submitted to the jury.

The judgment will be affirmed, with costs.

(77 N. J. L. 732)

MAYOR, ETC., OF CITY OF NEWARK . EAST SIDE COAL CO.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

1. Weights and Measures (§ 12*)-Crim-INAL PROSECUTION-EVIDENCE.

INAL PROSECUTION—EVIDENCE.

A coal dealer gave his driver several written orders for the delivery of different quantities of coal to sundry purchasers. The orders were in writing and contained the names of the respective purchasers, as well as the quantity of coal to be delivered to each, and in addition to the written orders the driver was given special oral instructions as to the purchasers and the quantity to be delivered to each. The driver, in executing one of the orders, which was for less than a ton, attempted, through an admittedly honest mistake, to deliver it to one of the purchasers whose order was for a ton. Held, that the vendor was improperly convicted under the act entitled "An act for the protection of purchasers of coal" (Act March 5, 1900 [P. L. p. 27]).

[Ed. Note.—For other cases, see Weights and Measures, Dec. Dig. § 12.*]

2. WEIGHTS AND MEASURES (§ 12°)—COAL—FRAUD IN WEIGHTS.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1507 to date, & Reporter Indexes

the vendor and the party to whom it is at ! the order to the coal company for one ton tempted to be delivered.

[Ed. Note.—For other cases, see Weights and Measures, Dec. Dig. § 12.*]

Pitney, Ch., and Trenchard, Parker, Minturn, Bogert, and Congdon, JJ., dissenting. (Syllabus by the Court.)

Error to Supreme Court.

The East Side Coal Company was convicted of a violation of an ordinance of the City of Newark, and from a judgment of the Supreme Court affirming the conviction (70 Atl. 734), brings error. Reversed.

Hood & Hood, for plaintiff in error. Francis Child, Jr., for defendant in error.

BERGEN, J. The plaintiff in error was convicted, in the Second district court of the city of Newark, of a violation of "An act for the protection of purchasers of coal" (Act March 5, 1900 [P. L. p. 27]). The judgment of conviction was affirmed in the Supreme Court, for the reasons given by the district court, and the legal accuracy of that, judgment is the subject of this writ of error.

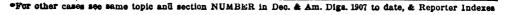
The act above mentioned, after declaring that, in the sale or delivery of coal, 2,000 pounds shall constitute a net ton, and 2,240 pounds a gross ton, subjects to a penalty of \$50 any person "that shall sell or attempt to sell or deliver less than two thousand pounds by weight to a net ton, or two thousand two hundred and forty pounds by weight to a gross ton, or a proper proportion thereof for fractions of a ton." It further requires that each load shall be accompanied with a delivery ticket and a duplicate thereof, on which shall be expressed in ink or otherwise the quantity, in pounds, of coal contained in the wagon used in making any delivery, as well as the names of the purchaser and vendor. The agreed state of the case shows that on November 14, 1904, the defendant, a dealer in coal, received three orders, one from a Mrs. Wasman for one net ton of coal, one from a Mr. Rosenberg for three quarters of a ton (1,680 pounds), and another from Rosenberg for a like quantity; that these orders were placed in separate envelopes, and of each order duplicate delivery slips were made, which were put in separate envelopes; that they were delivered in this condition to a person named Mutchell, who owned a horse and wagon and was frequently employed by defendant to deliver coal for it at a fixed schedule of compensation for deliveries made, and was so employed in this case; the course of business being to send the orders by him to the coal pockets of the Delaware, Lackawanna & Western Coal Company, where the coal was furnished by that company on the orders given by Mutchell.

The case also shows that on the day in question Mutchell, when given the orders, was carefully instructed by defendant that but no attempt was made to carry out that

was for Mrs. Wasman, and was also instructed in like manner as to delivery of the other orders given him. The findings of fact, as they appear by the record, show that Mutchell in some way confused the Wasman order with the Rosenberg order and delivered one of the Rosenberg orders at the coal pockets, believing it to be the Wasman order, and upon receiving the coal proceeded to deliver it to Mrs. Wasman, but before doing so was intercepted by an agent of the city, who obtained from the driver the order or delivery slip bearing the name "Wasman," ing for one ton of mixed coal. The agent then required the weighing of the load, which disclosed that it contained but 1,680 pounds. The defendant was thereupon prosecuted under the statute, and at the close of the plaintiff's case defendant's counsel moved for a. nonsuit on two grounds: First, because Mutz: chell was an independent contractor, and his act was not chargeable to defendant; and, second, that if there was an attempted delivery on the part of defendant it was an innocent mistake, and not a violation of the stat-: ute. The trial court refused the motions, holding that Mutchell was the agent of the defendant for the purpose of delivery, and also admitting that the attempted delivery of 1,680 pounds for a net ton was the result. of an honest mistake, and that the defendant. did not, through its agent, knowingly commit the offense charged, still the defendant was guilty, because the act of the Legislature relied on is not in terms limited to those who knowingly violate it, and, to support this conclusion relied upon Halsted v. State, 41 N. J. Law, 592, 32 Am. Rep. 247, and Waterbury v. Newton, 50 N. J. Law, 545, 14 Atl, 609, neither of which, in our opinion, can be applied to the present case.

If, in the case under consideration, the defendant had sold to Mrs. Wasman a net ton of coal, and in executing that contract had delivered, or attempted to deliver, less than the required weight as an intended compliance on its part, it would be an act prohibited by the statute, for what the Legislature manifestly intended by the statute in question was the protection of purchasers of coal against the use of false weights, and it has undoubtedly required a vendor of coal to see that, in completing a sale by delivery, the amount called for by the agreement is delivered. This we think it has the power to do, and also to subject the offender to a penalty for a violation of the statute without requiring proof of a corrupt motive, but, in order to convict a person, it must appear that, he intended the quantity attempted to be delivered to be in satisfaction of his agreement.

In this case there was a contract to sell and deliver to Mrs. Wasman a ton of coat.



sale. What defendant attempted to do was to deliver, not her purchase, but, through an honest mistake, coal which was intended for another person. It was not a delivery intended to execute a contract for the ton sold Mrs. Wasman, but an attempted delivery of coal sold to Rosenberg and intended for him, but carried by a driver to Mrs. Wasman through a mistake. We are of opinion that to render a vendor of coal liable under this act, it must appear that the delivery was intended to be in execution of the sale to the person to whom delivery is attempted, and when it appears, as it does in this case, that a sale to one person is attempted to be completed by the delivery of another person's order, resulting from an honest mistake, the act does not apply.

The trial court having found from the undisputed testimony that the attempted delivery resulted from an honest mistake, and the error which we find being a misapplication of the statute to the facts found, the judgment entered in the Supreme Court, as well as that of the district court should be reversed, and final judgment entered in favor of the defendant, with costs. Lehigh Valley Railroad Co. v. MacFarland, 44 N. J. Law, 674.

PITNEY, Ch., and TRENCHARD, PAR-KER, MINTURN, BOGERT, and CONGDON, JJ., dissent.

(77 N. J. L. 719)

PROUT et al. v. BERNARDS LAND & SAND

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

WITNESSES (\$ 268*)-Cross-Examination. Cross-examination on matters either directly in issue or directly relevant to the issue is a matter of right, and its exclusion is error. [Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948; Dec. Dig. § 268.*] (Syllabus by the Court.)

Error to Supreme Court.

Action by Fred Prout and others against Bernards Land & Sand Company. Judgment for plaintiffs, and defendant brings error. Reversed.

Harry V. Osborne, for plaintiff in error. Clark & Case, for defendants in error.

PARKER, J. The plaintiffs below are a firm of attorneys, and sued the defendant corporation, whose business is indicated by it: name, for services in making a search and abstract of title to a tract of land owned by it, and for disbursements connected therewith. The declaration consisted of the common counts in assumpsit, with a bill of particulars annexed, containing only one item, "June 12, 1906. To making as follows: search showing title of the Bernards Land & Sand Company at Basking Ridge, N. J., and On cross-examination he stated that his firm

money paid out for expenses in making same. \$650." There was a verdict and judgment for plaintiffs for the full amount claimed, with interest.

The plaintiffs' evidence showed that no price had been agreed on in advance, but that in July, 1902, one of the plaintiffs was asked at a company meeting what he would charge to make a complete search of the land referred to for the company, and that he refused to set a price, offering to do the work either on the per diem basis or charge what it was worth when he had finished it; that the matter was laid over for consideration, and several weeks later Mr. Dunster, the vice president and manager of the company, saw plaintiff, and said there had been another meeting, and the company had decided to have plaintiffs make the search, and he wanted them to make it as cheap as they could. The abstract of title was not tendered to the company until September, 1906, after a lapse of over four years, during which period important changes had taken place in the defendant corporation. It had been organized and managed as a close corporation, the board of directors being limited to three persons who apparently held all or most of the stock: one of these was Mr. Dunster, who, at the time the abstract and bill were presented, was the only survivor of the original incorporators and had been a director until April, 1906, when the board was reorganized after the death of the other two directors and Dunster was dropped. The new board refused to accept the abstract of title, and denied that the corporation had ever ordered the search. The trial judge submitted this question to the jury, and we find no error in his culings on evidence or instructions to the jury so far as relates to this branch of the case. The verdict for plaintiffs, therefore, amounted toa finding that they had been regularly employed in 1902 to make the search.

But another important issue was raised as to the reasonable value of the services performed by the plaintiffs. On this issue the defense was twofold. It was denied in the first place that plaintiffs had performed any such amount of work as they claimed to have done; and alleged in the second place that the search, if ordered, was to have been made promptly, and that the delay for four years in presenting the abstract of title had greatly diminished its value to the defendant. Both these issues were opened on cross-examinatior of William Prout, one of the plaintiffs, and in the exclusion of questions bearing on those issues on that cross-examination we find error prejudicial to the defendant. As to the work actually performed, and its value, the witness testified to work done off and on in the county clerk's office and at his own. during the four years. He testified generally to the total amount of time and money spent.

the defendant, but that he kept the record of work and disbursements on this matter in his head. The following questions were then asked: "Do you say that you never kept a record of the work you did in any case? Do you keep a record of the time expended by you or devoted by you in the conduct of your business to various matters? When you do work for your clients, do you keep a ledger account, charging them for services? Do you keep when you do work for your clients, an account showing the amount of your disbursements in connection with the matter done?" Each of these questions was objected to and overruled, and an exception taken and the rulings assigned for error.

The discretion of the trial court in regulating and limiting the range of cross-examination is very great, and extends, among other things, to matters affecting the credibility of the witness and matters not directly relevant to the issue. So, in Jones v. Insurance Co., 36 N. J. Law, 29, 42, 13 Am. Rep. 405, which was a suit on a fire insurance policy, it was held no error to exclude questions on plaintiff's cross-examination as to how much he was worth, and what debts he owed, these matters not being directly relevant to the issue, and so within the court's discretion. But as to matters directly in issue or directly relevant to the issue, there is no discretionary power. The rule is stated in Jones on Evidence, § 821, thus: "Although the court may exercise a reasonable discretion in regulating or limiting the cross-examination, yet it is clearly error to exclude cross-examination on subjects included in the examination in chief, where such ruling is prejudicial. So far as such cross-examination of a witness relates either to facts in issue or facts relevant to the issue, it may be pursued by counsel as a matter of right." See, also, Langley v. Wadsworth, 99 N. Y. 61, 63, 1 N. E. 106. Cases where the trial court has erred in excluding cross-examination on matters of right are rare. Eames v. Kaiser, 142 U. S. 488, 12 Sup. Ct. 302, 35 L. Ed. 1091, was a case in which one of the issues was whether a party whose property had been attached had fraudulently attempted to dispose of his property, and it appearing that just after the attachment he had turned a large amount of accounts receivable into negotiable paper, it was held error to exclude a question on cross-examination as to what he had done with that paper. In Colloty v. Schuman, 73 N. J. Law, 92, 62 Atl. 186, an action on contract, the plaintiff testified to transactions with defendant as with a principal, and it was held error to exclude cross-examination tending to show that plaintiff knew he was dealing with an agent. See, also, Gaunt v. State, 52 N. J. Law, 178, 19 Atl. 135; Green v. Skoqvist, 57 N. J. Law, 617, 31 Atl. 228.

The present inquiry being whether the excluded questions above quoted were relevant to the issue, we have no doubt that they were. | versed and a venire de novo awarded.

had never made any book entries against | If they had been answered, the defendant might have shown that the plaintiffs in their general business kept a complete set of books containing accounts with their clients, and regularly and systematically made charges of work done which were carried into ledger accounts and from which their bills were made up. If such a state of facts appeared in connection with the other facts that no account of either services or disbursements was kept with the defendant, and no daily entries made of work done on this voluminous and expensive search, the absence of any such account and entries would go far to discredit their claim with the jury, both as to what work was done, and its value, as not worth charging up. The overruling of these questions was therefore error.

So also as to defendant's inquiry whether plaintiffs knew, or were told, the purpose for which the search was wanted. The questions follow: "Q. What did you think they wanted that search for-did you know? (Objected to.) Q. Do you know what they wanted it for? The Court: It doesn't make any difference." To this ruling the defendant took an exception. Again it was asked: "Q. Did he (Dunster) say what they wanted it for?" This was overruled by the court, and an exception taken. "Q. Did he say anything with reference to when he wanted that search completed? A. I don't recall that he specified any time when he wanted it completed; no. Q. Did he say anything about what they wanted the search for?" This was overruled by the court, and exception entered; and the exclusion of this evidence is also assigned for error.

The theory of these questions was perfectly plain. If the defendant wanted a search, it presumably wanted it promptly before selling off its property, so as to avoid the danger of selling or warranting a defective title; and if defendant could have shown, for example, that time was of the essence of the contract, it might perhaps have been justified by the long delay in assuming that the contract was abandoned and in rejecting the abstract when tendered; or at least it could be argued that ar abstract which ought to have been delivered promptly but which was tendered only after four years, could not be worth so much to defendant as one furnished with reasonable promptness. So, also, if the witness had been compelled to testify that he was told in 1902 that the search was needed to satisfy the company that it could safely make certain sales of land, and it appeared that these sales had to be made in the end without it, or were lost for lack of it, the value of the abstract would be materially diminished. The line of inquiry suggested by these questions was both material and relevant to the issue, and the court was required by law to admit them.

For these errors the judgment will be re-

(77 N. J. L. 784)

LOID'S ADM'X v. J. S. ROGERS CO.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

MASTER AND SERVANT (§\$ 206, 219*)—INJU-RIES TO SERVANT—INCIDENT OF EMPLOY-MENT—ASSUMPTION OF RISK.

A carpenter was called from his work in a building in the course of erection, and, with other workmen, directed by their foreman to straighten by hand the leaning top of a tall straighten by hand the leaning top of a tall wooden derrick which had been placed near the center of the third story of the building, in order to hois heavy timber up for the construction of the roof. Through failure to temporarily tie down by ropes, furnished there by the master, the feet of the derrick, before forcibly disturbing its balance upon the supporting plank, it fell and killed him. On exception sealed to the trial court's refusal to uonsuit, keld:

(1) That the proper adjustment of this building appliance for its intended and effective operation was a component part of a carpenter's duty, in the performance of which the intestate and his fellows engaged as a part of their common employment, and that no actionable negligence chargeable to the master had been made to appear.

made to appear.

(2) That the foreman was a fellow servant with the deceased and the other workmen, and, under the facts proved by the plaintiff, the intestate, in the attempt to straighten the top of the derrick by pushing its unfastened feet with a force so great as to raise them up out of the notches in which they rested upon the plank, assumed an obvious risk sufficient in law to defeat plaintiff's recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 550, 610-624; Dec. Dig. §§ 206, 219.*]

(Syllabus by the Court.)

Error to Supreme Court.

Action by Susan T. Loid, administratrix of the estate of William H. Loid, deceased, against the J. S. Rogers Company. Judgment for plaintiff, and defendant brings error. Reversed.

See, also, 68 N. J. Law, 713, 54 Atl. 837.

E. A. Armstrong, for plaintiff in error. John W. Westcott, for defendant in error.

VREDENBURGH. J. This action is brought by the representative of a deceased employé against his employer to recover damages for the death of the employe occasioned by the fall of a wooden hoistingderrick, which was in use in the construction of a building then in the course of erection by the intestate and others. When it fell, a rope attached to its top caught, or became entangled with his limbs, throwing him down from the third story to the ground. The edifice under construction was a large structure known as "The Burlington County Insane Asylum." This derrick had been in use previously upon different parts of the building, and had on the occasion in question been brought from a lower floor to the third floor and placed very near the center of the building in order to hoist the heavy roof girders from a lower level into their proper

timbers in the usual well-kndwn shape of the letter A, fastened together, with a width apart at the bottom of about 12 feet, but narrowing towards the top, to which top ropes with blocks had been attached. Its four timbers or legs rested upon planks about 12 inches wide by three inches in thickness, the plank being supported upon the floor joists of the building. Around its four feet upon the plank small wooden pieces or cleats had been nailed so as to form notches or pockets in which its feet might rest, intended to prevent the derrick, while in its proper operation, from slipping or shifting from its footings. Two guy ropes were fastened to the top. One is testified to have been also tied at its other end to the floor joists, and the other rope hung unfastened, and seems from the evidence to have been the rope which threw the intestate when the derrick fell down. No structural defect nor want of proper repair in this mechanism was either shown by the evidence or is claimed by the brief of counsel filed in this court in support of the judgment below.

The intestate was a carpenter by trade, and was at the time of the accident employed and engaged as such in the construction of the asylum. He was presumably educated in his trade and familiar with the nature and operation of this well-known building appliance. On the occasion in question the evidence shows that he, together with (as one witness said from six to twelve, and another from eight to ten) other workmen also engaged in the construction of the building, were called by the foreman to assist in straightening the top of the derrick which was then said to be "leaning too far over." They took hold of the uprights, as the principal witness expressed it, "as far up as they could reach," about "six feet from the bottom," and pushed, and the "force of the pushing, instead of raising it straighter, just pushed the whole thing backwards," when "the bottom slipped right out," and "let the whole thing right over. • • • " "When the plank slid, that caused the feet to raise out of these notches and the whole thing went right over the wall. Didn't nothing stay there but the plank." It should be remarked at this point that the feet of the derrick were not designed to be stationary nor to be nailed, nor fastened by nails either to the plank, or to the floor joists in the building, because it was required to be often moved from place to place as occasion might demand in its proper use of hoisting up heavy construction materials. At the first trial (the case has been twice tried) the absence of nails in the plank to prevent the feet of the derrick from slipping at the time of the accident was in the opinion of this court given undue weight in the charge of the trial judge to the jurytheir verdict in regard to the liability of position. It was constructed of four upright the defendant having been by the charge ex-

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

stance. For this and other reasons not now material the judgment in favor of the plaintiff below was reversed. See 68 N. J. Law, 713, 54 Atl. 837. At this—the second—trial of the cause now under review, the cross-examination of the plaintiff's witnesses has thrown new light upon the precise reason of the fall of the derrick and has also furnished an explanation of the simple means (that of tying its feet down with the rope to the plank and floor joists), which if it had been taken by the persons endeavoring to straighten the top, would obviously have preserved its center of gravity and prevented its fall. A few brief extracts from this testimony transcribed in the form it was expressed by the witnesses will present this important phase of the evidence more convincingly, I think, than mere conclusions of their effect drawn by me from the evidence, viz., "Q. If you had taken a turn around that plank and the joists with the rope that was there, it would probably have held it in place, in your opinion, wouldn't it? A. It probably might have stayed there; yes, sir. Q. (to another witness) The ends of this rope could have tied this plank to the joists so it would not have slid? A. It could if they had used it. Q. How did you think it (the derrick) ought to have been straightened; by pulling on the guy rope? A. It could have been by pulling on the guy rope, and the bottom ought to have been fastened before they undertook it. Those feet could have been chained to the girders. * * * The ends of the rope could have tied this plank to the joist so it would not have slid * * * if they had used it."

At the close of the plaintiff's testimony, the trial court refused to grant defendant's motion for a nonsuit, and in such action I think it erred. Nothing showing nor tending to show any negligence on the part of the master had been disclosed by the plaintiff's evidence. Certainly and admittedly no omission by the master in the proper make up of the mechanism or which could have made it a more perfect tool in the performance of the work for which it was adapted and used in the building had been proved. But it is earnestly urged in the brief of the counsel for the defendant in error that the negligence of the master follows from evidence to the claimed effect that the deceased carpenter was not put in a "reasonably safe place" to do his work, and also that this was a jury question. There is certainly no place in the third story of a building without floors where it is reasonably safe for a carpenter to work if he be the least incautious. The slightest misstep even in walking upon the open floor joists may any moment precipitate him to the ground. Yet his duties oblige him to be there, and such and many other and greater risks every carpenter agrees by his calling and employment to undertake in consideration of the compensation he is to receive whereby injury be received by a fellow serv-

pressly directed to turn upon such circum- | from his employer. The place in question, where the intestate stood at the time of the accident, was near the base of the derrick, and was certainly reasonably safe until and unless he, or the others with him, did something to make it unsafe. What the abovequoted evidence shows they in fact did was to push against the feet of the derrick in order to raise, or straighten up, its top, without first taking the simple precaution to secure or tie down the feet to the plank and joists on which they rested; and they pushed so hard that the feet were actually forced out of the pockets in which they stood, and the derrick quite naturally lost its equipoise, and fell down. The place would have been as plainly unsafe to the deceased if instead of the derrick he and the others had attempted to raise the top of a long standing ladder by a force exerted at its feet without first holding or securing them to the floor. No distinction in principle between such an act of imprudence and that which has been noted above is observable. This evidence was offered by the counsel himself, and seems to me to be decisive against him as to the fact that the place was rendered unsafe not through any act of the master, but solely by the negligent act of the intestate and his fellow workmen.

There is additional reason, I think, why the court below should have denied to the plaintiff a right of recovery—the evidence has shown an assumption of the risk of the fall of the derrick by the deceased. In the case of McLaughlin v. Camden Iron Works, reported in 60 N. J. Law, 557, 38 Atl. 677, this court held that a laborer called from his special work and with others directed by their foreman to raise by hand a large frame which, through lack of bracing or fastening, fell and injured him, could not establish a right of recovery against his employer because the plaintiff knew that the frame was being raised by hand and "assumed such resultant risk of that method of doing the work as was obvious to him." The case at bar is a still stronger illustration of the principle there declared by this court. The deceased was not shown to have been called from any special work. The work of properly adjusting for use in the building the derrick was as much a part of his employment as were any of his other duties as a carpenter in the building. In the case just cited it appeared that there was on the premises, just as in the present case, an abundance, among other things, of ropes, and this court held and the opinion declares as the result of numerous adjudications in this state (cited page 559, of 60 N. J. Law, page 678, of 38 Atl.) the rule of law to be that, "where appliances for work are needed, the duty is on the master to use reasonable care in their selection, and he cannot escape it by delegation; but carelessness in their use, or failure to use them on the part of his servant.

ant in the same common employment, is not to the workmen to straighten the derrick chargeable to the master, no matter what may be the grade or authority of the servant." I think that case should control in all respects the present, and that the foreman in the case in hand should be held to have been a fellow servant with those who were engaged in the common effort of raising by hand the top of this derrick, and that his and their negligent failure to use proper appliances provided by the master, which would, if used, have prevented the derrick from falling, is not legally chargeable upon the latter. The opinion in the recent decision of this court in the case of Laragay v. East Jersey Pipe Company, reported in 72 Atl. 57, expressly approved McLaughlin v. Camden Iron Works, supra, and the important legal principles relating to the "fellow servant" doctrine there laid down. It is true that case (the Laragay) held that the plaintiff was entitled to go to the jury upor the facts there presented—that whether or not the result of the fall of the "spile driver" (styled a "derrick" in the head note) was so obvious that it ought to have been foreseen by the plaintiff was a question of fact that should have been left to the jury. Yet the opinion takes pains to distinguish between the two decisions, and points out that the "fellow servant rule" has no application where the duty is one that is owing by the master to his servants, but that McLaughlin was engaged in the erection of a frame that fell "because in the performance of their duty the servants did not make use of the materials the master had furnished," and declares that "judicial decisions made in cases where accidents have occurred in the course of construction, or in the so-called scaffolding cases, have no application." This distinction has direct bearing upon the case at bar. The derrick here was essentially a carpenter's tool or instrumentality actually in use in the construction of the building. Ιt was supplied by the master as well for the · carpenters' benefit as for his own. By its means the heavy timbers were to be lifted up to their proper locations in order that they might be adjusted and fastened by the carpenters in the roof. The derrick was therefore an efficient assistant to, if not a complete substitute for, a scaffold, and the case falls within the rule governing that subject. The fact that an injury happened to the carpenter from an accident through his negligent use of or failure to use the proper means which had been furnished him to straighten the derrick-tool for the construction of the work in which he was engagedshould afford him no greater right to damages against his employer than if he had accidentally cut his own hand in the negligent use of one of his employer's carpenter saws provided for him in his work. It follows the plaintiff was sent to assist in piling it,

must be regarded in law as the act of a fellow servant, and not that of the master. The abortive attempt of the workmen to move the top of the derrick without first securing its footing must be held to have been the assumption of an obvious risk by them for the consequences of which the master should not be held liable.

The judgment below should be reversed. and a new trial awarded.

(77 N; J. L. 772)

FLOERSCH v. DONNELL.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

MASTER AND SERVANT (\$ 219*)-INJURIES TO SERVANT-OBVIOUS DANGER.

Where the plaintiff who had been employ-Where the plaintiff who had been employed for two days in general work about defendant's lumber yard was sent, without any instruction as to the dangers incident to the work, to assist in piling lumber from a wagon between two standing lumber piles, one of which fell injuring plaintiff, and it was shown that the pile which fell had not been piled in the usual manner adopted by lumbermen, it cannot be said that to the plaintiff unacquainted with the business the danger was obvious: and a the business the danger was obvious; and a nonsuit upon that ground is set aside.

[Ed. Note.—For other cases, see Master and ervant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*]

(Syllabus by the Court.)

Error to Supreme Court.

Action by Joseph Floersch against William J. Donnell. Judgment for defendant, and plaintiff brings error. Reversed.

George S. Silzer, for plaintiff in error. Beekman & Spencer, for defendant in error.

MINTURN, J. When this cause was before the Supreme Court on a rule to show cause from a previous trial the verdict for the plaintiff was vacated upon the grounds substantially that there was nothing presented in the testimony from which a jury could legally infer negligence upon the part of the defendant. Upon a venire de novo a new trial was had, additional testimony was supplied, and the inquiry presented to this court upon this writ of error is directed entirely to the alleged error of the trial court in nonsuiting the plaintiff at the close of his case.

The plaintiff was injured at the lumber yard of defendant at Perth Amboy where he had been employed for two days in unloading cars, carting lime and other general employment. He had no experience in piling timber, so that on the day of the injury, when a wagon load of lumber was carted to the shed in the yard where it was to be piled. that the direction of the foreman in charge he was ignorant of the dangers peculiarly

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

received instructions from the master or from any person representing him relative to any danger connected with the work, or relative to the proper method of piling the lumber. A driver on the wagon handed the lumber to the plaintiff, who stood above the driver on a scaffold, which was two feet wide, and extended along in front of a number of piles of lumber. As he received the lumber from the wagoner, the plaintiff placed it in an open space about four feet in width, between two lumber piles then standing to the height of six feet. While thus engaged the lumber pile on plaintiff's left, upon which he was not working, toppled over, struck him on the head, knocked him from the scaffold, causing a fracture of his leg, which necessitated its amputation. The trial court granted the motion to nonsuit upon the ground that the danger incident to this work was obvious, or should have been obvious to this plaintiff.

In view of the testimony of seven expert lumbermen for the plaintiff, whose testimony was not given upon the previous trial, to the effect that the pile of lumber which fell and caused the damage, and upon which the plaintiff was not working, was defective and negligently piled, it is difficult to perceive how it can be said as matter of law that the danger thus created, and which it might be argued was latent and inhered in the piling of the lumber, can be said to be obvious to one like the plaintiff, who, according to the testimony, was absolutely untutored in the art of this particular craft. It was in evidence that the pile contained neither braces nor cross-pieces, and was without any support at all to prevent it from falling. It further appeared that to keep such piles intact, lumbermen use binders and cross-pieces, and that without such precautions, in the language of one expert witness, "a pile will fall of itself; or a jar would do it; or a man walking on the platform in front; a vibration or a jar would cause the pile to go over." Knowledge of these facts was chargeable to the defendant; and it therefore became a question for the jury to determine upon the facts in evidence whether in view of the existence of this condition the master had properly under all the circumstances of the case discharged his duty to the servant. For, as has been said by this court: "Where the danger is unknown to the servant he cannot be held to have voluntarily assumed it, although the physical surroundings that create the danger are known to him; and so the known absence of safeguards and precautions cannot prevent a recovery, when the danger that rendered them necessary is unknown to the injured servant." Burns v. Telegraph Co., 70 N. J. Law, 750, 59 Atl. 220. 592, 67 L. R. A. 956; Smith v. Erie R. R., 67

incident to that class of work; nor had he Christensen v. Lambert, 67 N. J. Law, 341, 51 Atl. 702; Laragay v. East Jersey Pipe Co. (N. J.) 72 Atl. 57.

The judgment of nonsuit is therefore reversed, and a venire de novo awarded.

(77 N. J. L. 740)

FAUST V. RODELIIEIM.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

PRINCIPAL AND SURETY (\$ 33*)-CONSIDERA-TION-

N-SUFFICIENCY.
A landlord and tenant executed a lease which the landlord refused to accept unless and until a surety for the performance of the cov-enants therein had been obtained. The delivery enants rnerem had been obtained. The delivery of the lease did not occur until after the surety had signed it. Held, until such delivery, the contract of letting was incomplete even though the tenant meantime may have entered into the occupancy of the premises and paid an installment of rent. Held, also, that the delivery of the lease being contemporaneous with the delivery the lease being contemporaneous with the delivery of the surety's obligation each contract be-came completed at the same time, and the consideration which supports the principal contract supports the subsidiary one.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 66; Dec. Dig. § 33.*]

(Syllabus by the Court.)

Error to Circuit Court, Atlantic County. Action by Mary B. Faust against William L. Rodelheim. Judgment for plaintiff, and defendant brings error. Affirmed.

Thompson & Cole, for plaintiff in error Higbee & Coulomb, for defendant in error.

VOORHEES, J. This is a writ of error to the Atlantic circuit removing a judgment founded upon a verdict directed for the plaintiff for \$400 and interest. The suit was brought upon a written instrument guaranteeing the payment of rent accruing under a written lease. The lease was dated April 25, 1904, made to the plaintiff by one Stone. The guaranty was indorsed upon the lease, and was dated May 24, 1904. Both the lease and guaranty were drawn in duplicate, and were executed on the days of their respective dates. The defendant had directed Mrs. Stone, who subsequently became the tenant, to one Calloway, a real estate agent, to look about for her for a house in Atlantic City which she might rent. The defendant had promised her to become surety for her rent before she went to Atlantic City. After Calloway had secured the premises, the defendant promised Calloway to sign as surety upon the lease to be executed between the plaintiff and Mrs. Stone. One Bond, acting for Calloway as a matter of accommodation. prepared the written leases and the contract of suretyship in duplicate. The leases were then signed in his office by the plaintiff and Mrs. Stone upon April 25th. The defendant testified that on May 24th he signed the two leases as surety for the rent; that he met N. J. Law, 637, 52 Atl. 634, 59 L. R. A. 302; Mr. Calloway on the boardwalk, who re-

fendant for over a month and wanted him to sign as surety, gave him a fountain pen, and he signed the two papers and gave them back to Mr. Calloway at the time. The defendant admits that he then saw Mrs. Stone's signature on the lease. Mr. Calloway at the time had the leases in his pocket. So far as appears from the testimony the leases had been in Mr. Calloway's possession from the time when the parties signed them up to the time when the surety executed them. There is no evidence of their previous delivery. The lease runs from May 15, 1904, to October 1st. It was presented to the husband of the plaintiff, who was her agent and attended to her business, together with \$50. Upon ascertaining how the payments were to be made, he said "he wouldn't accept it unless he had security for the performance of the lease, and, until he got that, he wouldn't receive any money, but when he got the security on the lease he took the money." This testimony is uncontradicted. There are indorsed upon the lease two payments: April 25th, \$50; May 16th, \$350. It is asserted that Mrs. Stone went into possession of the premises on the 16th of. May, and that being in possession, and having made a payment of rent, the contract of leasing had become completed, and, therefore, when the defendant afterward, on May 24th, signed the guaranty that instrument was without consideration and unenforce-

As before stated, the evidence shows that the leases were not delivered but were held by Mr. Calloway awaiting the signature of the surety, and that the plaintiff had refused to accept them until the surety had signed. The contract of suretyship signed before the delivery of the leases must be construed to have been executed upon the consideration of the leases thereafter delivered simultaneously with the delivery of such contract. In Child's Suretyship & Guaranty, p. 52, it is said: "If, during the original negotiations between the principal and creditor before the contract was complete, the creditor had stipulated that the maker should procure a surety when asked to do so, there would have been a consideration for the contract of the surety whenever he might sign, as in such case the creditor suffered the disadvantage of parting with his money in reliance upon the surety to be obtained, and would not have parted with his money had it not been for the contract of suretyship yet to be made." In the present case the plaintiff had refused to deliver the lease and accept the first payment unless he had security, and, awaiting the promised signature of such surety, the leases had remained in the hands of Mr. Calloway undelivered. The possession of the premises by the tenant before the delivery of the leases, if indeed the tenant was in possession, was a mere occupancy in contemplation of the subsequent delivery of court rightly refused the nonsuit, and also

marked that he had been looking for the de- | the written lease with surety, and until such delivery the transaction was incomplete.

Williams v. Perkins, 21 Ark. 18, was a case where a payee of a writing obligatory took it at the time when it was executed by the principal obligors, and held it for some length of time before the signatures of the sureties were procured. At the time the writing was signed by the principal obligors it was understood that the sureties would also sign the bond. It was held that it did not follow that the writing obligatory was first made and signed by the principal obligors and accepted by the payee as a complete contract and afterwards at another time the contract of the sureties was made, as a distinct and independent transaction because at the time it was signed by the principal obligors it was understood by the payee that the sureties would also sign, and that the payee did not accept the writing obligatory as a complete contract until the signatures of the sureties were obtained. Although the signatures of the principal obligors were procured at one time and those of the sureties afterwards, nevertheless in contemplation of law the promises were contemporaneous and formed a part of one and the same general transaction, and the same consideration which supports the promise of the one also supports that of the other.

In Grim v. Semple, 39 Iowa, 570, it was held that a bond to indemnify a surety upon a bond for costs was sustained by a sufficient consideration, although not executed until after the bond for costs, where it appeared that the latter was signed under a promise that the former should be given. See, also, Bowen v. Thwing, 56 Minn. 177, 57 N. W. 468; Smith v. Molleson, 148 N. Y. 241, 42 N.

The landlord and tenant having executed the lease which the landlord refused to accept unless and until a promised surety had been obtained, it would seem to follow from the above cases that the engagement of the surety when entered into would have a valid consideration for its support. There is much authority for the view that a contract induced by the promise of security thereafter to be given affords sufficient consideration for the contract of suretyship when given. Aside from the above doctrine, however, this case shows that the delivery of the lease did not occur until after the surety had signed, and, therefore, until such delivery the contract of letting was incomplete, even though the tenant meantime may have entered into the occupancy of the premises and paid an installment of rent. The delivery of the lease being contemporaneous with the delivery of the surety's obligation, each contract became completed at the same time, and the consideration which supports the principal contract supports the subsidiary one.

The contract of suretyship was therefore made upon sufficient consideration and the defendant, and was justified in directing a verdict for the plaintiff.

The judgment must be affirmed.

(75 N. J. E. 581)

SIMPSON V. ANDERSON.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

1. CHATTEL MORTGAGES (§ 63*)-AFFIDAVIT

OF CONSIDERATION—SUFFICIENCY.

The affidavit of consideration attached to a chattel mortgage stated that it was given to a chattel mortgage stated that it was given to secure the payment of a bond and mortgage executed and delivered by the maker of the chattel mortgage to H., which H., in consideration of \$1,500 paid to him by the deponent, had assigned to deponent, and that the amount due thereon was \$1,500. Held to be a sufficient statement of the consideration to comply with the statute, and that it is not necessary to set out the consideration which passed between the original parties to the bond and mortgage; the consideration of the chattel mortgage being the amount paid by the assignee.

[Ed. Note.—For other cases, see Chattel Mort-

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 63.*]

2. CHATTEL MORTGAGES (§ 63*)—AFFIDAVIT OF CONSIDERATION.

The affidavit to a chattel mortgage, after stating "that the consideration of said mortgage is: Whereas," proceeded to recite the facts which disclosed the consideration. Held, that the word "whereas" did not make the affidavit uncertain, or destroy the positive statement that the con-sideration was as thereafter set out.

[Ed. Note.-For other cases, see Chattel Mortgages, Dec. Dig. § 63.*]

(Syllabus by the Court.)

Appeal from Court of Chancery

Bill by the ordinary on behalf of Mabel L. Simpson against Abijah A. Anderson. Decree for complainant (70 Atl. 696), and defendant appeals. Reversed.

John Sykes, for appellant. John S. Van Dike, for respondent.

BERGEN, J. The complainant, a judgment creditor of Josiah B. Flock, filed his bill of complaint, praying that a chattel mortgage given by Flock to the defendant be decreed void as to the judgment of the complainant. The learned Vice Chancellor adjudged that the mortgage was void as to complainant's judgment for want of a sufficient affidavit, and advised an order for injunction restraining the defendant from selling the mortgaged chattels, from which defendant appeals.

The mortgage bears date August 28, 1897, conditioned for the payment of \$1,925, being the aggregate amount of certain items particularly set out in the mortgage as follows, viz.: A bond dated March 23, 1892, executed and delivered by Flock to one Richard H. Hendrickson, for the sum of \$1,500 and interest, the payment of which was secured by a mortgage given by Flock and wife to Hendrickson and assigned by Hendrickson to

rightly refused to direct a verdict for the | being duly recorded; also, the sum of \$344 loaned by the defendant to Flock in cash, and the amount due on three certain promissory notes "upon which the said Abijah A. Anderson has become an accommodation indorser and surety for the said Josiah B. Flock." Then follows the dates and the amounts of the respective notes, two of them being payable three months after date, and the other two months after date. The record shows that the liability as indorser had been discharged, the cash loaned repaid, and the mortgage foreclosed and mortgaged premises sold, and the proceeds of such sale applied towards the payment of the mortgage, leaving a deficiency of \$976.67, which sum was all that remained unpaid of the debts secured by the chattel mortgage when the bill was filed in this cause. The affidavit which the learned Vice Chancellor held to be insufficient sets out, so far as it is necessary to be here recited. "that the consideration of said mortgage is: Whereas, the said Josiah B. Flock became indebted to one Richard H. Hendrickson in the sum of fifteen hundred dollars; and whereas, the said Richard H. Hendrickson, for the consideration of fifteen hundred dollars, assigned, transferred and set over the said mortgage to Abijah A. Anderson; * * * and whereas, the said Josiah B. Flock is indebted to this deponent for the full amount of the said fifteen hundred dollars: * * * and whereas, on the thirtieth day of March, eighteen hundred and ninety-four, this deponent loaned and advanced in cash the sum of three hundred an forty-four dollars to the said Josiah B. Flock, at his special instance and request, and that the whole amount of the said three hundred and forty-four dollars, with interest thereon from the first day of April, eighteen hundred and ninety-seven, is still due and owing: * * and whereas, this deponent has, at the special instance and request of the said Josiah B. Flock, become an accommodation indorser and surety upon three certain promissory notes, one of which bears date the twenty-second day of June, eighteen hundred and ninety-seven; and now the consideration for this chattel mortgage is the said fifteen hundred dollars due from the said Josiah B. Flock to this deponent upon the said bond and mortgage, and the further sum of three hundred and fortyfour dollars loaned and avanced by this deponent to the said Josiah B. Flock, * * * and the further sum of money as this deponent may be called upon to pay by reason of having become an accommodation indorser upon the said three certain promissory notes hereinbefore mentioned."

The Vice Chancellor held the affidavit imperfect for several reasons, the first being that it does not state the consideration passing from Hendrickson to Flock when the the defendant, the mortgage and assignment bond and mortgage for \$1,500, afterward as-

Tor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

signed to deponent, was executed and delivered. We think that, reading the mortgage and the affidavit together, this objection cannot be sustained, and that they should be read together in order to ascertain whether there has been a compliance with the statute was determined in this court in Black v. Pidgeon, 60 N. J. Law, 802, 58 Atl. 372. When so read, it appears that the defendant had paid \$1,500 for the bond and mortgage, the payment of which the obligor was willing to further secure, and did undertake to further secure by the chattel mortgage. The chattel mortgage was given to secure the payment of \$1,500 advanced and paid for an obligation of the mortgagor, the validity of which he did not dispute, and the real consideration of the chattel mortgage was what the defendant had paid out in relieving the debtor of his obligation to Hendrickson, and its transfer to the deponent, and not that passing between the original parties to that obligation of which the deponent would not be presumed to have had any knowledge. If it did not appear that the deponent had paid something for the assignment, a different question would arise. The learned Vice Chancellor relies upon Graham Button Co. v. Spielmann, 50 N. J. Eq. 120, 24 Atl. 571, in support of his conclusions, but in that case the affidavit stated the consideration to be "a present indebtedness of \$1,500," without disclosing how the indebtedness came into existence, and presents an entirely different situation from the one under consideration, where it appears that the defendant had parted with \$1,500, and taken for it an obligation which the debtor issued for that sum. the bona fides of which was undisputed. The learned Vice Chancellor also determined that the affidavit was insufficient, in that the language used to show the indebtedness of Flock to Hendrickson is not positive and direct, but a mere recital of facts, the truth of which was not verified, because of the use of the word "whereas," as above set out. We do not agree with this interpretation, for the word "whereas" and all that follows it is preceded by the direct and positive statement "that the consideration is" as disclosed by the recital following. In addition to this, the affidavit declares, after a full statement of all the circumstances concerning the creation of the several debts, "and now the full consideration of this chattel mortgage is" the several items particularly described in the mortgage and preceding part of the affidavit. The affidavit is also condemned because it is said the promissory notes mentioned in it were not sufficiently described, and Dunham v. Cramer, 63 N. J. Eq. 151, 51 Atl. 1011, is cited in justification of this conclusion. There is a wide difference between that and the present case, for there the consideration stated was "for the payment of a

for the sum of eight hundred dollars." from which it would appear that there was nothing to distinguish the note from any number of notes dated on that day by any number of persons for a like amount. In the case under review, it clearly appears from the affidavit and mortgage that at the special instance and request of Flock the defendant became "an accommodation indorser and surety for the said Josiah B. Flock" upon three certain promissory notes of which the dates, time to run before maturity, and amounts are given, with special reference to each note. The reasonable presumption arising from this state of facts is that the defendant indorsed the notes as surety and for the accommodation of Flock as maker, at his request, and this we think is sufficiently precise and explicit to afford the creditors of the mortgagor "in case fraud was suspected, a fair opportunity to ascertain, by judicial investigation or otherwise, whether the mortgage was an honest security or a mere fraudulent cover." Graham Button Co. v. Spielmann, supra, pages 120-122 of 50 N. J. Eq., pages 571, 572 of 24 Atl., which is the primary object of the statute. There is no proof to sustain the charge of fraud contained in the bill of complaint, and, in the absence of fraud where there is an honest and substantial compliance with the statute, the mortgage will not be opened to attack of other creditors merely because the affidavit is inartificially drawn. American Soda Fountain Co. v. Stolzenbach, 75 N. J. Law, 721, 68 Atl. 1078, 16 L. R. A. (N. S.) 703.

The affidavit being a sufficient compliance with the statute, the order appealed from is reversed, with costs.

(77 N. J. L. 670)
MELLON v. VICTOR TALKING MACH. CO.
(Court of Errors and Appeals of New Jersey.
June 14, 1909.)

1. TRIAL (§ 260*)—INSTRUCTIONS.

It is error for a trial court in an action of negligence to refuse a request of defendant's counsel that accurately points out to the jury the concrete question of fact with respect to which the parties differ, but upon the existence of which the negligence of the defendant is predicated. A statement to the jury in lieu of such request of a general rule of law in general terms is not an adequate substitute for a specific charge upon the concrete question the jury is to pass upon in the given case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

AUTHORITIES—CASE APPLIED.
 The case of Card v. Wilkins, 61 N. J. Law,
 296, 39 Atl. 676, applied.
 (Syllabus by the Court.)

Error to Supreme Court.

that and the present case, for there the consideration stated was "for the payment of a certain promissory note dated July 8, 1898. | Action by Alice Mellon against the Victor Talking Machine Company. Judgment for plaintiff. Defendant brings error. Reversed.

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Gaskill & Gaskill, for plaintiff in error. John F. Harned and John W. Wescott, for defendant in error.

GARRISON, J. The defendant in error was injured while working upon one of the presses of the plaintiff in error by the dropping of the upper die upon her hand. The negligence attributed to the master was the looseness of the belt that operated the top die. The plaintiff, the sole witness to the accident, testifies to the looseness of the belt, and that "it was the looseness of the belt that caused the trouble." Her counsel in their brief contend that "the jury must say whether the slipping of the belt contributed to the fall of the press." Counsel for the plaintiff in error, recognizing the precise point of the case, requested the court to charge the jury: "There can be no recovery in this case unless you believe that the looseness of the beit and its consequent slipping caused the upper plate of the die to drop or fall upon her hand."

This was a proper request. To refuse so to charge would be error. The only question is whether this request was denied or whether it was charged. It was formally denied and an exception sealed, so that error was committed unless the request was in effect charged. This, however, was not done. Nowhere in the charge is the attention of the jury directed to the substance of this request, for not once does the charge refer to the alleged ground of the master's negligence or even make mention of the looseness of the belt or its causal relation to the plaintiff's injury. The language of the charge is: "The claim of the plaintiff in this instance is that the defendant company was negligent in not providing her with safe machinery or a fit machine with which to work, and that because of such negligence her hand was caught in the manner which has been described. Now, if this accident was caused by the negligence of the defendant in not providing a safe machine, and she received this injury without negligence on her part in operating the machine, she is entitled to recover a verdict at your hands."

The statement of the plaintiff's claim in the general way was not an adequate substitute for the defendant's specific request. At the juncture when the case was submitted to the jury the claim of the plaintiff did no rest in generalities. It had been by the testimony reduced to a specific question of fact upon the existence of which the negligence of the defendant was predicated. One of the important, if not the most important, functions of the charge of the trial court in an action of negligence is to point out to the jury the question of fact with respect to the existence of which the parties differ, but upon the establishment of which the negli- railroad purposes under condemnation pro-

duty of the defendant is as a rule ascertained by the court itself from the general principles of the law of negligence, and, being so ascertained, is declared to the jury, but whether or not such duty has been neglected in the given case depends upon the existence or nonexistence of one or more concrete facts which is the question the jury is to pass upon. The mere omission of a trial court to point out to the jury the question of fact it is thus to decide may not in a legal sense be erroneous, but the refusal of the court so to do when properly and specifically requested is error that requires reversal. Aldrich v. Peckham, 74 N. J. Law, 711, 68 Atl. 345.

The judgment brought up by this writ of error must therefore be reversed, and, inasmuch as a venire de novo may be awarded, it is well to draw attention to the fact that the plaintiff testified that the gauge or gate was out of order, and that she had been told when instructed how to operate the press "not to operate the press if the gauge or gate was out of order." The case was thus brought under Card v. Wilkins, 61 N. J. Law. 296, 39 Atl. 676, in accordance with which the defendant's motion for a nonsuit should have been granted.

(77 N. J. L. 736)

FARRADAY IMPROVEMENT CO. v. PENN-SYLVANIA & N. R. CO.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

APPEAL AND ERROR (§ 1094*)-REVIEW-FIND-

APPEAL AND LEAGE (§ 1002-)—REVIEW—FIND-INGS OF FACT.

Where, on certiorari to review proceedings appointing commissioners to assess damages for lands proposed to be condemned for railroad purposes, the only substantial objection is that the line of the road cannot be located from the map and description of the route as filed, and the Supreme Court having found as a fact that the Supreme Court having found as a fact that such map and description were sufficient, such finding is not subject to review on error.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1094.*]

(Syllabus by the Court.)

Error to Supreme Court.

Action by the Farraday Improvement Company against the Pennsylvania & Newark Railroad Company. From a judgment of the Supreme Court (69 Atl. 1078), affirming an order for defendant, plaintiff brings error. Affirmed.

Bleakly & Stockwell, for plaintiff in error. Alan H. Strong, for defendant in error.

PER CURIAM. The purpose of this writ is the review of a judgment of the Supreme Court affirming an order appointing commissioners to assess the damages of the plaintiff in error for lands proposed to be taken for gence of the defendant depends. The legal ceedings. Two objections are made: First.

•For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that the center line of the route of the proposed railroad cannot be located from the description and map of such route as filed in the office of the Secretary of State; second, that prosecutor's land proposed to be taken is not described in the proceedings with sufficient accuracy to permit the ascertaining of its boundaries.

As to the first point, the only real difficulty, if any, relates to the sixth course in the proposed center line. If that can be located. the projection of the line to and over prosecutor's land can be made without difficulty. The Supreme Court found as a fact that such course could be located, and there was evidence to support such finding. The civil engineers produced by the prosecutor testifled that it could not be done, while the engineers of the defendant testified that there was no difficulty in making the location, none of the engineers having gone to the locality for the purpose of demonstrating the truth of their respective opinions by attempting a practical location. Under such conditions. facts found by the Supreme Court will not be reviewed on error.

As to the location of the land of the plaintiff which is proposed to be taken, the Supreme Court found the facts in favor of the defendant's claim that the boundaries could readily be located from the description, and the evidence shows that the conclusion reached by that court has abundant support.

The judgment below is affirmed.

HUMBRECHT v. PENNSYLVANIA & N. R. CO.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

Error to Supreme Court.
Action by Victor J. Humbrecht against the
Pennsylvania & Newark Railroad Company.
From the judgment, plaintiff brings error. Affirmed.

Bleakly & Stockwell, for plaintiff in error. Alan H. Strong, for defendant in error.

PER CURIAM. The facts appearing in this case are precisely those considered and dealt with in Farraday Improvement Company v. Pennsylvania & Newark Railroad Company (decided at this term) 73 Atl. 495, and for the reasons there given the judgment below is affirmed.

(77 N. J. L. 769)

OAKERSON v. ATLANTIC COAST ELECTRIC RY. CO.

(Court of Errors and Appeals of New Jersey. June 15, 1909.)

CARRIERS (§ 320*)—CARRIAGE OF PASSENGERS
— ACTIONS FOR INJURIES — QUESTIONS FOR

The plaintiff while alighting from defendant's car fell, as she claimed, by reason of the negligence of the defendant's employes in starting the car while plaintiff was alighting. This

contention was controverted by defendant's witnesses. *Held*, that the question was one of fact for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1244; Dec. Dig. § 320.*]

(Syllabus by the Court.)

Error to Supreme Court.

Action by Sarah E. Oakerson against the Atlantic Coast Electric Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Durand, Ivins & Carton, for plaintiff in error. Aaron E. Johnston, for defendant in error.

MINTURN, J. On the night of July 27, 1907, while the plaintiff, accompanied by her 14 year old boy, was returning from Asbury Park to her home in Neptune City as a passenger upon the defendant's trolley car, she was injured in attempting to step from the running board of the car to the roadway, to recover damages for which injury she instituted this suit. The plaintiff's theory as to the happening of the accident, viz., by the sudden starting of the car while she was alighting, was supported by her own testimony, and, in part, by that of her son. There was no motion to nonsuit, but defendant proceeded to contradict the story of the plaintiff by the testimony of the conductor of the car, who testified that she stepped from the running board after his caution to her to wait, and fell to the ground while the car was in motion. The motorman testified that, after he stopped the car, he looked around and saw the plaintiff upon the ground. Both testified that the bell was given in time to stop at Third avenue, where plaintiff and her boy alighted. Ireland, a witness for the defendant, was a passenger upon the car, and noticed the plaintiff's boy alight at Third avenue after the boy had motioned to the conductor to stop there. The boy got off before the car stopped, and the witness heard the conductor say to plaintiff, "Don't get off till the car stops." She looked at the conductor, and proceeded to alight while the car was slowly moving. After her fall, he saw the conductor approach her, and she said, "I must have stepped on something," and her boy, who had gone ahead without waiting for his mother, returning to her, said, "No; you must have stepped off backwards." This witness also testified that "she got off as the car came to a standstill."

The refusal of the trial court to direct a verdict for defendant upon this state of facts is the main error complained of by defendant, and it will suffice to say in answer to this contention that the issue thus presented was entirely one of fact for the jury. The testimony thus indicated presents a legal status in no wise different in its essential aspects from that presented in McCullom v. Atlantic

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

City & S. Ry. Co. (decided at the last term of this court) 72 Atl. 87, wherein it was held that whether a passenger upon a trolley car who has signaled to the conductor to stop is guilty of contributory negligence in stepping upon the running board of the car before it has stopped preparatory to alighting therefrom is, where the facts are in dispute, a question for the jury. And also that whether the motorman exercised the care required by law when a passenger was attempting to alight and was thrown, as was there claimed, by a jerk or lurch of the car, is a question for the jury, where the facts are disputed. McCullom v. Atlantic City & S. Ry. Co. (N. J.) 72 Atl. 87; Whalen v. Traction Co., 61 N. J. Law, 606, 40 Atl. 645, 41 L. R. A. 836, 68 Am. St. Rep. 723; Davis v. Camden, etc., Ry. Co., 73 N. J. Law, 415, 63 Atl. 843. The record in the case at bar presents essentially the same questions of fact that were presented in the McCullom Case, and is, of course, to be controlled by the application of similar principles of law. In consonance with that determination is a comparatively recent decision of the federal Supreme Court, wherein it has been held that it is the duty of a street railroad company to stop when a passenger is about to alight, and not to start the car until he has alighted. Washington & G. R. Co. v. Tobriner, 147 U. S. 571, 13 Sup. Ct. 557, 37 L. Ed. 284.

Nor was it error, as claimed by defendant, for the court to charge that the plaintiff was not required to prove her case beyond all reasonable doubt. The exception taken to this portion of the charge was not sealed, but it may be more satisfactorily answered by the statement that the extent of the legal requirement as to proof of negligence is that the plaintiff shall present a prima facie case. Smith on Neg. 214; Jaggard on Torts, 1084; N. J. R. R. Co. v. Pollard, 22 Wall. 341, 22 L. Ed. 877; Turner v. Wells, 64 N. J. Law, 269, 45 Atl. 641; 16 Cyc. 932, and cases.

The exception taken to the ruling of the court allowing plaintiff to testify that other operatives in the same line of work received the same amounts she received for similar work was not irrelevant, but was corroborative of the claim she made; and the exception taken thereto was unsubstantial.

Equally so was that taken to the admission of the inquiry made of the conductor whether the relations existing between him and the defendant's witness Ireland were intimate or otherwise. This line of testimony was entirely within the sound legal discretion of the trial court, and it is not perceived that the court committed any injurious legal error in admitting it. Batdorff v. Farmers' Nat. Bank, 61 Pa. 179; Wallace v. Taunton St. Ry. Co., 119 Mass. 91; Schultz v. Third Ave. Ry. Co., 89 N. Y. 242; 16 Cyc. 982, and cases.

The judgment is affirmed.

(77 N. J. L. 715)

JONES V. WHITTIER.

(Court of Errors and Appeals of New Jersey. July 2, 1909.)

EVIDENCE (§ 448*)—CONTRACTS (§ 231*)—PA-ROL EVIDENCE AFFECTING WRITINGS—CON-STRUCTION—PAYMENT.

STRUCTION—PAYMENT.

A contract for the erection of a building provided for payment by installments of the contract price as the work progressed. The third payment was to become due "when house is inclosed, except window and door openings and porch floor"; the fourth, "when wall board and plaster is on." Held, that the terms of these payments were completely expressed, that evidence in aid of construction was properly excluded, and that the contractor was not required to do the work excepted from the third payment in order to be entitled to the fourth payment."

[Ed. Note.—For other cases.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 448; * Contracts, Dec. Dig. § 231.*] (Syllabus by the Court.)

Error to Circuit Court, Bergen County.
Action by Oscar E. Jones against John W.
Whittier. Judgment for plaintiff, and defendant brings error. Affirmed.

Luther Shafer, for plaintiff in error. Johr M. Bell, for defendant in error.

PARKER, J. This is an action on mechanic's lien, brought by the contractor against the owner. The building contract was in writing, and provided for payment of the contract price in installments as the work progressed. The provisions of the contract that are material to the present inquiry are those relating to the third and fourth payments, viz.: "Third. When house is inclosed, except window and door openings and porch floor, \$1,300. Fourth. When wall board and patent wall plaster is on, \$1,200."

There was also a provision that the contractor should buy certain materials from the owner, and that the cost of the same should be credited on the contract price. It was conceded that the third payment was earned and made. The contractor claimed the fourth payment as due, and the owner refused to make it, on the ground that the work excepted in the third payment, the window and door openings and porch floor, formed part of the requirements for the fourth payment, and must be done before that payment would become due. conceded, or fully proved, that the wall board and patent plaster were on, thus complying with the express requirements of the fourth payment. It was also admitted that the porches and windows and door openings had not been completed. Upon the owner's refusal to pay, the contractor abandoned the work, and brought suit for the fourth payment, less credits for lumber purchased. The case was tried on the theory that if the work had progressed sufficiently to call for the fourth payment, plaintiff was entitled to

recover. The assignments of error bring up the point that according to the evidence the the refusal of the court to nonsuit and to direct a verdict, the exclusion of certain evidence as to the customs of builders, and certain language in the charge to the jury.

Under the assignments of error relating to the exclusion of evidence offered by defendant, the complaint is that defendant was prevented, by rulings of the court, from showing that, according to the usual and orderly method of constructing such a building as that in question in this case, the wall board and patent plaster should not be put on until the doors and windows were in, or at all events until the window and door openings excepted from the third payment had been constructed. Without passing on the question whether such evidence was competent and relevant to the issue that was in trial, it is enough to say that the assignments of error do not point out the exclusion of any evidence of this kind. The overruled questions brought up by the assignments are as follows: "Q. If a contract provided that the third payment should be made when the house is inclosed, except window and door openings and porch floor, and the fourth payment provided that it should be due wher wall board and patent plaster are on, and it was admitted and was the fact that the windows were not in; that the window and door openings were not closed; the porch floors were not laid; and the porches were not built-would or would not the fourth payment be due under those circumstances?" "Q. Now, then, if a contractor had omitted from his third payment, inclosing of window and door openings and porch floors, and proceeded to put on wall board and plaster, would the fourth payment, under this particular contract, read in the light of the custom of builders, be due?" It is obvious that these questions did not call for testimony as to the custom of builders, but for the construction that, in view of what the witness understood that custom to be, he himself would put upon the language of the contract The questions were therefore properly overruled.

There was no error in the denial of motions to nonsuit and to direct a verdict. No grounds for the latter motion were stated. The grounds of the motion to nonsuit were that the plaintiff had failed to make out a case, and "that the plaintiff's evidence showed that the fourth payment was not due according to the terms of the contract, when the plaintiff demanded that payment, and plaintiff was not justified in refusing to proceed under the contract." There was nothing in the first ground to direct the court's attention to any essential feature of plaintiff's case as to which proof was lacking, and the second ground that plaintiff was not justified in refusing to proceed was based, not on the point that the contract was entire, but on

the point that according to the evidence the fourth payment was not due. Even on defendant's theory that the language of the clauses as to payments was open to explanation by evidence of the custom of builders, there was evidence to show that it was nelther customary nor proper to complete window and door openings before plastering, and that the porches are part of the last work to be done. A nonsult in view of this evidence would have been improper.

All the foregoing points, however, become unimportant in view of the position taken by the court in charging the jury. The trial judge held that the contract was complete and definite on its face, and needed no parol evidence to explain it, and that its construction was a matter of law for the court, and instructed the jury that, as the undisputed evidence showed that the wall board and patent plaster were on as required in the clause providing for the fourth payment, payment was due under the contract, and that the only point for the jury to consider was the amount of set-off to which defendant was entitled for material supplied by him to plaintiff. This was equivalent to construing the contract on its face as entitling the contractor to his fourth payment when the wall board and patent plaster were on, and as not calling for the work excepted in the third payment as a prerequisite of the fourth. We think this construction was right, and that if the parties intended that this excepted work was to be done before the fourth payment became due, it should have been so stated in the clause providing for that payment.

This view of the case disposes of all the assignments of error. The judgment under review will be affirmed.

(77 N. J. L. 619)

STATE v. ZELLER.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

1. Homicide () 313*)—Verdict—Degrees of Murder.

The statute which prescribes that, if a jury find one guilty of murder, they shall declare by their verdict whether it be murder in the first degree or murder in the second degree (Act June 14, 1898 [P. L. p. 824] § 107) does not confer upon the accused any right to have the jury left free to find him guilty of murder in the second degree, if there be no reasonable ground for such a verdict in the evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 671-675; Dec. Dig. § 313.*]

2. CRIMINAL LAW (§ 1158*)—Confessions—Appeal—Review.

The finding of the trial court to the effect that a confession was voluntarily made is not reviewable on error, if there be evidence to support the finding.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3066; Dec. Dig. § 1158.*]

3. Grand Jury (§ 3°)—Number of Jurors.

The statute which imposes upon the sheriff the duty of summoning 24 good and lawful men

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to serve as grand jurors (Act June 14, 1898 [P. L. p. 869] § 11) does not require that the entire number of 24 shall serve as such. In this state the practice is to permit no more than 23 men to be sworn upon the grand jury.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 3-6; Dec. Dig. § 3.*]

(Syllabus by the Court.)

Error to Court of Oyer and Terminer, Cumberland County.

Walter Zeller was convicted of murder, and brings error. Affirmed.

Olin Bryan and Edwin F. Miller, for plaintiff in error. J. Hampton Fithian, Prosecutor of the Pleas, for the State.

PITNEY, Ch. The plaintiff in error, together with Cline Wheeler and Herbert Grigg, was indicted by the grand jury of Cumberland county for the murder of William Read. Zeller had a separate trial, and was convicted of the crime of murder in the first degree. The present writ of error brings under review the record of the conviction, together with certain bills of exceptions and a certificate of the entire proceedings had upon the trial.

The following are the points relied upon for reversal:

First. The indictment charged that the murder was committed at the borough of Vineland, in the county of Cumberland. It is insisted that there was no evidence that the crime took place in the borough or within the county. Counsel concedes that the borough lies entirely within the county, but contends that while there was evidence to show the crime was committed "in Vineland." it is not to be presumed that it occurred within the borough of that name, in view of what is said to be the fact that the "Great Vineland Tract," as laid out by Charles K. Landis, includes not only the entire borough of Vineland and the township of Landis in the county of Cumberland, but also, as asserted, parts of Gloucester and Atlantic counties, and that all this tract is popularly known as "Vineland." Assuming we could take judicial notice of this (for there is no proof of it), we think that the evidence of the witnesses at the trial, to the effect that the homicide took place "in Vineland," might reasonably be understood by the jury as meaning that it occurred within the borough of that name.

Second. The refusal of the trial judge to charge the jury that the question whether a certain confession made by Walter Zeller, and introduced in evidence, was made when the mind of the prisoner was under the influence of hopes or fears held out to him by the officers of the law was a question of fact, to be determined by the trial court in the first instance, and by the jury subsequent-Without going into the question of the proper function of the jury in the matter, it conclusion of the trial court upon this ques-

is sufficient to say that the record clearly shows that no such request was preferred to the trial judge.

The third and fourth points are based upon the ground that the court took from the jury the function, imposed upon it by the statute, of determining the degree of guilt of the prisoner, by instructing them that under the law and the evidence they could not find Zeller guilty of murder in the second degree, and that the law and the evidence, if a verdict of guilt were found, would warrant no other verdict than murder in the first degree. While the statute (Act June 14, 1898 [P. L. p. 824] \$ 107) prescribes that the jury, if they find one guilty of murder, shall declare by their verdict whether it be murder in the first degree or murder in the second degree this does not in our opinion confer upon the accused any right to have the jury left free to find him guilty of murder in the second degree if there be no reasonable ground for such a verdict in the evidence. Our statute (Act June 14, 1898 [P. L. p. 824] § 106) declares that murder committed in the perpetration, or attempt to perpetrate, a robbery is murder in the first degree. All the evidence that tended to implicate Zeller in the murder of William Read (including Zeller's own confession) tended to show that the murder was committed in the perpetration of a robbery. All the circumstances of the homicide bore a similar import as to the character of the crime. If under the evidence Zeller was guilty at all, he was guilty of a murder committed in the perpetration of a robbery. The charge of the trial judge upon this question was therefore entirely proper. State v. Young, 67 N. J. Law, 223, 51 Atl. 939. Counsel for the plaintiff in error earnestly argues that the jury upon comparing two different statements made by Zeller purporting to give his movements on the evening of the homicide, and by accepting parts of each of the two statements, might have come to the conclusion that Zeller was guilty of murder in the second degree only. The first of these two statements, however, in effect declares that Wheeler and Grigg were solely responsible for the murder, and that Zeller was not present at its occurrence, and had no part in it. The second statement is a plain confession that Wheeler, Grigg, and Zeller went together to the house of the deceased at night and murdered him in the perpetration of a robbery.

The fifth point relied upon is that the trial judge erred in permitting these statements to be introduced as evidence when, as is alleged, the testimony showed that they had been unlawfully and improperly obtained. This point is without substance. There was abundant evidence to show that both statements were entirely voluntary, and the Tomassi, 75 N. J. Law, 739, 69 Atl. 214.

The sixth point is that the indictment was not found by a grand jury of 24 men. The statute (Act June 14, 1898 [P. L. p. 869] \$ 11) requires the sheriff to summon 24 good and lawful men to serve as grand jurors. But it does not require that the entire number of 24 shall serve as such. Indeed, the invariable practice in this state has been. and is, to permit no more than 23 men to be sworn. In this respect we follow the English practice as laid down in 4 Black. Com. 302, and Rex v. Marsh, 6 Ad. & El. 236, 240. The sixth point is therefore without support in the law. But if it were well founded, we do not mean to hold that such an error could be taken advantage of after the defendant has pleaded and gone to trial and been convicted. Rex v. Marsh, just cited, is an authority against the plaintiff in error on this point. And the statute under which the present review is had (Act June 14, 1898 [P. L. p. 915] § 136), provider that no judgment given upon any indictment shall be reversed for any imperfection, omission, defect in, or lack oi, form, or for any error except such as shall or may have prejudiced the defendant in maintaining his defense upon the merits.

The seventh and last point raised in argument is that the cour, permitted the witness Spencer to answer certain leading questions. This objection is entirely without substance: leading questions being always in the discretion of the court.

The judgment under review should be affirmed.

(77 N. J. L. 596)

TITTLEBAUM v. PROGRESSIVE PAPER BOX CO.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

MASTER AND SERVANT (§ 288*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

SERVANT—ASSUMPTION OF KISK.

Where the plaintiff, a boy 15 years of age, employed to adjust a belt from a machine to a revolving shaft, was instructed only as to the method of adjusting the belt to the shaft and the machine, without any reference to the danger incident to the existence of brass hooks in the belt which became worm and sharp by continued belt which became worn and sharp by continued friction, and which while revolving caught the plaintiff's sleeve and injured him, it cannot be said as matter of law that plaintiff assumed such risk as an obvious danger, and that the master was not guilty of negligence. ordered on these grounds set aside.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288,*1

Trenchard, Voorhees, and Gray, JJ., dissenting.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Harry Tittlebaum against the

tion is not reviewable on error. State v. | for defendant, and plaintiff brings error. Reversed.

> Samuel Kalisch, for plaintiff in error. Whitehead & Payne, for defendant in error.

> MINTURN, J. A nonsuit was granted by the trial court in this case upon the grounds that no negligence on the part of the defendant company had been proved, and that plaintiff was guilty of contributory negligence, and upon this direction the writ of error now before us was taken. The plaintiff's case presented the facts that he, a boy of 15 years, had been in the defendant's employ about five months flanging stays upon a small machine, which was not in constant use, and was movable from place to place in the factory. When not in use, it was moved to the wall near a window, and, when in use, it was placed directly under the shafting, so that a belt from the shaft might be attached thereto and the machine thus set in operation. On the 27th of January, 1906, the plaintiff was injured while trying to put on this belt; and he describes the manner of his injury thus: "The machine was near a window so I had to go up on the window in order that I could reach the shaft. So one foot I had on the window, and the other I had on the machine, because I couldn't put it up when I was standing on the window, because I would fall over. I had to keep my balance. I went up and began to put up, and I was caught by one of the hooks there, and I was pulled up, and my arm was crushed." The bel: referred to was of leather made up of three sections, sewed together, and fastened at the end of each seam by two brass hooks; which by constant friction in the revolutions of the belt became worn and sharp. The sharp points thus produced protruded at the time of this accident from the belt and revolving caught the boy's sleeve. He received no warning or instruction from or through defendant of the danger incident to this condition. The extent of his instruction is conveyed by his testimony: "Q. Had there been anything said by anybody with reference to the hooks that had been put in the belt? A. I didn't hear anything. Q. Had any of the bosses told you about the hooks in the belt? A. No one told me. Q. Had any one shown you how to put the belt on the shaft? A. Yes, sir; the boss showed me. He showed me once, and then I put it on the next time."

It further appeared in the testimony that this was plaintiff's first employment in any factory, or upon machinery, and that he entered defendant's employment about two weeks after his arrival in this country. Opposed to the rigid application of the doctrine of assumption o' risk is the exculpatory factor in this case of the minority of this plain-Progressive Paper Box Company. Judgment | tiff. That ipso facto would not exempt him

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

from the general application of the rule; but it has resulted in impressing upon the master as a prerequisite to absolution from the obligation to use reasonable care to safeguard his employes the necessity for 'nowing that the minor was notified of the danger which caused the injury, or was given ample instruction to enable him to comprehend the dangers incident to his employment. Smith v. Erwin, 51 N. J. Law, 508, 18 Atl. 852, 14 'Am. St. Rep. 699; Beckham v. Hillier, 47 N. J. Law, 12; Addicks v. Christoph, 62 N. J. Law, 788, 43 Atl. 196, 72 Am. St. Rep. 687. The case as presented upon this writ is devoid of any testimony upon that question of an affirmatory character in defendant's behalf: while that above quoted 'rom the lips of the plaintiff brings the case within the exception to the general doctrine, and, if uncontroverted, imposes liability upon defendant. It may be said also that the doctrine applied in Burns v. Telegraph Co., 70 N. J. Law, 752, 59 Atl. 220, 592, 67 L. R. A. 956, in the case of an adult may a fortiori be applied here in extenuation of any apparent culpability upon this plaintiff's part. The physical environment might be perfectly apparent to him, but the extent of any inherent latent risk in attempting to execute his work in the midst of revolving danger might not be so apparent to an immature mind. so to speak, engaged in such an occupation, as to warn him of the danger. This doctrine of consciousness of the physical environment, without proof of consciousness of the inherent danger involved in the situation, has received its latest application in this court in Laragay v. East Jersey Pipe Co., 72 Atl. 57, where Mr. Justice Garrison, speaking for the court, says: "In determining whether or not a risk is obvious in a legal sense, the question as to the impression that would be made on the mind of a reasonably prudent man by the congeries of concurrent circumstances is normally one for the jury, and always so when

Whether finally the accident was in any degree the result of plaintiff's negligence presented a jury question. The case in this respect is resolvable under that rule of law applicable in actions of tort, which rests the determination of the controverted questions of fact as to the negligence of the master and the contributing negligence of the servant with the jury. Consolidated Traction Co. v. Reeves, 58 N. J. Law, 575, 84 Atl. 128; Newark Gas Co. v. Block, 55 N. J. Law, 605, 27 Atl. 1067, 22 L. R. A. 874; Laragay v. East Jersey Pipe Co., 72 Atl. 57.

from such circumstances opposite inferences

might in reason be drawn by different minds."

For the reasons above stated, the judgment below is reversed and a venire de novo is awarded.

TRENCHARD, VOORHEES, and GRAY, JJ., dissent.

(77 N. J. L. 766)

HILL V. MAXWELL

(Court of Errors and Appeals of New Jersey. July 2, 1909.)

WITNESSES (§ 345*)—APPEAL AND ERBOR (§ 216*) — CREDIBILITY — INDICTMENT — PRES-

216*) — CREDIBILITY — INDICTMENT — PRESENTATION AND RESERVATION OF GROUNDS OF REVIEW—ADMISSION OF EVIDENCE.

In a civil action for damages for assault and battery, the defendant was asked whether he had been indicted for assault and battery upon the plaintiff, for the particular occurrence that was the subject-matter of the civil suit, and whether he had not pleaded non vult to simple battery under that indictment. Held (1) that the question was proper for the purpose of affecting defendant's credibility; (2) where the court allowed the question upon two grounds, one of which was legal, and the other not, the illegal aspect of the question cannot be taken advantage of upon writ of error, unless the record discloses that the court's attention was diord discloses that the court's attention was directed to the alleged illegality, and request made that the effect of the testimony be limited to its legal use.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1126-1128; Dec. Dig. § 345; Appeal and Error, Cent. Dig. § 632; Dec. Dig. § 216.*]

(Syllabus by the Court.)

Error to Supreme Court.

Action by Ray D. Hill against Robert C. Maxwell. Judgment for plaintiff, and defendant brings error. Affirmed.

John H. Backes, for plaintiff in error. Scott Scammell, for defendant in error.

MINTURN, J. Upon the trial of a civil suit for assault and battery between these parties the attorney for the plaintiff put the following question upon cross-examination to the defendant: "Mr. Maxwell, you were indicted by the grand jury of this county for an assault and battery upon Hill, for the particular occurrence that is the subject-matter of this suit, were you not? and dld you not on March 19, 1908, plead non vult to simple battery under that indictment?" The question was objected to, the objection was overruled, and the court stated: "My judgment is that the testimony is relevant in the suit, and that it is competent as being a declaration of the witness from which it may be argued that'ı statement has been made in contradiction to the one being testified to." The exception brought up by this writ of error is directed to the legality of that ruling. This court, in State v. Henson, 66 N. J. Law. 601, 50 Atl. 468, 616, held that a defendant on trial for a crime, who offers himself as a witness, may be asked on his cross-examination whether he has pleaded non vult contendere to an indictment for petit larceny for the purpose of affecting his credibility. and also that a conviction for assault and battery might be shown for the same purpose; and this result was reached after a most thorough review by Mr. Justice Van Syckle of the history of the evidence act in this state. The first section of that act as it

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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now exists provides that: "No person offered as a witness in any action or proceeding of a civil or criminal nature, shall be excluded by reason of his having been convicted of crime; but such conviction may be shown on the cross-examination of the witness, or by the production of the record thereof, for the purpose of affecting his credit." P. L. 1900, p. 362, \$ 1. In the case at bar, we consider the reasoning applied in the Henson Case equally cogent to admit asking the question in Issue as affecting the defendant's credibility, and upon that ground we deem it admissible under the provisions of the evidence act.

Nor is it material from that point of view that the trial judge expressed an opinion that the question was competent in two aspects of the case, when it was in reality competent in but one; for the reason that, if its competency in either aspect be conceded. its illegal aspect cannot be taken advantage of upon this writ of error, particularly when the only ground of objection urged was that generally of illegality. To test the correctness of the court's ruling as expressed, the attention of the court should have been directed by objection to the specific error complained of, and a request should have been made that the evidential effect of the testimony before the jury should be limited to its use in impeaching the credibility of the witness, and not extended for the purpose of contradicting unything previously estified to by the witness in the criminal case. Whether or not the testimony vas illicit for the latter purpose we do not now decide.

The judgment will be affirmed.

(77 N. J. L. 724)

RUTKOWSKY v. BOZZA.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

1. CONTRACTS (§ 105*)-VALIDITY-USE OF AS-SUMED NAME.

"An act to regulate the use of business names" (Act May 17, 1906 [P. L. p. 513]), making it a misdemeanor to transact business under a fictitious name without filing, in the office of the clerk of the county where the business is transacted, a certificate, as required by the act, does not prevent a plaintiff, transacting business under a name which was not his real name, without having filed the certificate, from recovering on an executed contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 494; Dec. Dig. § 105.*]

2. STATUTES (§ 226*)—CONSTRUCTION—ADOPTION FROM FOREIGN STATE.

The act as adopted in this state being a substantial reproduction of the statutes of New York on the same subject, the interpretation of the act by the courts of that state will be presumed to have been accepted by the Legislature . of this state as indicating its purpose and effect.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 256, 307; Dec. Dig. § 226.*]

(Syllabus by the Court.)

Error to Supreme Court.

Action by Stephen T. Rutowsky, doing business as Stephen T. Kelly, against Michael Bozza. Judgment for plaintiff. Defendant brings error. Affirmed.

G. M. Belfatto, for plaintiff in error. E. Q. Keasbey, for defendant in error.

BERGEN, J. This suit was instituted by the plaintiff to recover the value of certain plaster boards sold and delivered by him to the defendant. The cause was tried at the Essex circuit, where the plaintiff recovered a judgment which the defendant, the plaintiff in error, seeks to reverse.

The first assignment of error argued is that plaintiff was carrying on his business under an assumed name without filing, in the office of the clerk of the county where such business was carried on, the certificate required by the statute of May 17, 1906 (P. L. p. 513), which makes it a misdemeanor for any person or persons to carry on or transact business under an assumed name without filing in the office of the clerk of the county or counties in which such person or persons transact such business a certificate, setting forth the name under which it is transacted. and the "true or real full name or names" of the person or persons conducting or transactng the same, with the post-office address or addresses of the said person or persons. It is admitted that the plaintiff transacted his business with the defendant under the name of Stephen T. Kelly, which was not his real name, and that the certificate required by the act had not been fled. It also appeared that the contract had been executed by the plaintiff by the delivery of the goods sold by him to the defendant.

At the close of the plaintiff's case, there was a motion for nonsuit based upon the sailure to file a certificate, and, this motion being refused, an exception was sealed and error assigned. The act does not make the contract void, but subjects the offender to indictment. It is highly penal, and must be strictly construed. Its manifest intention is to protect persons giving credit to one doing business under a fictitious name, and follows n substance a similar statute of the state of New York, adopted in this state after it had received judicial construction in New York, which it will be presumed was accepted by the Legislature of this state to be the true interpretation of the words of the act so adopted. Fritts v. Kuhl, 41 N. J. Law. 91, 17 Atl. 102; De Raismes v. De Raismes, 70 N. J. Law, 15-18, 56 Atl. 170. In construing the New York act the Court of Appeals of that state in Gay et al. v. Seibold, 97 N. Y. 472, 49 Am. Rep. 533, said: "The purpose of the statute was obviously to protect persons giving credit to the fictitious firm on the faith of the fictitious designation. It could have no other purpose. It was not needed

•For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to protect those who obtained credit from such a firm." This construction being, in our opinion, justified by the very words of the act, supports the presumption that it was the legislative intent to make the statute effective as thus interpreted, and that where, as in this case, goods contracted for have been accepted, and the contract executed by the vendor, the debtor cannot escape payment because the creditor has rendered himself liable to indictment. The motion to non-suit was properly refused.

The next alleged error argued was the refusal to nonsuit upon the ground that the plaintiff had failed to prove an agreement "whereby the plaintiff agreed to sell within a certain time a certain quantity of goods for the price of which the suit was brought." The basis of this assignment of error is that proof of the agreement rested upon a carbon copy of an alleged order, which the court admitted after proof that notice had been given to the defendant to produce the original. As the plaintiff in error has not seen fit to print in the record submitted to the court the copy of the order, we are without any knowledge of its contents, but there was evidence of a sale, delivery, and part payment sufficiently to justify the verdict. The order was admitted as evidence and submitted to the jury, together with proof of delivery and acceptance of the goods, the value of which was the subject-matter of the controversy between these parties, and, as the plaintiff in error has not afforded the court an opportunity to examine the order, we cannot say that the jury were not justified in finding as a fact that its terms had been complied with on the part of the plaintiff.

The other point argued, relating to an alleged misrepresentation as to the character of the goods sold, is not the subject of any exception taken, and therefore cannot be considered.

The judgment below is affirmed, with costs.

(77 N. J. L. 712)

MacLEAR v. MAYOR, ETC., OF CITY OF NEWARK.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

1. MUNICIPAL CORPORATIONS (§ 162*)—CITY ATTORNEY—COMPENSATION.

An ordinance prohibiting a city officer from receiving any compensation except his salary for services rendered to the city will prevent a city attorney from maintaining an action against the city for legal services rendered pursuant to request of a special committee that was empowered by resolution of the city council to employ special counsel.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 360; Dec. Dig. § 162.*]

2. COMPENSATION OF CITY ATTORNEY.
Klemm v. Newark, 61 N. J. Law, 112, 38
Atl. 692, distinguished.
(Syllabus by the Court.)

Error to Supreme Court.

Action by Malcolm MacLear against the Mayor and Common Council of the City of Newark. Judgment for plaintiff, and defendant brings error. Reversed.

Francis Child, Jr., and Herbert Boggs, for plaintiff in error. Franklin W. Fort, for defendant in error.

PARKER, J. The defendant in error, plaintiff below, recovered a judgment of \$1,000 and interest against the city of Newark for services as one of three "special counsel" to a committee appointed to inquire into and report on the legality of a contract of the city with the Delaware, Lackawanna & Western Railroad Company for the elevation of its tracks, and certain other matters connected therewith; and the city brings this writ of error to review that judgment.

At the time of his retainer by the special committee, Mr. MacLear held the office of city attorney of the city of Newark, receiving a salary as such of \$4,000 a year, and his claim was resisted on the grounds, first, that his employment was not made in a manner binding on the city; secondly, that any services which he performed were such as properly would be rendered by virtue of his office as city attorney; and, thirdly, that by city ordinance he was debarred from receiving any compensation, except salary, for any service performed by him.

The material facts are that in December, 1905, the common council passed a resolution providing for the appointment of a special committee for the purposes already mentioned, and purporting to give the committee "the power to employ in its discretion special counsel * * * and that the expenses of said investigation shall not exceed six thousand dollars." The committee met and appointed two outside counsel (whose bills were afterwards paid) and plaintiff. An identical resolution was passed on January 5, 1906, the term of the first committee having expired with that of the council on December 31st, and a new committee was appointed, who designated the same counsel. Neither resolution was ever approved by the mayor or passed over his veto. as required by section 30 of the city charter; but on December 1, 1905, a resolution was passed appropriating a sum not to exceed \$1,000 for the purpose of investigation, and on January 5, 1906, a similar resolution was passed appropriating \$5,000 more. Both these last resolutions were approved by the mayor. Motion to nonsuit was made on the first two grounds above mentioned, and motion to direct a verdict on all three grounds. These motions were denied, and the case submitted to the jury, which found for the plaintiff in the full amount of his claim.

Several interesting questions are raised on this writ of error: First, whether plain-

effor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1997 to date; & Reporter Indexes

tiff, being already city attorney, could be a | at the same time certain moneys were by "special counsel" within the meaning of the resolution; secondly, whether the services performed by plaintiff were wholly or partly outside the scope of his regular duties as city attorney, and so not within the rule in Evans v. Trenton, 24 N. J. Law, 764; thirdly, whether the acceptance of plaintiff's services and the payment of the other two counsel would amount to such a ratification by the city authorities as to bring the claim within the rule in N. J. Car Spring & Rubber Co. v. Jersey City, 64 N. J. Law, 544, 46 Atl. 649. We find it unnecessary to decide any of these points for the reason that we consider the plaintiff's claim barred by the ordinance introduced in evidence, and which reads as follows: "Section 10. No city officer shall be interested in any contract with the city, or in compensation for work done for, or materials or supplies furnished to the city, or to any contractor, or other person furnishing the same to the city, nor shall he participate in any profits with such contractor or other person or receive any compensation, commission, gift or other reward for his services, except the salary or fees established by law, or by ordinance or resolution of the common council." This ordinance, which had been continuously in force from a time prior to plaintiff's employment up to the trial, makes no discrimination between services within and without the scope of employment of a city officer, but applies to all alike; and, unless invalid or repealed, effectually disposes of the claim under consideration. Its validity is not attacked, but it is argued that the case of Klemm v. Newark. 61 N. J. Law, 112, 38 Atl. 692, justifies a recovery under the circumstances of this case notwithstanding the ordinance. That decision is not binding on this court, but if it were, it would not control this case. declaration in Klemm v. Newark set up services performed by plaintiff as an architect in designing two engine houses for the city "at its request." The plea alleged that plaintiff at the time of performing the services was a school commissioner, and that his claim was barred by the ordinance. On demurrer to the plea, the court held that the words "at its request" contained in the declaration and admitted by the plea implied a contract by the city itself with one of its officers for work manifestly outside the line of his official duty, which amounted to a suspension pro tanto of the ordinance, and, when it had been performed by the other party, the city would not be permitted to repudiate it. The opinion expressly distinguishes the case from one in which the contract is made with a city officer by a board or committee, as in the case at bar. All that appears in this case is that, by resolution not approved by the mayor, the committee was authorized to employ special counsel; that given a bond, which was subsequently as-

resolutions which were so approved appropriated to pay expenses of the investigation; that the committee requested plaintiff to do certain work as counsel, and that he did it. There is nothing in any of the resolutions to indicate that the employment of a city official was contemplated by the council, or that any repeal of the ordinance or action inconsistent therewith was intended.

The court was requested to direct a verdict for defendant on the ground that this ordinance prohibited plaintiff as a city officer from receiving any compensation beside his salary for the services rendered, except as provided in the ordinance, and that plaintiff was not within the exception, and was requested to charge that, under section 10 of the ordinances, plaintiff had no right to compensation beyond his salary, and could not recover in the suit. Verdict should have been directed accordingly, or the jury instructed in accordance with the request stated, which would amount to a direction.

The judgment will be reversed, and a venire de novo ordered.

(77 N. J. L. 787)

BURLINGTON COUNTY RY. CO. V. NEW JERSEY RAPID TRANSIT CO.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

INDEMNITY (§ 9°) — CONSTRUCTION — OPERA-TION OF CONTRACT.

The plaintiff, assignor, having procured

The plaintiff, assignor, having procured consents, ordinances, and permissions for the building of a trolley railway, sold them, and as part consideration took a bond from the vendee conditioned to indemnify it against loss or claim of any character "emanating from or arising under or in connection with or by reason of said ordinances," etc., "at any time hereafter." Held, that the bond only indemnified against losses arising after it was given, and that the obligor was not bound for debts of the vendor incurred in obtaining the consents and ordinances transferred.

[Ed. Note.—For other cases see Indemnity.

[Ed. Note.—For other cases, see Indemnity, Dec. Dig. \$ 9.*]

Swayze, Trenchard, Voorhees, Minturn, and Rogert, JJ., dissenting.

(Syllabus by the Court.)

Error to Supreme Court.

Action by the Burlington County Railway Company against the New Jersey Rapid Transit Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Carrow & Kraft, for plaintiff in error. Grey & Archer, for defendant in error.

BERGEN, J. The People's Traction Company, having obtained certain ordinances and grants for permission to construct trolley railways in the counties of Cape May and Cumberland, in this state, sold them to the defendant, and in part consideration was

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

signed to the plaintiff. The sufficiency of such assignment with the right of the plaintiff to enforce its conditions is not questioned. After the delivery of the bond, suits were brought against the plaintiff by persons who had rendered services to the People's Traction Company in procuring the consents, permissions, and ordinances which that company had sold to the defendant. These suits were unsuccessfully defended, and the plaintiff compelled to pay the claims sued for, in which defense counsel fees to a moderate amount were expended. The present action was instituted on the bond of the defendant to recover the amounts paid for such services and counsel fees. It was admitted that the services relating to the consents and ordinances were performed before the execution of the bond and the transfer of the consents and ordinances to the defendant.

At the close of the plaintiff's case, the trial court directed a verdict for defendant, which order is the error assigned in support of this writ. The bond upon which plaintiff's action is based, after reciting that certain "locations of rights of way and proposed new lines of railway and ordinances" had been taken out in the name of the People's Traction Company, contained a condition that, if the defendant should indemnify the obligee "against all and every loss or claim through or by reason of any unpaid bills, charges, expenses or claims of any character emanating from or arising under or in connection with or by reason of said ordinances, grants, locations, permissions, consents or permits, at any time hereafter," then the obligation was to be void. The present controversy is confined to the effect to be given to the words "at any time hereafter." The claim of the plaintiff is that these words refer to unpaid bills which had been overlooked, disputed, or not presented, of which the claims it had been required to pay were a part. To accede to this would require us to hold that the words were intended to refer to time of payment, because debts in existence could not arise "at any time hereafter." nor could the plaintiff thereafter incur obligations relating to the subject-matter of the bond, for the consents and ordinances had passed to the defendant. We think that the claims indemnlfled were those which might thereafter arise "under or in connection with or by reason of" the property conveyed. Nearly all such consents, permissions, and ordinances impose some duty or obligation to be performed in the future by the holder thereof, of which the payment of an annual license fee is an illustration, and it was against claims of this character that indemnity was given.

The trial judge committed no error, and the judgment should be affirmed, with costs.

SWAYZE, TRENCHARD, VOORHEES, MINTURN, and BOGERT, JJ., dissent.

(75 N. J. B. 576) ROBERTS v. TOMPKINS. (two cases.) SCHOFF v. SAME.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

1. Deeds (§ 70°) - Validity - Fraudulent Representations-False Impression.

REPRESENTATIONS—F'ALSE IMPRESSION.
Defendant obtained from complainants.
without payment or consideration, deeds of
their interests in real estate worth about \$11,000, over the mortgages thereon, by leading
complainants to believe that he was morally the
owner under a will not published or witnessed,
that their interests were of nominal value, and
in one case that the "equity was small." Held
that, even if there were no statement of anything false as being true, defendant knowingly thing false as being true, defendant knowingly took advantage of a false impression created by what he had said, and was thereby guilty of false representation for which the deeds could be set aside.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 176-182; Dec. Dig. § 70.*]

2. FORMER DECISION FOLLOWED.

Lomerson v. Johnston, 47 N. J. Eq. 812, 20 Atl. 675, 24 Am. St. Rep. 410, followed. 8. ACTION (§ 7*)—DEFENSES—MOTIVE IN SU-

ING.

If a party is enforcing a legal right in a legal manner, the reasons for his so doing are immaterial.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 8; Dec. Dig. § 7.*] (Syllabus by the Court.)

Appeal from Court of Chancery.

Separate bills by Orlando L. S. Roberts, John S. Roberts, and Emily R. Schoff against John P. Tompkins. There was in each case a decree for complainant, and defendant appeals. Affirmed.

Thompson & Cole, for appellant. Ulysses G. Styron, for respondents.

PARKER, J. These three suits are on the same lines as the case of Ricketts v. Tompkins (N. J. Ch.) 68 Atl. 1075. The bills were filed to set aside, as obtained by fraud of defendant, deeds made to him by various parties, claiming by descent undivided interests in real estate at Atlantic City, the title to which, subject to two mortgages aggregating \$2,500, stood, at the time of her death, in one Annie N. Roberts. She died unmarried and intestate, leaving as her heirs at law three surviving sisters, of whom one afterwards died unmarried and intestate, and another is the mother of the defendant, and also a number of nephews and nieces, including the complainant in Ricketts v. Tompkins, and the three complainants in the cases at bar. As will appear by the reported opinion in the Ricketts Case, Miss Annie Roberts left a penciled writing purporting to be a testamentary disposition of her property, giving it all to the defendant. This paper was signed, but not witnessed or published, and was therefore worthless as a will. Annie N. Roberts died on January 3, 1896. On the 16th Caroline Roberts, one of the surviving sisters, quitclaimed all her interest in the prop-

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

erty to Mrs. Tompkins, defendant's mother; matters had been correctly represented to and by deed dated January 27, 1896, acknowledged on the 29th, the latter made her deed purporting to convey the whole premises to the defendant.

It would appear that defendant believed himself to have taken by this deed a complete title, on the theory that the nephews and nieces did not inherit any interest therein; for he occupied it for about 10 years, and in March, 1906, apparently in entire good faith, he contracted to convey a clear title for \$13,-500. The purchaser applied to a title company for a guaranty of title, and, being advised in due course of the outstanding interests, notified defendant who then consulted his own counsel, and was advised that he owned only two-fifths undivided interest in the property, and that a complete title could be acquired only by deeds from the other heirs, or by obtaining control of the outstanding mortgages and foreclosing them. He seems to have taken both courses. The mortgages were assigned to one Faunce, and promptly foreclosed by him as trustee for defendant. The bill to foreclose was filed on June 11, 1906, and the sheriff's sale took place on October 27th of the same year. To this foreclosure the three complainants respondents were not made parties, because before the bill was filed the defendant had visited them all, and obtained the deeds which they, respectively, seek to set aside as procured by fraud and misrepresentation of the facts.

No consideration whatever was paid to any of the complainants, nor was any one of them under obligations to the defendant. The value of the property is sufficiently indicated by the price named in the agreement, \$13,500, deducting from which the mortgage incumbrance leaves an equity of about \$11,-000. The share of Orlando L. S. Roberts in this equity was one undivided fifteenth, and of John S. Roberts and Mrs. Schoff each onetwentieth. It is therefore apparent that each one parted with a valuable interest for nothing. Each complainant swore positively that he (or she) was not aware, at the time of signing the deed, that he (or she) had any interest in the property that represented Without quoting the testidefinite value. mony, or going into particular detail, the representations made by defendant were such as to lead the complainants to believe defendant to be the rightful owner of the whole, that their signatures were a matter of form, to enable him to get over some technical objection of counsel advising the purchaser, and that by signing they parted with nothing of material value. As Orlando Roberts put it, he inferred that the interest was so small that it was not worth while making an enemy of Tompkins by refusing his signature. Inasmuch as Orlando was a pensioner at a sailors' home, to whom such a sum as \$500 was a matter of great moment, it is readily

him. To Mrs. Schoff and John S. Roberts the defendant made further representations about the testamentary paper, which he called a will, and said it was unavailable because of a "technicality," meaning, but not stating, that it was not published nor witnessed. He had the "will" in his pocket, but did not show it to any of the parties. In this aspect the case somewhat resembles Broderick v. Broderick, 1 Peere Williams, 239. To John S. Roberts he also spoke of the equity being small. If he said nothing about a "will" to Orlando, he substituted the inducement that all the other heirs had signed away their interests, as indeed they had, but certainly, so far as John S. Roberts and Mrs. Schoff were concerned, and also Helen R. Ricketts, under the influence of these very representations from Tompkins.

It is urged for the appellant that no statement made by him was materially false, and that the complainants are driven to charges of suppressio veri which are not contained in their bills. We do not agree with this view, but if it were true that no absolutely false statement was made, the case would still fall within the rule in Lomerson v. Johnston, 47 N. J. Eq. 812, 20 Atl. 675, 24 Am. St. Rep. 410, where it was said: "In order to establish a case of false representation it is not necessary that something which is false, should have been stated as if it were true. If the presentation of that which is true creates an impression which is false, it is, as to him who, seeing the impression, seeks to profit by it, a case of false representation." See, also, 20 Cyc. pp. 23, 24. There can be no doubt that the several complainants derived a false impression of their rights from what defendant told them, and that he intended that they should, or at least saw that false impression, and undertook to profit by it.

Two minor points are made. Defendant produces an agreement of sale of this property between a former owner and defendant's mother, Hannah Tompkins, and asserts that the original conveyance to Annie N. Roberts was in execution of that agreement; that the purchase money was supplied by Hannah Tompkins, who was therefore equitably owner by virtue of a resulting trust, and claims that because of these circumstances his representation that he was morally the owner of the property was justified. This claim was not opened to the court until the day of final hearing, at which time the court and counsel came to an understanding that it was properly the subject of a cross-bill. Some evidence was taken to show that Annie N. Roberts had no means, and was dependent for her support on defendant and his mother: and the old agreement was introduced in evidence. The court allowed defendant 20 days to file a cross-bill, but none was filed. Hence the direct attack on complainants' tiinferable that he would not have signed if the may be considered as abandoned, and it is a legitimate inference that defendant does not seriously rely on this feature of his defence. In any event, complainants had a legal title, and presumptively the equitable interest was joined thereto; and it cannot be said that a claim of this kind justified defendant in telling them that their interest was in effect nominal.

Criticism is also made of the conduct of complainants' solicitor in stirring up the litigation by alleged misrepresentation of some testimony given by defendant, to the effect that Annie N. Roberts left no will, and that thereby-complainants became unfairly prejudiced against defendant. Without passing on the merits of this issue, it is sufficient to say that, as complainants had an equitable right which they have enforced in a manner authorized by law, their motives and the underlying causes for their action are quite immaterial. Davis v. Flagg, 35 N. J. Eq. 491.

The decrees appealed from will be affirmed, with costs.

(77 N. J. L. 744)

MIKULA v. DELAWARE, L. & W. R. CO. (Court of Errors and Appeals of New Jersey. June 14, 1909.)

MASTEE AND SERVANT (§§ 217, 265, 286*)—INJURIES TO SERVANT—INSPECTION—QUESTIONS FOR JURY—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

A plaintiff, while engaged as a laborer in a tunnel which was being excavated through solid rock by means of blasting, was injured in said tunnel after a blast, by the falling of a stone from the roof hitting him upon the head. It was proved that an inspection of the tunnel had been made according to approved methods. The plaintiff testified in his own behalf that, after being ordered out of the tunnel preparatory to the firing of the blast, the foreman after the blast—but how long after he could not tell; it might be five minutes—ordered all back to work. That he stayed out maybe 10 minutes and maybe more; he could not tell. That the drillers charged with making the inspection went in first, and he and his fellow workmen followed them. There was also evidence that such inspections would occupy from 10 to 40 minutes; that a big blast might take half an hour, but the usual blast 10 to 15 minutes. Held, that the mere falling of the stone after inspection was not proof of negligence, that the inference of improper inspection did not arise from the indefinite evidence of the plaintiff as to the time he was out of the tunnel to make it a jury question, and that if the plaintiff returned into the tunnel immediately following those charged with the inspection, he must either have assumed the risk of danger without an inspection, or by his negligence in entering too soon to have contributed to the injury; it being shown that he had been for six months in the employment of the defendant performing the same kind of work, and that a direction of a verdict for the defendant was proper.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 591, 881, 1026; Dec. Dig. §§ 217, 265, 286.*]

Garrison, Trenchard, Parker, Vredenburgh, and Vroom, JJ., dissenting.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Wasyl Mikula against the Delaware, Lackawanna & Western Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Herbert Clark Gilson, for plaintiff in error. M. M. Stallman and Wm. D. Edwards, for defendant in error.

VOORHEES, J. This action was brought in the Supreme Court to recover for injuries to plaintiff while in defendant's employ. A verdict was directed for the defendant. The plaintiff brings error.

The defendant was engaged in the construction of a railroad tunnel through Bergen Hill. The plaintiff, 45 years old, had been employed there as a laborer for about five months. The tunnel was excavated mainly through solid rock, by means of blasting. The duty of the plaintiff was to load upon cars the stone which had been thrown out by the blasts. When a blast was about to be fired, the workmen were notified and went out of the tunnel. After a blast it was the custom of the foreman and drill runners to enter the tunnel and make an inspection of the sides and roof to see if any rocks or stones remained in place, but had been loosened and had become dangerous and likely to fall, and to bar down any rock so loosened. The method of inspection was to strike the sides and roof with tamping bars; the sound thus produced indicating whether the portions of rock so struck had become loose. The accident in which the plaintiff was injured is described by him, and he is the only witness, as follows: He and his fellow workmen had withdrawn from the tunnel preparatory to the firing of a blast. After the blast-how long after he cannot tell, maybe five minutes—the foreman ordered all back to work. He stayed outside maybe 10 minutes, maybe more; he cannot tell. The foreman went in, and the drillers followed. Inside of a minute all went back. The drillers went in first, and the plaintiff and his fellow workmen followed them. As soon as the explosion occurred, the foreman ordered the drillmen back, and all the men followed. The plaintiff says he was injured at 3 o'clock p. m. While he was piling up stones on cars, a couple of stones fell in front of him, and one on his head. There was an inspection of the tunnel after the blast had been fired. There was no direct evidence on the part of the plaintiff to show that this inspection was not carefully made, but it was argued that his testimony that he was ordered back by the foreman perhaps 5 minutes after the explosion, but cannot tell how long it was, and that he stayed outside maybe 10 minutes, maybe more, but cannot tell how long, is sufficient to raise a jury question whether a proper inspection could

be made in that time. The plaintiff produced two witnesses who describe the usual method of inspection, which agrees substantially with the method actually used. They both agree that an inspection would occupy from 10 to 40 minutes. One says after a big blast it might take a half hour but of the usual blast 10 to 15 minutes would be sufficient. This same witness says that there are more or less small loose pieces left even after the tamping.

It is further asserted that the fall of the stones indicates that the defendant did not use due care to provide a safe place to work in, and also, together with plaintiff's evidence above referred to, shows that the inspection was not properly made. The rule of law requires such inspection as ordinary prudence dictates by the use of practical tests known to the master, or so commonly used for the purpose that he might be presumed to have knowledge of them. Atz v. Manufacturing Co., 59 N. J. Law, 41, 34 Atl. 980; McGrath v. D. L. & W., 69 N. J. Law, 331, 55 Atl. 242; Randolph v. N. Y. C. & H. R. R., 69 N. J. Law, 420, 55 Atl. 240. The proof is uncontradicted that the defendant had a complete scheme of inspection, which in this instance was carried out by means of the foreman and some eight drill runners, not only as to the part of the tunnel within the influence of the blast, but it also showed that the walls and roof at the particular place where plaintiff's accident occurred had been inspected, and that such inspection revealed no loose stone. spection occupied from 40 to 50 minutes. It is not contradicted that the proper method of inspection was used, and was the one in general use. Both sides concede this. The mere falling of the stone does not prove negligence, especially when the witnesses admit, and common experience indicates, that inspection cannot be infallible. The place of work was one of inherent danger. We cannot infer that the master's inspection was improper from the indefinite evidence given by the plaintiff as to the time he was out of the tunnel. To allow a jury to consider it for that purpose would be granting them permission to find a verdict upon mere conjecture and speculation. The blast occurred at 2:34, and plaintiff fixes time of accident right after 3 o'clock. He does not say that he actually went to his work at the place where the accident occurred at the time that the laborers followed the drillmen in. The testimony on the part of the defendant uncontroverted is that the laborers did not come into the place of inspection until after the process of barring down had been completed, but were working out toward the portal where it was safe. The loose stone, if there was one, was not discovered by the

nary use, and such as the law required the master to make. The master is not liable for injury occurring from a defect not disclosed by such inspection. Atz v. Manufacturing Co., supra. The motion to direct a verdict was made upon the grounds that the defendant had made a proper inspection, which has been considered, and also that the plaintiff by his negligence contributed to the accident.

The drillers whose duty it was to inspect were ordered in after the explosion. There is no testimony that the laborers were so ordered in immediately after the explosion. The only testimony on the subject is that of the plaintiff to this effect, through an interpreter: "Q. Then after the blast did he [plaintiff] go in again? A. The foreman ordered all back to work. Q. How long after the explosion did the foreman order him [plaintiff] to go back? A. I can't tell. Q. Was it a minute or half an hour? A. Maybe 5 minutes. Q. I want to know whether anybody went in * * * and inspected the tunnel while he [plaintiff] was waiting around outside after the biast. A. He says the foreman went in, and the men followed him in. The people that drilled the hole went in there first. Q. How long before the foreman? A. Inside of a minute all went back." And on cross-examination: "Q. Then after this smoke got out, the drill runners went into the tunnel—the drillmen that make the holes? .A. They went in first, and we followed them. Q. Well how long after the drillmen went in did the plaintiff follow them in? A. All workmen went in together right after, following the drillers. Q. Did you always do that all the time you worked there? A. As soon as the explosion the foreman ordered the drillmen, and all the men followed right back to work." It thus appeared that orders to go in were given to the drillers immediately after the explosion, and the laborers followed right after the drillers without orders. If the plaintiff went back to the place where he was injured as soon as he says he did, he failed to give the defendant a reasonable time to inspect, and must be said either to have assumed the risk of danger without an inspection, or by his negligence in entering too soon to have contributed to the injury. He must be presumed, after six months' experience in this employment at the same place, performing the same kind of work, to know that inspections took place after every blast; that they were intended to secure safety for the men; that they were made by the drillmen, and what was the approximate length of time required for their completion.

The judgment must be affirmed.

if there was one, was not discovered by the GARRISON, TRENCHARD, PARKER, inspection, which was the method in ordi-VREDENBURGH, and VROOM, JJ., dissent.

(77 N. J. L. 551)

VAN NESS v. NORTH JERSEY ST. RY. CO. (Court of Errors and Appeals of New Jersey.

June 14, 1909.)

1. STREET RAILEOADS (§ 117°)—INJURIES TO PERSON ON TRACK.

Plaintiff's intestate, while crossing a trolley track at a crosswalk on foot, was struck and killed by a trolley car. Evidence given during the course of the trial justified the inference that deceased and the motorman saw each other; that deceased stopped before going on the track and the motorman applied the brake and reduced the speed of the car, and, then observing that deceased had halted, released the brake and applied the power just as deceased, who had observed the reduced speed of the car, again started to cross. Hels, following Van Cott v. Railway Co., 72 N. J. Law, 229, 62 Atl. 407, that the questions of negligence of deceased were both properly submitted to the jury.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 117.*]

2. APPEAL AND ERBOR (§ 1061*)—HARMLESS ERBOR.

Error in refusing to nonsult at the close of plaintiff's case for lack of proof is rendered harmless when such proofs are afterwards supplied during the trial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1061.*]

(Syllabus by the Court.)

Error to Supreme Court.

Action by Matilda L. Van Ness, administratrix, against the North Jersey Street Railway Company. Judgment for plaintiff (75 N. J. Law, 273, 67 Atl. 1027), and defendant brings error. Reversed.

Edward Kenny, for plaintiff in error. Leonard J. Tynan, for defendant in error.

PARKER, J. If it were conclusively shown that the accident that caused the death of plaintiff's intestate took place in the manner and under the circumstances set forth in the opinion of the Supreme Court, we should in all probability concur in the finding of that court. A careful examination of the evidence, however, satisfies us that the Supreme Court erred in holding that the plaintiff's presentation of the case was not helped by any evidence given for the defendant. The plaintiff's evidence indicated that the deceased, while attempting to cross the street on a crosswalk, was prevented from doing so by a car going northwardly on the nearer track, and had to wait until it had passed, and, without paying any attention to a southbound car on the further track, or being unaware of its approach, stepped across the nearer track, and directly in front of the south-bound car. This state of facts would probably bring the case within the lines of Eagan v. Jersey City, H. & P. Street Railway Co., 74 N. J. Law, 699, 67 Atl. 24, 11 L. R. A. (N. S.) 1058; Shuler v. North Jersey Street Railway, 75 N. J. Law, 824, 69 Atl. 180; Hageman v. Same, 74 N. J. Law, 279, 65 Atl. 834, cited in the opinion below, and since af-

firmed in this court, 75 N. J. Law. 939, 70 Atl. 1101. Even on the plaintiff's case, however, we think the Supreme Court assumed one fact as conclusively shown as to which there was at least a substantial dispute. The opinion stated that the accident occurred about 7:30 p. m., when it was yet quite light. One witness, Carnelli, testified for plaintiff that it was between 8 and half-past 8. Winant, a cabman, who saw the man being dragged under the car, testified that he was on his way to the Central Railroad Station just below to answer a call for 8:30, and, as he did not have much time, had sent his partner ahead to get the call, while he took the blanket off his horse. If, as the jury might well have found in view of this evidence, the hour was nearly 8:30 p. m., it is plain that it could not have been so light as was assumed by the court below; and if, by reason of the dusk, the car was not so plainly visible, it may have been a jury question as to whether the deceased saw it or ought to have seen it in season to avoid the accident.

But it is unnecessary to dwell on this aspect of the case, because in our judgment the evidence for the defendant cured the error, if there was error, in the trial court's refusal to nonsuit, and justified a submission of the case to the jury. On that evidence there were two theories open to the jury-one, that the deceased waited until the north-bound car passed him, and then undertook to cross the track when the south-bound car was about 50 feet away, going about 6 miles an hour. This was the testimony of the witness Niedemeier and of the witness Tracy, except as to the distance of the car, to which Tracy did not testify. The other theory is that arising from the motorman's testimony that the north-bound car had not passed at all before the accident, but that the car which struck deceased was in plain sight, that deceased evidently saw it while standing on the north-bound track, and, while the northbound car was also approaching him, undertook to exercise his judgment as to crossing in front of the south-bound car. It may be that the motorman was right as to the northbound car. It may be that he confused it with another car that followed, for cars are very frequent at that point, but all the defendant's testimony points to the inference that Van Ness did see the car that struck him; that he halted as if to let it go by, and at about the same instant the motorman applied his brake, and, then seeing Van Ness, standing, released it and put on his power again just as deceased, apparently having observed the slowing of the car, started again to cross in front of it, and was caught because the car took on increased speed instead of continuing to slow up. Samuel Kalisch who was inside the car, testified to a burst of speed. The conductor said the car slacked, and he thought a wagon was in the way,

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and looked out for one, then heard the brake! ratchet, and noticed a little burst of speed, and then the car came to a stop. The motorman and Tracy both testified on direct examination that deceased stopped on the north-bound track and the car slowed up, and then the car started ahead again before deceased attempted to cross. Examined by the court, the motorman testified further as "Q. You say that this man that follows: was crossing the street stopped and looked at you? A. Yes, sir. Q. Where was he when he stopped and looked at you? A. He was on the rail. Q. On what rail? A. I was on two over here, and he was on this third one [indicating]. Q. He was on the rail of the north-bound track that was nearest to your track? A. Nearest to my car; yes, sir. Q. And then what did he or you do next? A. What did he do next after he stood? Q. Or what did you do—what next happened? When I seen him stand, then I started. I was winding the brake when he was crossing, and I saw he was standing, and I thought it would be all right. Q. When you saw him stand, what did you do? A. Then I started to feed the car up again. I thought he would stand there. Q. You mean you gave it more speed? A. More power. I had shut off entirely at that time, and when I seen him standing, I fed the car up. Q. As you gave the car more speed and went on, what did he do? A. He stepped right in front of me. He made about two or three steps, right in the middle. Q. And where did he get to? He got right in the middle of the car, right in the middle of the fender." Tracy also modified his testimony on cross-examination: "Q. You saw him stop for one car to pass? A. Yes, sir. Q. And then what else? Well, he kind of stopped, and then the motorman slacked up, you know, and he started over in front of the car. Q. As he was coming over the car that hit him stopped, did it? A. It didn't exactly stop. It slacked up. Q. Slacked up? A. Yes, sir. Q. Slacked up right there, and then the man went on? Yes, sir. Q. And then the car hit him? Yes, sir."

From this testimony it is a fair inference that deceased, led by the action of the motorman in slackening speed to believe that he was to be allowed to cross, attempted to do so before speed was again put on. It was for the jury to say which version they believed. Hayward v. North Jersey S. R. Co., 74 N. J. Law, 678, 65 Atl. 737, 8 L. R. A. (N. S.) 1062. But, even if deceased did not start until just after the power was applied, the court would not be justified in nonsuiting for contributory negligence. We are unable to distinguish the case in this aspect, either in principle or in material facts, from Van Cott v. North Jersey Street Rallway Co., 72 N. J. Law, 229, 62 Atl. 407, decided by this court, in which it appeared that plaintiff stopped the County of Hudson. Writ refused.

at the sounding of the bell, the car slackened and then increased its speed, and plaintiff then started forward again. Plaintiff was a minor, but this fact is not adverted to in the opinion as bearing on the question of contributory negligence. A similar state of facts, except that plaintiff was driving a horse and wagon, was considered in Weinberger v. North Jersey Street Railway Co., 73 N. J. Law, 694, 64 Atl. 1059, also decided in this court, in which the Van Cott Case was cited and approved. We think the evidence above quoted justified the jury in drawing inferences similar to those stated in the opinion in the Van Oott Case, pages 230, 231, of 72 N. J. Law, pages 407, 408, of 62 Atl., and that the negligence of the motorman and of the deceased were both questions for the jury. In that case, as in this, the evidence to support the witnesses came into the case after a motion to nonsuit; and the rule there applied is applicable here. Bostwick v. Willett, 72 N. J. Law, 21, 60 Atl. 398.

The fact, if it was a fact, that the northbound car had not passed at the time of the accident, would make no difference in this result. If it was approaching, it was still too far away to require any inference of negligence in law to be drawn from the act of deceased in standing on the track in front of it; for, according to the motorman's testimony, the fenders of the two cars were together when he stopped, and all the proof showed that the car had gone from the First Church crossing where the accident occurred to a point in front of a restaurant, some 75 to 100 feet away, before stopping, and at the time of the accident the north-bound car must have been much further away.

The case was submitted to the jury under general instructions appropriate to this state of facts. This submission under the circumstances was proper.

The judgment of the Supreme Court reversing that of the circuit court will be reversed, and the judgment of the circuit court affirmed.

(78 N. J. L. 94)

ARBUCKLE v. KELLY, Sheriff, et al. (Supreme Court of New Jersey. July 6, 1909.)

PRISONS (§ 7*)—HEAD KEEPER OF COMMON JAIL—DISMISSAL.

The head keeper of the common jail of Hudson county holds his position under the sheriff, and not under the government of the county, and his position is not protected by Act March 27, 1907 (P. L. p. 37).

IEd Note—For other cases see Prisons Dec.

[Ed. Note.—For other cases, see Prisons, Dec. Dig. § 7.*]

(Syllabus by the Court.)

Rule to show cause, on the relation of John M. Arbuckle, why writ of mandamus should not issue to James J. Kelly, Sheriff, and the Board of Chosen Freeholders, of

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Argued February term, 1909, before REED, TRENCHARD, and MINTURN, JJ. Melosh & Morton, for relator. John Griffin, for defendants.

REED, J. The relator, John M. Arbuckle, on August 15, 1908, was appointed head keeper of the county jail of Hudson county by former Sheriff John C. Kaiser, and his salary was approved by the board of chosen freeholders of Hudson county under section 4 of the act placing sheriffs on a salary (Act Feb. 21, 1905 [P. L. p. 19]). Upon the expiration of Sheriff Kaiser's term, he was succeeded by James B. Kelly. Sheriff Kelly failed to reappoint Arbuckle to his position of head keeper, and has entirely ignored him in connection with that position. Mr. Arbuckle claims that he is protected in the position to which he was appointed by Sheriff Kaiser by Act March 27, 1907 (P. L. p. 37). and seeks in this proceeding to compel a restoration or recognition by the sheriff and board of chosen freeholders as still the head keeper of the common jail.

The act of 1907 enacts that: "No person now holding a position or office under the government • • • of any county, city, town, township or other municipality of this state, or who may be appointed to any such position, whose term of office is not now fixed by law, and receiving a salary from such county, city, town, township or other municipality, who is a soldier, sailor or marine. who has served in any war of the United States and has been honorably discharged from the United States service, shall be removed from such position or office except for good cause shown after a fair and impartial hearing." It is admitted that Mr. Arbuckle served as a soldier in the Spanish-American War, and was honorably discharged from the federal service, and so far is entitled to the benefits of the act of 1907. The question is whether he held a position or office under the government of the county of Hudson, in the state of New Jersey, the term of which was not fixed by law.

I think it cannot be doubted that, under the fee system which prevailed before sheriffs were put upon a salary, the keepers of the common jails appointed by the sheriffs were not persons holding positions under the board of chosen freeholders, or under the government of any municipality. sheriff is a constitutional officer, and to his office is attached all the substantial powers, duties, and functions which appertained to that office before the adoption of our Con-Virtue v. Freeholders of Essex. 67 N. J. Law, 139-144. 50 Atl. 360. Not only was the sheriff at common law the custodian of the common jail, but upon him rested the duty and the power of employing the keeper or keepers of such jail. He must appoint an underkeeper, who is called a jail-

er, for whose conduct in office the sheriff in, JJ.

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if the jailer refuse to surrender up or quit possession, the sheriff may take him out by force, as he may a private person. Bac. Abr.

swer, and the jail being put in his custody, the sheriff was answerable for the escapes, where the jail belonged to him. Rex v. Fell, 12 Mod. 226. So it seems clear that the head keeper of a common jail, appointed by the sheriff, held his position under the sheriff, and not under the government of the county.

Nor was this relation between the sheriff and such appointee changed by Salary Act Feb. 21, 1905 (P. L. p. 18). The only change made by that act was that, instead of the sheriff being paid for his services by statutory fees paid to him for each service, these fees were turned over by him to the county. and the county became his paymaster. The sheriff was still, in the language of section 4 of the act of 1905, to select and employ the necessary deputies and assistants for his office, and the county was to pay them such compensation as it approved. The appointment of head keeper still rested with the sheriff. The Legislature never intended by the act of 1905 that the sheriff should be responsible for the conduct of any servant not of his own selection. After, as before, the passage of the act of 1905, the keeper of the common jail was the appointee of the sheriff, and did not hold his position under the board of chosen freeholders.

The case of Cavenaugh v. Freeholders of Essex, 58 N. J. Law, 531, 33 Atl. 943, is not controlling. That case was decided upon the assumption that the board of chosen freeholders of Essex was the custodian of the jail, and that Cavenaugh was its appointee. The decision of Virtue v. Freeholders of Essex, supra, destroyed the foundation upon which the result in the Cavenaugh Case was reached, and the latter case is not applicable.

I am therefore of the opinion that the act of 1907 is not applicable to the situation presented by the testimony taken upon the rule to show cause.

The allowance of the writ prayed for should be refused.

(77 N. J. L. 575)

ESSEX COUNTY PARK COMMISSION v. TOWN OF WEST ORANGE et al.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

1. Taxation (§ 173*)—Public Lands—Statutory Provisions.

The supplement to the general tax act of April 8, 1903 (P. L. p. 394), approved April 20, 1906 (P. L. p. 273), deals with taxation, and in terms imposes taxes upon certain public

[•]For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

lands, and must be considered as imposing a in terms imposes taxes upon certain public

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 173.*]

2. Taxation (§ 42*)—Classification—Stat-utory Provisions.

The supplement to the tax act (Act April 20, 1906 [P. L. p. 273]) attempts to classify lands of counties and taxing districts for the purpose of taxation by reference to the location of such lands. *Held*, that such classification is in contravention of the Constitution.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 90; Dec. Dig. § 42.*]

3. STATUTES (\$ 95*)—GENERAL AND SPECIAL

The supplement to the tax act (Act April 20, 1906 [P. L. p. 273]), in attempting to classify the lands of counties and taxing districts devoted to public use, has not included in the class thereby created all the members of such class thereby created all the members of such class, hence is not a general law, and is unconstitutional.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 100; Dec. Dig. § 95.*] (Syllabus by the Court.)

Error to Supreme Court.

Action by the Essex County Park Commission against the Town of West Orange and the Board of Equalization of Taxes of New Jersey. Judgment for defendants (75 N. J. Law, 376, 67 Atl. 1065) and plaintiff brings error. Reversed.

Alonzo Church, for plaintiff in error. Simeon H. Rollinson, for defendants in error.

VOORHEES, J. The writ of error in this case runs to the Supreme Court, and is prosecuted to test the constitutionality of a supplement to the general tax act of April 8, 1903 (P. L. p. 394), approved April 20, 1906 (P. L. p. 273), which enacts: "All lands the property of any county, and all lands the property of any taxing district, which are situated within the limits of any other taxing district, shall be subject to taxation by the taxing district within which such lands are situated at the true value of such lands without regard to any buildings or other improvements on such lands, notwithstanding any exemption provided for in the act to which this is a supplement." The Supreme Court in its opinion eported in 75 N. J. Law, 376, 67 Atl. 1065, upholding the act, has set out in detail the facts of the case and history of the litigation, so as to render it unnecessary to recount them here.

This court is unwilling to sustain the act upon the .dea, intimated in that opinion, that a tax strictly speaking may not be involved, but that in substance this law provides a method of enforced contribution exacted by the state from one public agency toward the support of another public agency, requiring public moneys to be taken from one public agent and paid to another. It may well be doubted whether the Legislature has such power. The enactment, which is a supple-

lands. The law, therefore, regards it as a tax, and it must be so dealt with.

The original act of 1903 provides that "the property * * * of the state of New Jersey and of the respective counties, school districts and taxing districts, when used for public purposes," shall be exempt from taxation. Act April 8, 1903 (P. L. p. 394, § 3). Such an exemption is justified having regard to the use to which the property is put, and is not violative of article 4, § 7, par. 12, of the Constitution, which directs that "property shall be assessed under general laws by uniform rules," for property may be classified in respect to its use, and a law based upon such classification will be general. State Board v. Central R. R. Co., 48 N. J. Law, 146, 4 Atl. 578; Tippett v. McGrath, Col., 70 N. J. Law, 110, 56 Atl. 134, affirmed 71 N. J. Law, 338, 59 Atl. 1118. But this supplement does not provide that all the lands of these public agencies shall be taxed and thus become removed from the exemption contained in the original act. It makes the lands of counties taxable, and all lands the property of any taxing district which are situated within the limits of any other taxing district.

The supplement in question is aimed to contract the exemptions in the general act by bringing back into the taxable class 'ertain property formerly exempt. Whether we deem it as forming a subclass, or to be read with the original act as a single enactment, its effect is to subject certain property owned by municipal corporations, when used for public purposes, to taxation, while other property subjected to a like use and ownership is exempted. The only distinction between these two classes is location of the property and ownership. The latter is applied to county property, the former to the property of certain other public agencies. That the Legislature should select the property of counties for taxation, and exempt a part of the property of other municipal corporations identical in its uses with that of counties, is arbitrary classification.

That property of a class may be exempted from taxation is not to be denied, provided always that the classification is a proper one; but it is well settled that all memoers of a class shall be included in the taxing act, whether for purpose of imposition of or exemption from taxation. State Board v. Central R. R., supra. In Trenton Savings Fund v. Richards, 52 N. J. Law, 156, 18 Atl. 582, Mr. Justice Dixon, writing for the Supreme Court, says: "But the statute does not exempt the entire mass; it remits to ordinary taxation real estate purchased under foreclosure, and hence the question is narrowed down to this, whether the mass, with this exception, constitutes such a class. I can find no reason for an affirmative answer to this ment to the tax act, deals with taxation, and question. No substantial ground appears for

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

discrimination between the real estate purchased under foreclosure and the real estate purchased under judgment or in settlement of debt. A class formed upon any reasonable principle to embrace the latter must include the former also, and therefore an attempted exemption of the one without the other infringes the rule which permits the taxation and exemption of property by classes only. If a law excludes from its operation a single member of a class which it otherwise would affect, it will be invalid. Bray v. Hudson, 50 N. J. Law, 82, 11 Atl. 135; Sisters of St. Elizabeth v. Chatham, 51 N. J. Law, 89, 16 Atl. 225." The constitutional provision would be nugatory if this were not so, for a general tax act could, by exemptions of special property thereafter provided for from time to time by supplementary legislation, be narrowed until it also became special.

The question, therefore, arises whether a proper classification has been created by the supplement under review, and, if so, whether into such class have been gathered all its members. By it all county property shall be taxed. A county is not a taxing district, neither is a school district; yet the act omits from the lands to be taxed those owned by a public agency, if it is not at the same time either a county or taxing district. Thus schoolhouses belonging to a school district are exempt under the general law. But they are not relegated to the taxable class by the supplement; yet they are property owned by a public agency, used for public purposes, and do not differ in that respect from county property. Again, a portion only of the property of taxing districts is made taxable, depending upon the accident of its location.

If the property is situated within the taxing district levying the tax, it escapes taxa-If its location be without such taxing district, it is to be taxed. It is thus sought to form a class for taxation marked by the characteristic of location merely.

A county is not a taxing district, but it must have revenue to defray the cost of the governmental acts by law imposed upon it, as well as to meet any state tax which may be levied. This revenue is raised by taxation in the taxing districts, and by section 41 of the tax act of 1903 it is made the duty of the collectors of taxes in each year, out of the first moneys collected, to pay to the county collector the state and county taxes required to be assessed in his taxing district, and the county collector shall pay the state taxes which he shall have so received to the State Treasurer.

An illustration of the practical working of the amendatory act under review may thus be stated: The almshouse of a city is located in an adjoining township; by the act it is made taxable, and the taxes assessed against it when collected go into the treasury of the township. Thereafter a portion of these are paid over to the county, and reduce pro tanto the general burdens of taxation for by other errors assigned.

county and state purposes throughout all the taxing districts of the county and state. If, however, the city almshouse is located within the confines of such city, it escapes taxation, and does not contribute pro tanto to relieve the general burden of taxation throughout the county and state. omaly of this situation is not explained by saying that it would be useless to require a city to pay tax on its own property within its borders, because it would immediately upon payment be returned into its own treasury. While such result would follow, it would be true only as to the mere transmission of the money. `A part of the money so repaid would merely pass through the hands of the city's taxing office on its way to the county treasury to be used for county and state purposes, and would in no sense become the funds of the city.

It will thus be seen that the classification of the property of the taxing districts has for its basis the location of the property. It is not differentiated by its use or by characteristics possessed by it.

To form a class with reference to the accident of the location of the property is to ignore the fact that differences in the amount of ratables in every taxing district make differences in the amounts assessed for township, county, and state taxes. Whether all property similarly used and possessing the same characteristics is included in the ratables should be the test of the generality of the law. An instance of the vicious effect of the act sub judice may be cited: The city of Newark would be taxable on its waterworks in Bellville, but it would not be taxable on its city hall and schoolhouses and various other public appliances within the city of Newark. The result would be to add to the proportion which Bellville would have to pay of the county and state tax by including in Bellville's ratables property which was not distinguished from the city hall and the parks, firehouses, and schoolhouses in Newark except by the mere accident of loca-

Classification according to the location of the property is not a classification according to any feature inherent in the property itself. but with reference entirely to chance of location, a circumstance quite as disconnected with the characteristics of the property itself as is its ownership, which was condemned as a distinguishing mark in Tippett v. McGrath, Col., supra. If, however, the class thus erected could be approved, yet the law is vicious, because, as already stated, all of the members of such class have not been included, and thus it lacks generality.

For these reasons, the act must be held to be in contravention of the organic law, and the judgment of the Supreme Court must be reversed.

The views above expressed render it unnecessary to consider the questions presented (77 N. J. L. 802) GARCIA et al. v. FOSTER.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

APPEAL AND ERROR (§ 870*)—REVIEW—JUDG-MENT ON DEMURRER.

A judgment for defendants on demurrer.
having been followed by the entry of a rule
to plead over, is not brought up by plaintiffs
writ of error to the final judgment, and does
not militate against the suing out of such writ. [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3507; Dec. Dig. § 370.*]

Error to Supreme Court.

Action by Jessie H. Foster, executrix, against Michael Garcia and others. was a judgment in favor of defendants, and plaintiff brings error. Affirmed.

John H. Backes, for plaintiff in error. Vreeland, King, Wilson & Lindabury, for defendants in error.

PER CURIAM. This writ of error brings up the final judgment of the Supreme Court. The questions raised are the same as those that were decided by the Supreme Court upon a demurrer to pleas. Simons v. Forster, 73 N. J. Law, 338, 63 Atl. 858. For the reasons stated in that opinion by Chief Justice Gummere, the judgment in the present case is affirmed. The judgment for defendants upon demurrer, having been followed by the entry of a rule to plead over, is not brought up by the plaintiff's writ of error to the final judgment, and does not militate against the suing out of such writ,

(75 N. J. E. 539)

BASSETT v. UNITED STATES CAST IRON PIPE & FOUNDRY CO.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

CORPORATIONS (§ 156*)-DIVIDENDS-PREFER-BED STOCK.

Where preferred stock of a corporation was entitled to noncumulative dividends not exceeding 7 per cent. per annum, payable out of any surplus net profits, and the common stock was surplus net profits, and the common stock was entitled to dividends out of the surplus net profits remaining after payment of the dividends on the preferred stock, and the corporation accumulated a reserve fund, part of which was obtained by scaling down dividends which would otherwise have been paid on the preferred stock, the reserve fund in so far as it was composed of funds which would have been paid as dividends on the preferred stock, had it not been reserved, could be used to pay subsequent dividends on that stock, though the portion of the reserve which would otherwise have gone to common stockholders could not be so used. common stockholders could not be so used.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 581, 582; Dec. Dig. § 156.*]

Appeal from Court of Chancery.

Bill by Frank Bassett against the United States Cast Iron Pipe & Foundry Company. From a decree for defendant (70 Atl. 929), complainant appeals. Affirmed.

Pitney, Hardin & Skinner, for appellant. Lindabury, Depue & Faulks, for respondent.

GUMMERE, C. J. The contest in this case is over the right of the board of directors of the defendant company to declare a dividend on its preferred stock out of a fund known as "Reserve for additional working capital." By the defendant's certificate of incorporation, its preferred stock is entitled to noncumulative dividends not exceeding 7 per cent. per annum, payable out of any and all surplus net profits; and the common stock is entitled to dividends out of the surplus net profits remaining after payment of the dividends on the preferred stock. The fund known as "Reserve for additional working capital" amounts to \$2,459,896, and was accumulated from the surplus net profits for the years 1900, 1902, 1903, 1904, and 1906. Of this amount \$1,593,750 was obtained by scaling down the dividends on the preferred stock below 7 per cent. in four of these years.

The complainant is a holder of common stock of the defendant company. His contention in the court below and here, was, and is, that the dividends on preferred stock for any fiscal year must be paid out of the profits made during that year; that the profits of any given year which are not distributed in dividends declared in that year belong to the common stockholders, and when distributed must be paid to them to the exclusion of the holders of preferred stock. The defendant's claim is that it may pay dividends on its preferred stock out of any and all surplus net profits, without regard to the period during which they were earned. The learned vice chancellor who heard the cause adopts in his opinion the contention of the defendant upon this point.

It seems to us that neither the contention of the complainant nor that of the defendant is altogether sound. On the one hand. the corporation has no right to accumulate a reserve fund from earnings which would otherwise be paid out as dividends to the holders of common stock, and afterward use it to pay dividends to the preferred stockholders, when the net profits of the year for which the dividend is declared are not sufficient for that purpose. On the other hand, when the reserve fund is accumulated, in whole or in part, by the cutting down of dividends which would otherwise have been paid to preferred stockholders, that fund, so far as it represents moneys so retained, is available for the payment of subsequent dividends upon the preferred stock. To yield to the contention of the complainant would be to permit the directors of the corporation to defraud the preferred for the benefit of the common stockholders; while to sanction the claim of the defendant would be to put it in the power of the directors to defraud the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

common for the benefit of the preferred the contract, and the specifications accomstockholders. The dividend which the defendant proposes to pay to its preferred stockholders, and the payment of which the complainant seeks to enjoin, amounts to \$218,750. The fund out of which it is proposed to pay it contains over \$1,000,000, which would have been heretofore paid in dividends to the preferred stockholders had not the directors of the company considered it wise to accumulate the fund as a reserve. So far as that fund is made up from moneys which would otherwise have been paid to the preferred stockholders, we concur in the conclusion of the vice chancellor that it is available for the purpose of paying the dividend which is the subject-matter of this controversy

Except to the extent indicated, we are in entire accord with the views contained in the opinion of the learned vice chancellor, and conclude that the decree under review must be affirmed.

(83 N. J. L. 506)

CAMPBELL, MORRELL & CO. v. LE-HOCKY.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

MECHANICS' LIENS (§ 127*)—FILING CONTRACT AND SPECIFICATIONS.

A materialman is entitled to the benefit of the third section of the mechanic's lien law (Act June 14, 1898 [P. L. p. 538]), when the contract, together with the specifications accompanying the same, by virtue of which the building is erected, is filed in the office of the county clerk in pursuance of section 2 of that county clerk in pursuance of section 2 of that act. It is not necessary that the plans accompanying the contract be filed.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 127.*]

(Syllabus by the Court.)

Error to Supreme Court.

Action by Campbell, Morrell & Co. against Joseph Lehocky. Judgment for plaintiffs, defendant brings error. Affirmed.

See, also, 71 Atl. 694.

William W. Watson and Robert R. Watson, for plaintiff in error. Whitehead & Moore, for defendants in error.

TRENCHARD, J. This writ of error brings up for review a judgment to the Supreme Court in favor of Campbell, Morrell & Co., the plaintiffs below. The case was tried at the Passaic circuit before the judge without a jury, upon an agreed state of facts. The material facts were these: On July 6, 1905, the defendant, Lehocky, entered into a contract with the firm of Scarnecki & Bros. for the mason work of a new building of the defendant at Passaic. The consideration of the contract to be paid by the defendant was the sum of \$5,019, payable in installments at certain intervals during p. 2073). Prior to the amendment of 1895 the the progress of the work. On July 7, 1905, corresponding section of the mechanic's lien

panying the same, were filed in the office of the clerk of the county of Passaic before any work was done or materials furnished for the building. The plans for the mason work, however, were not filed with the contract. The plaintiffs furnished building materials to Scarnecki & Bros., to be used by them in doing the mason work upon the defendant's building, of the price and value of \$409.38, and the materials so furnished were used in the defendant's building. Scarnecki & Bros. having failed to pay for the materials upon demand, the plaintiffs served a stop notice on the defendant under the third section of the mechanic's lien law (Act June 14, 1898 [P. L. p. 538]). At the time of the service of the notice, the contract was still uncompleted, and the defendant had in his hands a balance more than sufficient to pay the amount of the plaintiffs' bill. Notwithstanding this fact, the defendant paid over all the moneys due upon the contract to Scarnecki & Bros. The trial judge gave judgment for the plaintiffs below.

The only question raised by the assignments of error of the defendant is whether, under this state of facts, the plaintiffs below were entitled to the benefit of the third section of the mechanic's lien law (Act June 14, 1898 [P. L. p. 538]). The contention of the defendant is that, where the contract is accompanied with plans and specifications, the statute requires not only the contract, but also the plans and specifications, to be filed, in order to protect the building against liens of mechanics and materialmen; that the benefit of the third section of the lien law cannot be acquired except by materialmen and mechanics who cannot acquire a lien upon the building: that, through failure to file the plans with the contract and specifications, the building remains subject to lien on the part of the plaintiffs, and therefore the remedy of the third section is not conferred upon them.

The second section of the mechanic's lien law (Act June 14, 1898 [P. L. p. 538]) provides that whenever any building shall be erected by contract in writing, such building, and the land whereon it stands, shall be liable to the contractor alone for work done or materials furnished in pursuance of such contract, "provided, said contract, or duplicate thereof, together with the specifications accompanying the same, or a copy or copies thereof, be filed in the office of the clerk of the county in which such building is situate before such work done or materials furnished." This section is an exact reproduction of an amendment to the second section of the mechanic's lien act of 1874 (Rev. St. 1874, p. 448), which amendment was approved March 14, 1895 (P. L. p. 313; 2 Gen. St. 1895,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

act of 1853 (Nixon Dig. p. 487) and of the act of 1874 (Rev. St. 1874, p. 448) contained no provision that the specifications accompanying the contract should be filed. The sole office of the amendment of 1895 was to add the words "together with the specifications accompanying the same." Construing this section as it stood prior to the amendment of 1895, our courts held that when the contract covered all the work to be done, and all the material to be furnished, it was not necessary to file the plans and specifications. Ayres v. Revere, 25 N. J. Law, 474; Babbitt v. Condon, 27 N. J. Law, 154; Budd v. Lucky, 28 N. J. Law, 484; Pimlott v. Hall, 55 N. J. Law, 192, 28 Atl. 94; La Foucherie v. Knutzen, 58 N. J. Law, 234, 33 Atl. 203; Freedman v. Sandknop, 53 N. J. Eq. 243, 8: Atl. 232.

The doubtful soundness of this construction of the statute seems more than once to have been intimated, but, since the decision of Ayres v. Revere, supra, it was always followed as being settled law. The doubt suggested in judicial opinions, however, doubtless led the Legislature in 1895 to change the provision with relation to the filing of the contract by adding the words "together with the specifications accompanying the same." The fact that in making this amendment the lawmakers did not add also the word "plans" is, we think, conclusive against the soundness of the contention of the plaintiff in error. "Inclusio unius est exclusio alterius." When the Legislature at the time of the amendment of 1895, with knowledge that the scope of the provision relating to filing was considered doubtful by the courts, added only the word "specifications," it seems plain that they intended to require that only the contract with the specifications should be filed, and not the plans.

The result is that the judgment of the court below is affirmed.

MAYER v. ROCHE et al.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

APPEAL AND ERROR (§ 793*)—WRIT OF ERROR
—DISMISSAL—DEFECTIVE RETURN.
A writ of error will be dismissed, though

without prejudice, where the printed book shows no return thereto, nor anything purporting to be a judgment of the court below.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 793.*]

Error to Supreme Court.

Action by Milton Mayer against Katherine G. Roche and others. There was a judgment in favor of plaintiff (69 Atl. 246), and defendant Roche brings error. Writ dismissed.

Robert L. Lawrence, for plaintiff in error. Tennant & Haight, for defendant in error.

PER CURIAM. The printed book shows no return by the Supreme Court to the writ of error, nor does it show anything that even purports to be the judgment of the Supreme Court in the cause.

The writ of error must therefore be dismissed. The dismissal will be without prej-

LUDY v. LARSEN et al. (Court of Errors and Appeals of New Jersey. June 14, 1909.)

APPRAL AND EBROR (§ 635°)—RECORD—PRINTED BOOK—DISMISSAL OF APPRAL.

Where the printed book shows that certain testimony was taken before a Vice Chancellor, and that he announced his conclusions with respect to a certain claim in dispute, but the book does not show whether he advised a decree, nor what decree he advised, nor whether any decree was signed, and no stipulation is shown providing that the decree under review shall be omitted, the appeal will be dismissed, although the book contains a draft of a decree which lacks date and signature; rule 19 of which lacks date and signature; rule 19 of the appellate court providing that the state of the case shall contain, among other things, an order or decree in chancery, and that by agreement of parties an abridgment of the de-cree may be printed in lieu of the decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2780; Dec. Dig. § 635.*]

Appeal from Court of Chancery.

Action by Robert B. Ludy against John M. Larsen and others. Appeal by Rufus Booye, assignee of John W. R. Maginnis. Appeal dismissed.

Bourgeois & Sooy, for appellant. John C. Reed and U. G. Styron, for respondent Atlantic City Lumber Co.

PER CURIAM, While the printed book appears to show that certain testimony was taken before one of the Vice Chancellors, and that he announced his conclusions with respect to a certain claim in dispute, from which the inference may be drawn that a judicial investigation of some kind was in progress in the Court of Chancery, there is nothing in the printed book to show whether the Vice Chancellor gave effect to his judgment by advising a decree, nor what decrees he advised, nor whether any decree was signed by the Chancellor. What purports to be a draft of decree is found in the book, but it lacks date and signature. Rule 19 of this court provides that the state of the case shall contain, among other things, the pleadings, proofs, and order or decree in chancery, and further provides that by agreement of parties an abridgment of the foregoing may be printed in lieu thereof. But there is not before us any stipulation providing that the decree under review shall be omitted.

The appeal will therefore be dismissed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1.01 to date, & Reporter Indexes

(77 N., J. L. 774)

WRIGHT v. ORANGE & P. V. RY. CO. (Court of Errors and Appeals of New Jersey. July 2, 1909.)

Carriers (§ 356*)—Street Railways—Ejection of Passenger.

TION OF PASSENGER.

Where a passenger on a street car is entitled by his contract to be carried to a certain point, and the railway company breaks the contract by turning the car back at a point ahort of the destination, the passenger's right of action is complete; and, if he elects to remain on the car for its return journey, he must pay the fare, and may include the amount in his damages. He is not entitled to remain on the car without payment of fare.

[Ed. Note.—For other cases see Carriers

[Ed. Note.—For other cases, see Carriers, ent. Dig. §§ 1409, 1410, 1428–1432; Dec. Dig.

(Syllabus by the Court.)

Error to Circuit Court, Essex County. Action by Alfred A. Wright against the Orange & Passaic Valley Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

Leonard J. Tynan and Chauncey H. Beasley, for plaintiff in error. Samuel Kalisch and Frederick M. Payne, for defendant in error.

MINTURN, J. Three cases, involving the same question, arising out of an alleged trespass vi et armis by defendant through its conductor upon plaintiffs, respectively, were tried together; and the determination of the fundamental question involved in the case sub judice, it is stipulated between counsel, shall be dispositive of the other two cases. The material facts constituting the concrete case are not in dispute. The plaintiff and his two sons resided at Montclair near Eagle Rock, from and to which place they went and returned each working day in the course of their business, using defendant's street railway car upon their return by transfer from Orange. On February 15, 1906, the plaintiff boarded at Orange a car upon which the sign "Eagle Rock" was displayed. The cars upon this route, owing to the condition of the tracks at that period, had not been running to Eagle Rock for some days, but stopped at a place called Valley Way, which is in the neighborhood of a mile below the former place. At Valley Way the conductor turned the trolley pole, and notified plaintiff that the car would proceed no further. Plaintiff then said, "We have transfers to Eagle Rock," and the conductor replied, "Well, we don't go any further," and, he continues, "he came around and demanded our fare, and we would not pay any more fare; so they dragged us off the car," which at that time was on its way back towards West Orange. The alleged trespass was of a nominal character, and no claim is made that serious injury resulted to plaintiff therefrom. At the trial the plaintiff's counsel limited the issue by the state- | 672, that supports the plaintiff's contention.

ment: "We stand upon the assault and battery counts in each declaration. We rely upon so much of the facts in each of the counts as constitutes a cause of action, and that is the wrongful ejection from the car." This narrowed the issue to the determination of the question whether the ejection of plaintiff from the car was wrongful. The defendant met this claim by insisting that after request made upon plaintiff for his fare and his refusal to pay, he became ipso facto a trespasser; and, upon his refusal. to alight, the right inured to defendant to eject him.

It must be conceded that, if the legal status of plaintiff under the circumstances was that of a trespasser, the right of ejection might be properly exercised by defendant; and proof of that fact at common law, conjoined with the plea molliter manus imposuit, would afford a complete defense to the action. 1 Chitty's Pl. 500; Gates v. Lounsbury, 20 Johns. (N. Y.) 427. The plaintiff insists that he was not a trespasser, but had a legal right to remain on the car because the company had failed to perform its contract to carry him to Eagle Rock. He does not claim that he was entitled to be carried back free to his starting point, but stands upon a right, as he claimed to the conductor, "to stay on that car until it went to Eagle Rock." The trial judge charged that the question for the jury was whether the plaintiff was warned, when he got on the car, that it would not go through to Eagle Rock. We think this was erroneous. The failure to warn him when he got on the car would, under the circumstances of this case, justify an inference that the company had contracted to carry him to Eagle Rock; but the plaintiff's remedy for breach of that contract was an action for damages, and that right of action was complete as soon as the company abandoned the trip and turned the car back. The plaintiff was not obliged to stay on the car any longer to test the readiness of the company to perform its contract. And his remedy for the breach of contract did not include a right to stay on the car indefinitely. He had his election, when the car came to the end of its actual trip, to leave and sue for damages, or to make a new contract for carriage on the return trip, and add its cost to his damages, subject, of course, to the rule which requires one to minimize his damages. He chose the latter alternative. Having done so, he became bound to pay his fare to the conductor, who had no authority to carry him free. This is the effect of our decision in Shelton v. Erie R. R., 73 N. J. Law, 558, 66 Atl. 403, 118 Am. St. Rep. 704, 9 L. R. A. (N. S.) 727. There is nothing in McDonald v. Central R. R., 72 N. J. Law, 280, 62 Atl. 405, 2 L. R. A. (N. S.) 505, 111 Am. St. Rep.

passenger's contract entitled him to be carried to Chester by the train on which he began his journey, he was not bound to get off at an intermediate station, merely because the conductor told him the train would not stop at Chester. He was entitled to make reasonable efforts to exercise his right. So in this case the plaintiff was entitled to stay on the car until he knew that the defendant had finally determined not to run it to Eagle Rock. As soon as the company so determined, and started the car on its return trip, his right of action was complete; but his right was a right to damages merely, not a right to occupy the car indefinitely. The right claimed by him would, in effect, deprive the company of the management of its own car, and make the plaintiff a tenant in common. The law of selfhelp has never been extended as far as that; and, in contemplation of law, damages are a sufficient redress for a private wrong.

The early common law is replete with recorded instances, illustrative of the rule that. under such circumstances, the abuse of a legal right or privilege, which accrued originally as the result of a contract or a legal obligation or a duty imposed by law, terminable at a certain period, places the transgressor in the status of a trespasser. Thus Rolle in his abridgment instances the case of a lessor who enters to view for waste and stays all night; of the commoner who lawfully enters the common and cuts down trees; of a man who enters an inn and continues all night against the will of the taverner. Rolle's Ab. 561, pl. 2. So, in a recent case, where a passenger remained upon a train for an unreasonable time after it reached its destination, he thereby ceased to be a passenger. Chicago R. R. Co. v. Frazer, 55 Kan. 582, 40 Pac. 923. In like manner, Brenner v. Joneston R. R., 82 Ark. 128, 100 S. W. 893, 9 L. R. A. (N. S.) 1060, 118 Am. St. Rep. 56, Ripley v. N. J. Transfer Co., 31 N. J. Law, 388, Imhoff v. Chicago, M. R. Co., 20 Wis. 344, 6 Cyc. p. 541, and cases cited, afford instances illustrative of the principle that the legal status of the plaintiff was that of a trespasser. At the very basis of these decisions in denial of the plaintiff's right, is the fundamental ethical, as well as legal, maxim, "Nemo ex proprio dolo consequitur actionem." Ellen v. Fopp, 6 Exch. 424. So from this status was evolved that privilege which found judicial recognition as early as the Year Books, and which conceded to every owner whose property is unlawfully invaded the right, after reasonable demand. to eject therefrom the tort-feasor. Case of the Tithes (1507) 1 Y. B. Hen. VII, 27 Pl. 5; Entich v. Carington, 19 Hon. St. Tr. 1029; Ilvat v. Wilkes, 3 Barn, & Ad. 308; State v. Moore, 31 Conn. 479, 83 Am. Dec. 159.

What we there decided was that, where the | also, in the case at bar the right of defendant, through its agents, to eject the plaintiff from its car, after his refusal to avail himself of the condition which by right of contract would have given him a legal status, cannot be successfully controverted, in the light of uniform adjudication, wherever the common law is recognized as the law of the land. State v. Overton, 24 N. J. Law. 435, 61 Am. Dec. 671; Jardine v. Cornell, 50 N. J. Law, 485, 14 Atl. 590; Manning v. L. & W. Ry. Co., 95 Ala. 392, 11 South. 8, 16 L. R. A. 55, 36 Am. St. Rep. 225; Chicago, B. & L. Ry. v. Wilson, 23 Ill. App. 63; Bradshaw v. Boston Ry. Co., 135 Mass. 407, 46 Am. Rep. 481; Sandford v. 8th Ave. R. R., 23 N. Y. 343, 80 Am. Dec. 286.

> For these reasons the judgment in this case is reversed, and a venire de novo awarded.

> > (76 N. J. L. 636)

PHILADELPHIA BREWING CO. v. Mc-OWEN.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

ESTOPPEL (§ 29*)—TITLE—COMMON GRANTOR.

One of two grantees of a common grantor may assert as against the other a title different from or paramount to that derived from the common grantor.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 69-73; Dec. Dig. § 29; Trespass to Try Title, Cent. Dig. § 14.]

(Syllabus by the Court.)

Error to Circuit Court, Camden County. Action by the Philadelphia Brewing Company against Frederick McOwen. Judgment for plaintiff, and defendant brings error. Affirmed.

Joseph Kaighn and French & Richards. for plaintiff in error. Wilson, Carr & Stackhouse and Bleakly & Stockwell, for defendant in error.

GARRISON, J. This is an action of ejectment for lands lying beneath the waters of the River Delaware. The locus in quo described in the declaration has a base of 238. 94 feet in a line drawn parallel with Front street of the city of Camden and 320 feet to the west of the westerly side thereof, which line so drawn is below the high-water line of the river. This base of 238.94 feet is the easternmost boundary of the locus in quo. and if extended westwardly out into the river until the exterior wharf line is reached will include the land for which this suit is brought, which each party claims under the state's riparian grant. It will be observed that the tract of land under water thus described does not adjoin the fast land on the Jersey shore, but that between the easterly end or base of such tract and the shore the So. River Delaware rises at high tide; that is

as the ground of its present action.

Originally, of course, the land described in the plaintiff's declaration belonged to the state of New Jersey, and each of the parties to the present action has a grant from the riparian commissioners which in its descriptive portion covers the locus in quo. The defendant's grant was earlier in point of time, but the plaintiff contends, and its present action is based upon the proposition of fact, that the defendant is not now, and was not when he got his riparian grant, the owner of any land adjoining the locus in quo, and hence that he did not by the said grant acquire the rights of the state therein; but that on the other hand the plaintiff's grant covering the same lands was duly supported by its ownership of the ripa opposite the locus in quo; i. e., the land adjoining the waters of the river that intervene between the locus in quo and the high water line on the Jersey shore. If the plaintiff's proposition of fact is true its legal proposition is also correct for the defendant's grant from the state expressly provided that such grant should be vold "if the said Frederick Mc-Owen is not the owner of the land adjoining the land under water hereby granted." The fundamental question, therefore, is whether or not the defendant was the owner of land on which the river rose at high water adjoining the locus in quo. In more concrete form, the precise question is whether the Pavonia Land Association, which was the common grantor, had conveyed to the defendant, who was the earlier grantee, any land adjoining the locus in quo, or whether such common grantor did not remain the owner of the land at high water to the east of the locus in quo until by a subsequent conveyance it conveyed such land to the immediate grantor of the plaintiff.

At the trial the plaintiff made out a case under its declaration by proving the following facts: On October 18, 1893, the Pavonia Land Association owned a city block on the easterly bank of the Delaware river extending from Dupont street on the south to Cooper avenue on the north, bounded on the east by Front street of the city of Camden, and on the west by the Delaware river, whose waters washed the entire front of the lot, a distance of over 400 feet. The shore line of mean high tide was not, however, exactly parallel with Front street, from the westerly side of which the shore was more than 320 feet distant at the northerly end of the lot, although not at the southerly end. In other words, the river at this point describes a This incurve in the southerly half of the lot error may avail himself thereof. The prop-

to say, the river at high water intervenes be- would cut a straight line parallel with Front tween the easternmost boundary of the lo- street and 320 feet west of its westerly side cus in quo and the fast land of the shore. at two points, the distance between which It is upon this fact that the plaintiff relies would be 238.94 feet, for which distance such line would run wholly beneath the waters of the river. This 238.94 feet is the base or easterly boundary of the locus in quo which extends westwardly out to the exterior wharf line. The significance of the line 320 feet from the westerly side of Front street and parallel thereto is that such a line is by the deed from the Pavonia Land Association to the defendant dated October 18, 1893, made the easterly boundary of the land thereby conveyed. In other words, the defendant by his said deed got all of the land that the association owned to the west of such line—i. e., between such line and the Delaware river; but got thereby no land to the east of such line-i. e., between such line and Front street. The land between such line and Front street remained the property of the association until June 17, 1895, when it conveyed it to the immediate grantor of the plaintiff. If, therefore, at the southerly end of the tract conveyed to the defendant such line on October 18, 1803, ran for a distance of 238.94 feet through the waters of the river-i. e., below its high water line—the defendant as to such distance got title to no land, for the reason that the title to the land so under water was not in his grantor, but in the state of New Jersey; from this it also follows that the defendant got no title to such land under water from the state of New Jersey by his riparian grant for the reason that as to such 238.-94 feet he was not the owner of any adjoining land which by the express provision of his grant was an essential condition of its validity. This was the plaintiff's case, which was not contradicted by any oral testimony offered by the defendant. The plaintiff having proved the foregoing state of facts rested its case, and the defendant having introduced certain documentary evidence also rested, whereupon each counsel requested the court to direct a verdict in his favor; plaintiff's counsel relying upon the uncontroverted state of facts, defendant's counsel relying upon certain propositions of law based upon documentary evidence that be had introduced. Each counsel admitted that there was no question touching the case made by the plaintiff that required it to be submitted to the jury. The trial judge after argument denied the defendant's motion, and directed a verdict for the plaintiff, to which rulings exceptions were severally allowed and sealed. On this writ of error the defendant below who is now the plaintiff in error relies upon the propositions of law advanced by him in the trial court as grounds for the grantdouble curve somewhat similar to a capital ing of the motion he then made. If, however, S, so that at the south end of the lot the in view of any of such propositions it was river bellied into the land, and at the north error for the trial court to direct a verdict end the land jutted out into the river. for the defendant in error, the plaintiff in

amined with the view of determining whether error was committed at the trial either in the denial of the motion then made by the plaintiff in error or in the granting of that made by the defendant in error.

The first proposition relied upon for reversal is that the riparian grant made to the defendant in error inured as matter of law to the plaintiff in error by way of estoppel. The line of reasoning upon which this proposition is invoked is that the common grantor-i. e., the Pavonia Land Association-claiming to own what it conveyed to the plaintiff in error warranted its title thereto, so that if such grantor had acquired, the state's title to the land in question it could not have asserted such title against the plaintiff in error; therefore (it is argued) when such title was acquired by the defendant in error, a subsequent grantee of the common grantor, the same disability attached to it as if the common grantor had itself acquired the state's grant. The conclusion, however, is a non sequitur from the premises. If the defendant in error was setting up against the plaintiff in error no title other than the title it got from the common grantor, a question would be presented that is not now before us. In the present case the claim of the defendant in error is made under a title that it did not get from the common grantor, a paramount title derived directly from the state. There is no rule of law that prevents one of two grantees of a common grantor from asserting against the other a title different from or paramount to that derived from the common grantor. 16 Cyc. 716, note 60.

The next proposition is that the riparian act under which the defendant in error got the state's grant did not authorize such grant because such act is by its title limited to "lands lying under the waters of the bay of New York and elsewhere in this state." The argument upon this point is that, "If the words 'and elsewhere' were omitted, the statute would clearly apply to nothing but the bay of New York"; to which the plenary answer is that the words "and elsewhere" were not omitted.

The next contention is that the rights obtained from the state by the defendant in error cannot be asserted in this case, for the reason that certain rents due the state are in arrears. This fact is true and does not in a legal sense concern the plaintiff in error. As to such matters the state is represented by agencies of its own creation, of which the plaintiff in error is not one.

Next, it is claimed that "the state never acquired any title to the land in question." This contention involves the affirmative of the proposition that the land in suit, al though originally granted by the Duke of York through mesne conveyance to the proprietors, was not included in the surrender made by the latter to the crown in 1702, and appears that Mr. Justice Depue, charging the

ositions in question have therefore been ex-, hence did not repass to the state of New Jersey after the Revolution. This large claim rests for its sole proof upon the single circumstance that there is found among the records in the Surveyor General's Office at Burlington a record of a resurvey of land made in 1734, which recites that the land resurveyed was part of 500 acres formerly surveyed to Samuel Coles and granted by said Coles to Jacob Spicer in 1685. The argument is that, if this recital be accepted as evidence of the facts stated in it, it puts the 500 acres referred to out of the proprietors prior to 1702, so that such land was not included in their act of surrender.

> The argument thus made assumes as its major premise that "Title to the land under tide water passed by the grant from Charles II to the Duke of York"-citing in support of this proposition Martin v. Waddell, 16 Pet. 367, 10 L. Ed. 997, and Am. Dock & L. Co. v. Trustees, 39 N. J. Eq. 409. Martin v. Waddell was decided by the Supreme Court of the United States in 1842 and was reprinted in our state Reports for that year. N. J. Law, 495. In the opinion delivered by Chief Justice Taney the principal matter discussed was whether the grant of Charles II to the Duke of York separated the "soils" under navigable waters in this state from "the other royalties," so as to convert them into private property, or whether such "soils" passed to the Duke of York to be held by him, as, since Magna Charta, the King himself had held them-i. e., "of common liberty" as Lord Hale characterizes "the jura regalia." De Juris Maris, Har. L. 711. Chief Justice Taney construed the grant as "No words," he having the latter effect. says, "are used for the purpose of separating them from the jura regalia and converting them into private property." Upon this point the opinion concludes with these words: "In the judgment of the court the land under the navigable waters passed to the grantee as one of the royalties incident to the powers of government; and were to be held by him in the same manner and for the same purposes that the navigable waters of England and the soils under them are held by the crown." In 1870 Chief Justice Beasley delivering the opinion of this court in Stevens v. Paterson & Newark R. R. Co., 34 N. J. Law, 532, 3 Am. St. Rep. 269, said, "In my opinion it is entirely indisputable that the proprietors of New Jersey did not under the grant from the Duke of York take any property in the soil of navigable rivers within the ebb and flow of the tides. This was the very point of decision in Arnold v. Mundy, 6 N. J. Law, 1, 10 Am. Dec. 356, and Martin v. Waddell, 16 Pet. 367, 10 L. Ed. 997." The case of Martin v. Waddell, therefore, does not sustain the argument in support of which it is cited by the plaintiff in error. The other case cited was Am. Dock & I. Co. v. Trustees. In this equity case it

jury in an issue of law out of chancery, said: | plush of one hundred acres of Land is here-"These rights in lands under tide waters in the province of New Jersey were granted by Charles II to the Duke of York by the charters of 1664 and 1674, and the land or soil under such waters passed to the Duke of York, to be held by him in the same manner as the soil under the navigable waters of England was held by the crown"citing Martin v. Waddell, 16 Pet. 367, 10 L. Ed. 997, and Stevens v. P. & N. R. R. Co., 34 N. J. Law, 532, 3 Am. St. Rep. 269. The only action of the court of chancery in this case was to deny a new trial.

It would seem, therefore, that, unless this court is prepared to recede from the views expressed in Stevens v. Paterson & Newark R. R. Co., the Duke of York did not take in lands under the navigable waters of this state that private property therein that is necessary to sustain the argument and trial theory of the plaintiff in error. For if the Duke of York did not take in such lands the property to low water he could not have transferred such property to the proprietors, and if the proprietors did not have it they could by no act of theirs vest in Samuel Coles a title to private property they themselves did not possess, so that such property should remain in their grantee notwithstanding their surrender to the crown in 1702. Inasmuch, however, as we have not had the benefit of counsels' views upon this precise phase of the case, the matter now under consideration will be disposed of upon grounds directly within the lines of their argument.

The documentary evidence under consideration is a resurvey of land made to Jacob Spicer in 1734, the recitals of which, it is claimed, show that such resurvey is part of a survey of 500 acres of land made to Samuel Coles prior to 1685, and also that Jacob Spicer, at the time of his application for such resurvey in 1734, "stands lawfully seized of two hundred and sixty (260) acres of the above said five hundred acres of land." Then follows a survey to Jacob Spicer by metes and bounds which concludes "containing Three Hundred and sixty acres of land Besides the usual allowance for roads. And whereas is appears by the above resurvey that their is one hundred acres of over Plus Land within the above mentioned and described Meetes and Bounds thereof. Therefore By virtue of a warrant from the Councill of Proprietors to me directed Bearing date ye Twelfth day of February Anno Domini one thousand seven hundred and seventeen requiring me to survey unto Isaac De Cou the full quantity of eleven hundred acres of land," etc.; and the recital then traces un assignment of 300 hundred acres of the De Cou warrant to Jacob Spicer and concludes, "Therefore I have caused one hundred acres part of said three hundred acres tobe surveyed to the said Jacob Spicer with-

by certified to have been surveyed to the said Jacob Spicer."

It is evident, therefore, assuming all that is argued, that the survey to Jacob Spicer in 1734 rested in part upon the survey to Samuel Coles, said to be prior to 1685, and in part upon a warrant made to Isaac De Cou in 1717, and that it is impossible to tell, assuming that the survey of 1734 covered the locus in quo, whether such particular part of the 360 acres was originally in the Coles survey or came into the Spicer survey as "overplush" by force of the De Cou warrant which was in 1717, and hence after the surrender to the crown. Nothing, therefore, was shown even inferentially by this documentary evidence that could have been accepted by the trial court or that should have been submitted to the jury.

The next contention is that "rights adverse to the state were acquired by the operation of a shore fishery on the land in question." Such rights adverse to the state were not established at the trial, nor is any legal error of the trial court in dealing with the testimony upon this branch of the case pointed out. The production of certain "descriptions of fisheries" and the self-serving recitals of the accompanying bonds to the effect that the obligors therein were the owners of the fisheries so described did not, as documentary evidence addressed to the court, establish the existence of such rights as against the state, or demonstrate to the court that the fisheries in question were operated on the locus in quo. The most that can be said is that such proof taken in connection with the very meager oral testimony on the subject may have presented a question for the jury that it would have been error for the trial judge to refuse to submit to them. Upon this point, however, the plaintiff in error is concluded by the admission of his counsel contained in the following colloquium with the court at the conclusion of the testimony: "The Court: I believe it is agreed there is no question of fact which the jury ought to pass upon?" to which counsel for the defendant in error said, "That is our view of the case"; and counsel for the plaintiff in error said, "I cannot conceive why we are not entitled to a direction. It seems to me that the court should determine that question," and then proceeded to argue as matters of law the points on which his motion was based. After this motion had been denied the court again asked, "Now, is there any question of fact to be submitted to the jury?" to which counsel of plaintiff in error responded that he thought it should be left to the jury to say whether there was a survey of the land prior to 1702, and then added, "I do not think of any question except that."

In view of this double interrogation of counsel and his replies to the court it canon the bounds aforesuid and the said over not now be said that a question proper to

from them or that from the testimony alone without the aid of the jury the trial judge should have held that rights adverse to the state and covering the locus in quo had been established. The testimony, it should .be noticed, showed without contradiction that the shore line at the locus in quo had made out 8 feet in the past 15 years, and as there was nothing to show whether or not this process had been going on during the 60 or 80 years that had elapsed since the dates of the fishing bonds in question, the location of the fisheries then in operation with respect to the precise locus in quo now in dispute would require testimony of a different character from any that was given or offered. The attempts of counsel to crossexamine the witnesses of the other side as to fishing operations were overruled but such rulings merely regulated the order of proof and did not prevent the plaintiff in error from calling such witnesses as part of his own case. The remarks of judges and textwriters cited as historical proof of the existence and incidents of shore fisheries in the Delaware river did not in the slightest degree tend to show the operation on the land in question of the fisheries mentioned in the documentary proof that was offered. No error of the trial court in dealing with this assignment is disclosed, but, to avoid misapprehension, it should be added that if error had occurred in this or in the immediately preceding assignment it is not to be

ered in this action of ejectment. In such actions when both parties at the trial are claiming title from a common grantor it is not in general requisite that either should trace his title back of such common source. Such was the case here where each party claimed under a riparian grant from the state through the Pavonia Land Association. The effort, therefore, of the plaintiff in error to show that the state had no title presents the question we have indicated, but which in view of the conclusion we have reached we shall not further discuss.

conclusively assumed that such error would

require the reversal of the judgment recov-

Finding no error that should lead to reversal, the judgment of the circuit court is affirmed.

(78 N. J. L. 142) GROEL V. MAYOR, ETC., OF CITY OF NEWARK et al.

(Supreme Court of New Jersey. June 30, 1909.) 1. MUNICIPAL CORPORATIONS (§ 294*)—PUBLIC IMPROVEMENTS—NOTICE TO LANDOWNER.

It is the right of a landowner specially

affected by a public improvement to be inform ed, either by actual or constructive notice, of the time and place appointed for the meeting of council, to consider their proposed action. [Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 778–781; Dec. Dig. § 294.*]

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date. & Reporter Indexes

be left to the jury was erroneously withheld 2. MUNICIPAL CORPORATIONS (§ 320°) — Infrom them or that from the testimony alone PROVEMENTS—NOTICE TO PERSONS AFFECTED.

Where an ordinance is void for want of jurisdiction in council to pass it, by reason of absence of notice to persons affected, the error is fundamental, and cannot be cured by subsequent legislation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 834-836; Dec. Dig. § 320.*]

3. Municipal Corporations (§§ 488, 489*)— Improvements — Assessments — Setting ASIDE.

A person affected by the passage of an illegal ordinance is not prejudiced in his rights by not attempting to set it aside until after an assessment is made under it, where it ap-pears that he was led to believe that the gener-al scheme of improvement was to be made at public expense, and that no assessment would be levied against him.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1145-1152; Dec. Dig. §§ 488, 489.*]

(Syllabus by the Court.)

Certiorari, on the prosecution of John C. Groel, against the Mayor and Common Council of the City of Newark and others to review a sewer assessment. Assessment set aside.

Argued February term, 1909, before REED, TRENCHARD, and MINTURN, JJ.

Riker & Riker, for prosecutor. Francis Child, Jr., for defendants.

TRENCHARD, J. This writ of certiorari brings up for review an assessment for benefits conferred by the construction of sewers made upon the lands of the prosecutor in the territory formerly the borough of Vailsburgh, now a part of the city of Newark. On November 16, 1903, an ordinance to establish a system of lateral sewers to be connected with the joint trunk or outlet sewer was introduced in the borough council of Vailsburgh. On December 9, 1903, it passed finally and was approved by the mayor. There was no notice of intention to pass the ordinance given, nor any notice that it was pending. After its passage, and on the same day, a resolution was passed by the council to raise by bond issue the sum of \$60,000 to defray the cost of the sewers provided for in the ordinance. This was in accord with the resolution adopted at a public meeting called by the borough council and attended by citizens held November 12, 1903. At that meeting a resolution was unanimously adopted (all persons present being allowed to vote) that the system of sewers should be constructed at the expense of the borough, and that no assessments should be made for the benefits arising from the improvements. The borough made no assessment for benefits, but issued and sold the bonds to pay for the entire cost of the sewers. After the sewers had been constructed, and sinking fund and interest charges paid on the bonds for one year, and on January 1, 1905, Vailsburgh was annexed to the city of Newark under the provisions

379). Under the terms of the annexation, the city of Newark was required to pay the bonded indebtedness of Vailsburgh. After the annexation of the borough to the city of Newark, the Legislature passed an act entitled "An act to authorize consolidated and annexed municipalities to make assessments for local improvements," approved April 29, 1905 (P. L. p. 414), declaring in substance that whenever municipalities or portions thereof have been annexed to, or consolidated with any other city, and any local improvement or improvements have been or shall be made in and by such municipality so annexed prior to such annexation or consolidation for or on account of which no assessment has been or shall be made upon the property in such municipality peculiarly benefited thereby it shall be lawful for the proper local authorities of the city to which any such municipality is or shall be annexed to make an assessment upon all property peculiarly benefited by such improvement. Under this act, the commissioners of assessment of the city of Newark have proceeded to levy an assessment for benefits upon the property of the prosecutor within the limits of what was formerly the borough of Vailsburgh for the construction of the lateral sewers in Vailsburgh under the ordinance of December 9. 1903. The assessment was presented to the judge of the circuit court and the rule confirming the report was signed and entered on January 16, 1908, and on March 14, 1908, this writ was allowed to review the same. The prosecutor insists that the assessment was made without due process of law, and we think it was.

It is the right of a landowner specially affected by a public improvement to be informed, either by actual or constructive notice, of the time and place appointed for the meeting of council to consider their proposed action. This is so because the act is judicial in character; it being contrary to natural justice that a person should be bound by proceedings of a judicial character affecting his person or property without having an opportunity to be heard. Camden v. Mulford, 26 N. J. Law, 49; State v. Orange, 32 N. J. Law, 49: State v. Jersey City, 34 N. J. Law, 31; West Jersey Traction Co. v. Board of Public Works of Camden, 56 N. J. Law, 431, 29 Atl. 163; Landis v. Vineland, 60 N. J. Law, 264, 37 Atl. 625; Sears v. Atlantic City, 72 N J. Law, 435, 60 Atl. 1093, affirmed 73 N. J. Law, 710, 64 Atl. 1062, 118 Am. St. Rep. 724. This right was denied the prosecutor, for there was no notice, either actual or constructive, to him. The public meeting of November 12, 1903, did not amount to notice of an intention to pass an ordinance which might put a burden upon the property of the prosecutor State v. Morristown, 34 N. J. Law, 445, 454. It was not, strictly speaking,

of an act approved March 29, 1904 (P. L. p. | a meeting of council, but rather a meeting of citizens of the borough, and was held several days before the ordinance in question was introduced. Moreover, it was not adjourned, nor the subject-matter continued, to any time or place. On the contrary, the action taken at that meeting, the subsequent action of council in adopting the ordinance without notice, the making of the contract, the issuing of bonds for the payment of the whole cost, indicates that no assessment against the prosecutor was contemplated. By the supplement to the joint sewer act approved April 8, 1903 (P. L. p. 497), council was authorized to determine by ordinance or resolution that the special benefits conferred upon property by the sewers in question should not be assessed upon the property specially benefited thereby, and it appears that council had been so advised by the borough solicitor.

> Because of want of notice, either actual or constructive, to the prosecutor, the ordinance is wholly ineffectual as a basis for the assessment in question. The ordinance upon which the assessment in question necessarily rests being invalid for want of jurisdiction by competent notice to the prosecutor, the defect is fundamental, in that it deprives him of his constitutional right to be heard, and it cannot he remedied by subsequent legislation such as the act of 1905, P. L. p. 414. Boice v. Plainfield, 38 N. J. Law, 95; Maxwell v. Goetschius, 40 N. J. Law, 383, 29 Am. Rep. 242; Meredith v. Perth Amboy, 63 N. J. Law, 520, 44 Atl.

> The prosecutor is not precluded from challenging the assessment by reason of the fact that he did not attempt to set aside the ordinance until after an assessment had been made under it, because the case shows that he was led to believe that the general scheme of improvement was to be made at public expense, and that no assessment would be levied against his property. Ogden v. City of Hudson, 29 N. J. Law. 475.

> The assessment under review, together with the preliminary proceedings upon which it rests, so far as they affect the prosecutor, must be set aside and vacated, with costs.

> > (78 N. J. L. 148)

WALSH V. MAYOR, ETC., OF CITY OF NEWARK et al.

(Supreme Court of New Jersey. June 30, 1909.)

MUNICIPAL CORPORATIONS (\$ 508*)-Assess-

MUNICIPAL CORPORATIONS (§ 5005)—ASSESSMENTS—REVIEW BY CERTIORARI.

The statutory limitation upon the allowance of the writ of certiorari (Act April 13, 1907 [P. L. p. 109]) cannot be enforced for the protection of an assessment made upon a landowner which the Legislature could not constitutionally subharize stitutionally authorize.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 508.*]

(Syllabus by the Court.)

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1997 to date, & Reporter Indexes

. J. Walsh, against the Mayor and Common Council of the City of Newark and others to set aside an assessment. Assessment set aside.

See, also, 71 Atl. 39.

Argued February term, 1909, before REED, TRENCHARD, and MINTURN, JJ.

Riker & Riker, for prosecutor. Francis Child, Jr., for defendants.

TRENCHARD, J. This writ of certiorari brings up for review an assessment for benefits conferred by the construction of sewers made upon lands of the prosecutor.

The material questions in this case are the same as those considered and decided at the present term of this court in the case of Groel v. Mayor and Common Council of the City of Newark, 78 Atl. 522, with this exception: In the present case it appears by stipulation of counsel that the alieged assessment was confirmed by the circuit court on January 16, 1908, and this writ of certiorari was not allowed until December 1, 1908. It is insisted by the defendant that, in view of "a supplement to an act entitled 'An act relative to the writ of certiorari (Revision of 1903)' approved April eighth one thousand and nine hundred and three" (Act April 13, 1907 [P. L. p. 109]), the prosecutor is in laches in procuring his writ, and is debarred of his remedy. The act of 1907 provides that "no writ of certiorari shall hereafter be allowed to review any assessment or assessments made upon the owner or owners of land or lands for benefits assessed * * * for the construction or cost of construction of any * * * sewer or sewers * * * unless application for such writ shall be made within sixty days after such assessment or assessments shall have been confirmed by a court of competent jurisdiction. * * *" While the record before us does not show when the writ was applied for, yet we assume, as counsel in their briefs have assumed, that it was more than 60 days after the alleged assessment had been confirmed. But, notwithstanding this act, we think the prosecutor was not deprived of

We have pointed out in the other case (Groel v. Newark) that the ordinance providing for the construction of the sewers on account of which the assessment in question was made was adopted without either actual or constructive notice to the prosecutor, and that, for that reason, the ordinance and all proceedings thereunder were void as to the prosecutor, because he was deprived of his constitutional right to be heard before his property rights were affected, and that the defect was not remedied by the acts of April 19, 1905 (P. L. p. 414). In that case we fur-

Certiorari, on the prosecution of Patrick i to set aside the ordinance until after an assessment was attempted to be made under it, because it appeared that he was led to believe that the general scheme of improvement was to be made at public expense, and that no assessment would be levied against

> By the failure of the municipal authorities to give either actual or constructive notice to the prosecutor of the intention to adopt, or the pendency of, the ordinance by virtue of which they attempted to assess his land, they failed also to acquire the right to impose the assessment of special benefits in question. Under such circumstances, it is not within the constitutional power of the Legislature to sanction a special assessment. Meredith v. Perth Amboy, 63 N. J. Law, 520, 44 Atl. 971. The statutory limitation upon the allowance of the writ of certiorari cannot be enforced for the protection of an assessment which the Legislature could not constitutionally authorize. Meredith v. Perth Amboy, 63 N. J. Law, 520, 44 Atl. 971; Pardee v. Perth Amboy, 57 N. J. Law, 106, 29 Atl. 587; Kirkpatrick v. Commissioners, 42 N. J. Law, 510; Traphagen v. West Hoboken, 39 N. J. Law, 232, on error 40 N. J. Law, 193; Evans v. North Bergen. 39 N. J. Law. 456.

> For this reason, and for the reasons given in the case of Groel v. Newark, the assessment under review, together with the preliminary proceedings upon which it rests, so far as they affect the prosecutor, must be set aside and vacated, with costs.

> > (77 N. J. L. 640)

STATE V. BERTCHEY.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

1. Homicide (§ 20*) - Murder - Apprehen-SION OF CRIMINAL.

SION OF CRIMINAL.

Crimes Act June 14, 1898, \$ 106 (P. L. 1898, p. 824), declares that any one who kills a private person endeavoring to apprehend a criminal, knowing the intention with which such private person interposes, is guilty of murder. Held that, in order to sustain a conviction under such act, the state must prove that the defendant, who shot his pursuer, was a criminal, that decessed was endeavoring to a criminal, that deceased was endeavoring to apprehend him when shot, and that defendant then knew deceased's purpose.

see Homicide. [Ed. Note.—For other cases, see Hor Cent. Dig. §§ 33, 34; Dec. Dig. § 20.*]

2. Homicide (§ 182*) — Apprehension of Criminal — Shooting Private Citizen — - APPREHENSION OF CRIMINAL -EVIDENCE.

In a prosecution for murder in shooting a private citizen while aiding officers to apprea private citizen while aiding officers to apprehend defendant after an alleged burglary, under Crimes Act June 14, 1898, § 106 (P. L. 1898, p. 824), providing that the killing of a private person endeavoring to apprehend a criminal, knowing the intention with which the private person interposes, is murder, proof of defendant's burglarious entry interaction in the private person interposes, is murder, proof of defendant's burglarious entry interaction in the private prior to the shooting, and his theft while there, was competent to show that he was a criminal at the time he shot deceased, and proof of the hue and cry raised in pursuing defendther pointed out that the prosecutor was not of the hue and cry raised in pursuing defend-prejudiced in his rights by not attempting ant, of the firing of the shots in close proximity

eFor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to an inn, from which deceased emerged and responded to orders of the officers to "Catch the thief," and of decedent's joining in the pursuit, was competent to show deceased's intention in following and overtaking accused.

[Ed. Note.—For other cases, see I Cent. Dig. § 386; Dec. Dig. § 182.*] Homicide,

8. Homicide (§ 20*) - Murder - Apprehen-SION OF CRIMINAL

Under Crimes Act June 14, 1898, § 106 (P. L. 1898, p. 824), declaring that any one who kills a private person endeavoring to apprehend a criminal, knowing the intention with which such private person interposes, is guilty of murder, it is not essential that decedent, while following defendant to apprehend him just prior to the shooting, had knowledge of the particular crime which defendant had committed and for which it was sought to apprehend ted, and for which it was sought to apprehend him.

[Ed. Note.—For other cases, see I Cent. Dig. § 33, 34; Dec. Dig. § 20.*] Homicide,

4. CRIMINAL LAW (§ 762*)—INSTRUCTIONS ELEMENTS OF OFFENSE—ELIMINATION

ELEMENTS OF OFFENSE—ELIMINATION—VALUE OF TESTIMONY—OPINION OF COURT.

In a prosecution for killing decedent while attempting to apprehend defendant for a crime, the court charged that the jury would have little difficulty in determining a crime had been committed, and that deceased was trying to apprehend a criminal, that there was evidence from which the jury might find that the police frequently called on citizens, who gradually joined in the pursuit to "Catch that man," who was fleeing from them, and that the jury might also find that in passing an inn the offimight also find that in passing an inn the offi-cers repeated their commands to "Catch that man," and that deceased heard the commands of the officers, joined in the pursuit, and was enthe omeers, joined in the pursuit, and was endeavoring to arrest defendant when shot. Held, that such instruction was proper, under the rule that the trial judge may give his own views to the jury with respect to the value of the testimony or on the merits of the case, and was not objectionable as eliminating the question whether decedent had knowledge of the tion whether decedent had knowledge of the crime defendant had committed, and was endeavoring to apprehend him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1758; Dec. Dig. § 762;* Homicide, Cent. Dig. §§ 581, 656.]

CEIMINAL LAW (\$ 777 ½*)—INSTRUCTIONS— REFERENCE TO TESTIMONY.

Where the court charged that "there was evidence in the case" from which the jury might find certain facts, which was amply sustained by the evidence, the instruction was not objectionable as misquoting the testimony of a particular witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1807; Dec. Dig. § 777½.*]

6. CRIMINAL LAW (§ 824*)-Instructions

NECESSITY OF REQUESTS.

Omission of the court to charge on a particular matter is not error, in the absence of a request to charge thereon.

[Ed. Note.—For other cases, see Crimin Law. Cent. Dig. § 1996; Dec. Dig. § 824.*] see Criminal

Error to Court of Oyer and Terminer, Ocean County.

Adolph Bertchey was convicted of murder, and he brings error. Affirmed.

Robert P. Bell and V. Claude Palmer, for plaintiff in error. Theodore J. R. Brown, Prosecutor of the Pleas, and Edmund Wilson, Atty. Gen., for the State.

GUMMERE, O. J. The defendant below was indicted for, and convicted of, the murder of one Frank Janowski. The record and the proceedings at the trial are before this court for the purpose of reviewing certain rulings of the trial court on questions of evidence, and certain instructions delivered by the court to the jury. The case made by the state showed that the killing of Janowski occurred under the following circumstances: About 9 o'clock on the night of December 29, 1908, the defendant burglariously entered one of the rooms of the Hotel Manhattan, in the village of Lakewood, by means of a ladder placed on the outside of the building, and stole some of the property belonging to a guest of the hotel. As he was attempting to enter another room by the same means, he was discovered by people in the neighborhood who called "Thief!" and "Police!" As soon as he heard the outcry, he dropped from the ladder, and started to run away. A hue and cry was immediately raised, and he was soon pursued by a large crowd of people, among whom were two police officers, who from time to time halloed "Catch that man," and "Catch the thief." During the course of the pursuit the fleeing man and the officers exchanged several shots, but no one was hit. Two or three of these shots were fired by the defendant in close proximity to the Bartlett Inn, where Janowski, the deceased, was employed as a bartender, together with one Coates. Both of these men were in the barroom at the time, and when the shots were fired, they looked at one another and then ran out into the street. Coates, while on the street, heard cries of "Catch the thief," or "Catch the man," he was uncertain which. These cries came from the officers, and Janowski was only about 10 to 20 feet away from them at that time. In a few minutes both Coates and Janowski went back into the hotel. Janowski immediately got his hat, left the hotel again, and joined in the pursuit of the defendant. After following him some distance, he overtook him, and as he laid hands on him, or was about to lay hands on him, he was shot down and killed.

The rulings on evidence, which are submitted to us for review, were refusals by the trial court to exclude the testimony of witnesses showing the burglarious entry and theft at the Hotel Manhattan by the defendant, and the subsequent hue and cry after him. It is somewhat difficult to understand from the argument of counsel why he conceives that this testimony should have been excluded. He says that it could not be other than prejudicial to the defendant; but he can hardly mean that this fact would require its exclusion, for all testimony which tends to convict a person of the crime for which he is being tried is prejudicial to him. He further says that, to justify its admission, it was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

necessary for the state to first show that the deceased knew of the offense which the defendant had committed, or that he was specially directed or commanded by a police officer to aid in the defendant's capture. He cites no authority in support of this assertion, and it is manifestly unsound. The law does not require that a citizen, before answering to the call of a police officer for assistance in the arrest of a criminal, shall first be informed of the particular crime which the defendant has committed; nor does it require that the citizen shall be specially selected by the officer, in order to justify him in rendering assistance. A general call by an officer for assistance in arresting a fleeing criminal, not only may, but ought to, be responded to by all persons within sound of his voice, who are physically able to render him aid; and aid should be rendered promptly, without stopping for information as to the crime which has been committed. The line of testimony which was objected to was, in our opinion, clearly competent. By the one hundred-and-sixth section of our Crimes Act June 14, 1898 (P. L. 1898, p. 824), any one who kills a private person endeavoring to apprehend a criminal, knowing the intention with which such private person interposes, is guilty of murder. In order to bring the defendant within the condemnation of this statute the state was required to prove three things: First, that the defendant was a criminal; second, that Janowski was endeavoring to apprehend him when the defendant shot him; and, third, that the defendant then knew the purpose with which Janowski interposed. Proof of the defendant's burglarious entry into the Hotel Manhattan, and his theft while there, was competent to show that he was a criminal at the time when he shot Janowski. Proof of the raising of the hue and cry; of the firing of the shots in close proximity to the Bartlett Inn; of the coming onto the street of Janowski immediately afterward; of the cries of the officers "Catch the thief," or "Catch the man," uttered when they were within 10 or 20 feet of Janowski, and of the subsequent joining of Janowski in the pursuit—was competent for the purpose of showing the latter's intention in following and overtaking the defendant. Most of it was also competent for the purpose of showing that the defendant knew what Janowski's intention was at the time when he shot him down.

The portion of the charge to the jury which is made the subject of criticism by counsel for the defendant is as follow: "You will have little difficulty in determining that a crime had been committed, and that the deceased was trying to apprehend a criminal. There is evidence in the case from waich you may find that the police frequently called upon the citizens, who gradually made up a crowd and joined in the pursuit, to 'Catch also there is evidence in the case from which part of his charge, did not profess to quote

you may find, if you believe it, that in passing Bartlett Inn these officers repeated their commands to 'Catch that man,' and that a fellow barkeeper of Janowski, the deceased, heard the shots that were fired as the crowd was passing the inn, and went out, and that the deceased went out with him, and that the fellow barkeeper heard the cries of the police to 'Catch that man,' and that the deceased was then near to his fellow barkeeper, and outside of the Bartlett Inn. You may. from this evidence, find that the deceased also was acquainted with the commands of the police to catch this man, and joined in the pursuit, and was endeavoring to arrest the defendant." The objection made to this excerpt from the charge is that it practically took from the consideration of the jury the question whether Janowski had knowledge of the crime of the defendant, and was endeavoring to apprehend him. We have already pointed out that the question whether Janowski had knowledge of the particular crime which the defendant had committed was nonessential in determining whether the latter was guilty or innocent of the crime for which he was being tried; and it was, for this reason, not a question for the jury's consideration. Whether Janowski was endeavoring to arrest the defendant when the latter stopped him was, of course, a vital question, to be determined by the jury; but we do not consider that the trial court, by this portion of its charge, usurped the function of the jury, and took upon itself the decision of it. What was said was the expression of the view of the court as to the conclusion which ought to be drawn from the testimony as to the intention with which Janowski followed the defendant. The propriety of such judicial action is entirely settled in this state, as will appear from the following citations from former decisions in this court: "That a judge has a right to give his own views to the jury with respect to the value of the testimony, or upon the merits of the case, is, and always has been, the law of this state." Smith & Bennett v. State, 41 N. J. Law, 374. "Under our system of jurisprudence a trial judge is not only justified in pointing out to the jury what seem to him to be the salient features of the case, but it is always his right, and frequently his duty, to go further, and give the jury the benefit of his greater experience by telling them how the testimony strikes his mind, both as to its force, and as to the inferences he would draw from it." State v. Hummer, 73 N. J. Law, 714, 65 Atl. 249; State v. Schuyler, 75 N. J. Law, 487, 68 Atl 56.

It is further insisted that in this excerpt the trial judge "misquoted to the prejudice of the defendant the testimony of Coates, the fellow bartender of the deceased, that the deceased was standing close to him when he (the witness) heard shouts 'Catch that man.' " All that it is necessary to say in disposing of that man,' who was fleeing from them. And | this contention is that the trial judge, in this from the testimony of Coates, or of any other witness, but stated that there was evidence in the case from which the jury might find that the deceased was near to Coates at the time when the latter heard the cries of the police, and, further, that an examination of the case disclosed an abundance of evidence from which the jury might have found that the deceased was near enough to Coates to hear the cries of the police which Coates heard; and this was the point which the trial court was attempting to impress upon the minds of the jurors.

The only other assignment of error argued by counsel for the defendant is that the trial judge erred in not charging the jury that there was no evidence that the deceased knew that any crime had been committed, or that he was making an effort to apprehend a criminal. It is only necessary to say, in disposing of this assignment, that no request for such an instruction was submitted to the court. It may be added that had such an instruction been asked, it would have been properly refused, as being without justification under the facts proved.

The conviction of the defendant will be affirmed.

(77 N. J. L. 704)

NAJARIAN v. JERSEY CITY, H. & P. ST. R. CO.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

1. STREET RAILROADS (§ 112*)—ACCIDENT TO PEDESTRIAN—NEGLIGENCE—EVIDENCE.

In a suit brought against a street railroad company to recover for the death of a pedestrian in a street, caused by his being hit by the rear end of a car which left the track because of the "splitting" of a switch, proof of the happening of the accident is sufficient to charge the company with negligence, and to place upon it the burden of showing that the injuries resulting in death were not received through any fault on its part.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 227; Dec. Dig. § 112.*]

2. NEGLIGENCE (§ 136*)—QUESTION FOR JURY.

Where the happening of an accident is sufficient to charge a defendant with negligence, and where fair-minded men might honestly differ as to whether the defendant has sustained its burden of showing that the decedent's injuries were not received through any fault on its part, the question of defendant's negligence should be submitted to the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

3. STREET RAILROADS (§ 98*)—INJUBY TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE.

A pedestrian, struck by a street car which left the track, is not guilty of contributory negligence because he was standing in the roadway, when it appears that he was sufficiently distant from the track for the car to have passed him in safety if it had remained upon the track.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 204-208; Dec. Dig. § 98.*] (Syllabus by the Court.)

Error to Circuit Court, Hudson County. Action by Lucia Najarian, administratrix of Deckran Najarian, against the Jersey City, Hoboken & Paterson Street Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Edwards & Smith, for plaintiff in error. Hartshorne, Insley & Leake, for defendant in error.

TRENCHARD, J. On January 23, 1907, the plaintiff's intestate, Deckran Najarian, was struck and killed by a trolley car of the defendant company. The accident occurred about 6 or 7 o'clock in the evening, and while it was dark. The decedent was walking westward on Angelica street (being on the north side of that street), and stopped, when he came to the corner of that street and Spring street, to allow the trolley car in question to pass before him. The car was going southward on Spring street. A switch was in the track on Spring street north of Angelica street, for the purpose at times of switching cars off eastward into the car barn on Angelica street. The tongue of this switch was usually kept "closed for Angelica street"; that is, it was ordinarily so set that cars traveling south on Spring street would pass over it, and continue southward through that street. The decedent stood in the roadway between the curb of Spring street and the trolley track. The front wheels of the car in question passed over the switch in safety, but the hind wheels took the switch into Angelica street, thereby throwing the rear of the car toward the curb on the east side of Spring street, and against the decedent, injuring him so that he died shortly after. This action was brought in the Hudson county circuit court by the administratrix of the decedent to recover damages for his death. The trial resulted in a verdict for the plaintiff, and this writ of error brings up for review the judgment entered upon the verdict.

The defendant below assigns error upon the refusal of the trial judge to nonsuit the plaintiff and to direct a verdict for the defendant. We think the motions were properly refused. Both motions were grounded upon (1) want of evidence of negligence of the defendant company; and (2) the contributory negligence of the plaintiff's intestate. With respect to the negligence of the defendant company, we think there was evidence requiring the submission of that question to the jury. It was not necessary for the plaintiff, in order to make out a prima facie case, to prove the cause of the accident. All that she was required to do was to show the existence of negligence, on the part of the defendant, which occasioned the injury resulting in death. This she did by proving that the rear of the car left the straight track upon which the front part of it was proceeding, so as to kill the plaintiff's in-

•For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

testate who was standing in what was normally a place of safety. Ordinarily proof of the occurrence of an accident will not, of itself, support a conclusion of the defendant's carelessness; but this principle is not of universal application. Where the accident is one which, in the ordinary course of events, would not have happened if proper care had been used by the defendant, res ipsa loquitur. Bergen County Traction Co. v. Demarest, 62 N. J. Law, 755, 42 Atl. 729, 72 Am. St. Rep. 685; Bahr v. Lombard, Ayers & Co., 53 N. J. Law, 233, 21 Atl. 190, 23 Atl. 167; Sheridan v. Foley, 58 N. J. Law, 230, 33 Atl. 484.

In Bergen County Traction Co. v. Demarest, supra, Chief Justice Gummere, speaking for this court, said: "In the ordinary operation of the defendant's railroad its cars would not have left the rails. It is a matter of common knowledge that the roadbed of a street railroad is so built, and the cars so constructed, that when there is no defect in either, and the cars are run with due care, the latter will remain upon the track; and consequently proof of the derailment of a car, in the absence of evidence to the contrary, justifies the conclusion that it resulted either from improper construction, failure to keep in proper repair, or negligence in operation." In the present case it may likewise be said that common experience teaches that switches are so built, and cars so constructed, that when there is no defect in either, and the switches are prudently operated, and the cars are run with due care, the latter will pass over closed switches in safety. Therefore proof of the "splitting" of the switch, in the absence of evidence to the contrary, justifies the conclusion that it resulted either from improper construction, failure to keep in proper repair, or negligence in operation of the car or switch, or both. If there were any facts inconsistent with negligence, it was for the defendant to prove them. The motion to nonsuit upon the ground of want of proof of the defendant's negligence was therefore properly denied. We think there was no conclusive rebuttal of such presumption of negligence established by the defendant.

We have pointed out that the switch, the "splitting" of which caused the accident, was supposed to be kept set so that cars would pass over it down Spring street. The front wheels passed safely, but the rear wheels took the switch into Angelica street. Immediately after the accident, and before the car was moved, the tongue of the switch was found "open for Angelica street"; that is, so placed that a car going southward on Spring street would be turned by the tongue of the switch into Angelica street. This movable court below is affirmed.

tongue of the switch (which, according as it is "closed" or "opened," keeps the wheels of the car upon the main track, or shunts them off upon the switch) is six feet nine inches long. It rests in a pocket, and is pivoted at the large end with a pin. The other end or point of the tongue is the part which is moved from right to left for the purpose of opening or closing the switch. The defendant attempted to overcome the presumption of negligence by showing that the switch was of standard type and in good working order. But the testimony shows that the tongue was considerably worn at the point. Moreover, the accident may well have happened from the failure of the defendant's servant to completely close the switch; that is, from his failure to move the point of the tongue until it was in actual contact with the rail of the main track. If it was not so completely closed, the forward wheels might well have passed over, and the rear wheels have taken, the switch, on account of the natural swing of the car from side to side from time to time. The testimony shows that, had the switch been properly closed, it could not have been forced open by the motion of the car wheels in running over it, unless the tongue was defectively loose at the pivot. The motorman says that as he went over the switch, he noticed that it was "set straight to go right on to Spring street." Whether his conclusion was correct, or his inspection imperfect, was, in view of the fact that the switch was found open immediately after the accident, a matter about which fair-minded men might honestly differ. The negligence of the defendant being a jury question, motion for a direction of a verdict upon the ground of want of proof of the defendant's negligence was properly refused.

With respect to the alleged contributory negligence of plaintiff's intestate, counsel has not pointed out, nor do we perceive, in what respect he was negligent. He was about to cross Spring street, when he saw the car approaching, and stopped evidently to allow it to pass. He had the right to stand in the roadway of the street where he was standing, while waiting for the car to pass down the street before him. He had no reason to suppose that the forward end of the car would keep on the track and the rear end take the switch, and so make the spot where he stood a place of danger. Kathmeyer v. Mehl (N. J. Sup.) 60 Atl. 40. The alleged contributory negligence of the deceased was therefore at least a jury question, and the motions to nonsuit and direct a verdict upon that ground were properly refused.

The result is that the judgment of the



(78 N. J. L. 128)

BARRISH V. ORBEN.

(Supreme Court of New Jersey. June 30, 1909.) 1. TRIAL (§ 33*)-RECEPTION OF EVIDENCE-

ADMISSIBILITY.

Where it is necessary for a party, in order to maintain the issue, to prove several facts, the court should admit any legitimate evidence tending to establish either fact. [Ed. Note.—For other cases, see Trial, Dec. Dig. § 33.*]

2. CONTRACTS (§ 349*)—ACTION FOR BREACH—EVIDENCE—ADMISSIBILITY.
Where the plaintiff testified to transactions

with one Runyon as with the agent of the defendant, it was error to exclude cross-examination tending to show that he knew he was dealing with Runyon as with a principal or with him as the agent of another than the defendant fendant.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 349.*]

(Syllabus by the Court.)

Appeal from District Court of City of Newark.

Action by Samuel H. Barrish against Charles S. Orben. Judgment for plaintiff, and defendant appeals. Reversed.

Argued November term, 1909, before REED, TRENCHARD, and MINTURN, JJ.

Prout & Prout, for appellant. Philip J. Schotland, for appellee.

TRENCHARD, J. This action was brought in the First district court of the city of Newark, by Samuel H. Barrish against Charles 8. Orben, to recover damages for the breach of a contract which the plaintiff is alleged to have had with the defendant for the painting of houses belonging to the defendant. The learned trial judge, sitting without a jury, rendered judgment for the plaintiff, and from that judgment the defendant appeals to this court. The testimony at the trial showed that the plaintiff, Barrish, was a painter; that he submitted to one Runyon a written signed estimate of the amount for which he agreed to furnish the material and labor necessary to do the painting of 10 houses; that later he worked upon the houses of the defendant until he was stopped. It was to recover for such painting that this suit was brought.

The written estimate upon its face does not show to whom it was submitted nor upon whose houses the work was to be done, nor does it show acceptance. According to the plaintiff's contention, which there was evidence tending to support, Runyon was the agent of the defendant, and the defendant was present when the estimate was submitted to Runyon. According to the defendant's contention, which there was also testimony tending to support, the defendant was not present, and had no knowledge of the transaction, and Runyon was not his agent, but was acting on his own account. It also appeared in evidence that Runyon TRENCHARD, and MINTURN, JJ.

had a subcontract to do the painting in question from one Frank G. Orben, with whom the defendant had contracted for the erection and finishing of the houses. To maintain his defense, therefore, it was material and relevant for the defendant to show, not only that Runyon held the contract for the painting in question, but also, if he could, the time when his contract was entered into. and that the plaintiff had knowledge of it. These things he attempted to show, but the testimony was excluded by the trial judge, and the defendant assigns such action, among others, as causes for reversal. We think the trial judge erred in overruling the question put by the defendant to Frank G. Orben as to the time when he subletted the contract for painting to Runyon. It was one of several facts necessary for the defendant to prove in order to maintain the issue which he had tendered.

We think, also, that the trial judge erred in overruling the cross-examination of the plaintiff as to whether he knew there was a contract between the defendant and Frank G. Orben which included the painting in question. The plaintiff had already testified in effect that he was dealing with Runyon as the agent of the defendant. question propounded was manifestly designed to elicit the fact that the plaintiff knew he was dealing with Runyon either as agent of the contractor or as a subcontractor, and not with him as the agent of defendant, for such knowledge might be inferable from plaintiff's being aware that there was a contract between the defendant and Frank G. Orben which included the painting in question. Colloty v. Schuman, 73 N. J. Law. 92, 62 Atl. 186.

The judgment of the court below must be reversed, and a venire de novo awarded.

(78 N. J. L. 176)

WORMAN v. SEYBERT.

(Supreme Court of New Jersey. June 80, 1909.)

EVIDENCE (§ 374*)—BILL OF SALE—EXECU-TION — ATTESTING WITNESSES — HANDWEIT-

ING.

Where the subscribing witnesses to a bill of sale reside in another state, proof of their handwriting is prima facie evidence of the due execution of the instrument.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1596-1603; Dec. Dig. § 374.*] (Syllabus by the Court.)

Appeal from District Court of City of Camden.

Action by George W. Worman against Harry W. Seybert. Helen T. Smith filed claim of title. Judgment for defendant, Worman, and claimant appealed. Reversed.

Argued February term, 1909, before REED,

French & Richards, for appellant. Howard L. Miller, for appellee.

TRENCHARD, J. This was an action to try the title to the launch Sue attached by the sergeant at arms of the Camden district court as the property of Harry W. Seybert, in the suit of George W. Worman against Harry W. Seybert, and to which Helen T. Smith filed a claim of title. Upon trial the learned judge of the district court directed a verdict for the defendant, Worman, upon the ground that the claimant had failed to prove title, and from the judgment entered thereon the claimant appeals.

Among other reasons specified for reversal is this: That the district court refused to admit in evidence a bill of sale from Harry W. Seybert to Helen T. Smith, offered by the claimant. The bill of sale, by virtue of which Miss Smith claimed title to the launch in question, showed upon its face that it had been attested by two witnesses. At the trial the claimant called a witness who testified that he knew the handwriting of both subscribing witnesses, that the same was their handwriting, and that he was present when they signed their names, and that they were both residents of Philadelphia. The general rule is that the attesting witness to a written instrument is regarded as the person who must be called to prove its execution when he can be had, as it is said that the parties selected him to enable them to refer the execution of the document to him in case any question should arise over its execution. Williams v. Davis, 2 N. J. Law, 277; Williamson v. Wright, 3 N. J. Law, 984; King v. King, 9 N. J. Eq. 44; Corlies v. Vannote, 16 N. J. Law, 324. Where the attesting witness cannot be had by reason of his death, or because he is beyond the jurisdiction of the court, or if living and his whereabouts cannot be ascertained by the use of diligence, secondary evidence is allowed. New Jersey Zinc, etc., Co. v. Lehigh Zinc, etc., Co., 59 N. J. Law, 189, 35 Atl. 915; Lorrillard v. Van Houten, 10 N. J. Law, 270. Where the attesting witness is thus unavailable, proof of his handwriting is admissible as secondary evidence, and is prima facie evidence of the due execution of the instrument. Glover v. Armstrong, 15 N. J. Law, 186; Servis v. Nelson, 14 N. J. Eq. 94. In the present case, it appearing that the subscribing witnesses were residents of another state, proof of their handwriting was prima facie evidence of the due execution of the bill of sale, and its exclusion was therefore erroneous. This result renders unnecessary the consideration of other reasons specified for reversal.

The judgment of the district court must be reversed, and a venire de novo awarded. (78 N. J. L. 256)

(two cases). STATE v. BIENSTOCK et al. (Supreme Court of New Jersey. June 22, 1909.) 1. CONSPIRACY (§ 26*)—CRIMINAL "CONSPIRACY"—WHAT CONSTITUTES.

A combination to accomplish an object which is not criminal, by means which are not criminal, may become an indictable "conspiracy," where the public is injuriously involved, or where the result would be either injury or oppression to individuals.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 37; Dec. Dig. § 26.*

For other definitions, see Words and Phrases, vol. 2, pp. 1454-1461; vol. 8, p. 7613.]

2. Conspiracy (§ 43*)—Criminal Conspiracy—What Constitutes—Election Frauds—"Unlawful."

An indictment for conspiracy alleged, substantially, that since the year 1856 continuously the principal political parties in the United States have been, and still are, known as the Republican party and the Democratic party; that since said date every president of the United States elected by the electors has, before election been promined for said office by fore election, been nominated for said office one of said two parties; that the Republican party has during all that time maintained a central and national political, organization, known as the "Republican national committee," which exercises general and supreme control of the management of said party throughout the United States, and has maintained con-tinuously in New Jersey, and in each of the states, a state political organization known as the "Republican state committee," which exerthe "Republican state committee," which exercises supreme control of the management of the Republican party in the state of which it is the state committee, and also continuously maintains in each county of New Jersey, and in each county of each of the several other states, a county political organization designated as the Republican county committee, which exercises, subject to the state and national committee, supperme control of the management of said Republican party in the county of which it is the Republican county committee; that for many years it has been the right and practice of the Republican reviewed and practice. many years it has been the right and practice of the Republican national committee under its rules, in every year in which presidential electors are to be chosen, and before they are elected, to issue a call for the holding of a national convention, composed of delegates at large, and of delegates other than delegates at large, to be chosen directly by large, to be chosen directly or indirectly by the Republican voters of the respective states; that the delegates from the state of New Jer sey to the national convention were required, by the rules of the Republican state committee of New Jersey, to be elected by a convention of delegates chosen by the Republican voters of the counties, and the delegates other than those known as delegates at large from New Jersey anown as delegates at large from New Jersey to the Republican national convention are required, by said rules of the state committee, to be elected by a convention of delegates chosen by Republican voters in each of the congressional districts of the state, and that delegates to the Republican state convention, and to the convention in each of the convention, and to the to the Kepublican state convention, and to the convention in each of the congressional districts, have been during said time required by the rules of the party and of the county committee to be elected by the Republicar voters in each of said counties at primary elections, held at such times and places in each of the counties are the Republican country committee of each of as the Republican county committee of each of as the Republican county committee in pursuance of that the county committee, in pursuance of the several calls aforementioned, ordered and directed primary elections of the Republican party to be held at a certain time and place through-out the county of Hudson, and appointed the persons who should act at each of said primary

•For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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elections as election officers to conduct the same; that one such primary was directed and ordered to be held at No. 5 Brunswick street in the city of Jersey City for the purpose of receiving the votes of the Republican voters of ceiving the votes of the Republican voters of that ward qualified to vote, and offering to vote thereat for delegates to the Republican state convention, as aforesaid, and for delegates to the Republican conventions to be held in said congressional district; that the defendants, at the time and place aforesaid, designated and appointed by the county committee to conduct said primary at the place aforesaid, and for the purpose aforesaid, it became and was their duty as persons actually in charge of and conduty as persons actually in charge of and conduty as persons actually in charge of and conducting the primary election, to receive the votes of the qualified voters, to give all votes cast their full, due, and honest effect, to reject the votes of persons not qualified, and to honestly and accurately tally, count, and canvass and declare the full and correct number of votes cast, and not to count and declare any votes cast, and not to count and declare any votes for any person that were not cast for such person, or persons, and to conduct the election fairly and honestly; but that the defendants unlawfully, willfully, dishonestly violating their duty to the public in the premises, and intending and contriving to cause to be returned to the county committee, and accepted by it and by the people of New Jersey, as a fact, that the persons who were lawfully elected as delegates were not elected as such delegates thereat, and that persons who were not elected for delegates were elected as such delegates, and to defeat, frustrate, and nullify the will of a majority of the qualified Republican voters, and defeat, frustrate, and nullify the will of a ma-jority of the qualified Republican voters, and to corrupt and pervert the action of the state convention in the election of delegates to the national committee and the action of the con-gressional district in the election of delegates, and to defraud, cheat, and deprive the majority of the qualified Republican voters, did wicked-ly, etc., combine, etc., to deprive, cheat, and defraud, etc., and to pervert, etc., the action of the state convention in the election of delegates the state convention in the election of delegates to the national convention and the action of the congressional convention in the election of delegates to the national convention, and that in pursuance of the conspiracy did unlawfully, etc., count 300 ballots, none of which were cast by any person at the election as ballots cast and voted for persons and candidates at said election, who were not the persons and can-didates for whom a majority of all the qualified Republican voters voting at said primary voted. Held that the indictment charged a conspiracy the object of which was "unlawful" (unlawful acts in this connection not being confined to those punishable as crimes), in that it had a necessary tendency to prejudice the public, and so was essentially a public injury, and that such unlawful object was designed to be accomplished by deceit and fraud, and was a cheat reaching large numbers of persons, and tended to their oppression, and was sustainable as an indictment for a criminal conspiracy. as an indictment for a criminal conspiracy.

Note.—For other cases, see Conspiracy, Dec. Dig. § 43.*

For other definitions, see Words and Phrases, vol. 8, p. 7186.]

8. FORMER DECISIONS DISTINGUISHED

The cases of State v. Woodruff, 68 N. J. Law, 94, 52 Atl 294, and State v. Nugent (N. J. Sup.) 71 Atl. 481, distinguished.

(Syllabus by the Court.)

Certiorari to review indictments against Charles Bienstock and others. Indictments sustained.

Indictment No. 139 is in the following words:

Jersey, in and for the body of the county of Hudson, upon their respective oath, present that, since the year 1856 continuously up to the date of the presentation of this indictment, the principal two political parties in the United States of America have been, and still are, commonly known and designated as the Republican party and the Democratic Party; that, since said first-mentioned date, continuously up to the date of the presentation of this indictment, every president of the United States who has been elected to the presidential office by electors, as prescribed by the Constitution of the United States, has, before his said election. been nominated to and for said office by one or the other of said two political parties, and that, during all the time aforesaid, one or the other of said political parties has been in control of the executive and legislative departments of the government of the United States; that the Republican party has during all the time aforesaid continuously maintained, and still maintains, a central and national political organization, commonly known and designated as the Republican national committee, which during all the time aforesaid possessed and exercised, and still possesses and exercises, general and supreme supervision and control of the management, conduct, and affairs of said Republican party throughout the United States aforesaid, and has also, during all the time aforesaid, continuously maintained and still maintains, in the state of New Jersey, and in each of the several other states of the United States of America aforesaid, a state political organization, commonly known and designated as the Republican state committee, which, during all the time aforesaid, possessed and exercised, and still possesses and exercises, subject to the said Republican national committee, general and supreme supervision and control of the management, conduct, and affairs of the said Republican party in the state of which it is the Republican state committee, and has also, during all the time aforesaid, continuously maintained, and still maintains, in each county of the state of New Jersey, and in each county of each of the several other states of the United States of America, aforesaid, a county political organization commonly known and designated as the Republican county committee, which, during all the time aforesaid, possessed and exercised, and still possesses and exercises, subject to the said Republican state committee and said Republican national committee general and supreme supervision and control of the management, conduct, and affairs of said Republican party in the county of which it is the Republican county committee; that for many years last past it has continuously been and still is. the right, duty, and practice of the said "The grand inquest of the state of New Republican national committee, under its

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

rules and regulations, in every year in which the holding of a convention in each of the presidential electors are to be elected, and before they are elected, to issue a call for, and to fix the time and place for, the holding of a national convention of the Republican party, to be composed of delegates at large and of delegates other than delegates at large to be chosen directly or indirectly by the Republican voters of the respective states; that during all the time aforesaid, the delegates, known and designated as delegates at large, from the state of New Jersey to said Republican national convention, representing the Republican voters in New Jersey in said Republican national convention, have been, and still are, required by the rules, regulations, and practice of the Republican state committee of New Jersey to be elected by a convention of delegates chosen by the Republican voters of the respective counties of the state of New Jersey, and the delegates other than those known and designated as delegates at large from New Jersey to said Republican national convention have been, and still are, required by said rules, regulations, and practice of said Republican state committee to be elected by a convention of delegates chosen by the Republican voters in each of the several congressional districts of the state of New Jersey, and that said delegates to said Republican state convention in the state of New Jersey, and to the convention in each of the several congressional districts of the state of New Jersey, have been during all the time last aforesaid, and still are, required by the rules, regulations, and practice of the Republican party, and of the Republican county committees of the respective counties of New Jersey, to be elected by the Republican voters in each of the said counties, at primary elections, held at such times and places, in each of said counties, as the Republican county committee of each of said counties has designated, or may designate.

"And the grand inquest aforesaid, upon their oath aforesaid, do further present that the Republican national committee aforesaid - in the year of – day of – our Lord 1908, issued its call for the holding of a Republican national convention to be held in the city of Chicago, in the state of Illinois, on the 16th day of June in the year last aforesaid, for the purpose of nominating the candidates of the Republican party for each of the respective offices of president of the United States, and vice president of the United States; that in obedience to and in compliance with, said call the Republican state committee of the state of New Jersey issued its call, addressed to said several Republican county committees of the state of New Jersey for a state convention, to be held in the city of Treaton, in this state, on the 5th day of May, in the year last aforesaid, for the purpose of electing four delegates at large to the Republican

several congressional districts of the state of New Jersey, for the purpose of electing delegates, other than delegates at large, to said Republican national convention; and that in obedience to, and in compliance with, said call, so as aforesaid issued by said Republican state committee, the Republican county committee of the county of Hudson of this state, on the -- day of the year last aforesaid, ordered and directed that primary elections of the Republican party should be held on the 28th day of April, in the year last aforesaid, throughout the said county of Hudson, and appointed the persons who should act at each of the said primary elections, and that one of the said primary elections so ordered and directed by the said Republican county committee was by the said committee ordered and directed to be held, and was held at No. 5 Brunswick street, in the city of Jersey City, for the ---- districts of the Fifth ward of the said city of Jersey City (said districts of said ward being then and there included in, and forming a part of, the Tenth congressional district of the said state of New Jersey,) for the purpose of receiving the votes of the Republican voters in the · districts of the said Fifth ward of the city of Jersey City, qualified to vote, and offering to vote, at said primary election, for delegates to the Republican state convention as aforesaid, and for delegates to the Republican conventions to be held in the Tenth congressional district of the state of New Jersey.

"And the grand inquest aforesaid, upon their oath aforesaid, do further present that Charles Beinstock, Thomas Brodell, and Peter J. McDonald, all late of the city of Jersey City, in the county of Hudson aforesaid, on the 28th day of April, in the year of our Lord one thousand nine hundred and eight, at the city of Jersey City, in the county aforesaid, and within the jurisdiction of this court, being then and there designated and appointed by the said Republican county committee aforesaid to conduct, and then and there conducting, a Republican primary election at No. 5 Brunswick street, in the city of Jersey City, for the Fifth ward in said city, for the purpose of receiving the votes of all Republican voters, qualified and offering to vote at said primary election, and residing in the Fifth ward of the city of Jersey City, for four delegates to the Republican state convention so called to meet at Trenton as aforesaid, and for four delegates to the congressional districts of New Jersey as aforesaid, it became and was their duty, as the persons actually in charge of and conducting said primary election, to receive at said primary election the votes of all qualified Republican voters in said districts of said ward who desired and offered to vote at said primary election for any person, or national convention aforesaid, and also for persons, as delegate, or as delegates, to said

Republican state convention, or to said con-1ed as cast for the persons and candidates gressional conventions, and to give to all votes cast at said primary election their full, due, and honest effect, and to reject the votes of all persons offering to vote at said primary who were not qualified Republican voters in said district's ward; and to honestly and accurately tally, count, canvass, allow, and declare the full and correct number of votes cast at said primary election by qualified Republican voters voting thereat, for the person, or persons, for whom said votes were cast, and not to tally, count, canvass, allow and declare any votes for any person, or persons, at said primary election that were not cast for such person, or persons, and to conduct said election in all respects fairly and honestly, to the end that the persons and candidates receiving a majority of the votes cast at said election by qualified Republican voters voting thereat should be declared to be, and should be, returned to the said Republican county committee, and should be permitted to act as delegates elected at said primary election, and that thereby full, due, and honest effect should be given to the wishes and votes of the qualified Republican voters, voting at said election, as to the delegates who should represent them in the said state convention, and in the said congressional district conventions; but that they, the said Charles Beinstock, Thomas Brodell, and Peter Mc-Donald, willfully, unlawfully, dishonestly, immorally, fraudulently, and corruptly disregarding and violating their duty to their party and to the public in the premises, and designing, contriving, and intending to make it publicly appear, and to cause to be returned to said Republican county committee, and to be accepted by said committee and by the people of New Jersey as a fact, that the persons who were lawfully elected at said primary election as delegates to said respective conventions were not elected as such delegates thereat, and that persons who were not elected at said primary election as delegates to said respective conventions were elected as such delegates thereat; and to defeat, frustrate, nullify, and set at naught the will, wishes, purposes, and intentions of a majority of the qualified Republican voters voting at said primary election as to the persons whom they desired and for whom they had voted at said primary election, to represent them as delegates in said Republican convention; and to corrupt and pervert, so far as in them lay, the action of the state convention in the election of delegates at large to said Republican national convention, and the action of the congressional district convention in the election of delegates, other than delegates at large, to the Republican national convention; and to deprive, cheat, and defraud the majority of the qualified Republican voters voting at said primary of their lawful right to have their

for whom their said votes were in fact cast at said election, and of their lawful right to have full, due, and honest effect given to their said votes, and to their lawful right to have no votes tallied, counted, allowed, or declared that were not cast at said election by qualified Republican voters entitled to vote thereat, did wickedly, dishonestly, immorally, fraudulently, corruptly, falsely, knowingly, and unlawfully combine, unite, confederate, conspire, and bind themselves by agreement to deprive, cheat and defraud the majority of the qualified Republican voters voting at said primary election of their lawful right to have their votes tallied, counted, canvassed, allowed, and declared as cast for the persons and candidates for whom their said votes were in fact cast at said election, and of their lawful right to have full, due, and honest effect given to their said votes, and of their lawful right to have no votes tallied, counted, allowed, or declared as cast for any person or candidate at said election that were not in fact for such person or candidate at said election by qualified Republican voters entitled to vote thereat; and to deprive, cheat, and defraud the persons who were elected delegates at said election of the right to act as delegates; and to declare and make it publicly appear, and to cause it to be returned to said Republican county committee, and to be accepted by said committee and by the people of New Jersey, as a fact that the persons who were lawfully elected, at said primary election, as delegates to said respective conventions were not elected as such delegates thereat, and that persons who were not elected at said primary election as delegates to said respective conventions were elected as such delegates thereat; and to defeat, frustrate, nullify, and set at naught the will, wishes, purposes and intentions of a majority of the qualified Republican voters voting at said primary election as to the persons whom they desired and for whom they had voted at said primary election to represent them as delegates in said Republican conventions; and to corrupt and pervert so far as in them lay, the action of the state convention in the election of delegates at large to said Republican national convention, and the action of the said congressional district convention in the election of delegates, other than delegates at large, to the Republican national convention.

"And the grand inquest aforesaid, upon their oath aforesaid, do further present that the said Charles Bienstock, Thomas Brodell, and Peter J. McDonald so being in charge of and conducting said primary election as aforesaid, together with divers other evil-disposed persons, whose names are to the grand inquest unknown, in execution of the said last-mentioned premises, and in pursuance of the said conspiracy, combination, confederavotes tallied, counted, allowed, and declar- tion, and agreement between and amongst

them as aforesaid, and to effect the object | thereof, afterwards, to wit, on the 28th day of April, in the year aforesaid, at the city of Jersey City aforesaid, in the county of Hudson aforesaid, did willfully, corruptly, and unlawfully estimate, number, count, canvass, tally, and give effect to a large number of ballots, to wit, 300 ballots, none of which were then and there cast and voted by any person at said election, as ballots cast and voted for persons and candidates at said primary election who were not the persons and candidates for whom a majority of all the qualified Republican voters voting at said primary election voted and cast their ballots, to the great prejudice, injury," etc.

Argued November term, 1908, before GAR-RISON, PARKER, and VOORHEES, JJ.

Pierre Garven, Prosecutor of the Pleas (Joseph M. Noonan, of counsel), for the State. Alexander Simpson, for defendants.

VOORHEES, J. Two indictments for conspiracy were returned against the defendants by the grand jury. To each a general demurrer was filed, and thereafter writs of certiorari removed them into this court for the determination of the questions arising upon the demurrers. The first indictment, known as No. 139, consisting of a single count, has been above set forth in extenso. The other indictment. No. 169, consists of four counts, the first of which is the same as No. 139, being founded on precisely the same facts. The second count concededly cannot be sustained. The third count is substantially covered by the first count. The fourth count seems to be bad under State v. Nugent (N. J. Sup.) 71 Atl. 481. The controversy is mainly concerned with the first count of each of the indictments, and not with the supplementary counts in the second indictment, so that the real question presented is whether the first counts above mentioned allege a criminal conspiracy.

At the outset it must be conceded that the nomination of a president and vice president of the United States is not recognized by the Constitutions or laws, either federal or state. The mode of choosing these officers is found in the United States Constitution. Article 2. § 1, provides that the president and vice president "shall be elected as follows: Each state shall appoint in such manner as the Legislature thereof may direct a number of electors" And article 12 (twelfth amendment) provides that the electors "shall name in their ballots the person voted for as president and in distinct ballots the person voted for as vice president," and sign and certify the voting lists and transmit them to the seat of government. It is perceived that the electors of each state are free to vote for any person for these offices who is not disqualified. The choice of electors is, however, wholly within state jurisdiction, and the state has power to punish for illegal and fraudulent voting for presidential electors. In re Green, 134

U. S. 377, 10 Sup. Ct. 586, 33 L. Ed. 951. These indictments, however, have not for their object the punishment of such fraudulent voting. Nor are they concerned with a violation of the state primary election act, for that act is not comprehensive enough to include the primary election referred to in the indictments. The wrong specified as the object of the conspiracy is the tampering with ballots cast at a party primary voluntarily held for the choice by the Republican voters of the ward (a) for delegates to the Republican state convention at Trenton, which was to elect four delegates at large to the Republican national convention to be held at Chicago; and (b) for delegates to the Republican convention of Tenth congressional district of New Jersey, which was to elect district delegates to the Republican national convention. The national convention in turn recommends persons for president and vice president of the United States to be voted for by the electors who may constitutionally vote as they choose, notwithstanding such recommendation. It is conceded that the acts charged as the purpose of the conspiracy do not constitute a crime for which an indictment would lie. Do the facts present a situation where neither the object of the conspiracy nor the means need be criminal in order to sustain an indictment for conspiracy?

In March 22, 1899 (P. L. p. 214), the crimes act relating to conspiracies was amended, so that, instead of providing "any two or more persons who shall combine, etc., to commit any offense," the word "crime" was substituted for the word "offense." The old act containing the word "offense" was construed in State v. Norton, 28 N. J. Law, 33, and it was there stated, "when the common law and the statute differ, the common law gives place to the statute, but only when the latter is couched in negative terms, or where its matter is so clearly repugnant that it necessarily implies a negative, and the common-law offence of conspiracy was not abolished by the statute defining conspiracy, but such a conspiracy as was indictable before the statute at common law is so still." This case, therefore, is not necessarily governed by the statute. We must look to the common law.

The earlier decisions in New Jersey held that a conspiracy, to be the foundation of an indictment, must be directed to the perpetration of a crime, or when having for its object a lawful or indifferent act, it must be accomplished by criminal means. State v. Rickey (1827) 9 N. J. Law, 293, was an indictment for conspiracy to obtain money from a bank by means of checks and drafts of the defendants, to be drawn on the cashier when the defendants had no funds in the bank for their payment, and the court beld that an indictment would not lie for a conspiracy to commit a civil injury of any description that is not in itself an indictable offense. Chief Justice Green, however, in State v. Norton, supra, speaking of State v.

Rickey, says: "In this state the point [whether a conspiracy to commit a private injury which is not in itself a public offense can constitute the offense of conspiracy at the common law] has never been decided. In the case of State v. Rickey, Justice Ford, in delivering his opinion, does indeed say that it may be laid down as a settled rule that an indictment will not lie for a conspiracy to commit a civil injury of any description that is not in itself a public offense, but that was not the opinion of the court." He then proceeds to say: "The great weight of authority, the adjudged cases, no less than the most approved elementary writers, sustain the position that a conspiracy to defraud individuals or a corporation of their property may, in itself, constitute an indictable offense if the act done, or proposed to be done, in pursuance of the conspiracy be not in itself indictable"-citing numerous authorities. He continues: "A combination (says Justice Gibson) is a conspiracy in law whenever the act to be done has a necessary tendency to prejudice the public, or oppress individuals by unjustly subjecting them to the power of the confederates, and giving effect to the latter, whether of extortion or mischief"-and then further on in the opinion adverts to the fact that to defraud a bank rests upon somewhat different grounds from a conspiracy to oppress an individual, saying: "It appears upon principle to come within this class of acts which are held to be indictable on the ground that the act done, though not in itself indictable, is essentially a public injury." This case would therefore seem to overthrow the doctrine supposed to have been enunciated in State v. Rickey, or at least to render that case inept upon the point for which it has been quoted. The soundness of the decision in State v. Norton, supra, was not denied in the case of State v. Young, 37 N. J. Law, 184, if, indeed, it may not be considered to have been approved by it.

In State v. Donaldson, 32 N. J. Law, 151, 90 Am. Dec. 649, Chief Justice Beasley refers to the preceding cases and says: "It is certain, however, that there are a numbr of cases in which neither the purposes intended to be accomplished, nor the means designed to be used, were criminal which have been regarded to be indictable conspiracies"-and then, referring to State v. Rickey, supra, and State v. Norton, supra, remarks on the latter case: "The rule of law thus enunciated appears to me to be the correct one. There are a number of cases which cannot be sustained upon any other doctrine." After citing cases. he continues: "These are all cases, it will be noticed, in which the act which formed the foundation of the indictment would not, in law, have constituted a crime, if such act had been done by an individual; the combination being alone the quality of the transactions which made them, respectively, indictable. I conclude, then, that there is no uncertainty in

the principles before adverted to, that cases may occur in which the purpose designed to be accomplished becomes punitive, as a public offense, solely from the fact of the existence of a confederacy to effect such purpose. It is certainly not to be denied, however, that great practical difficulty is experienced whenever any attempt is made to lay down any general rules by which to discriminate that class of combinations which becomes thus punishable from those which are to be regarded in their results as mere civil injuries, remediable by private suit. It may be safely said, nevertheless, that a combination will be an indictable conspiracy whenever the end proposed, or the means to be employed, are of a highly criminal character; or where they are such as indicate great malice in the confederates; or where deceit is to be used, the object in view being unlawful; or where the confederacy, having no lawful aim, tends simply to the oppression of individuals. careful analysis of the cases which have been heretofore adjudged will reveal the presence of one or more of the qualities here enumerated. To this extent, therefore, they may be relied on as safe criteria whereby to test new emergencies as they may be presented for adjudication."

In State v. Cole, 39 N. J. Law, 324, Chief Justice Beasley also delivered the opinion. The gravamen of the charge was the fraud of a partner in fabricating the notes of his firm, and with the collusion and aid of a third person putting them to a use entirely alien to the business of the firm. It was there urged that the facts charged in the indictment did not constitute a criminal offense, inasmuch as a partner has a right to execute and put off the notes of the firm. That was but a civil injury and not a breach of the public law. The court, continuing, says: "But this is a fallacious view, which has a plausible semblance only, because all the constituents of the problem to be solved are not taken into account. The query is not whether it is an indictable offense for a member of a firm to direct a partnership note to alien uses, but whether it is not such crime for him to do such act by concert with a third person; the intention of the two being fraudulent, and the act being carried into effect by deceitful devices. It is these added characteristics of the affair which, in my view, heighten the malfeasance into a punishable crime. Keeping in mind these adjuncts, the case easily falls within the scope of the offense of conspiracy, as defined in State v. Donaldson, 32 N. J. Law, 151, 90 Am. Dec. 649."

noticed, in which the act which formed the foundation of the indictment would not, in law, have constituted a crime, if such act had been done by an individual; the combination being alone the quality of the transactions which made them, respectively, indictable. I conclude, then, that there is no uncertainty in this legal topic to this extent, in addition to

Justice then says: "But the rule of law thus assumed to exist is not only unsupported, so far as has been described, by any authority, but is opposed by several direct decisions, and is inconsistent with the general legal authority of the subject. The cases on this head heretofore settled by this court are, with respect to the legal principle underlying that, entirely at variance with the rule here contended for"-quoting the Donaldson Case and the Cole Case.

In State v. Rowley, 12 Conn. 101, the court said: "Many acts which if done by an individual are not indictable are punishable criminally when done in pursuance of a conspiracy among numbers." And the doctrine that a combination to do an unlawful act, is punishable as a conspiracy, even though the act attempted was not a crime per se or by statute, was held in Smith v. People, 25 Ill. 17, 76 Am. Dec. 780, where the court said: "If the term 'unlawfui' means criminal, or an offense against the criminal law, and as such punishable then the objection taken to this indictment is good"; the unlawful act in that case being an act not indictable or punishable as a crime. But the court continues: "But by the common law governing conspiracies, the term is not so limited, and numerous cases are to be found where convictions have been sustained for conspiracies to do unlawful acts, although those acts are not punishable as crimes, nor, yet would it be quite safe to say that the term 'unlawful' as here used includes every act which violates the legal rights of another, giving that other a right of action for a civil injury; and we are not prepared to say where the line can be drawn."

Where the conspiracy results in mischief to the public, it seems that the indictment will be sustained where neither the object nor the means are criminal. In speaking of conspiracies involving public mischief, the remarks of Chief Justice Beasley in State v. Young, supra, are pertinent. He says: "There are many acts and things which become punishable on the ground that they affect seriously the rights of many which are not so when they thus affect the rights of only one or a few. A nuisance is an illustration of this principle. Such a wrong, originating in a private trespass, as it expands so as to work a hurt to numbers of persons is converted into an offense, against the community. I see no reason why, by analogy of reasoning, a cheat designed to be practiced against a body corporate representing the public is not to be put on a similar footing. In a politic point of view an injury grows in aggravation in the ratio of the number of persons injuriously affected by it, and the public is interested in the same ratio in preventing its recurrence. And public cheats not only reach large numbers of persons, but they are easy to effect, and most difficult to detect and punish. There are certainly the strongest social grounds to treat and punish

not a criminal offense. The learned Chief them as crimes; and, although there may be no case precisely in point, there are those which rest upon principles which logically lead to this result. But the cases go further than to hold that such indictments are sustainable only where the public is injured. An injury resulting to individuals is sufficient to sustain them." In North Carolina an indictment was sustained (State v. Younger, 12 N. C. 357, 17 Am. Dec. 571) for conspiracy to cheat one by making him drunk and playing falsely at cards with him. See, also, Twitchell v. Commonwealth, 9 Pa. 211.

> From this résumé it appears to be true that an indictable conspiracy may be a combination to accomplish an object which is not criminal by means which are not criminal where the public is injuriously involved, or where the result would be either injury or oppression to individuals. Adopting that as the law, do the facts in this case come within the legal limits of the rule thus laid down? The casting of votes at a primary of the kind in question clearly was an act not illegal, but rather one having a purpose highly beneficial to the public, designed to bring into public view, and so to the notice of the presidential electors, those men whom the public at large, by means of primaries, delegates, and conventions, agencies voluntarily accepted by the people, had recommended as being in their opinion fit for, and capable of, exercising the duties of the high office which the electors were under the Constitution to fill. In Hopper v. Stack, 69 N. J. Law, 562, 56 Atl. 1, the Supreme Court sustained the constitutionality of the primary election law as being admittedly a regulation of established party methods, and as regulative and protective as to the right to vote at primaries, holding that it did not create the right, but was based upon the legislative determination of the antecedent existence of that right. The court in that case said: "Thus the Legislature must have recognized as a fact the existence of political parties of varying numerical strength by which candidates for popular election were placed in nomination upon party tickets and platforms. It must likewise have determined that in the selection of such nominees each of these political parties invited the co-operation of voters who were in practical affiliation with it, and resented attempts at participation by, or interference from, those not so in sympathy. The Legislature must further have decided that the purpose of these party proceedings were so far public purposes that those engaged in them ought to be protected in what they had undertaken, and that to this end the police power of the state should be exercised. * '* * In all of this there is no calling of anything into existence, no creation of political parties or of primary meetings, no prescription of the terms of membership; in fine no initiation of any essential matter, but only the recognition of an existing state of facts, and a determination to throw over them the

protection of police regulation. • • • My conclusion upon this phase of the argument • • • is that primary elections as they in fact exist are so far matters of public concern that they are proper objects of legislative oversight."

Before the passage of the present Primary Act the Legislature had recognized the right of the individual to hold primaries. See "An act to regulate the holding of and to prevent fraud in primary elections of the several political parties in the cities of New Jersey," approved May 9, 1884 (P. L. 1884, p. \$23), and therein recognized "the rules and regulations adopted by either party for the government of said primary election." Another instance of like recognition is afforded by "An act to prevent and punish bribery at primaries, conventions and elections" (P. L. 1883, p. 171). This act has to do with influencing, by bribery, voters at any election of any delegate to any convention of any political party of this state to nominate any candidate, etc., thus recognizing the right and practice of the people to vote at primaries for delegates to nominating conventions.

Political conventions for the recommendation of presidential candidates are by no means new. They have been in existence certainly as early as the year 1825, although not continuously nor uniformly. But, as the indictments charge, they have been continuously resorted to for over 50 years, and for the purpose of recommending candidates for the consideration of the presidential electors. Their purposes, the crystallizing of political sentiment, and the manifestation of the will of the people from all parts of the country as to their choice for nominees, are not only lawful, but in entire accord with our notion of government by the people, and, moreover, are public purposes. It may not be too much to say that, having been so recognized and so used by the people as a means of expressing their ideas and wishes, to interfere with such expression by the unlawful means of tampering with the ballots cast at such primaries by deceitful and fraudulent devices, and thereby depriving, cheating, and defrauding the majority of those entitled to vote at such primary of their lawful right to have their votes cast thereat honestly counted, is interfering with a public act lawful in its purpose, so recognized by the people, and by the Legislature, and one in the exercise of which all citizens are entitled to protection from combinations designed to prevent the honest use of these agencies. As was said in State v. Woodruff, 68 N. J. Law, 94, 52 Atl. 296: "Fraud is clearly charged in the indictment before us, and is of such a kind as should be punished." We think, therefore, that the object of the conspiracy was unlawful (unlawful acts in this connection not being confined to those punishable as crimes), in that it had a necessary tendency to prejudice the public, and so was essentially a

was designed to be accomplished by deceit and fraud, was a cheat reaching large numbers of persons, and tended to their oppression. The first indictment, No. 139, must be sustained, as well as the first count of indictment No. 169.

These views render unnecessary a consideration of the learned and able argument on the part of the state, evincing great research, putting forth the claim that the right of the people of New Jersey to vote is an inherent political right, which had been exercised and recognized from the earliest times in England, citing in support Ashby v. White, 14 How. St. Tr. 795, and tracing the origin of the right from the words of Tacitus, from accounts of the elections of the kings, the nature of the Witenagemote, and other historical sources, and from the mode of conducting an election for members of Parliament, as described in 8 Petersdorff's Abr. of Com. Law, p. 458 (664).

We are met, however, on the part of the defendants, with the argument that the primary described in the indictments is of the same character as that under consideration in State v. Woodruff, 68 N. J. Law, 89, 52 Atl. 294, wherein this court used the following language: "Nor are we able to sustain this indictment as a common-law indictment. It is undoubtedly true that fraud at elections was indictable at common law, and is still, irrespective of the statute. In Commonwealth v. McHale, 97 Pa. 397, 39 Am. Rep. 808, 813, Chief Justice Padon, of Pennsylvania, discusses this whole question, and refers to the rule as to such indictments in this country. But the election at which the fraud is committed, to constitute the common-law offense, must be a popular election; the fraud going to the destruction of the right of the elective franchise in the selection of public officers for public positions. Such a thing as a primary was not known at the common law. It is the outgrowth of modern convenience or necessity. A primary is not an election in the sense of the common law. It is merely a method for the selection of persons to be balloted for at such an election. Prior to our primary acts a primary had no legal status whatever. All it has now is statutory, and all the penalties for its violation must be found in the statute." In considering that case, and its authority to control the present case, two things must be noted: First, it was not an indictment for conspiracy, but for unlawfully and fraudulently counting the ballots contrary to the statute; and, secondly, it was expressly founded upon section 217 of "An act to regulate elections." Revision of 1898 (Act April 4, 1898 [P. L. p. 331]). It was therein declared that the act specified as a crime was not made so by the above statute.

in that it had a necessary tendency to prejulate the public, and so was essentially a conspiracy the object of which is unlawful public injury, and that this unlawful object in the sense herein before pointed out, which

express warrant in the law, either common or statutory, to bring its object within the ban of the criminal law. Hence what was said regarding the status of a primary, and that it was unknown to the common law, must be understood to apply to the case then subjudice, and not to be extended to the facts in the present case, which are quite distinguishable. When an offense is created by statute, the indictment must be drawn in reference to the provision of the statute. 1 Wharton, Criminal Law. § 371. Such was the condition in the Woodruff Case. Hence the remarks as to the court's inability to sustain the indictment at common law were obiter.

Commonwealth v. McHale, 97 Pa. 397, 39 Am. Rep. 808, cited in the Woodruff Case is not an authority at variance with our holding in the present case. In that case the defendant, not an election officer was indicted on three counts for (1) fraudulently entering names on the pollbooks; (2) depositing false and fraudulent ballots in the ballot box; and (3) for making a false and fraudulent count at an election of a district attorney. There was no statute that covered it, but the court sustained the indictment as valid at the common law, saying: "We are of opinion that all such crimes as especially affect public society are indictable at common law. The test is not whether precedents can be found in the books, but whether they injuriously affect the public policy and economy. An offense against the freedom and purity of elections is a crime against the nation. It strikes at the foundation of republican institutions. Its tendency is to prevent the expression of the will of the people in the choice of rulers, and to weaken the public confidence in elections. The ingenuity of politicians is such that offenses against the purity of elections are constantly liable to occur which are not specifically covered by statute. It would be a reproach to the law were it powerless to punish them."

Assuming, however, that the primary was unknown to the common law, that fact cannot be made the basis for an argument that a combination like the one in question is not indictable at common law. Nor is State v. Nugent (N. J. Sup.) 17 Atl. 481, controlling here. There the indictment was for conspiracy, the object of which was to procure unqualified voters to vote, in violation of the statute concerning primary elections. indictment was confined to the statute, and did not attempt to describe a wrongful act apart from the statute; and, its statutory description of the wrong having failed, resort to the common law was precluded. Therefore the cases were not controlling. Rights unknown to the common law, if they be in truth rights, are protected by the principles of the common law, and then infringement by conspiracy is punishable by the crim- was riding in a carriage owned and driven

renders it unnecessary that we should find inal law. There being but a single count in indictment No. 139, and the demurrer interposed to indictment No. 169, which contains four counts, being a general demurrer to the whole indictment, the demurrer in each case must be overruled, the sustaining of a single count being sufficient to produce that re-

The court, therefore, determines that the said indictments are sufficient in law, and that an order may be entered that the same be returned by the clerk of this court to the court from which they were removed, to the end that said court shall proceed thereon in the same manner as if the said writs of certiorari had not been allowed, with costs to be recovered against the defendants.

(77 N. J. L. 698)

MITTELSDORFER v. WEST JERSEY & S. R. CO.

(Court of Errors and Appeals of New Jersey. June 18, 1909.)

1. NEGLIGENCE (§ 93*)—NEGLIGENCE OF DRIV-ER IMPUTABLE TO OCCUPANT OF VEHICLE. One who, while riding in the private conveyance of another, is injured by the negligence of a third party may recover against the latter, notwithstanding that the negligence of the driver of the conveyance in driving his team contributes to the injury, where the person injured is without fault and has no authority over the

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 147-150; Dec. Dig. § 93.*]

2. RAILBOADS (§ 350*)—ACCIDENTS AT CROSS-INGS—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE.

The plaintiff, a woman, was riding in a wagon owned and driven by another, at the invitation of the owner. She had no control over the driver. The relation of master and servant or principal and agent, or mutual responsibility in a common enterprise, did not exist between them. There was no evidence that the plaintiff knew that the driver was incompetent, and nothing about his driving to indicate that he was careless. The evidence showed that on approaching the railroad crossing the plaintiff did not look for the train because she observed that

not look for the train because she observed that the driver was looking for it, and that in fact she did not see nor hear the train.

Held, that the plaintiff's negligence was a question for the jury notwithstanding the fact that it appeared that if the driver had exercised the degree of vigilance in looking required of him by law he would have discovered the appeared by the train the beau anxiety that the procedure that in the second that the procedure that the pr proaching train in time to have avoided the collision.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1176; Dec. Dig. § 350.*]

(Syliabus by the Court.)

Error to Supreme Court.

Action by Sarah A. Mittelsdorfer against the West Jersey & Seashore Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Bourgeois & Sooy, for plaintiff in error. Higbee & Coulomb, for defendant in error.

TRENCHARD, J. Sarah A. Mittelsdorfer

by one Goldthrop. The wagon was struck of another, is injured by the negligence of a by defendant's steam railroad train at a grade crossing, and Mrs. Mittelsdorfer was thrown out and injured. She brought this suit to recover damages for personal injuries, and recovered a verdict at the Atlantic circuit. This writ of error brings here for review the judgment entered thereon.

It is conceded by the defendant company that the evidence justified the jury in finding that the defendant was negligent in failing to give the statutory signals. It seems also to be conceded by the plaintiff that Goldthrop, the driver of the carriage, was negligent in not observing the train. But whether so conceded or not, yet for the purpose of this case we assume that the evidence conclusively demonstrates that, if he had used his eyes with the care required by law, he would have seen the approaching train in time to have avoided the collision, and that his failure so to do was negligence which contributed to the collision. Pennsylvania R. R. Co. v. Righter, 42 N. J. Law, 180.

It further appeared from the evidence that Mrs. Mittelsdorfer was not driving the team, and had no control over it or the driver. She was merely a passenger, and was riding at the invitation of the driver and owner. The driver was not her servant, but a neighbor who had invited her to ride with him because of the heat of the day. The defendant company therefore properly concedes that the negligence of the driver was not imputable to her. New York, L. E. & W. R. R. Co. v. Stein-Brenner, 47 N. J. Law, 161, 54 Am. Rep. 126; Consolidated Traction Co. v. Hoimark, 60 N. J. Law, 456, 38 Atl. 684; Noonan v. Consolidated Traction Co., 64 N. J. Law, 579, 46 Atl. 770. The contention of the defendant company is that Mrs. Mittelsdorfer was guilty of contributory negligence, and error is assigned upon the refusal of the trial judge to nonsuit the plaintiff upon that ground. We think the motion was properly denied.

The defendant insisted that Mrs. Mittelsdorfer was negligent in not looking for the train. It is evident from the testimony that Mrs. Mittelsdorfer did not look for the train because she observed that the driver was looking. She was seated beside him in an ordinary farmer's covered carriage, the rear curtain of which was up. Whether the side curtains were up or down does not clearly appear. Neither does it clearly appear how the scat of the carriage was located with reference to the curtains. They were pro-As they approached the ceeding slowly. crossing, she observed the driver look out up and down the track, and she supposed he was looking for the train. The general rule with respect to the plaintiff's right to recover, under such circumstances, to be gathered in the situation as it existed, might have infrom cases in our own and other jurisdic- terfered with the observations of the driver. tions, both federal and state, is this: One we think that the question whether her

third party, may recover against the latter, notwithstanding that the negligence of the driver of the conveyance in driving his team contributes to the injury, where the person injured is without fault, and has no authority over the driver. See cases collected in note to Am. & Eng. Ann. Cas. vol. 3, p. 703. In the case at bar, as we have pointed out, the relation of master and servant, or principal and agent, or mutual responsibility in a common enterprise, did not in fact exist between the plaintiff and the driver such as would defeat the plaintiff's recovery. Consolidated Traction Co. v. Hoimark, 60 N. J. Law, 456, 38 Atl. 684.

The only remaining question for consideration is whether the plaintiff was so conclusively at fault as to preclude recovery. The fact that the plaintiff was a guest did not relieve her from exercising ordinary care. Farley v. Wilmington, etc., R. Co., 3 Pennewill (Del.) 581, 52 Atl. 548; Lake Shore, etc., R. Co. v. Boyts, 16 Ind. App. 640, 45 N. E. 812; West Chicago St. R. Co. v. Piper, 165 Ill. 325, 46 N. E. 186; Payne v. Chicago, etc., R. Co., 39 Iowa, 523. It's not contended that plaintiff was at fault in accepting the invitation of the driver. She had no knowledge that he was incompetent. Nor was there anything in his driving to indicate to her that he was careless. She testified as follows: "Q. At what gait was his horse going along Cologne avenue? A. We were going slowly. Q. Do you remember as you approached the railroad crossing? A. I remember his looking out. I supposed we were at the crossing or near it. Q. What did he do in regards to looking out? A. He looked out and looked up and down for the train both ways. I supp sed he was looking for the train. He didn't say, but I saw him look out."

The plaintiff did not see the train, and therefore no fault can be attributed to her in failing to apprise the driver of the impending danger. She says that she did not attempt to make any observations as to whether a train was coming. We think the irresistible inference from the testimony is that she did not look because she had observed that the driver appeared to be looking. She says that she kept quiet, refraining from conversation, presumably so as not to distract the driver. Just what opportunity the plaintiff had for observation up and down the track from her natural position upon the seat of the carriage does not appear. It is under these circumstances that the defendant company insists that she was so clearly guilty of negligence in not looking as to require a nonsuit. We think not. When we consider that an attempt upon the part of the plaintiff to watch for the train, who, while riding in the private conveyance conduct, in not attempting to look for the train when she saw that the driver was looking, was common prudence was a fair question for the jury. Davis v. Central R. R. Co. of N. J. 67 N. J. Law, 660, 52 Atl. 561; Consolidated Traction Co. v. Behr, 59 N. J. Law, 477, 37 Atl. 142; Howe v. Minneapolis, etc., R. Co., 62 Minn. 71, 64 N. W. 102, 30 L. R. A. 684, 54 Am. St. Rep. 616; United Rys. Co. v. Biedler, 98 Md. 564, 56 Atl. 813; Cotton v. Willmar, etc., R. Co., 99 Minn. 366, 109 N. W. 835, 8 L. R. A. (N. S.) 643, 116 Am. St. Rep. 422; Shultz v. Old Colony St. Ry., 198 Mass. 309, 79 N. E. 873, 8 L. R. A. (N. S.) 597, 118 Am. St. Rep. 502.

The motion to nonsuit being properly refused, the judgment of the court below is affirmed.

(77 N. J. L. 702)

MITTELSDORFER v. WEST JERSEY & S. R. CO.

(Court of Errors and Appeals of New Jersey. June 18, 1909.)

APPEAL AND ERROR (§ 273*)—PRESENTATION AND RESERVATION OF GROUNDS OF REVIEW—GENERAL EXCEPTION TO INSTRUCTION.

A general exception to a part of a charge of the court in a civil cause containing several distinct and separate propositions of law will not be available.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1621, 1622; Dec. Dig. § 273;* Trial, Cent. Dig. §§ 689, 690, 694-696.] (Syllabus by the Court.)

Error to Supreme Court.

Action by John H. Mittelsdorfer against the West Jersey & Seashore Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Bourgeois & Sooy, for plaintiff in error. Higbee & Coulomb, for defendant in error.

TRENCHARD, J. This suit was brought by John H. Mittelsdorfer, the husband of Sarah A. Mittelsdorfer, to recover for moneys expended for medical attention and the loss of service and society of his wife who was injured by reason of the negligence of the defendant company. The judgment rendered in the suit of the wife for her personal injuries (Mittelsdorfer v. West Jersey & Seashore Railroad Co.) was affirmed at this term of this court. 73 Atl. 538.

The disposition of the questions raised in the suit of the wife disposed of all questions presented in the present case, excepting the one now to be considered. In this case it is contended that the judgment entered upon the verdict of the jury should be reversed because of an alleged error in the charge of the court. The defendant took by a general exception to a portion of the charge which embraced several distinct and independent legal propositions. While error is assigned upon the entire portion of the charge excepted to, yet it is here contended

only that but one of the several propositions was erroneous. In this situation the alleged error will not be considered. The rule is that a general exception to a charge or a part of a charge containing several distinct and separate legal propositions will not be available. Oliver v. Phelps, 21 N. J. Law, 597; Potts v. Clarke, 20 N. J. Law, 536; Associates, etc., v. Davidson, 29 N. J. Law, 415. The doctrine is founded upon the inflexible rule that the party who objects in the course of a trial must bring his objection to the mind of the trial judge, so that the judge may correct erroneous expressions or explain what would otherwise mislead. Obviously, any such exception, while logically asserting the error of each of the propositions involved, is considered unavailable because the objection has not been leveled at a specific and distinct error, and the attention of the judge has not been called to the precise point of the objection. Packard v. Bergen Neck Ry. Co., 54 N. J. Law, 553, 25 Atl. 506. The rule is mainly established for the protection of the prevailing party. No party ought to be allowed to surprise or mislead his adversary, nor to raise here for the first time a point which might have been obviated had it been made in the court below. Oliver v. Pheips, 21 N. J. Law, 597. An exception to a part of a charge containing various legal propositions must, therefore, single out and specify, one by one, the propositions objected to, and this may be done, as was said in Potts v. Clarke, 20 N. J. Law, 536, "either by saying in the bill that the party excepts to so much of the charge as instructs the jury that the law is so and so, or by stating, by way of recital, the part of the charge excepted to, or by calling on the court to charge in a certain way, and if the court refuse so to charge, then by excepting to such refusal."

The result is that the judgment of the court below is affirmed.

(77 N. J. L. 709)

KAIGHN v. FRIDAY et al. SAME v. FOX et al. SAME v. ERRICKSON et al.

(Court of Errors and Appeals of New Jersey. June 29, 1909.)

1. STIPULATIONS (§ 18*)—CONSTRUCTION.

In a suit upon a mechanic's lien claim, the effect of a stipulation of counsel made in writing before trial for the purpose of the trial that "the defense is solely that of payment" is to exclude all other defenses.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. § 44; Dec. Dig. § 18.*]

2. MECHANICS' LIENS (§ 288°)—TEIAL—SUB-MISSION OF ISSUES.

In a suit upon a mechanic's lien claim, the sole defense was payment. The contractor was also the vice president of the company which furnished him materials which he put in the building. It conclusively appeared that the owner in paying the contractor the money duc upon the contract was merely discharging the obligation which the owner owed to his creditor the contractor, and was not assuming.

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter indexes

company.

Held, that it was erroneous to submit to the jury the question whether the payment was made to the contractor as the agent of the plaintiff company.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 288.*]

(Syllabus by the Court.)

Error to Circuit Court, Cape May County. Actions by David B. Kaighn, trustee for the Five Mile Beach Lumber Company, against Mary E. Friday and others, and by the same plaintiff against Marion Fox and others, and by the same plaintiff against Annie E. Errickson and others. Judgments for defendants, and plaintiff brings error in each action. Reversed.

Bleakley & Stockwell, for plaintiff in error. Matthew Jefferson and John W. Wescott, for defendants in error.

TRENCHARD, J. These three writs of error bring up for review judgments in favor of the defendants below entered in each case upon the verdict of a jury in the Cape May circuit court. The cases were tried and argued together.

The plaintiff below David B. Kaighn is trustee for the Five Mile Beach Lumber Company, a bankrupt. This company furnished one Garrison, a contractor, materials which were used by him in erecting buildings for each of the three defendants. At the time Garrison was the vice president of the Five Mile Beach Company. By a stipulation of counsel made in writing before trial for the purposes of the trial, the defendants "admitted all the facts necessary to establish a mechanic's lien in favor of the plaintiff against each defendant and the properties described in the liens on file, and that the defense is solely that of payment." The effect of that stipulation was to limit the defense to that of payment. Hine v. New York El. R. Co., 149 N. Y. 155, 43 N. E. 414. The evidence taken at the trial shows conclusively that each defendant paid to Garrison the full amount of money called for by their respective contracts with him, and therefore, in view of the stipulation, the only questions remaining were: First, whether these payments were made to him as contractor-as the party to whom the defendants were primarily responsible-or whether they were made to him as the agent of the Five Mile Beach Lumber Company in payment of the moneys which he, not the defendants, owed to that company; and, secondly, if the payments were made to Garrison as contractor, had he paid his debt to the company. The learned trial judge submitted the first question to the jury, but not the latter. The plaintiff contended that it conclusively appeared from the evidence that the payments were to Garrison as contractor, not as agent plaintiff to the first question to the jury, but not the latter. The plaintiff contended that it conclusively appeared from the evidence that the payments were to Garrison as contractor, not as agent plaintiff to the first question to the jury, but not the latter. The plaintiff contended that it conclusively appeared from the evidence that the payments were to Garrison as contractor, not as agent plaintiff to the jury, but not the latter. The plaintiff contended that it conclusively appeared from the evidence that the payments were to Garrison as contractor, not as agent plaintiff to the jury, but not the latter. The plaintiff contended that it conclusively appeared from the evidence that the payments were to Garrison as contractor, not as agent latter. had he paid his debt to the company. The

by the implied consent of the contractor, to for the company, and assigned error upon discharge the latter's obligation to the plaintiff exceptions taken to the refusal of the trial exceptions taken to the refusal of the trial judge to charge appropriate requests to that effect, and also to what was charged.

We think the refusal of the court to so charge was erroneous. It appeared to be undisputed that each of the defendants had from time to time made partial payments to Garrison on account of their respective contracts made with him, and that finally each, at their respective residences, made settlement of the balances due from each. Garrison testified in effect that each defendant made final payment in discharge of the debt due him as contractor. It further appeared that at the time of settlement neither of the defendants Fox and Errickson knew of the Five Mile Beach Lumber Company, nor that it had supplied materials for the buildings. With respect to the defendant Mrs. Friday, it is true that it appeared from the testimony of her husband that he knew of the relation of Garrison to the company, but it is equally true that it conclusively appeared that the final payment made was the amount shown to be due on her contract with Garrison, and that the nature and extent of the company's claim against Garrison was not known to him, nor was it discussed, referred to, or otherwise taken into account. In brief, the evidence showed that in making these payments the defendants were paying their creditor. They were discharging the obligations which they owed Garrison, and were not assuming, by his implied consent, to discharge the obligation which Garrison owed to the Five Mile Beach Lumber Company. It was therefore erroneous to submit to the jury the question whether the payments were made to Garrison as the agent of the Five Mile Beach Lumber Company.

The only possible remaining question was whether Garrison had paid his debt to the company. Since there must be a new trial it is unnecessary here to determine whether there was evidence other than that of the alleged releases (which were not offered as evidence of payment and did not tend to prove it) which required the submission of that question to the jury.

For the reasons stated, the judgment of the court below in each of these cases is reversed, and a venire de novo awarded.

(77 N. J. L. 749)

THOMAS ORR TRUCKING & FORWARD-ING CO. v. METROPOLITAN SURETY CO.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

the city where the policy was countersigned, and also immediate notice thereof to the company's local authorized agent and the nearest public police authorities having jurisdiction. Held, that such notices were distinct from the formal proofs of loss provided for in the policy to be made out on the company's blanks; that in case of theft, where it is for the interest of the insurer to apprehend and punish the criminal, a requirement for immediate notice is a reasonable regulation and valid making it inreasonable regulation and valid, making it in-cumbent upon the assured in a suit on the pol-icy to prove the performance of these conditions. [Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1666; Dec. Dig. § 646.*]

2. INSURANCE (§ 646*)—ACTION ON POLICY-PERFORMANCE OF CONDITIONS—PLEADINGS-BURDEN OF PROOF.

The change in the forms of pleading prescribed by the 118th section of practice act of 1903 (Laws 1903, p. 570, c. 247) does not change the burden of proof. That remains with the plaintiff to show performance as at common law. [Ed. Note.—For other cases, see I Cent. Dig. § 1666; Dec. Dig. § 646.*] Insurance.

3, Insurance (§ 559*) — Proofs of Loss-Walver of Defects.

Where proofs of loss under a policy of insurance have been returned by the company to the assured for correction, their subsequent retention by the company unobjected to but with a denial of liability on other grounds is suffi-cient to constitute a waiver of defects therein.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1391; Dec. Dig. § 559.*]

4. INSURANCE (§ 645*)—ACTIONS ON POLICIES
—ISSUES AND PROOF.

—ISSUES AND PROOF.

The provision in a policy of "theft" insurance that the assured, at the request of the company, shall swear out a warrant for the arrest of the offenders, is not a condition precedent, for it becomes obligatory upon the plaintiff only after request. Therefore a plea avering such request and refusal and concluding to the country, thus precluding a reply by the the country, thus precluding a reply by the plaintiff, is informal, and the plaintiff may prove excuse in the avoidance of such provision.

[Ed. Note.—For other cases, see In Cent. Dig. § 1634; Dec. Dig. § 645.*]

5. INSURANCE (§ 660*)—ACTIONS ON POLICIES
—EVIDENCE—VALUE OF LOST PROPERTY.

Where the theft policy of insurance confines the company's liability for loss of property to "the cash or market value of the property at the time of the loss," it is error to admit in evi-dence a bill rendered to the assured for such lost property by the owner as proof of its value.

[Ed. Note.—For other cases, see I Cent. Dig. § 1695; Dec. Dig. § 660.*]

(Syllabus by the Court.)

Error to Supreme Court.

Action by the Thomas Orr Trucking & Forwarding Company against the Metropolitan Surety Company. Judgment for plaintiff. Defendant brings error. Reversed.

Pierre F. Cook, for plaintiff in error. J. D. Bedle (Frederick Snow Kellogg, on the brief), for defendant in error.

VOORHEES, J. This is a writ of error to the Supreme Court. The plaintiff is a corporation engaged in the trucking business, and its president is Thomas Orr. The suit is on a policy of indemnity, called a theft or burglary policy, whereby the defendant agreed to indemnify Thomas Orr during

a certain period subject to certain "special and general agreements, terms and conditions" in the policy contained "which are to be construed as co-ordinate and precedent to any recovery" under the policy. The policy by indorsements was made to cover losses of the Thomas Orr Trucking & Forwarding Company, the plaintiff, and applies in each particular to direct loss by burglary, theft, or larceny. There are certain special agreements annexed to the policy, among them one headed: "The company shall not be liable for loss or damage." There is also a schedule consisting of 12 paragraphs. Then follows a number of "General Agreements" headed by the phrase, "Company Not Liable." The policy is made "subject to the agreements contained on the back hereof and the statements and agreements contained in the schedule in the attachment (or rider) hereto attached, which statements the assured makes and warrants to be true, and which agreements, statements, and schedule form a part of this contract as fully as if recited at length over the signatures hereto affixed." In the declaration a general performance of conditions precedent was alleged. To this 32 special pleas were interposed by the defendant, in which it specified the conditions precedent, the performance of which it intended to contest under the 118th section of the practice act (Laws 1903, p. 570, c. 247). Two losses were alleged, viz: First. goods to the value of \$523.90, shipped by Sternberg, consigned to Blogg & Littauer on January 21, 1907, stolen in transit; and the second \$542.70 of merchandise shipped by the Castle Island Linen Company, 25 White street, stolen while on the sidewalk after receipt for them had been given by plaintiff before loading. Judgment was rendered for the full amount of these bills in favor of the plain-

The first error assigned relates to the defense that the plaintiff failed to perform certain conditions precedent, namely, that, upon discovery of the loss, the plaintiff failed to give "immediate notice thereof by letter to the home office of the company in New York City and also by telegram to the company at the city where this policy is countersigned, briefly stating the particulars and probable amount of loss (telegraphic message at the company's expense), and also to give immediate notice thereof to the company's local authorized agent and the nearest public police authorities having jurisdiction." There was no proof of immediate notice of loss by letter, no proof as to sending a telegram, and no proof that immediate notice was given to the company's local authorized agent, except that such notice in one of the cases perhaps might be inferred from the fact that a representative of the company appeared shortly after the loss. The ground of the motion to nonsuit as to this subject was thus stated: "There is no evidence from which the jury

eFor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

can find that the assured upon the discovery | v. Northern Assurance Co., 75 Vt. 441, 56 Atl. of the loss gave notice by letter to the home office, and no evidence from which the jury can find that, upon the discovery of the loss, the assured gave immediate notice to the company's local authorized agent. There is no proof and no evidence from which the jury could rightly conclude that immediate notice was given to the police authorities having jurisdiction by the assured of the loss." Failure to give telegraphic notice is not made a ground for the nonsuit. The notices thus provided for in the policy must be deemed to be distinct from the formal proofs of loss to be made out on the company's blanks, and any waiver as to the latter could not be construed to be a waiver as to the former, the requirements being separate and distinct. Here, however, performance has been pleaded, and so proof of waiver is incompetent. Shinn v. Haines, 21 N. J. Law, 340; Franklin v. Rubber Co., 72 N. J. Law, 58, 60 Atl. 186. In a case of theft, where it is for the interest of the company to apprehend and punish the criminal, a requirement for immediate notice is a reasonable regulation, and whether the failure to give it technically amounts to the nonperformance of the conditions precedent, or whether we call it a forfeiture, is immaterial. In either case it is a reasonable provision and valid and of the essence of the contract. See 4 Cooley's Insurance Briefs, p. 3570. It was, moreover, under the pleadings incumbent upon the plaintiff to prove the performance of these conditions. It cannot be doubted that, where there is an allegation by the defendant of nonperformance of the special conditions precedent, the general performance of which has been asserted by the plaintiff under our statute, supra, the burden of proof remains with the plaintiff to show performance as at common law. The object of this statute is to eliminate prolix pleading and evidence. Dewees v. Insurance Co., 34 N. J. Law, 244; Vail v. Pen. Fire Ins. Co., 67 N. J. Law, 422, 51 Atl. 929, and cases cited. But the change in the form of pleading in no wise avoids the rule that: "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence or nonexistence of facts which he asserts or denies to exist must prove that those facts do or do not exist." Stephen's Digest of Evidence. Of a somewhat similar statutory provision in Vermont it was said: "But does it follow that, because the defendant must specially put in issue such matters, the burden of proof is therefore shifted? We do not construe the act as changing at all the substantive rights of the parties, but only as providing for a simpler mode of declaring. * * * If the defendant desired to put in issue any other matters he was to point them out by his pleadings. It would still be for the plaintiff to prove any matter so pointed

95. The nonsuit should have been granted.

Objection is made that no proofs of loss were filed by the plaintiff as required by the policy. The conditions require that proofs of loss shall be signed by the assured, and, if a corporation, by its officer in his official capacity. The proofs of loss were signed by Orr as an individual. It is further asserted that they were not made up fully with reference to the requirements of the blanks furnished by the company for that purpose. appears, however, that they were received by the company without objection, except in the case of one of the claims, and, as to that, they were returned to the plaintiff with the objection that they had not been sworn to. This defect was remedied by the oath of Mr. Orr, and then the proofs were taken back and retained by the company without objection. Waiver of conditions, the performance of which is to take place after a loss has occurred, differ from waiver of conditions which are contained in the policy having to do with the contract itself before loss. The former may be waived by parol. Carson v. Jersey City Ins. Co., 43 N. J. Law, 300, 39 Am. Rep. 584, affirmed 44 N. J. Law, 210: In the present case the return of the proofs to the plaintiff for correction and their subsequent retention unobjected to is sufficient to constitute such waiver (Merchants' Ins. Co. v. Gibbs, 56 N. J. Law, 679, 29 Atl. 485, 44 Am. St. Rep. 413), especially when coupled with a denial of liability on other grounds. Roumage v. Merchants' Fire Ins. Co., 13 N. J. Law, 110; State Ins. Co. v. Maackens, 38 N. J. Law, 564. The defendant must therefore be deemed to have waived any informalities and defects in the preliminary proofs of loss. Furthermore, the declaration expressly avers that the plaintiff rendered to the defendant proofs of loss after the happening of the losses and of each of them in accordance with the terms and conditions of the said policy of insurance "which were received and accepted by said defendant without objection." As to the proofs of loss, the plaintiff did not adopt the statutory method of pleading, but has in effect alleged a waiver, and that as was pointed out in Vail v. Pen. Fire Ins. Co., 67 N. J. Law, 424, 51 Atl. 929, he might do. The refusal of the nonsuit on this ground was therefore proper.

There is a further objection made that the nonsuit should have prevailed because of the statement in the policy that the drivers and men in charge of the conveyances were bonded by a fidelity company, when, in fact, in this case they were not. This appears to be a warranty of a fact known to the plaintiff (Finn v. Metropolitan Life Ins. Co., 70 N. J. Law, 255, 57 Atl. 438), and its falsity will void the policy. On this ground there should have been a nonsuit.

The next point made is that according to out which he would have been required to the terms of the policy the company is not liaprove under a special declaration." Hersey ble for the loss of goods while on the side-

walk of a thoroughfare unless they were under the supervision of the assured or his authorized employe, and that the case being destitute of testimony of such guarding while the goods were on the sidewalk, and the loss occurring while they were on the sidewalk, the defendant is not liable. The evidence is not clear as to whether one of the cases lost was on the sidewalk and left unguarded or not, but as to the other goods lost the question does not arise. The motion for a nonsuit and for the direction of a verdict having been made upon the following ground: "That there is not sufficient evidence from which the jury can conclude that the loss happened in any manner covered by the policy"-clearly did not bring to the attention of the court the special point in the mind of counsel that one of the cases was left unguarded on the sidewalk, and, furthermore, as the motion could not apply to both the losses but only to one, it was too broad, and its refusal was right. Garretson v. Appleton, 58 N. J. Law, 386, 37 Atl. 150.

It is urged that the motion to nonsuit should have prevailed because one lot of merchandise had reached its destination and the plaintiff had not received a valid receipt for it, and that the system of checking prescribed by the policy was not followed. They are based upon provisions in the policy that the company shall not be liable for loss for goods after they have reached their point of delivery and the assured or his employé in charge of the conveyance has received a valid receipt that the property is so delivered, or for goods unless the system of checking and receiving specified in the schedule is followed. In the one case there was proof that the goods had been delivered at the place of business of the consignee, and a receipt had been received which the consignee said was spurious and invalid. It is sufficient to say that these objections involve matters of defense. The validity of the receipt was a jury question involving, not only that particular question, but as the case turned the honesty of the driver also. As to the checking system, that is not covered by any exception, and there appears to be no evidence on the point.

There was no failure to prove that the conveyances did not bear the proper license num-There was evidence that the trucks bore the license numbers. The policy provided that "the company, if it so elects, shall have the entire charge of the prosecution of offenders. * * * and the assured shall at the request of the company swear out a warrant for the arrest of the offenders." It was also provided that "the assured * * * shall fill up and forward the burgiary notice form furnished by the company. * * * The said forms will be delivered to the assured upon demand." The swearing out a warrant was not a condition precedent, for it became obligatory upon the

plaintiff only after request. The plea of the defendant avers such request and refusal, and concludes to the country. This precluded a reply which was the plaintiff's right, and that reply might have denied the request, or set up new matter in confession and avoidance. To such a provision the plaintiff was not required to aver performance in the declaration. The plea being informal, it cannot be asserted that the plaintiff may not prove excuse in avoidance of the provision. It is not a case where performance has been pleaded by one party, and denied by the other, thus excluding proof of waiver or excuse as hereinbefore observed. The plaintiff admitted that he refused to swear out a warrant, and excused the refusal on the very proper ground that there was nothing to show that the driver was the offender. The same reasoning applies to the alleged failure to fill up the burglary form. It is asserted only in the plea that it was furnished. The proof of that fact rested upon the defendant. But it is not shown that either of the two objections lastly mentioned refers to both losses. A nonsuit, therefore, could not rest upon these grounds if the record disclosed a proper exception.

The next objection is as to the proof of the value of the goods lost. The policy confines the company's liability to "the cash or market value of property at the time of the loss." Mr. Orr was allowed to testify what amount he was liable to pay Sternberg for the goods and that he had already paid in part. But that was harmless because a witness, Greenspan, testified to the value of these goods, having qualified for that purpose after cross-examination, as to his knowledge of values. But there was no proof of the market value of the goods received from the Castle Island Linen Company except the bill for them which had been rendered to Mr. Orr. This was admitted as proof of their value. It was not supplemented by any other competent testimony. It was error to admit this evidence. Because this case must be tried again, it has been minutely examined in order to indicate to counsel the views of the court upon the several points mooted under this writ; this course being deemed better under the circumstances than to reverse upon a single point.

The judgment is reversed and the record remitted to the court below, to the end that a venire de novo issue.

(77 N. J. L. 570)

EMMONS et al. v. STEVANE et ux. (Court of Errors and Appeals of New Jersey. June 28, 1909.)

1. Animals (§ 70*) — Personal Injuries — Knowledge of Viciousness.

In an action for injuries committed by a dog, it is not necessary that the same injury should have actually been committed by the an-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

imal to the knowledge of its owner, but knowledge by the owner that the disposition of the animal is such that it is likely to commit a similar injury to that complained of is sufficient to maintain the action.

[Ed. Note.—For other cases, see Animals, Cent. Dig. §§ 228-237; Dec. Dig. § 70.*]

2. KNOWLEDGE OF VICTOUSNESS.

Scienter need not be precisely similar, but that it is substantially so will suffice.

3. Animals (§ 74*) — Personal Injuries — Knowledge of Viciousness — Presump-TIONS.

The right of the action against the owner of a vicious dog arises from the knowledge by the owner of its vicious propensities, and, such propensities having been established, there remains no presumption in law that the animal may not display them towards its keeper as well against a stranger.

[Ed. Note.—For other cases, see Animals, Dec. Dig. § 74.*]

4. Animals (§ 70°)—Victous Propensities Duty to Disclose.

The owner of the animal having vicious propensities, which are directly dangerous, is bound to disclose them, if known to him, to a bailee.

[Ed. Note.—For other cases, see Animals, Dec. Dig. § 70.*]

Animals (§ 70°) — Personal Injuries – Liability of Bailor.

A representation made to the bailee by the bailor of a vicious animal that such animal is of gentle disposition, when the bailor knows to the contrary, will render such bailor liable in an action against him by the bailee for injuries inflicted upon the latter by such animal, at least in the absence of proof that the bailee was chargeable with knowledge of its true disposition.

[Ed. Note.—For other cases, see Animals, Dec. Dig. \S 70.*]

(Syllabus by the Court.)

Error to Supreme Court.

Action by Ella Emmons and another against Albert Stevane and wife. Judgment for defendants (73 N. J. Law, 349, 64 Atl. 1014), and plaintiffs bring error. Reversed.

Samuel A. Patterson and Edmund Wilson, for plaintiffs in error. McDermott & Enright, Gilbert Collins, and Otto Horwitz, for defendants in error.

VOORHEES, J. This action is brought by Ella Emmons and John G. Emmons, her husband, against Albert Stevane and Ida F. Stevane, his wife. Mrs. Emmons, one of the plaintiffs, on the 23d day of January, 1903, was severely bitten by the defandant's dog, Nero. The circumstances were these: She went to the door of her house and found the dog lying on the porch. She spoke to him and placed her hand on his head, when, without warning, the dog yelped, jumped at her, and bit her severely about the throat. Mr. Stevane and his wife in September preceding had gone to board at the home of Mrs. Emmons in Asbury Park. Two Irish setter dogs, Nero and Rex, were brought with them, Mrs. Emmons being paid \$5 per month board for each dog. The Stevanes boarded with the Emmons family until December following, 150, 60 Am. Rep. 652. And of like import

when, upon leaving to go south upon a trip. they arranged that the dogs should remain in the care of Mrs. Emmons, and agreed to continue to pay \$5 per month for each dog so long as they remained. The trial judge directed the jury to find a verdict for the defendants. That direction is brought under review by this writ of error.

The declaration alleges ownership of the dog in both defendants. The first two counts are framed on allegations that the dog was known to the defendants to be vicious, and to have attacked and bitten mankind. The third count alleges that the defendants requested the plaintiffs to accept the dog to board, representing that he was of a gentle disposition, and that Mrs. Emmons, believing such to be the case, agreed to board him, while in truth the defendants well knew the dog to be savage and vicious. As to Mrs. Stevane's responsibility we are satisfied with the disposition made by the Supreme Court of that aspect of the case under the facts as then presented wherein it was held that there was no liability on the part of Mrs. Stevane. Emmons v. Stevane, 73 N. J. Law. 349, 64 Atl. 1014. On the trial evidence was given that the dog had jumped for, growled, and showed his teeth in several instances to stran-There was also evidence tending to show that some of these instances had come to the knowledge of Mr. Stevane. One witness testified as follows: "We was speaking about the dog, and I told him (Stevane) about the dog jumping for me, and he said he was a vicious dog and he knew it, and he didn't like him, and if it wasn't for his wife he wouldn't keep the dog." The defendants offered evidence that the dog was gentle and affectionate with his friends, a pet of everybody, and was playful with children.

At common law the keeper of animals of the class feræ naturæ was presumed to have knowledge of their vicious propensities and was liable as an insurer. May v. Burdick, 9 Ad. & El. N. S. 101: Smith v. Pelah. 2 Strange, 1264; Hale's Pleas of the Crown, 430, part 1, c. 38. But in the case of animals which had been domesticated, a presumption arose that they were not of a vicious nature, and hence their keeper was liable only in case the animal was vicious and he had knowledge of its vicious propensities. The action against the harborer did not proceed upon negligence, but if he had knowledge of the vicious nature of the animal he was liable as an insurer, the gravamen of the injury being the wrong of keeping the animal with the knowledge of its viciousness, and hence it was essential that the master's knowledge should be averred and proved. May v. Burdick, supra; Thompson's Commentaries on Negligence, §§ 839-844; Woolf v. Chalker, 31 Conn. 121, 81 Am. Dec. 175; Smith v. Donohue, 49 N. J. Law, 548, 10 Atl.

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are the decisions in this state (Gladstone v., Brinkhurst, 70 N. J. Law, 130, 56 Atl. 142), except perhaps as modified by what was said in De Gray v. Murray, 69 N. J. Law, 458, 55 Atl. 237, but which it is here unnecessary to consider, as the direct point decided in that case is not raised in the case sub judice.

The dog is classed among the domestic ani-This presumption, however, which arises in their favor is rebuttable. It is not necessary that the same injury should have actually been committed by the animal to the knowledge of its owner, but knowledge by the owner that the disposition of the animal is such that it is likely to commit a similar injury to that complained of is sufficient to maintain the action. Curtis v. Mills, 5 Car. & P. 489; Thompson's Com. on Neg. § 872. Scienter need not be precisely similar, but that it is substantially so will suffice. Shearman & Redfield on Negligence, § 631; Johnson v. Echberg, 94 Ill. App. 634. Where, therefore, the proof to establish viciousness and scienter consists of instances tending more or less clearly to indicate such a disposition and such knowledge, a jury question at once arises whether under the adduced proof the animal has displayed vicious propensities to the knowledge of the owner sufficient to rebut the presumption raised by the law in favor of domestic animals, and sufficient to charge the owner with scienter. Johnson v. Echberg, supra; Duval v. Barnaby, 75 App. Div. 154, 77 N. Y. Supp. 337. We think that the proof in this case was sufficient to raise such a question, and that the case on that point should have been submitted to the jury.

It is urged by the defendants, however, that from the fact that a dog has shown an unkindly and even vicious disposition toward a stranger it will not be inferred that the animal will manifest these vicious propensities toward his owner or his keeper. It is sufficient to say that an examination of the cases fails to disclose any such distinction. The vicious propensities having been established, there remains no presumption in law that the animal may not display them towards its keeper, as well as against a stran-

The third count of the declaration is grounded upon alleged misrepresentation made by Mr. Stevane to Mrs. Emmons as to the gentleness of the dog at the time when the agreement for boarding the animal was made. Without passing upon the question whether the general principles applicable to domestic animals as above set forth are modified where the relations between the parties arise out of a contract of bailment, it is sufficient to say that the cases clearly hold that the owner of an animal having vicious habits which are directly dangerous is bound to disclose them (if known to him) to a bailee. Such is the case when a person leaves

bell v. Page, 67 Barb. [N. Y.] 183; McGarry v. N. Y. C. R. Co. [Super. Ct.] 18 N. Y. Supp. 195, affirmed 137 N. Y. 627, 33 N. E. 745), although it has been said that this rule does not apply to animals having habits which are not directly dangerous. Keshan v. Gates, 2 Thomp. & C. (N. Y.) 288. A fortiori will a representation made by the bailor to the bailee that the animal is of gentle disposition, when in fact the bailor knows to the contrary, render the latter liable, at least in the absence of proof that the bailee was chargeable with knowledge of its true dispo-Whether the evidence offered was sition. sufficient to establish the fact that the dog possessed habits likely to result in injury, and whether when the owner made the alleged representations he had knowledge of the existence of such habits, were questions for the jury under proper instructions.

The trial judge having erred in directing a verdict in favor of the defendant Albert Stevane, it results that the joint judgment in favor of both defendants must be reversed, although the defendant Ida F. Stevane was properly entitled to a verdict and judgment in her favor. Let the judgment under review, therefore, be reversed, and judgment final be entered in favor of Mrs. Stevane against the plaintiff, with award of a venire de novo as against Albert Stevane.

(77 N. J. L. 514)

HARRISON v. NEW YORK BAY CEME-TERY.

(Court of Errors and Appeals of New Jersey. March 1, 1909.)

HIGHWAYS (§ 199*)—OBSTRUCTION—LIABILI-

If an abutting owner for his own convenience places an object (in this case a hitching post) in the public highway, his failure to use reasonable care that the highway be not thereby rendered unsafe makes him liable to users of the highway for injuries resulting from such neglect.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 508; Dec. Dig. § 199.*] (Syllabus by the Court.)

Error to Circuit Court, Hudson County. Action by Susan F. Harrison against the New York Bay Cemetery. Judgment for plaintiff. Defendant brings error. Affirmed.

R. L. Lawrence, for plaintiff in error. James A. Gordon, for defendant in error.

GARRISON, J. The plaintiff brought her action in the circuit court of Hudson county for damages for personal injuries received by her having stepped into a hole in the sidewalk of Chapel avenue in Jersey City. Chapel avenue at the point in question runs through the property of the New York Bay Cemetery, having sidewalks on either side or the central driveway. The part of the sidehis horse with a blacksmith to be shod (Camp- walk next to the cemetery was a graveled

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1507 to date, & Reporter Indexes

path between which and the curb was a sponsibility to users of the adjacent highstrip of grassplot. The hole into which the way is untenable, either upon general principlaintiff stepped was in this strip, where its | pies, or by force of statutory protection, in presence was in a measure concealed by the growth of grass.

The plaintiff's case, as stated in her declaration, was that a post had been placed by the defendant at the spot in question for use as a hitching post, and that thereafter when the post was removed the defendant had failed to exercise reasonable care that the hole should not be permitted to make the highway unsafe.

The case was submitted to the jury upon this legal theory of the defendant's liability; the jury being instructed that the plaintiff. in order to be entitled to damages, must establish by testimony the foregoing facts.

There is no valid ground of exception to this instruction. The rule is that, if an abutting owner for his own convenience places an object in the public highway, his failure to use reasonable care that the highway be not thereby rendered unsafe makes him liable in damages to users of the highway for injuries resulting from such neglect. Rupp v. Burgess, 70 N. J. Law, 7, 56 Atl. 166; 15 Am. & Eng. Ency. 419.

The plaintiff in error does not seriously question the soundness of the rule thus charged, but with more show of success urges that there was no direct evidence that the defendant had put the post at the place in question. Nevertheless this was, think, a fact that the jury might legitimately find from the evidence. The testimony was that the defendant had been in existence and in possession of this property for over 50 years; that some 20 years ago a row of hitching posts had been placed in the sidewalk on either side of the carriageway; that these posts were set 16 inches from the curb. and were equidistant, being 52 feet apart; that the hole in question was 16 inches from the curb and 52 feet from the nearest post in either direction. If the hole was in the place where a post should have been to complete the series, it was a permissible inference that a post had been there, that such post was one of a row of hitching posts placed there by the defendant for the convenience of its lot holders, and that it had rotted off, or been otherwise removed, a considerable length of time before the accident, since the hole that was left was concealed by the growth of grass about it.

We think this was competent evidence to go to the jury, both as to the negligence of the defendant and as to the assumption of risk by the plaintiff. This disposes also of the denials of the defendant's motions for a nonsuit and for the direction of a verdict. The contention that the defendant, either by reason of its statutory objects or the subdivision of its property among its lot hold-

view of the act of March 21, 1881 (P. L. p. 158; 1 Gen. St. 1895, p. 353, § 18).

The judgment of the circuit court is affirmed.

(77 N. J. L. 797)

BOGERT v. MacCHESNEY.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

APPEAL AND EBROR (§ 1010*)—REVIEW—FIND-INGS OF FACT BY COURT.
Where a cause is tried by the court, its

findings on questions of fact, and on blended law and facts, cannot be reviewed on error, where there is evidence to support them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3979-3982; Dec. Dig. § 1010.*]

Error to Supreme Court.

Action by Ira J. Bogert against C. Eugene MacChesney. There was a judgment in favor of plaintiff for less than the sum claimed, and he brings error. Affirmed.

The following is the opinion of the Supreme Court:

"This action was brought by the plaintiff to recover a commission on the purchase price of certain real estate sold by him, as agent for the defendant, to the Metropolitan Real Estate Improvement Company. case was tried before Minturn, J., without a jury, by consent of both parties. The contention of the plaintiff was that he was entitled to a commission of 4 per cent. on the sum of \$14,500, under an agreement to that effect made between himself and the defendant. The court found, on the facts submitted, that he was entitled to a commission of 21/2 per cent. upon the sum of \$10,-000, and awarded him damages in the sum of \$250. To this finding the plaintiff excepted, and that exception is the basis of the present writ of error.

"It is entirely settled in this state that where a cause is tried by the court without a jury, by the consent of parties, the court is substituted in the place of a jury, and its findings on questions of facts cannot be reviewed by writ of error. Columbia Delaware Bridge Co. v. Geisse, 38 N. J. Law, 39, s. c. on error, 38 N. J. Law, 580. So, too, where the trial is had under such conditions the finding of the court on the blended law and facts cannot be reviewed on error. Mills v. Mott, 59 N. J. Law, 15, 34 Atl. 947. The finding of facts of a judge trying an issue without a jury is as unassallable as the verdict of a jury would be. The weight and sufficiency of evidence to support the finding cannot be considered on writ of error. It is only in those cases in which the finding of fact by the judge is ers. was immune from ordinary legal re- without support from the proofs in the case

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that such finding will be reversed on error. Weger v. Delran, 61 N. J. Law, 224, 89 Atl. 730; Brewster v. Banta, 66 N. J. Law, 367, 49 Atl. 718.

"There being some evidence in the present case to support the finding of fact by the trial judge, the judgment under review must be affirmed."

George P. Rust, for plaintiff in error. Wayne Dumont and Clifford L. Newman, for defendant in error.

PER CURIAM. The judgment under review herein will be affirmed, for the reasons expressed in the above memorandum.

(77 N. J. L. 652)

STATE v. MARTIN.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

1. DISORDERLY HOUSE (§ 4*)-WHAT CONSTI-TUTES.

Any place where illegal practices are habitually carried on is a disorderly house.

[Ed. Note.—For other cases, see D House, Cent. Dig. § 4; Dec. Dig. § 4.*

For other definitions, see Words and Phrases, vol. 3, pp. 2108-2110.]

2. Usury (§ 149*)—Taking Usury as Unlaw-

Z. USURY (8 1237)—TAKING USURI AS UNLAW-FUL ACT.

The taking of usury in violation of the statute (3 Gen. St. 1895, p. 3703) entitled "An act against usury," and expressly prohibiting the same, is an unlawful act, though the only penalty imposed is the money which it prohib-its the lender from taking, and the statute does not prohibit the borrower from paying it.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 441; Dec. Dig. § 149.*]

3. DISORDERLY HOUSE (§ 4*)—M PLACE FOR BUSINESS OF USURY -Maintaining

A place where practices interdicted by statute are habitually carried on is a disorderly house whether or not the practices contain an element of criminality or of moral turpitude, and hence a person who maintains a place of business in which the law against usury is habitually violated is guilty of keeping a disorderly house.

[Ed. Note.—For other cases, see Disorderly House, Dec. Dig. § 4.*]

4. WITNESSES (§ 317*)—CREDIBILITY—FALSUS

IN UNO.
Where the jury find that defendants have testified falsely on a material part of the case, they are justified in disbelieving their statement as to another part.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1080-1083; Dec. Dig. § 317.*] 5. DISORDERLY HOUSE (\$ 20*) - TRIAL - IN-

In a prosecution for keeping a disorderly house wherein a usurious loan business was carried on, defendant claimed, as manager of the loan company, to have represented a third per-son in making loans at a legal rate, and the court charged that if it was found there was court charged that if it was found there was such a person and that she was a lender of the money, and did not participate in taking the money charged for expenses and services ren-dered in making the loan, they must acquit, but if they found that she was a myth, or that her name was put in the papers to have some other person than the loan company appear as lend-

er, it would be for them to say whether the making of a part of the papers in her name, and a part in the name of the loan company, was a mere device or scheme for exacting illegal interest. Held, that all that was meant by the use of the expression "myth" in the latter part of the instruction was that the jury were at liberty to find such third person was mythat liberty to find such third person was a mythical person so far as these transactions were concerned, and, so construed, there was no er-ror in the instruction.

[Ed. Note.—For other cases, see Disorderly House, Dec. Dig. § 20.*]

6. CRIMINAL LAW (§ 1172*)—APPEAL AND ERBOR—HARMLESS ERROR—INSTRUCTIONS.

If it was meant by such expression that the jury might find that there was no such person in the whole world, the instruction to the extent that it went beyond a declaration that they might find she was a mythical person so far as any connection with the transactions under review was involved, was harmless, for if they found she was a myth so far as the making of such loss, were concerned it was impured. ing of such loans were concerned, it was immaterial whether such person actually existed or not and that fact could not have affected the decision.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3154-3163; Dec. Dig. § 1172.*]

Error to Supreme Court.

William R. Martin was convicted of keeping a disorderly house, and he brought error to the Supreme Court. The judgment was affirmed (69 Atl. 1091), and he again brings error. Affirmed.

Gilbert Collins, for plaintiff in error. William J. Crossley, Prosecutor of the Pleas, and William R. Piper, Asst. Prosecutor, for the State.

GUMMERE, C. J. This writ of error brings up for review a judgment of the Supreme Court affirming the conviction of the defendant of the crime of keeping a disorderly house. The gravamen of the offense charged against the defendant is the habitual taking of usurious interest for loans made by him at the office of the Capitol Loan Company in the city of Trenton. Both in the trial court and in the Supreme Court it was contended on his behalf that the habitual taking of usury does not make the place where such practice is carried on a disorderly house. The ruling upon this point was adverse to the defendant in both courts, the precise question having been previously so determined by the Supreme Court in the case of State v. Diamant, 73 N. J. Law, 131, 62 Atl. 286, and the first assignment of error argued before us challenges the soundness of that ruling.

What constitutes a disorderly house has been frequently declared by the courts of this state. In the case of State v. Williams, 30 N. J. Law, 102, it was defined by Whelpley, C. J., speaking for the Supreme Court, as "Any place of public resort, whether an inn. a dwelling house, a store house, or any other building or garden in which illegal practices are habitually carried on." In State v. Hall.

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the opinion of the same court, says: "In a legal point of view a house may be disorderly in two ways, viz., first, from the end or purpose to which it is appropriated; and, second, from the mode in which it is kept. The end or purpose for which the house is designed will render the keeping of such house illegal, it it be such as, of necessity, contravenes the provisions of any public statute." In the case of McClean v. State, 49 N. J. Law, 471, 9 Atl. 681, this court adopted the definition of a disorderly house given in State v. Williams, supra, and declared that "Any place of public resort in which illegal practices are habitually carried on" is a disorderly house. This definition was again approved by this court in Haring v. State, 53 N. J. Law, 664, 23 Atl. 581. In the earlier case of Meyer v. State, 42 N. J. Law, 157, we declared that "A person who habitually keeps his house open * * * for a purpose which the statute interdicts" is guilty of the offense of keeping a disorderly house.

In view of this line of decisions it must be accepted as settled that any place in which illegal practices are habitually carried on is a disorderly house. The cases of State v. Hall and Meyer v. State would seem to have determined that practices which are prohibited by statute are illegal practices within the meaning of this definition. Counsel for the defendant now contends that the declaration of the two cases last referred to is broader than the decision of those cases required, and that it is only in cases where the habitual violation of a statute involves criminality, or moral turpitude, that a person is guilty of illegal practices, within the meaning of that phrase as used in the case of State v. Williams, and the other cases following it. He further contends that the taking of usury is not made unlawful by the statute of this

This latter contention may properly be considered first, for, if it is sound, it is dispositive of the case now before us. The title of our statute is "An act against usury." 8 Gen. St. 1895, p. 3703. The provision of its first section is "that no person or corporation shall, upon contract, take directly or indirectly, for loan of any money, wares, merchandise, goods and chattels, above the value of six dollars for the forbearance of one hundred dollars for a year, and after that rate for a greater or less sum or for longer or shorter time." The object disclosed in the title of the act is the prevention of usury; the method by which the Legislature provides for the carrying of that object into effect is by enacting an express prohibition against taking it. Counsel argues that a violation of this mandate of the statute by a person loaning money does not constitute an unlawful act, first, for the reason that the statute imposes no penalty upon him for so doing,

32 N. J. Law, 158, Beasley, C. J., delivering | act which prohibits the borrower from paying usury.

The statement that the statute does not impose any penalty upon a person who takes usury is not accurate; for the second section of the act deprives him of the power to enforce the payment of any interest on his loan, and entitles the borrower to have the amount of the usury deducted from the principal of the loan in case usury has been paid. In this respect our usury act is quite similar to our act to prevent gaming (2 Gen. St. 1895, p. 1606), the penalty imposed by which upon the successful bettor is the return of the stake if it has been paid to him. Each statute prevents the person who is benefited by the violation of its provision from enjoying that benefit, and nothing more. A violation of the act to prevent gaming has been declared by this court, in Haring v. State, supra, to be illegal, and a place where such violations are habitually indulged in to be a disorderly house. We conclude, therefore, that the fact that the statute imposes no penalty, except the deprivation of the money which the statute prohibits the lender from taking, affords no ground for holding that the taking of usury is not unlawful.

Nor do we think the suggestion sound that the taking of usury is not unlawful because the statute does not prohibit the borrower. from paying it. If it is, then the sale of liquor without a license is not unlawful, although prohibited by statute, for there is. nothing in the statute which imposes any penalty on a person who purchases liquor from an unlicensed vendor, or which forbids any one from so purchasing. The gaming act also, although it prohibits gambling, imposes no penalty on the loser. We are clear that a violation of the law against usury is an unlawful act.

Is it necessary that the unlawful practices which are habitually indulged in must contain an element of criminality, or of moral turpitude, in order to render the place in which they are carried on a disorderly house? The sale of intoxicating liquor is not criminal per se. It is only made so by statute. when the sale is unlicensed, or occurs on Sunday; and not always then. See Meyer v. State, supra. Nor does it, in the eye of the state, involve moral turpitude, whatever opinion we, as individuals, may entertain upon the subject; for the state grants permission to selected persons to make such sales, and collects revenue for the permission, and the idea that the state, for motives of gain, is willing to become a party to an act which in its judgment involves moral turpitude, cannot be tolerated for a moment. And yet it is settled in this state that a house in which unlawful sales of liquor are habitually made is a nuisance, and he who maintains it is guilty of keeping a disorderly house. Parker v. State, 61 N. J. Law, 308, 39 Atl. 651; s. c. on error, 62 N. J. Law, 801, 45 Atl. 1092. and, second, because there is nothing in the The logical conclusion to be drawn from the

case just cited, and those like it, as it seems to us, is that the declaration of Beasley, C. J., in State v. Hall, and our own statement in Meyer v. State, that a place where practices which are interdicted by statute are habitually carried on is a disorderly house, is sound in its fullest extent. We conclude, therefore, that a person who maintains a place of business in which the law against usury is habitually violated is guilty of the offense charged in the indictments now before us.

Counsel for the defendant further contends that the evidence submitted at the trial did not support the finding of the jury that the defendant habitually carried on the practice of taking usury at the office of the Capitol Loan Company, and that, therefore, the judgment against him should be reversed. This contention may be disposed of by saying that it is not justified by the fact. There is ample proof in the case to support the jury's conclusion upon this point.

The final assignment of error argued before us is directed at the charge of the court, and, in order that it may be appreciated, a brief reference to the facts is necessary. The defendant carried on business in the city of Trenton as the manager of the Capitol Loan Company. His method of transacting business was as follows: A person who desired to borrow, say \$200, for a year, was required to obligate himself to pay \$270 in twelve monthly installments of \$22.50 each. Where the amount was less than \$200 the excess required to be repaid was proportionately larger, increasing as the size of the loan diminished; the amount of the excess on a loan of \$10, for instance, being \$5.60. The method adopted by the defendant in making his loans was this: The borrower was told that the money advanced to him belonged to Clara H. Woodward, said to be a resident of a small town in the state of Illinois, and he was required to execute a chattel mortgage in her favor for the amount of the loan, with legal interest, and to pay for the drawing and recording of that instrument; he was further informed that the loan company was under obligation to guarantee to Mrs. Woodward the repayment of all of her moneys which it loaned, and he was required to give a second mortgage to the company for the remaining portion of the money which he agreed to pay at the end of the year, the excess over the principal and legal interest, as he was informed, being the company's charge for drawing the necessary papers and guaranteeing the loan, and its commission for obtaining it. Both the defendant and one Weatherby, one of the company's managers. testified that this method was not a mere scheme adopted to evade the usury law, but that the transactions were exactly what they were represented to be; that the money loaned was the money of Mrs. Woodward, and that she got for its use by the borrower only the legal rate of interest. The court, in

charging the jury on this phase of the case, instructed them that if they found there was such a person as Mrs. Woodward, and that she was the lender of the money, and did not participate in the taking of the money charged for expenses incurred, and services rendered in making the loan, they must acquit the defendant; but that if they found that Mrs. Woodward was a myth, or a name put in the papers for the purpose of having some other person than the Capitol Loan Company appear as the lender, then it would be for them to say whether the making of a part of the papers in the name of Mrs. Woodward, and a part in the name of the loan company, was a mere device or scheme for exacting illegal rates of interest. The latter portion of this instruction was excepted to, and was assigned for error, both in the Supreme Court and here; the pith of the assignment being that there was nothing in the proofs which would justify the jury in finding that Clara L. Woodward was a myth, and that to permit them to do so was harmful to the defendant. The Supreme Court disposed of the assignment by saying: "There was no evidence that Woodward was a myth, and if the judge had rested the case on that alone the charge could not be sustained. He did not rest it on that alone, but upon the question whether part of the papers were taken in her name, and part in the name of the Capitol Loan Company, as a mere device and scheme for exacting illegal rates of interest. We think the circumstances of the case justified this instruction."

We are inclined to think the statement of the Supreme Court that there was no evidence that Woodward was a myth is hardly justified. The only testimony that tended to show that she had any existence as a person connected with the transaction under investigation was that of the defendant and of Weatherby. The jury, by its finding, must be considered to have found these witnesses untruthful in their story with relation to the manner in which the loans were, in reality, made. That there was abundant evidence to justify it in so doing we have already stated. Having found that they had testified falsely upon this material part of the case, it was justified in disbelieving their statement that Clara L. Woodward was the person whose money was loaned. It was not pretended that she had any other connection with the transactions, and the jury, if it did not believe that the money loaned was hers, was justified in finding-were compelled to find—that she was a mythical personage, so far as these transactions were concerned. This, it seems to me, was all that the trial judge meant the jury was at liberty to find when he used the expression just criticised. If we are wrong in so considering, and he meant that the jury might find that there was no such person in the whole world as Clara L. Woodward, then the instruction, to the extent that it went beyond a declaration



that the jury might find she was a mythical | By the terms of the agreement the decedent person so far as any connection with the transactions under review was involved, was harmless: for, if they found she was a myth so far as the making of those loans was concerned, it was entirely immaterial whether such a person actually existed or not, and that fact could in no way have affected the decision of the case.

The judgment under review will be affirmed.

(224 Pa. 418)

In re WHITMER'S ESTATE.

(Supreme Court of Pennsylvania. April 12, 1909.)

1. HUSBAND AND WIFE (§ 34°) — ANTENUP-TIAL CONTRACT—FRAUD.

Though an antenuptial contract calls for

the highest degree of good faith, fraud is not to be presumed, and the burden of proof is not changed, in the absence of facts from which con-

cealment may be inferred.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 205; Dec. Dig. § 34.*]

2. Husband and Wife (§ 33*)—Antenup-tial Agreement—Right to Renounce.

Where a man 80 years of age entered into an antenuptial contract with a woman 53 years of age, under which they renounced all rights in each other's estate, except that the woman was to receive a small sum from the executors of the man, and she had knowledge of his estate sufficient to enable her to act advisedly, she cannot, after her husband's death, renounce the agreement and demand her share of his estate.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 33.*]

Appeal from Orphans' Court, Franklin County.

In the matter of the estate of Jacob S. Whitmer. From an order dismissing exceptions to supplementary report of auditor, Margaret Elizabeth Whitmer appeals. firmed.

Argued before FELL, BROWN, MEST-REZAT, ELKIN, and STEWART, JJ.

W. K. Sharpe, for appellant. William S. Hoerner and George W. Atherton, for appellees.

PER CURIAM. Parties to an antenuptial contract for the disposition of their estates do not deal at arm's length, but stand in a relation of mutual confidence and trust that calls for the highest degree of good faith in disclosing all circumstances bearing on the contemplated agreement. But fraud is not to be presumed, and the onus of proof is not changed, in the absence of evidence of facts or circumstances from which concealment or imposition may reasonably be inferred. Robinson's Estate, 222 Pa. 115, 70 Atl. 966.

There is no evidence as to what took place at the execution of the agreement that the appellant seeks to have set aside, and in the absence of all proof it is presumed that there

relinquished all claims to her estate and agreed that his executors should pay her \$1,500. She agreed to become his "wife, caretaker, and nurse" during his natural life, and renounced all claim to his estate. He was at the time 80 years of age and it was his third marriage. She was 53. He had five children of his first marriage living, and she was a widow with three children, two of whom were married, and the third was a boy of 17, who continued to live with her after her marriage. They had both lived for many years in a small town, where each inhabitant knew all the others. For three or four years she had kept house for a man living across the street from the decedent, and when she lost her situation with him she entered the employment of the decedent as housekeeper. The marriage took place three months later, and his death occurred a year afterwards. He had an estate of about \$20,-000, nearly all of which he had received from the estate of his second wife, concerning whose will there had been litigation, to which much publicity had been given, and which had terminated in his favor. The result and the amount received were subjects of general knowledge in the community. There was evidence that she had believed his estate to be much larger than it really was. and that she had said that she signed the agreement because, if she did not, some other woman would, and that she might as well have the money secured by it as anybody else. They deliberately made a bargain, by which he secured a caretaker, and she secured a home and compensation for services to be rendered during a period of uncertain. but necessarily quite limited, duration. She had sufficient knowledge as to his estate to enable her to act advisedly, and there is no adequate reason for releasing her from her contract.

The decree is affirmed.

(224 Pa. 397)

FIRST NAT. BANK OF READING V. FER-GUSON.

(Supreme Court of Pennsylvania. April 12, 1909.)

PLEDGES (§ 28*) — IMPAIRMENT OF VALUE — RIGHTS OF PLEDGEE.

A national bank owned the majority of the

A national bank owned the majority of the stock of a corporation, and accepted as collateral for a note stock of the same company. The entire value of the stock was destroyed by a change in the business made by the directors prior to the pledge as collateral. *Held*, that the bank could enforce its debt, though it could have prevented the change in the business.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 69; Dec. Dig. § 28.*]

Appeal from Court of Common Pleas, Berks County.

Action by the First National Bank of was no designed concealment or imposition. Reading against Nathaniel Ferguson. From an order making absolute rule for judgment in a position, but honestly failed to prevent? for want of a sufficient affidavit of defense, defendant appeals. Affirmed.

The following is the opinion of Endlich, P. J., in the court below.

"Conceding the general principle upon which the defense set up in this case is claimed to be founded—that, if collateral in the hands of the creditor is impaired in value through the creditor's negligence, he is liable to the pledgor to the extent of the loss-it is impossible to perceive how it can be applied to the facts alleged in this affidavit. On October 24, 1907, defendant became indebted to plaintiff upon a note for \$2,500. payable February 24, 1908. As collateral security he pledged to the plaintiff 70 shares of the preferred stock of the Keystone Wagon Works, a corporation the majority of whose stock was owned by the plaintiff, and which the plaintiff had been instrumental in organizing in order to protect itself against loss upon heavy advances made by it to the Keystone Wagon Company. Prior to February, 1907, the wagon works had built up and was doing a profitable business manufacturing wagons. About that time, against the defendant's protest, this business was abandoned, and that of manufacturing metal bodies for automobiles entered upon. The departure proved disastrous, so that the stock pledged by defendant to plaintiff became worthless, entailing upon him a loss greater than the amount of his indebtedness to plaintiff. Whilst the affidavit declares that the plaintiff made the change that wrecked the wagon works, it does not allege or point to any corporate act on the part of the plaintiff corporation as in any way directing or connected with it. What is meant is obviously to be gathered from the averment that the plaintiff owning the majority of the stock was, as such stockholder, through the majority of the directors of the wagon works, in control of its business and affairs. After all the change was brought about by the action of the management of the wagon works, and the most that can be charged against the plaintiff, according to this affidavit is, that it did not exercise its influence upon the management to prevent the change. It is not asserted that the failure to do so was actuated by any fraud or wrongful purpose, much less by any design to depress or destroy the value of the collateral pledged by defendant (which might be a defense, see Ritchie v. McMullen, 79 Fed. 522, 25 C. C. A. 50).

"The question thus presented is therefore simply this, whether a stockholder in a company who accepts as collateral from his debtor other stock of the same company loses his debt by the destruction of the value of the entire stock of the company consequent upon the action of its directors which he was!

There can be but one answer. The plaintiff could not be expected as pledgee of defendant's stock to understand the interests of the company differently from what he understood them as a stockholder. In assenting as a stockholder, honestly, however mistakenly, to a change in the business of the company by its directors, the plaintiff certainly did not make itself liable to defendant for the loss resulting to him in common with it and all other stockholders in proportion to their holdings.

"But, in addition to this, the change of business had been made long before the plaintiff became the holder of defendant's stock as collateral security. The improvidence or negligence he imputes to it antedated by eight months the inception of the relation of pledgee and pledgor, trustee, and cestui qui trust. There is nothing in the affidavit indicating any act or omission on plaintiff's part entitling defendant to redress after the defendant's stock came into plaintiff's hands. There is therefore nothing alleged which in any view could ground a defense in this action. To go behind the date of the pledge and hold the defendant entitled to a release from his debt by reason of the injury resulting to him from plaintiff's previous acts and omissions would be to hold the plaintiff responsible to defendant for the consequences of what it did, not as the bailee of defendant's, but as the owner of its own stock. Of course, that cannot be, because in what plaintiff did or did not do as a stockholder in the wagon works it was dealing with its own and not accountable to the defendant by reason of any privity between them.

"Notwithstanding the earnest and interesting argument made in behalf of the defendant, there seems to be no choice but to enter the judgment demanded by the plain-

"The rule to show cause is made absolute."

Argued before FELL, BROWN, MESTRE-ZAT, POTTER, and STEWART, JJ.

C. H. Ruhl and Richmond L. Jones, for appellant. J. Bennett Nolan, for appellee.

PER CURIAM. The judgment is affirmed on Judge Endlich's opinion.

(224 Pa. 408)

McGINLEY v. LEHIGH COAL & NAVIGA-TION CO.

(Supreme Court of Pennsylvania. April 12, 1909.)

1. MASTER AND SERVANT (§ 124*)—INJURIES TO SERVANT—DUTIES OF MINING COMPANY. The rule requiring railroad companies to inspect cars received from other companies and see that they are in a safe condition for their employés to handle does not apply to a mining company on whose sidings loaded cars are delivered to be unloaded.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235, 236; Dec. Dig. § 124.*]

2. MASTER AND SERVANT (§ 125*)—INJURY TO MINING EMPLOYÉ—DEFECTIVE CARS.

Where a mining company has no notice of defects in a car on its siding, it is not liable to a trainman injured by its defective condition while being moved preparatory to unloading.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 243; Dec. Dig. § 125.*]

Appeal from Court of Common Pleas, Carbon County.

Action by John McGinley against the Lehigh Coal & Navigation Company. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

At the trial the court entered a compulsory nonsuit, which it subsequently refused to take off; Heydt, P. J., filing the following opinion in the court below:

"John McGinley, the plaintiff, was employed as a brakeman by the Lehigh Coal & Navagation Company. The plaintiff's statement contains, inter alia, the following averment: That at the time of the grievances hereinafter set forth the defendant was a corporation engaged in mining coal, and for such purposes in possession and use of certain premises in the said county of Carbon, upon which premises were laid railroad tracks used by said defendant in its business of coal mining, and upon which tracks the said defendant company ran a locomotive and cars owned by it for the purpose of conveying material to its mines and coal from its premises.' On December 19, 1903, the Central Railroad Company of New Jersey had delivered two car loads of prop timber consigned to the Lehigh Coal & Navigation Company upon the tracks of the Central Railroad of New Jersey, at Hauto, the usual place of delivery. The crew upon which John McGinley was working drew these two cars loaded with prop timber out of the siding of the Central Railroad Company of New Jersey and 'kicked' them into a blind siding of the Lehigh Coal & Navigation Company in its yard at Hauto, whence they were to be taken to the mines and used by the defendant in its mining operations. John McGinley was on one of these cars (No. 37.144 Central Railroad of New Jersey), and when he applied the brake the brake gave way, he fell from the car, and the car passed over him, cutting off both his legs. brake chain on said car had been broken, and had been tied with wire, and when Mc-Ginley applied the brake the wire gave way and the brake refused to hold.

"The negligence of the defendant, as alleged by the plaintiff, consists in a failure common pleas.

to provide an inspection of the cars before moving them. The question thus resolves itself into whether or not the defendant was bound, under the facts as they appear in this case, to provide inspection. If the defendant was bound to have this car inspected before moving it, and failed to do so, then it was negligent. If, on the other hand, it was not bound to do so, then the failure to provide inspection would not be negligence, and the nonsuit was properly entered. The syllabus in the case of McMullen v. Carnegie Bros. & Co., 158 Pa. 518, 27 Atl. 1043, 23 L. R. A. 448, is: 'The rule which requires railroad companies to inspect cars received from other companies and to see that they are in good and safe condition for their employes to handle does not apply to companies or persons on whose sidings loaded cars are delivered for the purpose of permitting the owner of the siding to unload the freight. even though the sidings of such person or company may be extensive in number and great in length.' The facts in that case are strikingly like the facts in the case at bar, as will appear by a comparison thereof. That case was cited with approval in Rehm v. Penna. R. R. Co., 164 Pa. 91, 30 Atl. 356, and rules the case at bar. Under the facts in this case the defendant was not bound to inspect the car before moving it. There being no legal duty on the part of the defendant to furnish inspection, a failure on its part to do so does not constitute negligence.

"There is no merit in the argument that the defendant was 'engaged in the business of conducting a railroad.' There is no evidence in the case that the defendant is a common carrier, and so far as we are advised it is not a fact. The employment in which the plaintiff was engaged at the time he was injured was simply the handling of a foreign car on the siding of the defendant. The defendant was not moving this car as a common carrier, handling a foreign car, but simply in pursuit of its private business moving said car preparatory to unloading its freight. There is no evidence that the defendant had actual notice of the defective brake chain, and since the accident happened only about 20 minutes or a half hour after the car came into its possession the time was too short to affect it with constructive notice."

Argued before FELL, BROWN, MESTRE-ZAT, ELKIN, and STEWART, JJ.

J. O. Ulrich and L. C. Scott, for appellant. Geo. M. Roads, Frederick Bertolette, and William Jay Turner, for appellee.

PER CURIAM. The judgment is affirmed, on the opinion of the learned judge of the common pleas.

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(224 Pa. 319)

CARTER v. HENDERSON & CO., Limited. (Supreme Court of Pennsylvania. April 12, 1909.)

1. TRIAL (§ 420*)—OBJECTIONS—WAIVER.

Where an employer, sued by an employe where an employer, such by an employer for injuries alleged to have been due to a failure to provide proper appliances, allowed the trial to proceed without objection as though by mutual understanding a pilaster was included within the meaning of appliance, a refusal to direct a verdict for the employer on the ground that the allegations and proof did not agree was proper. not agree was proper.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 420.*]

2. MASTER AND SERVANT (§ 285*)-INJURIES IN SERVANT—ACTIONS—QUESTION FOR JURY.
Whether a pilaster was constructed in conformity with the architect's specifications so as to be adequate for the support of a truss which fell and injured a workman held for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 285.*]

3. Trial (§ 252*) - Instructions - Matters

NOT SUPPORTED BY EVIDENCE.

It was error for the court to introduce a theory of its own wholly different from any that had been suggested by either of the parties and without evidence to support it, and to submit it to the jury to be passed upon as the govern-ing question.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

4. TRIAL (§ 141*)—QUESTIONS OF LAW AND FACT—CREDIBILITY OF WITNESS.

Where the evidence relied upon to establish a fact is wholly in parol, the question is for the jury, notwithstanding the evidence is uncontradicted, since the credibility of witnesses is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 336; Dec. Dig. § 141.*]

Appeal from Court of Commor Pleas, Philadelphia County.

Personal injury action by James Carter against Henderson & Co., Limited. Judgment for plaintiff for \$15,934, and defendant appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Frank P. Prichard and James Wilson Bayard, for appellant. Charles F. Warwick, J. Edgar Butler, and John J. McDevitt, Jr., for appellee.

STEWART, J. Plaintiff was a workman employed by a subcontractor who had engaged to erect and put in place the iron trusses and beams required by the specifications for the roof of a public school building which the defendant company had contracted to build. When the last of the trusses was about to be placed in position on the walls, something gave way, and the truss fell to the ground below, carrying with it the plaintiff, who in the mishap was severely injured. He brought this action for damages against the defendant company, the general contractor, charging it in the state- required, when examined "it would have

ment filed with negligence in having failed to provide sufficient and proper appliances, and permitting certain supports for the roof of the building to be violently thrown to the ground. On plaintiff's part the case was tried on the theory that the proximate cause of the plaintiff's injuries was the negligent and defective construction of that part of the wall known as the pilaster, the angular projection of the wall on the top of which the iron truss was intended to rest for support. We need waste no time or effort in considering whether a pilaster is an appliance. Clearly it is not, if we have regard to the etymology of the term "appliance," and there is nothing in the case to show that the word is used in common speech or technically to denote a pilaster. However this may be, the pllaster was the thing which the word "appliance," as used in the statement, was meant to denote. The word was inapt almost to the extent of being a misnomer; but allowing it the sense in which it was used in the statement involved no change in the cause of action, and consequently variance could not be asserted. If the defendant did not so understand it when the case was called for trial, and was not prepared for the issue as thus made up. a motion for continuance would have been in order, and the evidence offered by plaintiff should have been objected to as not supporting the averment. Defendant adopted neither course, but allowed the trial to proceed as though by mutual understanding pilaster was included within the meaning of appliance. Under these circumstances, we think a refusal to give binding instructions for the defendant on the ground that the allegata and probata did not agree was entirely proper.

It was developed as part of plaintiff's case that, had the pilaster been constructed in conformity with the architect's specifications, it would have been more than adequate for the support of the truss. Defendant's evidence was to like effect. The whole effort on part of the plaintiff was to show that the pilaster had not been so constructed and that the accident resulted in consequence of this want of conformity. Was the evidence on this point sufficient to carry the case to the jury? Briefly it was this: Two witnesses called by plaintiff testified that, after the collapse, they had examined the mortar in which the bricks and stones had been laid and described it as "dry and crumbly," both said it was in bad condition-one, that "it would crumble out like sand, was spongy"; the other, that "it was dry and crumbly, and in bad condition." This was followed by the testimony of an expert witness, called by plaintiff, who testified that had the mortar been made of the materials called for by the specifications, and mixed in the proportions

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

been hard, and small particles would have mortar was not dry. But two witnesses tesbeen very hard to break, and sharp cutting edges on it." However unconvincing this testimony may have been to the mind of the court, and especially in view of the positive testimony adduced by the defendant, to the effect that the specifications had been strictly observed, it was for the jury to decide what weight they would give it. The court could not say as matter of law that, if credited, it would not support an inference that the wall had been defectively constructed. And yet the trial judge disposed of the question in his charge in this way: "I do not leave it as a question of fact for you to say whether that mortar was improperly mixed or of bad materials, for there is no evidence on that." This was error. Had the fact been as here stated by the learned judge binding, instructions to find for the defendant should have followed, since the plaintiff's whole contention was that the truss fell because the wall was unequal to the burden, and that this insufficiency resulted from the use of defective mortar in the construction. Instead of directing a verdict for the defendant, the judge introduced a theory of his own as to the cause of the accident, wholly different from any that had been suggested by either of the parties, and submitted it to the jury to be passed upon by them, as the governing question in the case, as will appear from the following extract from the charge: "The arguments of counsel through the case seem to have been, and that may be your view, that it was either the fault of the stone masons or the iron men. It is fo: you to say, but there is in my view-I at any rate call your attention to the third view I have of the case which will be for your determination, and that is that the stone masons or stone setters built their wall according to the specifications, according to the contract, but that the trusses were placed upon the wall when the mortar was not dry, and that as a result of that the pilaster buckled and bulged perhaps, or, at any rate, part of it gave way and slid off." At the conclusion of the charge, counsel for defendant, having excepted to the submission of the question whether the defendant had been careful to see that the pilaster was strong enough to bear the weight of the truss, the court thereupon gave further instructions as follows: "On that point, counsel having called my attention to it, the real question is whether the mortar was dry when the trusses were put on the pilaster, and, if not, who was responsible for that." theory here presented is that the wall fell under its burden because it was unseasoned; the mortar not having had time to dry. It may be that this theory was the correct one; but where was the evidence in the case to support it? Not a single witness testified [Ed. Note.—For other cases, see Trusts, Dec. that the wall was unseasoned, or that the Dig. § 151.*] support it? Not a single witness testified

tified to the condition of the mortar, and the only inference that can possibly be derived from their testimony is that the mortar was dry, but without binding strength because not properly prepared. Any finding by the jury on the question submitted would necessarily be pure and simple speculation. The instructions of the court with regard to this feature of the case are assigned for error in the fourth, fifth, and sixth specifications, and these assignments are sustained.

The jury having found for plaintiff, a motion for judgment non obstante followed. One of the reasons urged in support of the motion was that the wall had been built by an independent subcontractor; that no liability, therefore, attached to the defendant. This point assumes as a fact what was found not to be a fact by the jury. The court was asked to instruct the jury that the wall had been built by an independent subcontractor. This instruction was refused very properly, because the evidence relied upon to establish such fact was wholly in parol, and this circumstance drew the question to the jury necessarily, notwithstanding the fact that the testimony in regard to it was uncontradicted. The court could go no further in this direction than to say to the jury -and this should have been said—that, if they believed the testimony of plaintiff's witnesses, then the party who had built the walls was an independent subcontractor within the meaning of that term as defined by the court. The credibility of the witnesses was for the jury.

Upon the review we have made of the case, it sufficiently appears without specifying further that the case required a submission; not, however, for a choice between conflicting theories, but for a determination of the facts in issue under the evidence in

The judgment is reversed, and a venire de novo awarded.

(224 Pa. 262)

KUTZ v. NOLAN (READING TRUST CO., Garnishee).

(Supreme Court of Pennsylvania. March 29, 1909.)

1. TRUSTS (§ 151*)—REMEDIES OF CREDITORS— DUTY OF TRUSTEE-WALVER BY CESTUI QUE TRUST.

Error in the issuance of an attachment execution in which a trustee under an irrevocable ecution in which a trustee under an irrevocative deed of trust is made garnishee before the maturity of the judgment on a judgment note executed by the cestui que trust cannot be waived by the cestui que trust, and the trustee thereby relieved from liability in failing to resist the attachment of the funds in its possession under the illegal process.

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. TRUSTS (§ 151*)—REMEDIES OF CREDITORS—ANSWER OF TRUSTEE IN GARNISHMENT— SUFFICIENCY.

It is not sufficient for a trustee under an irrevocable deed of trust who has been made garnishee in an attachment execution on a judgment taken on a judgment note executed by the cestul que trust simply to demand in his answer an inquiry whether the judgment and execution are collusive, but the facts should be stated, and, upon them, he should aver that he believes that the conduct of the judgment he believes that the conduct of the judgment creditor and cestui que trust is collusive.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 151.*]

Appeal from Court of Common Pleas, Berks County.

Action by Ira G. Kutz against Maria L. Nolan, in which action the Reading Trust Company was summoned as garnishee. From an order making absolute rule for judgment against the garnishee, defendant appeals. Reversed.

Argued before FELL, BROWN, MESTRE-ZAT, POTTER, and STEWART, JJ.

Isaac Hiester, for appellant. Joseph R. Dickson and Ira G. Kutz, for appellee.

MESTREZAT, J. Apparently recognizing the strength of man's spendthrift nature and his weakness in resisting his inclination to dissipate his material wealth, this court, more than three-quarters of a century ago, held that he might legally protect himself from his own improvidence by a declaration Every day's experience confirms the wisdom as well as the necessity of this ruling which has been uniformly adhered to until the present time. Our law favors such a provision for the protection of estates, and has constructed no Appian Way strewn with roses over which the cestui que trust and a confederate may travel in defeating it.

Maria Louisa Nolan, whose estate is the subject of this contest, executed an irrevocable deed of trust in 1904 "for the purpose," as she declares therein, "of preserving the property and estate of the said Maria Louisa Nolan for her proper support and maintenance." The trustee was the Reading Trust Company, the duration of the trust was 10 years, and the duties of the trustee were to retain the securities, and collect the dividends, interest, and profits accruing thereon; and, after deducting therefrom the costs incident to the execution of the trust, to apply all of the proceeds in monthly installments to the support and maintenance of the cestui que trust. The estate was not to be subject in any manner to the control, engagements, debts, or liabilities of the cestui que trust. She was authorized during the continuance of the trust to dispose of the estate by will, or, if she died intestate during that time, the estate was to vest in the parties entitled under the intestate laws of this state. This trust was valid and enforceable against every

cestul que trust. At the time of the execution of the deed, it appears that Miss Nolan was young in years, but of mature mind and capable of fully comprehending the effect of her action. It is not alleged that the deed was not voluntary or was procured by fraud, imposition, or duress. In less than five months after its execution, however, she apparently changed her views as to the propriety and necessity of "preserving the property and estate" which she had placed in trust, and made a demand of the trustee that it redeliver a portion of the estate to her. The trust being in terms irrevocable, the trustee, conscious of its duty in the premises, declined to accede to the wishes of the cestui que trust, and continued to retain possession of the estate and to exercise its duties in conformity with the trust deed. The next attempt by the discontented cestui que trust to defeat the trust was made in 1907, when she confessed a judgment for \$1,000, payable in one day after date to her brother, who was without property or means. The judgment was entered about two months after the note was given, and an attachment execution was issued thereon, and the Reading Trust Company, the trustee, was made garnishee. The answer of the garnishee averred that the proceeding was a collusive attempt to defeat the trust, and the court refused judgment against the garnishee as to the corpus of the estate and sent the case to a jury. The next attack on the trust by the cestul que trust was the present proceeding. On July 23, 1908, she gave a judgment note for \$2,000 payable one day after date to Ira G. Kutz, the plaintiff, a member of the Reading bar and presumably competent to ascertain prior to making the loan the source from which the note must be paid. Manifestly the motive inducing the payee to make the loan was not to procure an investment or the interest which would accrue thereon. Neither could the loan have been prompted by a desire on the part of the creditor to secure the attorney's commissions for collection, because their recovery is simply to reimburse the plaintiff for what he was compelled to pay his attorney. McAllister's Appeal, 59 Pa. Mr. Kutz entered judgment the day 204. after the note was given and before its maturity, and issued thereon an attachment execution in which the Reading Trust Company was made garnishee. Upon the facts set up in its answer the garnishee alleged that the proceeding was collusive and instituted with an intent to defeat the trust; also, that the attachment was prematurely issued. court below held that the answer did not show facts disclosing collusion, apparently thinking that if the plaintiff gave a consideration his intention in taking the note, though to defeat the trust, was immaterial. We need not and do not now rule this question, as it person except a bona fide creditor of the is unnecessary in view of the fact that judg-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1307 to date, & Reporter Indexes



the premature issuance of the attachment.

It is conceded that the attachment execution was issued before the maturity of the judgment; but the learned court below held that this was simply an irregularity, and could be waived by the acquiescence of the cannot waive such irregularity and thereby defendant. In this there is reversible error. relieve the trustee from liability in failing to In this position the court fails to discrimi- resist the attachment of the funds in his posnate between the rights and duties of an ordi-session under the illegal process. There are nary garnishee in an attachment execution other interests than those of the cestui que and those of a garnishee who is a trustee trust in the fund attached which are affected under an irrevocable deed of trust. Even in by enforcement of the attachment execution, the case of an ordinary garnishee, if he wishes to relieve himself of liability for the funds attached in his hands, he must act in good faith to the debtor, and, by using the information in his possession, contest every inch by the attaching creditor. Scottish Rite., etc., Aid Ass'n v. Union Trust Co., 195 Pa. 45, 45 Atl. 651. He must see that the proceedings are regular, and that the judgment ciently aver the facts upon which it relied to against him has been regularly and duly obtained.

A garnishee who is a trustee under a valid deed of trust is not a mere stakeholder, nor simply a debtor or one who has in his possession the property of the defendant. He has possession of the property by virtue of his legal title thereto. He is charged with active duties with regard to it and is responsible not only to the defendant, but to the other beneficiaries named in the deed of trust. It is therefore incumbent upon him to preserve and protect the property for all the beneficiaries, and to administer it strictly in compliance with the terms of the trust. Failing to perform this duty, he is liable for any injury sustained by any person beneficially interested. The cestul que trust cannot revoke the trust nor withdraw the estate from the hands of the trustee contrary to the provisions of his deed. A bona fide creditor of the cestui que trust, enforcing payment of a valid judgment, may subject the trust estate to the payment of his debt; but this he can only do by due process of law. If the trustee fail to compel the creditor to proceed in a regular and legal way to enforce his claim against the estate, he is liable to the interested parties who have been injured by his negligent conduct. The failure of the trustee in this respect subjects him to the same consequences as if he permit the estate to be dissipated or lost in any other illegal way or by any other illegal means. Nor will the consent or acquiescence of the cestui que trust or defendant in the judgment relieve the trustee from the performance of his duty to protect the trust estate against the irregular or illegal acts of an execution creditor. The cestui
que trust in this case has no interest in or
control over the trust estate, except to remust under rule 30 be quoted totidem verbis. ceive the income as provided in the deed, and the power of appointment by will. She is

ment should have been refused because of without authority to revoke the trust either directly or by consenting to an act which will indirectly defeat it. The issuing of the attachment before the maturity of the judgment was manifestly irregular and without authority of law, and the cestui que trust and it is the duty of the trustee to protect those interests and not permit them to suffer by reason of any action of the cestui que trust. The learned judge erred in holding that the premature issuance of the attachof ground to prevent a recovery of judgment ment execution was an irregularity which could be waived by the defendant.

It may be, as suggested by the appellee, that the answer of the trustee does not suffishow collusion between the plaintiff and the defendant. It is not sufficient in an answer simply to demand an inquiry whether the judgment and execution are a collusive proceeding. The facts should be stated, and upon them the respondent should aver that he believes that the conduct of the parties is collusive. It is then the duty of the court without the request of the garnishee, if the facts averred be sufficient, to have the question of collusion determined by a jury. If this question of pleading should become important, the answer of the defendant can be amended, so as to meet the objection suggested by the appellee.

The judgment of the court below is reversed with a procedendo.

(224 Pa. \$16)

HALEY et al. v. AMERICAN AGRICUL-TURAL CHEMICAL CO.

(Supreme Court of Pennsylvania. April 12, 1909.)

APPEAL AND ERROR'(§ 736*)—Assignments OF ERBOR-VALIDITY.

An assignment of error raising three sep-arate questions is in violation of rule 29.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3028, 3029; Dec. Dig. § 736.*1

2. APPEAL AND ERROR (§ 237°)—PRESENTATION AND RESERVATION OF GROUNDS OF REVIEW—REQUEST FOR INSTRUCTIONS.

An assignment that the court erred in not instructing the jury to find for appellants is bad, where no request was made for binding instructions for appellants,

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 237.*]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3015; Dec. Dig. § 730.*]

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1977 to date, & Reporter Indexes

4. APPEAL AND ERROR (§ 288*)—PRESENTATION AND RESERVATION OF GROUNDS OF REVIEW—REQUEST FOR BLINDING INSTRUCTIONS.

VIEW—REQUEST FOR RINDING INSTRUCTIONS.

Under Act April 22, 1905 (P. L. 286), conditioning a judgment non obstante veredicto upon the presentation, before verdict, of a point requesting binding instructions, error cannot be predicated upon a refusal to enter judgment non obstante veredicto, where no point requesting binding instructions was submitted.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 238.*]

5. Wharves (§ 9*)—Leases—Construction. Land abutting on a navigable river was described in a lease thereof as coterminous with a pier constructed thereon, and as extending into the river to low-water line. There was in the lease a grant of other wharf property extending into the river from the previously described premises from the low water line to the pier headline, together with all water rights appurtenant thereto. Held, that the tenant could not be compelled to pay the cost of cleaning the adjoining basin between the piers leased required by law to be paid by the owner of the pier.

[Ed. Note.—For other cases, see Wharves, Dec. Dig. § 9.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Rose Haley and others, executors of the will of Adam W. Louth, deceased, against the American Agricultural Chemical Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

D. Webster Dougherty, for appellants. R. Stuart Smith, and Charles E. Morgan, for appellee.

POTTER, J. Upon the trial of this case the court below gave binding instructions in favor of the defendant, and subsequently refused to enter judgment non obstante veredicto in favor of plaintiffs, but did enter judgment on the verdict in favor of the defendant.

Plaintiffs have appealed, and their counsel has specified error in what was apparently intended as three assignments, but the form in which they are stated is that of a single assignment, raising three separate questions, and this is a violation of rule 29. But, if we overlook this, and consider the specifications as separate and distinct assignments, we find that the first one. in which complaint is made that the court erred in not instructing the jury to find for the plaintiffs, is bad, for the reason that the record shows that no request was made for binding instructions in favor of plaintiffs. As to the second specification, in which it is alleged that the trial judge erred in instructing the jury to find for the defendant, this assignment is in disregard of the requirements of rule 30, in that it does not quote the portion of the charge assigned for error totidem verbis. The third particular in which error is alleged upon the part of the

court below is in not entering judgment for the plaintiffs non obstante veredicto. But the trial judge cannot be convicted of error in this respect, for the reason that counsel for plaintiffs submitted no point at the trial requesting binding instructions in their favor. And under the act of April 22, 1905 (P. L. 286), the authority to ask for such judgment upon the whole record is conditioned upon the presentation, before verdict, of a point requesting binding instructions. See opinion of Rice, P. J., in Philadelphia v. Bilyeu, 36 Pa. Super. Ct. 562. This appeal, therefore, presents no valid assignment of error.

The question here presented is precisely the same as that considered and decided by this court on the former appeal of this case at 217 Pa. 354, 356, 66 Atl. 559. As our Brother Stewart there said: "The rights of the parties depend upon a proper construction of the lease which gives rise to the controversy." Nothing else is involved at the present time. It was clearly pointed out in the former opinion that the leased premises consisted only of the pier, with the buildings thereon. The dock or basin of water between the piers or surrounding them is part of the navigable river, a public highway, and could not be made the subject of a lease. It is used merely for the reception of vessels while loading and unloading. The obligation to keep in order, as an aid to navigation, that portion of the highway adjoining the pier, may, of course, be imposed upon the owner of the pier. As was said before: "It is in part the price he pays for the privilege of constructing and maintaining his pier upon the public domain; and it is in the nature of a charge upon the property, which a lessee can be required to meet only as he has expressly so covenanted." No stipulation that the lessee should bear the burden of keeping in good order the portion of the highway adjoining the pier is to be found in the lease which is the subject of this controversy. A covenant to keep in repair a leased dwelling house would not be construed to mean that the tenant should repair or repave the street, the public highway in front of the property. Yet that is in substance the construction which appellants are here asking to have applied to the lease of these premises.

The specifications of error are dismissed, and the judgment is affirmed.

(224 Pa. 227)

UNION SAFE DEPOSIT BANK OF POTTS-VILLE v. NICHTER et al.

(Supreme Court of Pennsylvania. March 29, 1909.)

1. JUDGMENT (§ 153*) — OPENING — SUPPLE-MENTAL AFFIDAVIT OF DEFENSE.

Where, before judgment is actually entered on an order allowing judgment to be entered

[•]For other cases see same topic and section NUMBLR in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

for want of a sufficient affidavit of defense, application is made for leave to file a supplemental affidavit of defense, and subsequently judgment is entered, it may be opened, and the supplemental affidavit permitted to be filed.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 153.*]

2. INDEMNITY (§ 9*)—CONSTRUCTION AND OP-ERATION OF CONTRACT.

A bank, holder of a mortgage given as

A bank, holder of a mortgage given as collateral security for a loan, bought in the real estate mortgaged at a bankruptcy sale, and thereafter defendants purchased the real estate from the bank, giving a bond conditioned to indemify it against any loss by reason of the mortgage, interest and costs not being paid in full upon distribution by the referee in bankruptcy, or to cause to be paid to the bank, the difference between the mortgage debt, with interest, until the same was paid and the amount awarded to it upon such distribution. The bank was awarded by the referee in bankruptcy the full amount of the debt, with interest to the sale. Held, that the condition of the indemnity bond was complied with, and that the liability thereon did not extend to interest from the sale to the time of distribution by the referee in bankruptcy.

[Ed. Note.—For other cases, see Indemnity, Dec. Dig. § 9.*]

Appeal from Court of Common Pleas, Schuylkill County.

Action by the Union Safe Deposit Bank of Pottsville, to the use of Charles Meyers, against J. H. Nichter and others. From an order discharging rule for judgment for want of a sufficient affidavit of defense, plaintiff appeals. Affirmed.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

C. E. Berger and C. E. Breckons, for appellant. James B. Reilly and D. J. Ferguson, for appellees.

MESTREZAT, J. The learned judge was clearly right in opening the judgment entered June 29, 1908, and permitting the defendants to file the supplemental affidavit of defense. No judgment had been entered on the order of the court when the application was made for leave to file the supplemental affidavit, and therefore the matter was within the power of the court, and the affidavit subsequently filed shows that the power was properly exercised. The facts averred in the supplemental affidavit were sufficient to prevent a summary judgment. The Union Safe Deposit Bank, the legal plaintiff, purchased certain real estate of the Miner's Brewing Company in Schuylkill county at the sale of a trustee in bankruptcy. The purchaser held a mortgage against the property the lien of which was discharged by the sale. The defendants purchased the property from the Union Safe Deposit Rank, and in addition to the sum paid therefor "agreed to protect and indemnify the said Union Safe Deposit Bank from any loss which may result by reason of the said mortgage not being paid in full out of the proceeds of said sale upon distribution thereof." In pursuance of this

agreement the defendants gave to the bank an indemnity bond the condition of which was that the defendants "shall indemnify and shall save and keep free the said Union Safe Deposit Bank from any loss or damage by reason of said mortgage debt, interest, and costs not being paid in full out of the proceeds of said sale upon distribution thereof by the referee in bankruptcy having jurisdiction of the same, or shall pay or cause to be paid to said Union Safe Deposit Bank the difference between the said mortgage debt with interest on the same until the same is paid, together with costs, and the amount awarded to said mortgage upon distribution as aforesaid." The bank was awarded by the referee in bankruptcy out of the proceeds of the sale of the bankrupt's property the debt in full of the mortgage, with interest thereon to October 14, 1905, the day of the

This action of assumpsit was brought on the indemnity bond to recover \$3,985.28, the interest due on the amount awarded the bank by the bankrupt court from October 14, 1905, the date of the award, to March 13, 1908, the date of the actual distribution and payment of the amount received by the bank. It is contended by the plaintiff that its claim is covered by the language of the condition of the indemnity bond and that the obligation was given for the express purpose of protecting it against the loss which it anticipated and which occurred by reason of the delay in the distribution of the proceeds of the sale of the bankrupt's property.

The supplemental affidavit sets up, inter alia, the defense that the mortgage was given as collateral security for a loan made by the bank to Meyers, the use plaintiff, and was so held by the bank at the time of the sale of the bankrupt's real estate; that the bank has been paid all interest due it by Meyers on the loan for which the mortgage was held as collateral security; and that it "has not sustained or suffered any loss or damage by reason of said mortgage * * not being paid in full, with interest and costs lawfully due thereon, out of the proceeds of said sale, as stipulated in said bond."

This brief recital of the facts discloses a complete defense to the plaintif's claim. If Meyers has paid the bank's claim in full, there is no ground whatever for its contention that it is entitled to recover on the bond the amount of its claim unpaid by the referee in bankruptcy because the bond provides that it shall be paid "the difference between the said mortgage debt with interest on the same until the same is paid, together with costs, and the amount awarded to said mortgage upon distribution." How this part of the obligation might be construed if standing alone and uncontrolled by the other parts of the obligation we need not determine. In ascertaining the liability of the defendants

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

on the bond in suit, we must, however, interpret the instrument so as to effectuate the intention of the parties. We are therefore required to consider the whole instrument, in cluding the recitals, in order to determine the extent of the condition of the bond. The bond itself clearly discloses its purpose and the extent of the liability imposed upon the obligors. We have given some of the recitals as a part of the facts of the case. The manifest purpose of the instrument was to protect the bank against loss on its mortgage, held as collateral security for a loan to Meyers. This is distinctly averred in the bond, wherein it is recited that the obligors "have agreed to protect and indemnify the said Union Safe Deposit Bank from any loss which may result by reason of the said mortgage not being paid in full out of the proceeds of said sale upon distribution thereof." purpose of the condition of the bond was to provide against such loss, and not against a liability over and beyond it. The bank ha no reason to impose a greater liability on the obligors, and they clearly intended to assume no greater responsibility. The alternative clause of the condition of the bond, relied on to impose liability, was simply a different expression than the prior one, but it was intended for the same purpose, which was to protect the bank against loss on the Meyers claim secured by the mortgage. There can be no valid reason why this clause of the condition of the bond should impose a different obligation on the obligors than indemnity for loss sustained by the bank by reason of its failure to receive the full amount of the claim secured by the mortgage. The recitals in the bond disclose no liability or an intention to assume any other obligation than the protection of the bank against loss on its mortgage. On the other hand, the intention to afford such protection is clearly shown by the instrument itself.

We must accept the averments as verity, and they set up a complete defense to the action. The affidavit alleges that the mortgage was held as collateral security for a loan to Meyers. He was, therefore, the principal debtor of the bank and required to pay the amount of the loan. When he paid the loan, including the interest for which this suit was brought, his obligation to the bank was met and he was no longer its debtor. The debt having been satisfied in full, there was no longer any liability on the mortgage given as collateral security to secure its pay-When the Meyers debt had been satisfied, the condition of the indemnity bond was complied with, and the liability of the obligors was at an end. The assignment of the bond to Meyers by the bank would not revive the obligation or impose a further liability upon the defendants. The obligation indemnified the Union Safe Deposit Bank not Meyers against loss on the mortgage.

Hence, when the claim for which the mortgage was held as collateral had been satisfled in full, the condition of the bond was complied with and the bank could not create a liability in favor of Meyers by assigning the bond to him.

The assignments of error are overruled, and the order is affirmed.

(106 Me. 91)

STATE, on Inf. of HAMLIN, Atty. Gen., v. BUTLER.

(Supreme Judicial Court of Maine. Jan. 6, 1909.)

1. CONSTITUTIONAL LAW (§ 60°)—LEGISLATIVE POWEE—DELEGATION.

The entire legislative power of the state is by the Constitution vested exclusively in the Legislature, and no part of that power can be transferred or delegated by the Legislature to either of the other departments of the government.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 89-107; Dec. Dig. §

2. Officers (§ 3*)—Power to Create Office -LEGISLATURE.

—LEGISLATURE.

Only the Legislature can establish a public office (other than a constitutional office) as an instrumentality of government. Whether the establishment of such office is necessary or expedient, its duties, its powers, its beginning, its duration, its tenure, are all questions for the Legislature to determine and be responsible to the neonle for their correct determination. to the people for their correct determination.

[Ed. Note.—For other cases, see Officers, Dec. Dig. § 3.*]

3. Officers (§ 3*)—Power to Create Office -Legislature

An office of special attorney for the state in any county to have full charge and control of all prosecutions in the county relating to the law against the manufacture and sale of intoxicating liquors would be a public office with governmental functions, and could be established only by the Logislature. ed only by the Legislature.

[Ed. Note.—For other cases, see Officers, Dec. Dig. § 3.*]

4. Officers (§ 3*)-Power to Create Office GOVERNOR.

Section 8, c. 92, p. 95, Pub. Laws 1905, enacting that "the Governor may, after notice to and opportunity for the attorney for the state for any county to show cause why the same should not be done, create the office of special attorney for the state in such county and appoint an attorney to perform the duties thereof," is unconstitutional and without any force of law for the reason that the creation of the office is left to the discretion of the Governor, contrary to the Constitution.

[Ed. Note.—For other cases, see Officers, Dec. Dig. § 3.*]

CONSTITUTIONAL LAW (§ 38*)—VALIDITY OF

STATUTE—CONSTRUCTION.

While an act of the Legislature should not be held unconstitutional except in cases where the conflict between the legislative act and the Constitution is clear and irreconcilable by any reasonable interpretation, yet, when there is such a conflict as in this case, the court must declare the act void, for the duty of the court to maintain the Constitution as the fundamental law of the state is imperative and unceasing.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 36; Dec. Dig. § 38.*] (Official.)

'r cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Report from Supreme Judicial Court, Somerset County.

Information, in the nature of quo warranto, by Hannibal E. Hamlin, Attorney General, in the name of the state, but at the relation of Thomas J. Young, county attorney for Somerset county, against Amos K. Butler. Case reported to the law court for determination. Judgment of ouster.

An information in the nature of quo warranto filed by Hannibal E. Hamlin in his capacity as Attorney General of the state for and in the name of the state, but at and by the relation of Thomas J. Young, who was county attorney for the county of Somerset, against the defendant, Amos K. Butler, who had been appointed "special attorney for the state" in said county, to act in all matters relating to the enforcement of the laws against the manufacture and sale of intoxicating liquors, and was acting in such matters.

The information is as follows:

"State of Maine. Somerset-ss.:

"To the Supreme Judicial Court, or any Justice thereof:

"State of Maine, by Information, v. Amos K. Butler.

"Be it remembered that on the twelfth day of February, A. D., 1908, Hannibal E. Hamlin, Attorney General of the state of Maine for and in the name of the state of Maine, but at and by the relation of Thomas J. Young of Solon, Somerset county, state of Maine, comes into court and files this information against Amos K. Butler of Skowhegan, Somerset county, state of Maine.

'And thereupon the said Attorney General informing shows and gives this court to understand as the claim of said relator, as follows, viz.:

"(1) That said Thomas J. Young, the relator, who served the said county of Somerset as its lawful county attorney for the two successive years expiring on the thirtyfirst day of December, A. D. 1906, was at the state election held on the second Monday of September, A. D. 1906, duly and legally elected as county attorney of said Somerset county, that he duly qualified as county attorney as aforesaid on the nineteenth day of November, A. D. 1906, and became in all respects the lawful county attorney for said Somerset county for the term beginning the first day of January, A. D. 1907, and expiring on the thirty-first day of December. 1908; that he duly entered upon the discharge of his duties as said county attorney on the first day of January, A. D. 1907, for his said present term, and that he ever since has held, and now holds, the office of said county attorney except in so far as he may have been ousted in the performance of his duties thereof by the said Amos K. Butler as hereinafter set forth.

been county attorney, as aforesaid, it has been and still is his duty as such official to act as attorney for the state in said Somerset county in all cases in which the said state or county is interested, including the violations of the laws of said state against the manufacture and sale of intoxicating liquors.

'(3) That the said Amos K. Butler, claiming to act as 'special attorney for the state of Maine in the county of Somerset' under an appointment from the governor of this state dated the fourth day of January, A. D. 1908 (the validity of which said appointment is at the instance of said relator questioned and denied), at the December term of the Supreme Judicial Court begun and holden at Skowhegan within the county of Somerset on the fourth Tuesday of December, 1907, to wit: On the eighth day of January, A. D. 1908, at said Skowhegan, did assume and exercise and from thence continuously afterwards to the time of the exhibiting of this information has so assumed and exercised and still does exercise without legal authority or right, the office of the attorney of the state of Maine for said county of Somerset, to wit, the said office of county attorney for said county of Somerset in that he then and there assumed and exercised the same powers vested in the said Thomas J. Young as county attorney for said county of Somerset in all prosecutions relating to the law against the manufacture and sale of intoxicating liquors, and then and there assumed and held full charge and control thereof, and now exercises said powers and has and holds full charge and control of said prosecutions and claims the right and privilege so to do, and that he the said Butler as aforesaid then and there at said term of said court conducted the prosecution relating to the law against the manufacture and sale of intoxicating liquors, and then and there had full charge and control against the written protest and objection thereto then and there filed in said court by said relator, the said Thomas J. Young, as county attorney for the said county of Somerset aforesaid, and for and during all the time, at and from said eighth day of January to the commencement of this proceeding, has there claimed and still does there claim without legal authority or right whatsoever to act as the attorney of the state for the county of Somerset in all prosecutions relating to the law against the manufacture and sale of intoxicating liquors and to have. hold and exercise full charge and control thereof, and to have, use and enjoy all the liberties, privileges and powers belonging and appertaining to said county attorney for said county of Somerset in all prosecutions relating to the law against the manufacture and sale of intoxicating liquors, which said office, liberties and powers to the extent aforesaid, he, the said Amos K. Butler, for "(2) That since said Thomas J. Young has and during the time at and from said eighth

day of January to the commencement of this proceeding has usurped and does usurp, preventing the said Thomas J. Young from performing all the duties of his said office as county attorney for the county of Somerset.

"(4) That there may be, therefore, two officers of the law, claiming the same rights and powers before the grand jury for the county of Somerset and in the courts for said county of Somerset.

"(5) That the interests of the state require in all the premises that the title of said Amos K. Butler as 'special attorney for the state of Maine in the county of Somerset' as aforesaid shall be fully passed upon and determined by proper tribunal under the laws of the land.

"Whereupon the said Attorney General prays the consideration of this honorable court in the premises and that due process of law may be awarded against the said Amos K. Butler in this behalf, to make him answer to the state of Maine and show by what warrant he claims to have, use and enjoy his said office as aforesaid, and that his title, right and powers to his office as aforesaid be considered by the court and that they either be confirmed if valid, or a judgment of this court may be rendered against the said Amos K. Butler directing him not in any manner to intermeddle or concern himself in and about the holding of or exercising his said office, or to intermeddle or concern himself in and with the rights, powers and duties in any way belonging to in whole or in part the said office of the county attorney for the county of Somerset as aforesaid, and for such further and other action in all the premises as may seem to the court meet and proper.

"Dated this twelfth day of February, A. D. 1908.

"Hannibal E. Hamlin, Attorney General. "Thomas J. Young, Relator."

"State of Maine, Somerset—ss.:
"February 12, A. D. 1908.

"Subscribed and sworn to by the above named Thomas J. Young, relator.

"Before me.

"Augustine Simmons, Justice of the Peace."

The defendant filed an answer, alleging, among other things, that he was acting in matters in said county relating to the enforcement of the laws against the manufacture and sale of intoxicating liquors under and by virtue of his appointment, commission, and qualification under the provisions of Pub. Laws 1905, p. 95, c. 92, § 8. The matter came on for hearing at the March term, 1908, Supreme Judicial Court, in said county, and, after certain admissions had been made, the case was "reported to the law court to render such judgment as the law may require."

Argued before EMERY, C. J., and WHITE-HOUSE, PEABODY, SPEAR, CORNISH, KING, and BIRD, JJ.

Augustine Simmons, for Thomas J. Young, County Atty. Arthur S. Littlefield, for Amos K. Butler, Sp. Atty.

EMERY, C. J. We think the validity of the respondent's claim to exercise the governmental function of public prosecutor in Somerset county will be best determined by looking straight at the language of the Constitution and of the statute and at established principles, and freely allowing them their full, natural effect.

The people of Maine in organizing their government as a state vested the legislative power of the government in a body "to be styled the Legislature of Maine" (Const. art. 4, p. 1, § 1), and did not confer any such power on any other person or body, and did not authorize the Legislature to do so. It follows that the Legislature alone can exercise the legislative power, and alone is responsible for its wise exercise, and hence cannot transfer any of the power nor any of the responsibility to any other department Says Judge Cooley in his Conor person. stitutional Limitations (6th Ed.) p. 137: "One of the settled maxims in constitutional law is that the power conferred upon the Legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the state has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the Constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust." The proposition needs no other citation of authority, and we do not find it anywhere doubted.

Further, the people in their Constitution expressly divided the powers of the government into three departments—the legislative, executive and judicial—and declared that "no person or persons belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted." Article 3, §§ 1, 2. Hence not only is the Legisla. ure not authorized to transfer any of its legislative power and responsibility, but it is expressly forbidden to transfer any part of them to a person or persons exercising either executive or judicial functions.

Another proposition is undisputed. Only the Legislature can establish a public office other than a constitutional office as an instrumentality of government. Whether the creation of the office is necessary or expedient, its duties, its powers, its beginning, its duration, its tenure, are all questions for the

Legislature to determine and be responsible public office with governmental functions, to the people for their correct determination.

By section 8, c. 92, p. 95, Pub. Laws 1905, the Legislature enacted as follows: "The Governor may, after notice to and an opportunity for the attorney for the state for any county to show cause why the same should not be done, create to continue during his pleasure the office of special attorney for the state in such county and appoint an attorney to perform the duties thereof. Such appointee shall, under the direction of the Governor, have and exercise the same powers now vested in the attorney for the state for such county in all prosecutions relating to the law against the manufacture and sale of intoxicating liquors, and shall have full charge and control thereof; he shall receive such reasonable compensation for services rendered in vacation and term time as the justice presiding at each criminal term in that county shall fix, to be allowed in the bill of costs for that term and paid by the county."

Acting under this section, after sufficient notice to an opportunity for the county attorney of Somerset county to show cause to the contrary and his refusal to do so, the .Governor on January 4, 1908, issued to the respondent a commission of the following tenor:

"State of Maine

"To all who shall see these Presents, Greeting:

"Know Ye, that I, William T. Cobb, Governor of the state of Maine, do hereby create to continue during my pleasure the office of special attorney for the state of Maine in the county of Somerset, all as provided by chapter 92 of the Public Laws of the state of Maine, for the year A. D. 1905, entitled 'An act to provide for the better enforcement of the laws against the manufacture and sale of intoxicating liquors,' and especially as provided for under section 8 of said chap-

"And reposing special trust and confidence in the integrity, ability and discretion of Amos K. Butler, of Skowhegan in the said county of Somerset, do hereby constitute and appoint the said Amos K. Butler, special attorney (to fill the office of Special Attorney as above created) for the state of Maine within and for said county of Somerset, and I do hereby authorize and empower him to fulfill the duties of said office to which he is herein appointed according to law and to have and to hold the same together with all the powers, privileges, and emoluments thereto of right appertaining unto him, the said Amos K. Butler, during my pleasure as Governor of the state of Maine, if he shall so long behave himself well in said office."

powers, and duties, such as cannot be performed by a mere administrative agency, and hence an office that only the Legislature can create. It could not authorize any other person or body of persons to create the office, much less the Governor, the head of the executive department. If, therefore, in enacting the statute, the Legislature did not itself, upon its own judgment and responsibility, create the office, it does not exist and the respondent is not the officer he claims to be.

Construing the statute in question according to the statutory rule for the construction of statutes that "words and phrases shall be construed according to the common meaning of the language," it would seem plain that the Legislature did not itself assume to determine whether there should be an office of "special attorney for the state" in any county, but left that question to the Governor to determine. The language does not seem fairly susceptible of any other interpretation. It is explicit that the Governor should "create" the office if it was to exist. When the Legislature adjourned, there was evidently no such office in existence. The functions and powers of the county attorneys remained with them, and were not transferred to any new office. The office of "special attorney for the state" was not to come into existence until the Governor was pleased that it should-until he saw fit to create it. He was instructed to "create" the office before appointing an incumbent. This evidently appeared to the Governor and his legal advisers the only reasonable interpretation. In his commission to the respondent he first declares that he (not the Legislature) does "hereby create" the office, and then goes on to appoint the respondent to fill the office "as above created"; that is, by himself.

The respondent cites cases to the effect that the Legislature may provide legislation for future specified contingencies and confer upon the executive or other persons the power to determine when the specified contingency has arisen; also, that the Legislature may enact a statute not to go into operation until specified facts or conditions are found to exist, and may empower the Governor to decide upon the existence of such facts and conditions. In this case, however, the Legislature has not made the existence of the office contingent upon specified facts, or conditions or contingencies being found by the Governor to exist. It leaves the existence or nonexistence of the office wholly to the Governor's discretion. True, before creating the office, he must invite the county attorney to show cause to the contrary, but he may wholly disregard whatever the county attorney may show as cause, and still create or not create the office We assume it will not be disputed that at his sole and unlimited discretion. He is the office described in the statute cited is a | not required to find any fact. He need not give any reason or have any reason. The office is to be created or not, at his pleasure. He may even create it for the purpose of blocking the enforcement of the laws by a faithful county attorney. True, no such action by a Governor is to be anticipated, and true, also, that the Legislature undoubtedly assumed the Governor would use the statute only for the better enforcement of the laws; but he could use it to defeat enforcement and effectually if the statute be valid. The test is what he could do, not what he probably or undoubtedly would do.

It is this discretion given the Governor to create or not create the office that distinguishes this case from those cited by the respondent, and that vitiates the statute. There are cases illustrative of this distinction and vitiation. In Gilhooly v. City of Elizabeth, 66 N. J. Law, 484, 49 Atl. 1106, the statute provided that, "upon the petition of not less than one hundred voters of any city, the Governor may in his discretion appoint a commission" to divide the city into wards. The statute was held unconstitutional as being an attempt to delegate legislative power to the Governor. The court said: "That this law commits to the Governor the determination of public policy controlling the government of cities does not admit of controversy as he is given an absolute and unlimited discretion, controlled by no rule, to be exercised in accordance with no facts to be ascertained by him, and upon no principle or terms of expediency declared by the Legislature." This language states the principle applicable to the case at bar. In King v. Concordia Ins. Co., 140 Mich. 258, 103 N. W. 616, the Legislature undertook to empower a commission to frame a standard insurance policy and to make such changes in it from time to time as justice and equity might require. Held void. In Noel v. People, 187 Ill. 587, 58 N. E. 616, 52 L. R. A. 287, 79 Am. St. Rep. 238, the Legislature undertook to empower a "board of pharmacy" to grant in their discretion permits to sell proprietary medicines. void as in vesting the board with an arbitrary discretion. In Michell v. State, 134 Ala. 392, 32 South. 687, the Legislature undertook to authorize a board of commissioners to suspend a dispensary for the sale of liquors. Held void. In State v. Rogers, 71 Ohio St. 203, 73 N. E. 461, the Legislature undertook to authorize the judges of the court of common pleas to fix the salaries of county surveyors. Held void on the ground that it had not prescribed any rule, but left the matter to the discretion of the judges. In Noel v. People, 187 Ill. 587, 58 N. E. 616, 52 L. R. A. 287, 79 Am. St. Rep. 238, the Legislature undertook to transfer to a pharmacy board the power to decide what drugs should be sold by druggists. Held vold. In Fogg v. Union Bank, 60 Tenn. 435, it was held that the Legislature could not empower trustees of insolvent banks to fix the time for details in present, but which may be left

the payment of claims. The foregoing cases are sufficient for illustration and authority. We find no case holding that the Legislature may leave any of its legislative powers to be exercised at the discretion of any other person or persons.

The respondent urges as a well-settled doctrine that, when the intention of the Legislature is clearly expressed in an enactment, the court should give effect to that intention, and not defeat it by adhering too rigidly to the letter of the statute or to technical rules for statutory construction, and that in some cases it may give effect to such intention even in direct contravention of the terms of the statute. An essential element in the doctrine invoked is that the intention should clearly appear in the enactment, otherwise its terms cannot be disregarded. In this case, however, the language of the statute clearly indicates an intention to leave the question of creating or not creating the office to the discretion of the Governor. "The Governor may * * * create to continue during his pleasure the office of special attorney," etc. Language could hardly be found more indicative of an intention to transfer the power and responsibility to the Governor. A contrary intention, even if it existed, is not expressed in the statute, hence the doctrine cited does not apply to this case. It is not the duty nor the right of the court to disregard plain language in order to find some intent contrary to that indicated by the language, even to save a statute from being declared unconstitutional.

The respondent further invokes as a wellsettled rule that if the statute is susceptible of two interpretations, one of which will avoid conflict with the Constitution, that interpretation should be adopted. not see that the words and phrases of this statute, construing them according to the common meaning of the language as required by the statutory rules of construction, can fairly bear the interpretation contended for by the respondent. The words are not technical nor of doubtful meaning. They seem plain and explicit. The Governor is to "create" the office as well as fill the office when created. Indeed, the respondent admits that the Legislature intended the office to remain in abeyance until the Governor should act. This interpretation would not save the statute, since under it the time of the statute going into effect and its duration depend, not on any specified fact, or contingency, or condition, but solely upon the will of the Governor. "The result of all the cases on this subject is that the law must be complete in all its terms and provisions when it leaves the legislative branch of the government, and nothing must be left to the judgment of the electors, or other appointee or delegate of the Legislature, so that in form and in substance it is a law in all its

the ascertainment of any prescribed fact or event." Dowling v. Lancashire Ins. Co., 92 Wis. 63, 65 N. W. 738, 81 L. R. A. 112. In the statute before us, the beginning and duration of the office intended to be created were left undetermined. No fact or event was prescribed upon the ascertainment of which the statute was to take effect and the office come into existence. The statute was not to take effect, the office was not to come into existence, until the Governor in his discretion should so decree. The Constitution forbids the Governor exercising any such discretion, and forbids the Legislature allowing it to him.

All through our consideration of this case we have borne in mind the principle that all reasonable doubts are to be resolved in favor of the constitutionality of a statute, but as said by the Supreme Court of Minnesota in State v. Great Northern Ry. Co., 100 Minn. 445, 11 N. W. 289, 10 L. R. A. (N. S.) 250: "While an act of the Legislature should never be held unconstitutional except in cases where the conflict between the statute and the Constitution is clear, manifest, and irreconcilable by any reasonable construction, yet when it so conflicts with the Constitution courts have no alternative than to declare it invalid, for the obligation to support the Constitution is im-This is such a perative and unceasing. case."

it follows that the respondent has no right to exercise any of the functions of public prosecutor, and the state must have judgment of ouster.

So ordered.

EMERY, C. J. After the foregoing opinion was written, but before the concurrence of all the concurring justices could be obtained, the term of office of the relator ex-The majority of the justices, however, hold that the information should not for that reason be dismissed, and that there should nevertheless be a judgment for the state, since not merely the title of the respondent, but the existence of the alleged office itself, is in question, and is determined by the opinion. Commonwealth v. Swasey, 133 Mass. 538.

(111 Md. 84)

DARBY CANDY CO. OF BALTIMORE CITY v. HOFFBERGER.

(Court of Appeals of Maryland. June 28, 1909.)

1. Trial (§ 251*)—Instructions—Confining Jury to Issues.

Plaintiff having counted on gross careless-ness and negligence, defendant is entitled to have the jury confined to the issue made by the pleadings.

[Ed. Note.—For other cases, see Trial, Cent. Dig: \$\$ 587-595; Dec. Dig. \$ 251.*]

to take effect in future, if necessary, upon | 2. Negligence (§ 136*)—Taking Case from

In the absence of legally sufficient evidence to prove negligence counted on, the court should withdraw the case from the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

3. BAILMENT (§ 14*)—INJURY TO PROPERTY—

LIABILITY.

A bailee for hire is not liable for an accidental injury to the property not caused by his negligence.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 46, 48; Dec. Dig. § 14.*]

Bailment (§ 31*)—Action for Injury—Burden of Proof.

The bailor, suing for injury to the prop-in case of a bailment for hire, has the burden of proving want of reasonable and prop-er care by the bailee, and also causal connec-tion between this and the injury.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. § 125; Dec. Dig. § 31.*]

5. LIVERY STABLE KEEPERS (§ 12*)—HIRING OF HORSE—INJURIES TO HORSE.

It is not gross carelessness and negligence for one hiring a horse to leave it 15 to 20 minutes unattended on a street near a wharf, while engaged in unloading the wagon and weighing its expectation. ing its contents.

[Ed. Note.—For other cases, see Livery Stable Keepers, Dec. Dig. § 12.*]

Appeal from Baltimore Court of Common Pleas; John J. Dobler, Judge.

Action by Harry Hoffberger against the Darby Candy Company of Baltimore City. Judgment for plaintiff. Defendant appeals. Reversed, without awarding new trial.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WOR-THINGTON, THOMAS, and HENRY, JJ.

Benjamin Rosenheim and Lee S. Meyer, for appellant. Milton D. Greenbaum and Daniel Greenbaum, for appellee.

BRISCOE, J. The appellant is a corporation engaged in the manufacture and sale of candy in Baltimore city. The appellee is engaged in the livery and stable business of hiring and boarding horses, for compensation, in Baltimore city. This suit was brought by the appellee against the appellant, to recover damages for the loss of two horses, belonging to the appellee, and hired to the appellant. The declaration contains two counts, and they set out the causes of action. The first count charges that among the horses so hired was a spotted sorrel horse and at the time of the happening of the injury, on or about September 16, 1906, this horse was perfectly sound and in good health and condition; that by reason of the gross carelessness and negligence of the defendant, its agents, and servants in the use of the horse while entirely under the control and in the custody of the defendant, its agents, and servants, and without any fault or negligence of the plaintiff, the spotted sorrel horse was so injured and maimed that it is now totally unfit for use, and is permanently disabled. The second count charges that among the horses so hired

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

happening of the injury, to wit, on or about November 12, 1906, this horse was perfectly sound and in good health and condition; that by reason of the gross carelessness and negligence of the defendant, its agents, and servants in the use of the horse while entirely under the control and in the custody of the defendant, its agents and servants, and without any fault or negligence of the plaintiff, the bay horse was so ill-used that it died. At the trial of the case below the appellant reserved 12 exceptions, presenting the various rulings of the court upon the admissibility of testimony, to the granting of the plaintiff's second, third, and fourth prayers, to the rejection of the defendant's prayers Nos. 1, 2, 3, 4, and 6, and to the overruling of the defendant's special exceptions to the plaintiff's second, third, and fourth prayers. The verdict and judgment was in favor of the plaintiff and the defendant has appealed.

The case being one of bailment for hire, the principal question is whether the plaintiff has established by legally sufficient evidence under the pleadings his right to recover against the defendant company. will be seen that the defendant's third prayer was based upon the insufficiency of evidence to prove that the injury to the horses was caused by reason of the gross carelessness and negligence of the defendant, as alleged in the pleadings. The defendant had the undoubted right to have the jury confined to the issue made by the pleadings. The law is well established that the fact of negligence is for the jury where there is evidence legally sufficient to prove it, but in the absence of such evidence it is the duty of the court to withdraw the case from the consideration of the jury. In the view we take of this case it will not be necessary for us to consider all the questions raised on the record, because we are of the opinion that the court below committed an error in rejecting the defendant's third prayer, which is as follows: "The defendant prays the court to instruct the jury that there is no legally sufficient evidence, under the pleadings, entitling the plaintiff to recover, and therefore the verdict of the jury must be for the defendant." The settled principle in this state applicable to the extent of the liability of the bailee, in a case of bailment for hire, is clearly stated in the cases of Hambleton v. McGee, 19 Md. 43, Telegraph Co. v. Walker, 72 Md. 454, 20 Atl. 1, 20 Am. St. Rep. 479, and the recent case of Baltimore Refrigerator Co. v. Kreiner, 109 Md. 361, 71 Atl. 1066. In all of these cases the rule is distinctly established that the onus of proving want of reasonable and proper care is on the bailor, and that the bailee is not liable for an accidental injury not caused by negligence. And this is so because bailees for hire are not insurers of the bailed property.

The burden of proof is also upon the plain-

was a bay horse; that at the time of the | defendant's acts or omissions, to constitute negligence, and the injuries complained of. And where under the evidence the injuries complained of may have resulted, either from the defendant's negligence, or from some other cause, or causes, for which he is not responsible, the plaintiff cannot recover, as he has not discharged the burden of proof. 21 A. & E. Ency. of Law, p. 216, and cases there cited. In the case at bar both counts in the declaration charge that the injuries were caused by the gross carelessness and negligence of the defendant, its agents, and servants, in the use of the horses. is no evidence in the record to sustain either of these allegations as set out in the declaration. On the contrary the proof fails to show what caused the injury to the foot of the sorrel horse that was in good condition when driven to the Norfolk boat on Light street, but was found lame on its return from the wharf. The horse was injured at the coronary band over the hoof of the right front foot, and this was mashed.

Mr. Hickman, the veterinarian, who testified on behalf of the plaintiff, in answer to the following question, stated: "Q. From your knowledge of horses, and your experience in treating them, and from the examination of the hoof itself, could you tell us what causes could produce that condition? Run over by a wagon wheel could have done it; something falling on it could have done it, or striking himself up against one of the iron plates going over a gutter, or something hard could have done it."

In Hartford Co. v. Wise, 75 Md. 38, 23 Atl. 65. Chief Judge McSherry, in passing upon a somewhat similar state of facts, said: "The loss was absolutely certain, but the cause of the loss, under the proof, might have been either, first, negligence of the defendant, for which it would have been responsible; or, secondly, some other circumstance unmixed with negligence." In this condition of the proof the court said: "There is strictly no evidence to warrant a jury in finding that the loss was occasioned by negligence, and not by theft. When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of those propositions against the other is necessarily wrong." R. R. Co. v. Bromley, 17 C. B. 372; Colton v. Wood, 8 C. B. N. S. 572. In Wise Case, supra, the court said it was a case devoid of legally sufficient evidence to convict the defendants of negligence causing the injury sued for, and should have been withdrawn from the jury. In Cason's Case, 72 Md. 380, 20 Atl. 113, it is said, there must be legally sufficient evidence to prove negligence and to connect that negligence with the injury before a court is justified in allowing a case to go to the jury. In the present case there is no evidence in the tiff to show causal connection between the record to show that the cause of the injury

to the sorrel horse was caused by the gross [carelessness and negligence of the defendant or the driver, as alleged in the pleadings, and there was not a scintilla of evidence to connect the alleged negligence with the injury to the horse. It is contended, however, that the leaving of the horse unattended at the wharf of the Norfolk boat on Light street for a period of 15 or 20 minutes, at a distance of 20 feet from the wharf, while the driver was engaged in unloading the wagon and weighing the goods, was evidence of such gross carelessness and negligence on the part of the driver as to permit the plaintiff to re-We cannot assent to this contention, under the facts and circumstances of this case. In Hayman v. Hewitt, in Peake, N. P. Add. Cas. 170, Lord Kenyon said: "That the law which considered a carrier as an insurer, and liable for all accidents except those arising from the act of God and the king's enemies, was already sufficiently hard, and ought not to be extended; and as to negligence, he did not see that the defendant in the present case had been guilty of it. He was performing his duty while removing the goods into the house; and, if every person who suffered a cart to remain in the street while he took goods out of it was obliged to employ another to look after his horse, it would be impossible for the business of the metropolis to go on."

The same principles of law, applicable to the first count of the declaration, and herein cited, control the second count, relating to the bay horse, and need not be repeated here. This horse died from a ruptured stomach, caused by acute colic. On November 12, 1906, the horse was taken from the stable of the appellee, about 8 o'clock a. m., but was not used until about 4 o'clock p. m., when he was driven in a wagon to Camden Station, Baltimore & Ohio Railroad, where the wagon was unloaded, and the horse returned to the stable about 6 p. m. of the same day. The horse was not used in the morning, but was returned to the appellee's stable about 12 o'clock, where it was fed by the appellee. It was taken from the stable about 1 p. m., and stood in front of the appellant's place of business until it was used between 4 and 5 The horse was somewhat swollen when returned to the stable. He died between 2 and 3 o'clock the next morning. There is no evidence upon this branch of the case to show that either the defendant or the driver of the wagon, had any knowledge of the sickness of the horse, until he was driven to the station and returned to the stable. Nor is there any evidence tending to show that the defendant or the driver contributed in any way to the illness of the horse, but the testimony shows that the colic could have been developed from many causes, independent of the negligence of the defendant. The bailee is not liable for any acci-

dental injury or illness happening to the animal not due in any way to negligence. Clearly there was no evidence of gross carelessness and negligence of the defendant or the driver in the use of the horse. In Story on Bailment, p. 365, it is distinctly said that the bailor must show affirmatively what caused the injury, that the bailee has done something, or omitted to do something, which he ought not to have done or omitted. In Bannon v. B. & O. R. R. Co., 24 Md. 108, this court said: "'Gross negligence' is a technical term. It is the omission of that care which even inattentive and thoughtless men never fail to take of their own property. It is a violation of good faith. It implies malice and evil intention."

For the reasons given the defendant's third prayer, in our opinion, ought to have been granted. The case was devoid of legally sufficient evidence to permit the plaintiff to recover on either counts of the declaration under the pleadings, and the case should have been withdrawn from the jury. As this conclusion disposes of the case, it will be unnecessary to pass upon the other questions raised on the record.

The judgment appealed from must be reversed; and, as it is apparent the appellee is not entitled to recover, a new trial will not be awarded.

Judgment reversed, without awarding a new trial, with costs.

(110 Md. 656)

BRADY et al. v. BRADY.

(Court of Appeals of Maryland. June 28, 1909.)

1. Appeal and Error (§ 837*) — Review — Scope of Questions Considered.

SCOPE OF QUESTIONS CONSIDERED.

Where defendant's motion for a nonsuit at the end of plaintiffs' case does not refer to the pleadings, the appellate court in passing on the exception of plaintiffs to the granting of the request will only consider whether the evidence was sufficient to entitle plaintiffs to recover, irrespective of the pleadings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3262-3278; Dec. Dig. § 837.*]

2. BILLS AND NOTES (§ 495*)—INSTRUCTION— PARTIES—JOINT MAKERS—EVIDENCE.

Two or more persons signing their names to a note as makers are presumed to be equally bound as such, and the debt evidenced thereby is presumed to have been created for their equal benefit, in the absence of a contrary showing, and the burden is on the party alleging that one is a surety to show that such was his relation.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1663–1668; Dec. Dig. § 495.*]

3. BILLS AND NOTES (§ 519*)—Construction—Evidence.

Evidence, in an action by the administrators of one signer of a note against another signer, held insufficient to overcome the presumption that the signers were joint makers.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 519.*]

JOINT MAKERS

JOINT MAKERS—ACTIONS.
Where one joint maker of a note is required to pay the whole amount due, he is entitled to

contribution from the co-maker on the count for money paid. [Ed. Note.—For other cases, see Contribution,

Cent. Dig. §§ 3, 4; Dec. Dig. § 4.*]

5. BILLS AND NOTES (\$ 499*)-EVIDENCE OF

If a note is found among the maker's papers after his death, it will ordinarily be presumed to have been paid by him, and the production of a note by a party bound to pay it is prima facle evidence that it was paid by him.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1696; Dec. Dig. § 499.*]

6. Contribution (\$ 9*)—Actions—Evidence. Evidence, in an action by the administrators of one signer of a note against the other signer to recover money paid by the intestate on the note, held sufficient to establish plaintiffs' right to recover from defendant one-half of the amount paid by their intestate.

[Ed. Note.—For other cases, see Contribution, Dec. Dig. § 9.*]

7. LIMITATION OF ACTIONS (\$ 56*)-PARTICU-

LAB ACTIONS—CONTRIBUTION.

Where one joint maker of a note pays the note before it is barred by limitations, the stat-ute begins to run against his right to contribution from the other joint maker from the date of such payment.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 809; Dec. Dig. § 56.*]

8. Principal and Surety (§ 190*)—Rights and Remedies of Surety—Actions Against

THE PRINCIPAL—EVIDENCE.

In an action by the administrators of one of the signers of a note against the other signer, for money paid by their intestate on the note, on the ground that defendant was principal on the note and their intestate was a surety, the oplnion of a witness as to the ability of defendant to pay the note from its date to the date of the last payment, and evidence as to what knowledge the witness had of the financial con-dition of the intestate between the date of the note and the date of its payment, was inadmissible, as evidence of the possession of money is not admissible as showing the probability of its payment.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. \$ 190.*]

Appeal from Circuit Court, Anne Arundel County; James R. Brashears, Judge.

Action by James R. Brady and others, administrators of James Revell, against J. Roland Brady. Judgment for defendant, and plaintiffs appeal. Reversed.

Argued before BOYD, C. J., and BRIS-COE, SCHMUCKER, BURKE, THOMAS, WORTHINGTON, and HENRY, JJ.

E. John W. Revell and Richard B. Tippett, for appellants. A. T. Brady, for appel-

THOMAS, J. On the 22d of December, 1893, the appellee and the late Judge James Revell executed and delivered to the Farmers' National Bank of Annapolis, the following promissory note:

Annapolis, Md., Dec. 22, 1893. "(\$500)

"On demand, we jointly and severally

4. Contribution (§ 4°)—Common Liability | Bank, or order, five hundred dollars, value J. Roland Brady. received. "Jas. Revell."

> Judge Reveil died in March, 1908, and after his death this note was found among his private papers, in his safe-deposit box in said bank, indorsed as follows:

> In red ink at the top of the note: "J. R. Brady. Demand. Dec. 22, 1893."

In black ink:	
Note	\$500 00 86 25
Paid Nov. 6, '96, by J. R	\$586 25 100 00
Interest to Mch. 10, '97	\$486 25 10 04
Paid Mch. 10, '97, by J. R	\$496 29 60 51
28th Sept., '98, Int. pd. to Sept.	\$435 78
10, '98 \$39 24 18th Mch., '99, Int. pd. to Mch. 10, '99 18 08	
5th Apr., 1900, Int. pd. to Mch. 10, 1900	
10, 1900 13 08 Mch 27, 1901, Int. nd. to Mch	
10, 1901	
Sept. 28, 1903, Int. pd. to Sept. 10, 1903	
10, 1904	
10, 1904	17 65
Int. to Mch. 10, 1904	\$453 43 13 07 39 22
*** ** *** *** *** *** *** *** *** * *	00 44

On the face of the note was written: "Farmers' Nat. Bank. Paid May 15, 1905. Annapolis, Md. Paid in full by Jas. Revell 15 May, 1905. L. D. Gassaway, Teller."

On the 2d day of May, 1908, the administrators of Judge Revell brought suit to recover from the appellee, J. Roland Brady, the amounts paid by their intestate on account of said note, claiming that he signed the note as surety for the appellee. narr. contains the common counts in assumpsit, and a special count, charging the payment of the note and interest by Judge Revell on the 15th day of May, 1908, as surety. The case was tried on issues joined on the pleas of never indebted as alleged, and never promised as alleged, and on the replication to the plea of limitations, and during the trial three exceptions were reserved, the first and second to rulings of the court on the evidence, and the third to the granting, at the conclusion of plaintiffs' testimony, of the defendant's prayer taking the case from

As the prayer does not refer to the pleadpromise to pay to the Farmers' National ings, in passing on that exception we have

eFor other cases see same topic and section NUMBER in Dec. & Am. Digz. 1907 to date, & Reporter Indexes

only the evidence to consider, and it is not necessary to determine whether under the pleadings in the case the evidence was legally sufficient to entitle the plaintiffs to recover.

The only witness in the case was Mr. Gassaway, cashier of the bank, who testified that he had been cashier of the bank for 6 years, and had been connected with the bank for 20 or 25 years; that Judge Revell was at the time of his death a director of the bank; that the signatures to the note were the signatures of the appellee and Judge Revell; that the note was in the handwriting of Judge Revell, and that "the memoranda and the receipts on the back of the note" were in the handwriting of former employes of the bank, made in the course of their official duties; that the last two receipts were in his handwriting; that the initials "J. R." after the word "Paid," on the back of the note, "stood for, he supposed. James Revell," and that the last payment on the note was made to him by Judge Revell on the 15th of May, 1908: that he was one of the appraisers of Judge Revell's estate. and found the note among his private papers, in his safe-deposit box in the bank. The note and indorsements thereon were then offered in evidence, and the witness when asked "to whom the money was paid when the said note was discounted?" replied. "From the usual course of business, I would say it was paid to J. Roland Brady;" and in reply to the question, "Why do you say it was paid to the defendant, J. Roland Brady?" said, "Because it is and has always been the custom of the bank since I have been connected with it to pay the money to the person whose name appears first on the note, and I find J. Roland Brady, the defendant's name, is signed first on the note which I hold in my hand." He further testified that the note did not show, and that he did not have any knowledge of, any payment by the defendant on account of the note or interest, and that the account of the defendant in the bank's ledgers shows that the following deposits were made between December 21, 1893, and February 4, 1894:

1893 Dec. 23 Dec. 26 1894	Ö	\$35 98 5 00
Jan. 8 Jan. 9 Jan. 23 Jan. 26 Feb. 6	00000	12 00 16 00 80 00 5 00 3 50

And also showed the following withdraw-

1893 Dec. 23 Dec. 26 1894	\$ 5 00 22 98
Jan. 8	2 50
Jan. 8	1 50
Jan. 9	1 00
Jan. 10	2 50
Jan. 10	10 00
Feb. 8	1 96

On cross-examination the witness testified as follows: "Q. In your examination in chief you said, 'according to the custom of the bank, the money was paid to J. Roland Brady'? A. Yes. Q. But as a matter of fact you do sometimes pay the money to persons other than first signers? A. Yes, sometimes, but it is not usual; as I said, it is not the custom of the bank to do so. Q. Did you not sometimes pay to Judge Reveil the money although his name appeared second on the note? A. We may have done so. Q. Then you cannot say from your own knowledge that the defendant received the money from the bank? A. No, not from my own knowledge, but from the usual course of business, I would say that he did."

The rule as stated in 2 Ency. of Evidence, 462, is that: "Two or more persons signing their names to a note as makers are presumed to be equally bound as such, and the debt evidenced thereby is presumed to have been created for the equal benefit of the ioint makers, in the absence of a contrary showing." See, also, 7 Cyc. 653, and 10 Ency. of Evidence, 51.

On the face of the note in this case the appellee and Judge Revell are joint makers, and the burden was on the plaintiffs to show that the deceased signed the note as surety for the defendant. 2 Ency. of Evidence, 462, and note 46; Keyser v. Warfield, 100 Md. 72, 59 Atl. 189; Keyser v. Warfield, 108 Md. 161, 63 Atl. 217.

"The order in which makers sign a note does not, of itself, raise a presumption of suretyship" (2 Ency. of Evidence, 4(12; 27 Am. & Eng. Ency. of Law, 438), and if it was the custom of the bank to pay the amount loaned on a note to the first signer on the note, without any regard to the relations of the makers, then the fact that the money was paid to J. Roland Brady would not tend to show that he received it as principal.

We do not find in the record evidence legally sufficient to overcome the presumption that the signers of the note were joint makers, and, as the case was tried on the theory that the deceased signed the note as surety, it was, no doubt, on that ground that the court below granted the defendant's prayer. But it does not follow, because of the failure of the plaintiffs to show that the relation of the parties was that of principal and surety, that they were not entitled to recover on the evidence in the case, and that the case should have been withdrawn from the jury. When one joint maker of a note is required to pay the whole amount due on the note, he is entitled to recover contribution from his co-maker on the count for money paid, etc. 1 Poe's P. & P. § 113. As we have said, on the face of the note the deceased and the appellee were joint makers. It was found after Judge Revell's death among his private papers, and from the note and the receipts thereon and the testimony of Mr. Gassaway it appears that Judge Revell paid the

balance due on the note May 15, 1905. Ordi- | not expect the note to be left in the hands of narily, if a note is found among the maker's papers after his death, it will be presumed to have been paid. 8 Cyc. 247.

In the case of Heald v. Davis, 11 Cush. (Mass.) 318, 59 Am. Dec. 147, where the only evidence offered in support of the plea of set-off was the production by the defendant of the note, the execution of which was admitted, the court said: "We do not question the correctness of the rule as stated in the cases of McGee v. Prouty, 9 Metc. (Mass.) 547, 43 Am. Dec. 409, and Baring v. Clark. 19 Pick. (Mass.) 220, that when a promissory note or bill of exchange has been negotiated, and afterward comes into possession of one of the parties liable to pay it, such possession is prima facie evidence of payment by him. But this rule of law does not apply to a possession by one of two joint promisors in an action by him to recover of the other onehalf the amount thereof. In the former case, the possession is only to be accounted for, in the absence of evidence in relation to it, by the fact of payment by the party holding it. Not so as between co-promisors. The possession by one of them is prima facie evidence of payment of the note by them, or one of them; but inasmuch as the possession could not be by each individually, it would be found with one, although both had contributed equally to the payment. In other words, the possession by one does not, as against his co-promisor, raise that inference of exclusive payment by the holder that would arise where the note was held by an indorser, or a surety, or a sole promisor." That case is cited and relied on in the case of Bates v. Cain, 70 Vt. 144, 40 Atl. 36, where the note was produced by the defendant, "without other evidence as to the fact or manner of payment," and in the case of Craig v. Craig, 3 Rawle (Pa.) 472, 24 Am. Dec. 390, the court held, in a suit by one obligor against his co-obligor for contribution, that the naked fact that the plaintiff was in possession of the bond was not sufficient to show that he paid the whole debt.

On the other hand, in the case of Chandler v. Davis, 47 N. H. 462, the court, in announcing the contrary view, said: "When a note or bill is found, after payment is due, in possession of a party who was bound to pay it, this is prima facie evidence that it has been paid, and that it was paid by the party who has possession of it. 2 Greenl. Ev. § 527; Smith v. Smith, 15 N. H. 55. This is a very familiar rule of evidence applied in every day's practice; and the reason of the rule is obvious, for, in the usual course of business, the note will be delivered on payment to the party that pays it. Brembridge v. Osborne, 1 Stark. 374. And there can be no presumption, till the fact is proved, that two or more persons, who owe a debt secured by a note, made up a common purse and paid it out of a joint fund. If such an ar- joint note, by one of the drawers, with a re-

one of them without something to show how the business was transacted; and, therefore, in such case, the presumption will be, till the contrary is shown, that the party to the note, who is found in possession of it, paid it, and the whole of it. Where one of two sureties sues the other for contribution, if he produce the note on trial, it is prima facie evidence that he paid the whole of it. In such case the two sureties are equally bound to pay the note, and I find it quite impossible to distinguish that case from this, where two joint and several makers are equally bound to pay the debt. In both cases the natural inference is that the note would be delivered on payment to the party that paid it, and remain in his hands till the business was adjusted with the other. If there had been but one note in this case, the general rule would apply, that possession of the note by the plaintiff's intestate was prima facie evidence that he paid it. But the reason of the rule applies still stronger to this case, for here were two notes of equal amount, which the two makers were equally bound to pay. If each paid his part, and for any reason it was found convenient to preserve the notes uncanceled, why was not one left in possession of the intestate and the other in that of the defendant? And this circumstance, that here were two notes of equal amount, which the two makers were equally bound to pay, distinguishes the present case from Heald v. Davis, 11 Cush. (Mass.) 318, 59 Am. Dec. 147, cited for the defendant. That case goes upon the assumption that, as both parties were equally bound to pay, it must be presumed that both contributed equally to the payment, and that, 'inasmuch as possession could not be by both individually, it would be found with one, although both had contributed equally to the payment,' a reason which evidently does not apply to this case, where there were two notes of equal amount, and there was no difficulty, if half was paid by each of the makers, in leaving one of the notes in the possession of each. No authority is cited for the decision in Heald v. Davis, and the reason assigned for it is not such as would induce us to follow it without hesitation. It would apply equally well to the case where one of two sureties, who sued the other for contribution, produced the note, on which they were jointly and severally liable, as is in conflict with the general rule, which we take to be extremely well established, that the production of a note by a party who is bound to pay it is prima facie evidence that it was paid by him. 1 Greenl. Ev. § 38; Baring v. Clark, 19 Pick. (Mass.) 220, 227; McGee v. Prouty, 9 Metc. (Mass.) 547, 551, 43 Am. Dec. 409."

In the case of Ingram v. Croft, 7 La. 82. the court held that the "possession of a rangement were made we certainly should | ceipt of payment by the holder or possessor



indorsed on it, by the person entitled to receive it, is prima facie evidence of the liability of the other drawer, to refund one-half of the note," and in the case of Dillenbeck v. Dygert, 97 N. Y. 303. 49 Am. Rep. 525, the court said: "We affirm this judgment upon the ground that the note, which was paid by George W. Snell, although extinguished as such by the fact of its payment, remained in the hands of Snell, the evidence of a right to contribution against his co-sureties, establishing both that they incurred the original obligation to contribute, and the fact of payment by Snell, which made that obligation operative in his favor."

In the case of Keyser v. Warfield, 103 Md. 161, 63 Atl. 217, suit was brought by one joint maker of two notes to recover contribution from the other, and the claim was resisted on the ground that the defendant signed the notes as guarantor and had been discharged by the action of the bank. The record shows that the plaintiff offered evidence tending to prove the genuineness of the signatures to the notes; that he paid the amount due on them, and that the defendant signed the notes as maker; and the court held "that the plaintiff had made out a prima facie case."

In the case at bar, unlike the cases of Heald v. Davis and Bates v. Cain, we have, in addition to the fact that the note was found among the private papers of the deceased, the testimony of Mr. Gassaway to the effect that Judge Revell, on the 15th of May, 1905, paid the amount them due on the note, and we think the evidence was sufficient to establish the prima facie right of the plaintiffs to recover from the defendant one-half of the amount paid by Judge Revell on account of the note and interest within three years prior to the bringing of the suit, and that the case should not, therefore, have been taken from the jury.

At the time of the payment of the note, on the 15th of May, 1905, the statute of limitations had not attached because of the previous payments on the note (Burgoon v. Bixler, 55 Md. 392, 39 Am. Rep. 417; Hooper v. Hooper, 81 Md. 155, 31 Atl. 508, 48 Am. St. Rep. 496), and, when one joint maker of a note pays the debt before it is barred by statute, the statute begins to run as against his right to contribution from the other joint maker from the date of such payment. 9 Cyc. 802; Hooper v. Hooper, supra; Davis v. Humphreys, 6 M. & W. 164.

We find no error in the rulings of the court in the other bills of exception. In the first exception the witness was asked to give his opinion as to the ability of the defendant to pay the note from its date to the date of the last payment, and in the second exception he was asked what knowledge he had of the "financial condition" of Judge Revell between the date of the note and the date of

indorsed on it, by the person entitled to receive it, is prima facie evidence of the liability of the other drawer, to refund one half of the note," and in the case of Dillenbeck v. Dygert, 97 N. Y. 303. 49 Am. Rep. 525, the court said: "We affirm this judgment upon the ground that the note, which was paid by George W, Snell, although ex-

It follows from what we have said that, because of the error in the granting of defendant's prayer, we must reverse the judgment below and grant a new trial.

Judgment reversed, with costs, and new, trial awarded.

(111 Md. 356)

PENNSYLVANIA R. CO. v. OREM FRUIT & PRODUCE CO. OF BALTI-MORE CITY.†

(Court of Appeals of Maryland. June 29, 1909.)

1. Carriers (§ 177*)—Contract of Carriage
—Liability for Breach.

A carrier receiving produce to be carried in its refrigerator car to a point beyond its lines and contracting to re-ice the car at two points, one on its line, and the other on the line of another carrier with which it had a through billing arrangement, is liable for the damage from failure to re-ice at such points.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 779-787; Dec. Dig. § 177.*]

2. CARRIERS (§ 183*)—INJURY TO FREIGHT— DAMAGES—EVIDENCE.

The original account of sales at destination of a car of tomatoes is admissible, in an action against a carrier for injury to the tomatoes from failure to re-ice the car at points on the route as agreed, to show the amount realized.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 133.*]

3. Carriers (\$ 133*)—Injury to Freight— Damages—Evidence.

Evidence, in an action for injury to a car of tomatoes from failure of the carrier to re-ice the car, tending to fix the amount they would have brought had they reached their destination in good condition, is admissible.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 133.*]

4. EVIDENCE (§ 244*)—Admissions—Declara-Tions of Agents.

TIONS OF AGENTS.

Declarations of its agents of general authority, such as general managers and general freight agents, may be competent, as admissions to affect a carrier, if made within the reasonable discharge of their duty.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 916-922; Dec. Dig. § 244.*]

5. EVIDENCE (§ 140*)—SIMILAR FACTS AND CONDITIONS.

A witness, in an action against a carrier for breach of contract to re-ice, at certain points on the route, a car of tomatoes, may testify as to his experience under similar conditions with cars which had gone through iced at such points.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 140.*]

6. APPEAL AND ERROR (§ 970*) — STRIKING OUT TESTIMONY—DISCRETION.

Refusal to strike out testimony admitted

Refusal to strike out testimony admitted without objection is within the unreviewable discretion of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3849-3851; Dec. Dig. § 970.*]

7. CARRIERS (\$ 133*)-BREACH OF CONTRACT

OF CARRIAGE—EVIDENCE.

Why it was not re-iced may not be shown in an action for breach of a carrier's contract to re-ice a car of tomatoes at certain points on the route.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 133.*]

Appeal from Superior Court of Baltimore City; Thos. Ireland Elliott, Judge.

Action by the Orem Fruit & Produce Company of Baltimore City against the Pennsylvania Railroad Company and another. From a judgment for plaintiff against said railroad

company, said defendant appeals. Affirmed. Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTH-INGTON, THOMAS, and HENRY, JJ.

Shirley Carter, for appellant. George E. Robinson and O. Parker Baker, for appellee.

BRISCOE, J. The principles of law applicable to the facts of this case were settled on a former appeal between the same parties, reported in 106 Md. 1, 66 Atl. 436, 124 Am. St. Rep. 462. The substantial facts are practically the same, and we will consider the questions raised on the various exceptions as bearing on this appeal.

The action was originally instituted in the Baltimore city court, but the case was subsequently removed to the superior court of Baltimore city. The trial resulted in a verdict and judgment in favor of the Northern Central Railroad, one of the defendants, and a judgment in favor of the plaintiff against the Pennsylvania Railroad Company, the appellant corporation, also one of the defendants, for the sum of \$449.50. And from the last-mentioned judgment the defendant has appealed.

The declaration alleges that on the 19th day of July, 1904, the defendants were common carriers of goods, for hire from Baltimore to divers places in the United States and Canada; that on said date, at Baltimore, Md., the plaintiff delivered to the Northern Central Railway Company, a branch of the defendant, the Pennsylvania Railroad Company, divers goods of the plaintiff, to wit, 479 crates of tomatoes, to be carried in refrigerator cars from Baltimore to Montreal, Canada, and then to be delivered to J. R. Clogg & Co. by said defendants, at the same time agreeing with the plaintiff to re-ice said refrigerator car in which said tomatoes were shipped at Wilkesbarre, Pa., and Oneonta, N. Y., which the defendants negligently failed to do; also the defendants neglected their duty and did not safely carry said goods to the aforesaid place, and, by reason of said neglect to safely carry and reice said tomatoes as aforesaid, the said goods were wholly lost and destroyed, whereby the plaintiff suffered great loss and damages, to wit, the value of said tomatoes.

The facts relied on by the appellee to sustain the action are these: The plaintiff had been a large shipper of fruit and produce from Baltimore city, their place of business, to Montreal, Canada, in refrigerator cars belonging to the appellant. On the 19th of July, 1904, the appellee delivered to the appellants, as common carriers, in the city of Baltimore, 479 crates of tomatoes to be carried in one of their refrigerator cars from Baltimore city to the place of destination-Montreal, Canada. The route of the car was over several systems of railroads, to wit, from Baltimore to Sunbury, Pa., over the Northern Central Railway; from Sunbury to Wilkesbarre over the Sunbury Division of the Philadelphia & Erie Railroad, operated by the Railroad Company; Pennsylvania from Wilkesbarre by the Delaware & Hudson Company to Rouse's Point, N. Y., and by the Grand Trunk Railroad from the last-named point to Montreal, Canada, the point of destination. The tomatoes were received by the Northern Central Railroad Company at Baltimore in good condition, and were placed in a car for transportation under the terms of a bill of lading set out in the record. The car was inspected and properly iced in Baltimore before leaving that city, at 5:40 p. m. on July 19, 1904. It arrived in Montreal on the 22d of July, 1904, in a "heated condition, the ice tanks empty, and the tomatoes dead ripe." The sum realized from the sale of the tomatoes amounted to \$37.59, whereas, if they had not been injured and damaged, the plaintiff would have received a larger sum.

According to the terms of the contract between the plaintiff and defendant, stated in the bill of lading, the car was to be re-iced at two points. viz., at Wilkesbarre, Pa., on the line of appellant, a distance of about 213 miles from Baltimore, and at Oneonta, N. Y., ou the line of the Delaware & Hudson Railroad, a connecting carrier, 167 miles from Wilkesbarre, the distance from Oneonta to Montreal being about 215 miles, making the entire route of the car 600 miles.

It further appears that one of the defendant's lines ended at Sunbury, Pa., and the other at Wilkesbarre, Pa., but they had a through billing arrangement with the Delaware & Hudson Railroad. The re-icing of cars is noted on the card waybill which goes with the car and is delivered to the connecting carrier. The card shows the initials, the car number, its destination, routing, and the consignee. It is admitted that the car was not re-iced at either Wilkesbarre, Pa., or Oneonta, N. Y., according to the terms of the bill of lading.

The witness Burroughs, assistant yardmaster of the Delaware & Hudson Railroad, testified that he inspected the car at Oneonta, N. Y., on July 20, 1904, and found the ice bad melted about a foot from the top, and he did not deem it necessary to re-ice it.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

There was evidence to show that the refrigerator car was delivered by the Pennsylvania Railroad Company at Wilkesbarre, and was received by the Delaware & Hudson Railroad Company in good order. The car was inspected, but not its contents. There was evidence also to the effect that the temperature in Baltimore, July 19, 1904, was highest 97 degrees, lowest 77 degrees; at Wilkesbarre, on July 20th, highest 83 degrees, lowest 68 degrees; at Oneonta on July 21st, highest 84 degrees, lowest 55 degrees; at Montreal, July 22d, highest 72 degrees, lowest 56 degrees.

The record contains 11 bills of exception. They all relate to the rulings of the court upon the admissibility of evidence, except the eleventh, and this embraces the action of the court in granting the plaintiff's first prayer, in rejecting the defendant's second, fourth, fifth, sixth, seventh, and eighth prayers, and in overruling the defendant's special exception to the plaintiff's first prayer.

It is not disputed, as we understand, that the appellant failed to re-ice the car at Wilkesbarre, Pa., or at Oneonta, N. Y., according to the terms of the contract, as stated in the bill of lading, and this is the ground upon which the appellee rests its right to recover in this action. We will first consider the prayers.

The plaintiff's prayer as to the measure of damages was properly granted. It submitted the correct rule for the guidance of the jury in estimating the damages. The defendant's special exception to this prayer was properly overruled, because there was evidence legally sufficient from which the jury could find the market value of the 479 crates of tomatoes at Baltimore on July 19, 1904, and also the amount realized by the plaintiff for the tomatoes when sold at Montreal.

The appellant's six prayers were properly refused. All of these prayers were practically demurrers to the evidence, and sought to withdraw the case from the consideration of the jury upon the ground that, under the pleadings, there was no evidence legally sufficient to entitle the plaintiff to recover. The evidence in this case is undisputed that the defendant company did not re-ice the car which contained the tomatoes, according to contract, at two points on the route, at Wilkesbarre, Pa., on the appellant's line, a distance of about 213 miles from Baltimore, and at Oneonta, N. Y., on the line of the Delaware & Hudson, a connecting carrier. On the contrary, the appellant's witnesses testified that they had not performed their contract to re-ice the car at the points nam-The appellants in this case rest their defense to the action upon the ground that they had transported the car with reasonable dispatch over its line to Wilkesbarre, Pa., and there safely delivered it to the Delaware & Hudson Company for further transportation towards its destination, to wit,

Montreal; hence they had performed every duty which they owed the plaintiff. And this contention is made in view of the plaintiff's evidence tending to show, if the car had been re-iced at the points named, the tomatoes would have reached Montreal, their point of destination, without injury and in good condition.

Failure to re-ice the car at the points named, according to the terms of the contract between the plaintiff and defendant, as set out in the bill of lading, and it appearing from the evidence that injury and damage resulted from this neglect, would be such default on the part of the carrier as to render it liable for the damage caused thereby. Orem Fruit Co. v. N. C. Ry. Co., 106 Md. 1, 66 Atl. 436, 124 Am. St. Rep. 462; Meredith v. Railroad Co., 137 N. C. 479, 50 S. E. 1; Myrick v. R. R. Co., 107 U. S. 107, 1 Sup. Ct. 425, 27 L. Ed. 325; U. S. v. Denver R. R. Co., 191 U. S. 84, 24 Sup. Ct. 33, 48 L. Ed. 106.

The ten remaining bills of exception present the rulings on the testimony, and these remain to be disposed of.

The first exception embraces the rulings of the court in permitting the original account of sales of the car containing the 479 crates of tomatoes to be offered in evidence. This evidence was admissible for the purpose of showing the net amount realized for the tomatoes after paying freight and commissions.

The evidence objected to in the second bill of exception was properly admitted. It tended to fix the amount the plaintiff would have received for the tomatoes, and the price the tomatoes would have brought, if they had reached their destination in good condition.

The third exception relates to the admissibility of an admission of Glanville, the general freight and claim agent of the appellant corporation, that the car had not been re-iced according to contract. The rule is well settled that the declarations of agents of general authority, such as general managers and general freight agents, may be competent, as admissions to affect the company, if made within the reasonable discharge of their duty. 16 Cyc. 1021; Burnslde v. Grand Trunk R. Co., 47 N. H. 554, 93 Am. Dec. 474. There was sufficient foundation laid for the introduction of this evidence. and there was no error in the court in admitting it.

The fourth exception presents an objection to the following question and answer "Yes" thereto: "Q. Can you state from your experience whether the car, if iced at Wilkesbarre, and the thermometer there being 85 degrees as the highest and 68 degrees as the lowest on the 20th of July, 1904, whether that ice would have lasted until it got to Oneonta?" The question was legal, and the answer pertinent. The court committed no error in rulings in this regard.

The fifth and sixth exceptions relate to

court as to his experience, under similar conditions, with a car iced at Wilkesbarre, passing through different temperatures, and with cars iced at Baltimore, and iced at the points at which these cars were to be iced, when they reached Montreal. There was no error in the ruling upon the matters in these exceptions, nor in the court's refusal to strike out the answer, upon appellant's motion, which was to the effect, "We had cars a few days prior to this one that went through with similar goods, and we got top market prices for the goods; that is the best evidence of how they arrived."

The remaining exceptions require but a brief notice. The seventh exception embraces the rulings of the court upon a motion to strike out the statement by the witness Orem that Glanville was the agent of the Pennsylvania Railroad Company. The refusal of the court to strike out testimony admitted without objection is a matter within the discretion of the court, and is not reviewable

In the eighth and ninth bills of exception the defendant offered to prove the reason why the car was not re-iced at the two points stated in the bill of lading. character of evidence was clearly inadmissible and properly excluded.

The tenth exception embraces the rulings of the court in excluding, as evidence, a receipt of the Fruit Companies Association, at Montreal, for the car containing the 479 crates of tomatoes. This evidence was not pertinent to the issue, and was properly retected.

Finding no reversible errors in the rulings of the court, the judgment will be affirmed. Judgment affirmed, with costs.

(82 Vt. 301)

CITY OF BARRE V. PERRY & SCRIBNER.

(Supreme Court of Vermont. Washington. July 2, 1909.)

1. MUNICIPAL CORPOBATIONS (§ 85*)—POWERS
—CHARTERS—"ORDINANCE."

CHARTERS—"ORDINANCE."
Under Barre City Charter (Acts 1894, pp. 148, 163, 164, No. 165) §§ 5, 53, 55, vesting the administration of municipal affairs in the mayor and board of aldermen, and empowering the council to make "ordinances," regulations, and by-laws to provide a supply of water, etc., a grant of a privilege to an individual to install a system of pipes through the streets of the city, to convey water to the inhabitants thereof, may be by resolution of the board of aldermen, approved by the mayor, and need not be by ordinance which, strictly speaking, is an expression of the municipal will afing, is an expression of the municipal will af-fecting the conduct of the inhabitants generally or of a number of them under some general designation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 188; Dec. Dig. § 85.*

For other definitions, see Words and Phrases, vol. 6, pp. 5024, 5027.]

questions asked the witness Orem by the | 2. MUNICIPAL CORPORATIONS (§ 85°) - ORDI-

WANCES-REQUISITES.
Where a municipal measure has the requisites of an ordinance, the name given to it, or the form in which it is cast, is ordinarily of little importance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 188; Dec. Dig. § 85.*]

3. MUNICIPAL CORPORATIONS (§ 110*)-ORDI-

NANCES—PUBLICATION—NECESSITY.
Where publication of ordinances and by-laws is prescribed by the city charter, a failure to publish will generally invalidate them.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 239; Dec. Dig. § 110.*]

CONSTITUTIONAL LAW (§ 193*)-CURATIVE

STATUTES—VALIDITY.

The Legislature may confirm by subsequent act what it may authorize in the first instance. [Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 536; Dec. Dig. § 193.*]

5. MUNICIPAL CORPORATIONS (§ 76*)—LEGIS LATIVE CONTROL—CONFIRMATION OF ACTS.

As the Legislature may authorize a city to grant to an individual the privilege of constructing and maintaining a system of waterworks to supply water to the inhabitants, so it may confirm, by subsequent enactment, a grant made by a city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 181; Dec. Dig. § 76.*]

6. WATERS AND WATER COURSES (§ 189*)—
PUBLIC WATER SUPPLY—FRANCHISE TO PRIVATE INDIVIDUALS.

Acts 1896, p. 108, No. 145, requiring every
person owning and having water pipes in the
streets in the city of Barre to file with the clerk
a survey of the location thereof and prohibiting a survey of the location thereor and prombiting any person from subsequently laying any pipes within the city until the filing of such a sur-vey, is a legislative recognition of the rights of an individual owning pipes in the streets of the city to supply water to the inhabitants, so that the city cannot question the permit grant-ing the right to the individual, and leaves the future relations of the parties to be determinfuture relations of the parties to be determined by the terms of the grant, the conditions imposed by the act, and the city's general powers of regulation.

[Ed. Note.—For other cases, see Waters and Vater Courses, Cent. Dig. § 272; Dec. Dig. §

7. WATERS AND WATER COURSES (§ 189*)—PUBLIC WATER SUPPLY—FRANCHISE TO PRI-

VATE INDIVIDUALS—TERM OF FRANCHISE.
Under Barre City Charter (Acts 1894, p.
164, No. 165) § 55, authorizing the council to make ordinances, regulations, and by-laws to provide a water supply, etc., the city cannot grant to an individual the privilege, in perpetuity, of maintaining in the city a system of water works to supply the inhabitants with water.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 272; Dec. Dig. § 189.*]

8. WATERS AND WATER COURSES (§ 189*)—PUBLIC WATER SUPPLY—FRANCHISE TO PRI-VATE INDIVIDUALS.

NATE INDIVIDUALS.
A grant by the city of Barre, pursuant to its charter (Acts 1894, p. 164, No. 165) § 55, of the right to maintain a waterworks system to supply the inhabitants with water, which fixes no time limit, is a grant for a reasonable time, and the question of the revocation of the grant, where it has been followed by a substantial expenditure for the city's benefit, must be considered with reference to

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the time which will satisfy the requirements of not expressed to be for a public purpose; and

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 272; Dec. Dig. 189.*]

MUNICIPAL CORPORATIONS (\$ 60*)-Pow-

One dealing with a city council is bound to know the extent of its authority whether determined by statute or the common law.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 150; Dec. Dig. § 60.*]

10. LICENSES (§ 50°)—REVOCATION.

A license which has been acted on cannot be so revoked as to deprive the licensee of the benefit of his expenditures.

[Ed. Note.—For other cases, se Cent. Dig. § 122; Dec. Dig. § 59.*] see Licenses,

11. MUNICIPAL CORPORATIONS (\$ 167*)-Pow-

ERS OF OFFICERS.

Municipal officers, acting under general authority, cannot bind the municipality for a longer time than is reasonable in view of the nature of the subject-matter.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 375; Dec. Dig. § 167.*]

12. WATERS AND WATER COURSES (§ 189*)-PUBLIC WATER SUPPLY—FRANCHISES.

Where a permit granted by the city of Barre under its charter (Acts 1894, p. 164, No. 165) § 55, to individuals to construct and maintain a system of waterworks to supply the inhabitants with water, contained no terms the inhabitants with water, contained no terms of limitation either as to time or territory, the city could revoke the permit at any time so far as the permit applied to territory into which the works had not been extended, and into which the expansion was not required for the reasonable utilization of the existing system, but could not prevent the laying of such additional pipes as might be needed to give reasonable use of the carrying pipes already laid.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 272; Dec. Dig. § 189.*]

Appeal in Chancery, Washington County; Alfred A. Hall, Chancellor.

Suit by the City of Barre against Perry & Scribner. Heard on pleadings, master's report, and exceptions thereto. From a decree pro forma for the orator, awarding relief, as prayed for, defendants appeal. Reversed and remanded.

Argued before ROWELL, C. J., and MUN-80N, WATSON, HAZELTON, and POW-ERS, JJ.

G. W. Wing, for appellants. J. Ward Carver. G. T. Swasey, and John W. Gordon, for appellee.

MUNSON, J. The defendants, partners in the business of supplying water to the orator's inhabitants for domestic and sanitary purposes, installed their system of pipes in reliance upon a resolution of the city council. which authorized them to lay and maintain an aqueduct through the streets of the city for the purpose of conveying water. The orator contends that the permit is void, be-

because not limited as to time. The specific prayer of the bill is that the defendants be enjoined from extending their mains and pipes through any of the streets, and from digging in any of the streets for that purpose, without having first obtained the consent of the common council; but without their being restrained from keeping in repair their mains and pipes as then located, nor from making excavations for that purpose in conformity with the charter and ordinances. The permit imposed certain conditions regarding the use of the streets, and was made revocable at any time for cause. The bill does not allege that the conditions of the permit have been violated. The defendants claim that the permit authorizes them to extend their system throughout (" city, that it is revocable only for cause shown, and that no cause for revocation appears.

It is said that the charter required that this action be taken by ordinance instead of resolution. The charter vests the administration of all fiscal, prudential, and municipal affairs in the mayor and board of aldermen, and these acting in their joint capacity constitute the city council. Ordinances and by-laws are enacted, and other business of the city council transacted, by the action of the board of aldermen with the approval of the mayor. The mayor's approval of any ordinance, by-law, resolution, or vote of the board of alderman is given by signing the same. The city council is empowered to make, alter, or repeal ordinances, regulations, and by-laws for certain specified purposes, and any other by-laws, rules, and ordinances which they may deem necessary, not repugnant to the Constitution or laws of the state; and all these by-laws, regulations, and ordinances are required to be published in newspapers prescribed by the city council at least 20 days before they take effect. One of the matters specified is to provide a supply of water for fire protection and other purposes, and regulate the use of the same, and to establish and maintain necessary reservoirs and water pipes. Acts 1894, pp. 148, 163, 164, No. 165, §§ 5, 53, 55.

The orator's argument assumes that its charter definitely requires that action of this nature be taken by ordinance, but we find nothing in it that can be so construed. The indiscriminate use of the terms "ordinances, by-laws, rules, and regulations," at the beginning and close of the section which enumerates in 32 subdivisions the powers of the city council, affords no basis for the claim. There is nothing in the nature of the subject that favors such a conclusion. Strictly speaking, an ordinance is an expression of the municipal will affecting the conduct of the inhabitants generally, or of a cause not given by an ordinance; because number of them under some general designa-

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

applicant is not within any of the usual definitions. Moreover this permit, although in the form of a resolution, is signed by the mayor, and is thus the joint and formal action of both branches of the city council. If a measure has all the requisites of an ordinance, the name given it or the form in which it is cast is ordinarily of little importance.

But the orator insists that the distinction is vital here because the charter requires that ordinances shall be published before going into effect, and does not require the publication of resolutions. The charter in fact requires this of whatever may be held to be covered by the terms "ordinance, bylaw, rule, or regulation," as used in the section above referred to. No distinction is made between an ordinance and a resolution as such, for the section contains nothing with reference to resolutions. It is generally considered that where publication is prescribed by the charter a failure to publish will invalidate the act; but there are cases that hold otherwise. 28 Cyc. 359. The publication required in connection with the grant of a privilege is usually a notice of the application, to the end that objections may be made before action is taken. The publication of an enactment in the nature of a municipal law is usually designed to give general notice of the provision before it goes into effect. If the requirement of publication, as applied to the measure in question. were held to be mandatory, it would be necessary to consider whether the defendants' expenditures were made in circumstances that gave them a right against the city, notwithstanding the failure to publish. But the view we take upon a further point is such that it will not be necessary to pursue this line of inquiry. It is certain that the defendants had their pipes in the streets and were supplying water to the inhabitants for domestic purposes, with the knowledge and sanction of the city council, when the amendatory act hereafter referred to was procured.

It is said that the city council had no power to authorize the laying of pipes in the streets for a private purpose, and that the permit is invalid because it does not show that the pipes were to be used for a public purpose. It is not necessary to consider the questions raised by this objection. The Legislature could have authorized the city council to grant the privileges enjoyed by the defendants, by such municipal action as was in fact taken, and it could confirm by subsequent enactment what it might have authorized in the first instance. No. 145, p. 108, Acts 1896, is an act in amendment of the orator's charter; and section 4 provides that every person, company, or corporation then owning and having water pipes in any street should make and file with the city clerk an accurate tions. Soon after this the defendants pur-

tion. The grant of a privilege to a single | survey of the location thereof, designating the streets, connections, and situation of the same with reference to fixed and permanent muniments, and that no person, company, or corporation should thereafter lay any pipes within street limits until such a survey was filed, and imposing a penalty for a failure to comply with any requirement of the section within four months after receiving notice from the city council. The defendants were then the owners of a system of pipes which had been located in the orator's streets under the permit in question; and this sweeping provision for the future regulation of existing private plants was a legislative recognition of defendants' occupancy and its purpose, which precluded the city from questioning the permit for the claimed defects above referred to, and left the future relations of the parties to be determined by the terms of the grant, the further conditions imposed by the act, and the orator's general powers of regulation.

But it is said that a municipal grant of a privilege for an indefinite time gives the recipient no vested right to its enjoyment for any time. It is true that the city council could not grant this privilege in perpetuity. It is true that one dealing with a city council is bound to know the extent of its authority. whether determined by statutory provision or by common-law rules. There are cases which involve the validity of municipal contracts entered into for a specified time which was in excess of a specified time fixed by the charter, and some of these hold the contract wholly void, while others hold it void only for the excess. Here, no limit is fixed by the charter, and none is specified in the permit, and the grant may properly be restricted to, and sustained for. a reasonable time-a time that will satisfy the requirements of equity. This was not a mere license, but a grant which contemplated, and has been followed by, a substantial expenditure for the orator's benefit; and the question of revocation is to be considered with reference to this fact. It must be remembered, however, that underlying the questions above considered is the fact that the claim of invalidity goes beyond the prayer of the bill: for the bill seeks to prevent the enlargement of the system, not to deprive the defendants of the use of their plant. But the orator would restrict the continued use of the system to the service pipes now in existence, while the defendants claim the right, not only to increase their service on the streets now occupied, but to extend their mains into new territory. In passing upon the question thus presented it will be necessary to refer to some further findings.

At the time the suit was brought the defendants' main line was a two and one-half inch pipe, which was not sufficient to meet the requirement of their existing connec-



chased several springs to increase their supply, but these are still unconnected and undeveloped. After the injunction was modifled, the original main was replaced by a four-inch pipe, and this is sufficient to carry all the supply that has been made available, and this supply would be equal to the needs of two or three times as many patrons as the system now has. Except for a short distance on one street, the defendants are the only spring water company in the territory covered by their mains. If all the inhabitants of this territory were patrons of defendants' system, their entire supply as now developed would be taken.

The adjustment of the claims before stated lies in the application of two rules: One, that a license which has been acted upon cannot be so revoked as to deprive the licensee of the benefit of his expenditure; the other, that municipal officers, acting under general authority, cannot bind the municipality for a longer time than is reasonable in view of the nature of the subject-matter. The permit in question contains no terms of limitation as regards territory or time. As far as the grant applies to territory into which the defendants' mains have not been extended and the expansion is not required for the reasonable utilization of the existing system. the city can revoke the permit at any time. On the other hand, the defendants cannot be precluded from laying such additional pipes as may be needed to give them the reasonable and natural use of the carrying pipes already laid. Upon the facts reported, it is considered that the city is entitled to prohibit the further extension of defendants' mains, but that the defendants are entitled to make further service connections in the streets or sections thereof where their mains are now located. It is not necessary to consider the facts reported regarding the cost of the plant, the expense of maintenance, and the gross receipts. The case does not call for a present determination of the time limit of defendant's right of enjoyment. The question of reasonableness does not arise in connection with a particular term specified in the permit. The prayer for an injunction carefully precludes any interference with the defendant's use of their existing pipes. The increased income that may be obtained through the additional connections now sanctioned will be an element to be considered in the final determination of the defendants' rights. The only argument which the orator bases upon the financial statement is one against the propriety of allowing further con-

The disposition of the case is such that it is unnecessary to take up the exceptions to the report in detail.

Pro forma decree reversed, and cause remanded with mandate.

(82 Vt. 310)

CITY OF BARRE v. McFARLAND et al.

(Supreme Court of Vermont. Washington. July 2, 1909.)

WATERS AND WATER COURSES (§ 189*)-WATERWORKS-FRANCHISE TO PRIVATE IN-DIVIDUALS.

A permit given by the bailffs of a village to an individual to construct and maintain pipes in the streets thereof to supply the inhabitants thereof with water is a license, carrying with it the possibility of interest, and may become non-revocable and assignable.

[Ed. Nota.—For other cases, see Waters and Waters Courses, Cent. Dig. § 272; Dec. Dig. § 189.*1

2. Licenses (§ 53°) - Rights Acquired -TRANSFER.

A license which carries with it the possibility of an interest may become nonrevocable and assignable, and it passes with the transfer of the property.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 111; Dec. Dig. § 53.*]

WATERS AND WATER COURSES (§ 189*)—PUBLIC WATER SUPPLY—FRANCHISES TO IN-DIVIDUALS

DIVIDUALS.

Acts 1896, p. 108, No. 145, requiring persons owning and having water pipes in the streets of the city of Barre to file with the clerk, a survey of the location thereof, prohibiting the laying of further pipes by any owner until such requirement is complied with, etc., is a legislative recognition of the rights of individuals to maintain water pipes in the streets of the city under a permit given by the bailiffs of the village of Barre, and under a resolution of the city of Barre, on their complying with the conditions imposed, whether or not the original permit or resolution was valid. permit or resolution was valid.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 272; Dec. Dig. § 189.*]

Appeal in Chancery, Washington County; Alfred A. Hall, Chancellor.

Suit by the City of Barre against McFarland and Boyce. Heard on pleadings, master's report, and exceptions thereto. From a decree pro forma for the orator, according to the prayer of the bill, defendants appeal. Reversed and remanded.

Argued before ROWELL, C. J., and MUN-SON, WATSON, and HASELTON, JJ.

Geo. W. Wing, John H. Senter, and Wm. A. Boyce, for appellants. J. Ward Carver and John W. Gordon, for orator,

MUNSON, J. This case was heard with City of Barre v. Perry & Scribner, 82 Vt. -, 73 Atl. 574, and stands the same as that case in many respects; but a difference in some of the facts is made the basis of further claims, which require special considera-

The original permit in this case is dated April 7, 1894, and was given by the bailiffs of the village of Barre to defendant McFarland, who was then the owner of the springs which supply defendants' system. After the permit was given, and before the work of installation was undertaken, defendant Boyce bought a half interest in the springs, and he

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes 73 A -- 37

has since been associated with McFarland in | points, that a special consideration of it is the entire business. The city of Barre was incorporated by No. 165, p. 144, Acts 1894, which took effect on the first Tuesday of March, 1895. The pipes of defendants' system were laid mainly in the seasons of 1894 and 1895, without other authority than the permit above mentioned. In February, 1896, the city council adopted a resolution which recited that the defendants were the owners of a water system constructed and continued under permission given by the bailiffs of the village, and that they desired to extend their works under the authority of the city; and which thereupon gave the defendants the right to lay, relay, and repair their pipes, and have the same remain in any and all the streets of the city for the purpose of supplying the inhabitants with pure spring water. The defendant McFarland was then one of the aldermen, and the resolution was offered by him, but nothing appears regarding the vote. A considerable extension of the defendants' system was made subsequent to the passage of this resolution.

It is objected that the permit as introduced in evidence had been mutilated by erasures which left its original reading uncertain. The master finds that a portion of one line of the original permit is so obliterated that its exact reproduction is impossible, but nothing appears regarding the cause. It is apparent from the permit as reproduced in the report that the last words were those designating something to be laid as the means of carrying the water through the streets, and that the inability to reproduce them is of no importance to the questions raised. It is also found that there are some pencil marks on the permit which were not on it when issued, but the report accounts for their presence, and the circumstances negative any improper purpose in making them.

It is insisted that the permit, if valid, was not transferable to defendant Boyce. effect claimed for this upon the case in hand is not stated, and need not be surmised. It is clear that the privilege was not one given as a matter of trust and confidence in the individual, and was one that depended for its exercise upon the development and control of property interests. It was not a mere license, but a license which carried with it the possibility of an interest; and such a license may become nonrevocable and assignable, and pass with the transfer of the property. 28 Cyc. 748; note 10 Am. Dec. 40; Quinn v. Middlesex Electric Light Co., 140 Mass, 109, 8 N. E. 204; Allen v. Fiske, 42 Vt. 462; Clarke v. Glidden, 60 Vt. 702, 15 Atl.

It is said that if the village charter authorized the bailiffs to provide a water supply it did not authorize them to permit the introduction of water for a special and lim-Ited purpose. This claim is so clearly disposed of by the views we entertain upon other and having water pipes in any street should

unnecessary.

The orator's main contentions are that the authority to provide a supply of water rested with the village and not with the bailiffs; that the action of the bailiffs, if authorized, could not affect the rights of the city under its charter in the absence of a reservation in defendants' favor; and that the vote by which the city council undertook to confirm and extend the privileges claimed under the village permit was invalid. The village charter provided that the village might make bylaws relating to a water supply, but no bylaw is shown conferring authority therein upon the bailiffs. Stress is laid in this connection upon the terms of the permit, which are, in substance, that the bailiffs grant the permission so far as they have the right to do it. The act incorporating the city of Barre cast upon it all the duties, liabilities, obligations, and debts of the village of Barre. If the defendants' expenditures imposed any obligation upon the village, this provision was doubtless sufficient to transfer that obligation to the city. But it is said that the defendants must have understood from the permit that there was a doubt as to the authority of the bailiffs to give it, and that expenditures made under a permit that carried with it this knowledge cannot equitably be made the basis of a right. It is said that no effect can be given to the action of the city council; that it is to be presumed that defendant McFarland voted for the resolution, and that his participation made the vote invalid. Our view of other matters is such that it is not necessary to inquire as to this presumption, or the effect of McFarland's interest upon the validity of the resolution. After this vote the defendant's proceeded with the extension of their system by laying both main and service pipes. Each addition of either class was made on a special authorization of the city council, as to the validity of which no question is made. Until shortly before the bringing of the bill, more than two years after the resolution was adopted, no question was raised as to the legality of the defendants' occupancy of the streets for the purpose stated in the resolution. In fact, no claim is made in this proceeding adverse to the continuance of the defendants' system as it existed when the bill was brought. The claim of invalidity is urged merely as a means of precluding its

enlargement. After the passage of the resolution in question, and after the defendants had continued their extensions under it and under the special authorizations above mentioned, and before any question had been raised as to the legality of their occupancy, the Legislature amended the orator's charter by No. 145, p. 108, Acts 1896, which provided that every person, company, or corporation then owning file with the city clerk a survey of the location thereof covering certain particulars, and which prohibited the laying of further pipes by any owner until such requirement was complied with. The defendants were clearly within the purview of this enactment, for they then had a system of pipes in the orator's streets, the later extensions of which had been made under special permits of the city council; and this provision was a legislative recognition of their occupancy of the streets, and of their right to continue it upon complying with the conditions impos-The view we take of this legislation renders it unnecessary to inquire regarding the power of the village bailiffs, the effect of the orator's charter as originally enacted, or the validity of the resolution objected to. The matter is more fully stated, and the further questions raised are disposed of, in the opinion in the companion case above referred to.

Pro forma decree reversed, and cause remanded with mandate.

(82 Vt. 263)

TOWN OF BARNET V. TOWN OF PLAIN-FIELD.

(Supreme Court of Vermont. Caledonia. June 29, 1909.)

Paupers (§ 52*)—Action for Furnishing Assistance—Notice of Condition—Sufficiency.

The statute requiring notice from one town to another of the condition of an alleged pauper, precedent to an action by the former against the latter for furnishing assistance, refers to his financial, and not to his physical, condition, and hence a notice merely stating that a boy was sick and had had an operation of some kind, and that his family applied for help, was insufficient.

[Ed. Note.—For other cases, see Paupers, Cent. Dig. § 174½; Dec. Dig. § 52.*]

Exceptions from Caledonia County Court; Alfred A. Hall, Judge.

Action by the Town of Plainfield agains the Town of Barnet. There was a judgment pro forma for plaintiff for \$165.55 costs, and defendant excepts. Reversed.

Argued before MUNSON, WATSON, HAS-ELTON, and POWERS, JJ.

Dunnett & Slack, for plaintiff. R. M. & E. M. Harvey, for defendant.

POWERS, J. The notice involved in this case is entirely inadequate. It reads as follows: "Barnet, June 24, 1907. Overseer of Poor, Plainfield, Vt.-Dear Sir: We have a boy of Chas. Bancroft, who is in the Waterbury Asylum, who is a resident of your town, sick in the hospital at St. Johnsbury. He has had an operation of some kind, and his family have applied for help from this town. I will see that these bills are paid, and will look to the town of Plainfield for remuneration. Yours very truly, A. N. Gillfillan, Overseer of Poor, Barnet, Vt. boy had his operation or at least went to the hospital June 8, and is there yet, but will be out soon. A. N. G."

The statute requires that the notice shall disclose the condition of the alleged pauper. The condition here referred to is his financial condition, which is the basis of the right of recovery, and not his physical condition, which is merely the cause of it. This was recognized in Randolph v. Roxbury, 70 Vt. 175, 40 Atl. 49, and made plain in Mt. Holly v. Peru, 72 Vt. 68, 47 Atl. 103. In the latter case the notice described the party on account of whose assistance the suit was brought as a "poor person unable to supply herself by her own labor and has no means of support, and is being now cared for and supported by said Mt. Holly." It was objected that the notice should have shown the cause of her need of support. In holding that the notice was sufficient, the court said "nor was it necessary to mention Mrs. Lyon's sickness in giving notice of her condition. The requirement relates to the condition which is the basis of recovery, and not to the circumstances producing that condition. If a person is poor and in need of assistance, the cause of this condition is immaterial." If we were to strike out of this notice here in question all that relates to young Bancroft's physical condition, which is immaterial under the above holding, we should have one not materially unlike that which was held insufficient in Essex v. Jericho, 76 Vt. 104, 56 Atl. 493.

This holding being decisive of the case, the other questions are not considered.

The pro forma judgment is reversed, and judgment rendered for the defendant to recover its costs.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(89 Vt. 266)

WEDGE v. CENTRAL VERMONT RY. CO.

(Supreme Court of Vermont. Washington. July 2, 1909.)

APPEAL AND ERROR (§ 1099*)—LAW OF THE CASE.

Under the rule of the law of the case the questions of negligence and contributory negligence decided on a prior appeal, on practically the same evidence, cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4372; Dec. Dig. 1099.*]

Exceptions from Washington County Court; E. L. Waterman, Judge.

Action by Hiram Wedge, administrator against the Central Vermont Railway Company. Verdict was directed for defendant and judgment entered thereon, and plaintiff excepted. Affirmed.

See, also, 78 Vt. 185, 62 Atl. 54.

Argued before ROWELL, C. J., and MUN-SON, WATSON, and HASELTON, JJ.

F. L. Laird, M. M. Gordon, and R. A. Hoar, for plaintiff. Hunton & Stickney, for defendant.

HASELTON, J. The plaintiff is the administrator of the estate of Israel Guilmont, deceased. This action was brought under the statute to recover, for the benefit of the wife and the next of kin of the plaintiff's intestate, their damages on account of his death, alleged to have been caused by the wrongful act or neglect of the defendant company. This case was twice tried. On the first trial exceptions were taken by the defendant, and the case having been heard in this court on such exceptions, it was held that, on the evidence, a verdict should have been directed for the defendant. See this case, 78 Vt. 18t 62 Atl. 54. This case having been remanded, a second trial was had, and at the close of the evidence a verdict was directed for the defendant. The case is now here on exceptions by the plaintiff, and the sole exception relied on was taken to the action of the court in directing such a verdict.

One of the defendant's locomotives, which was drawing a freight train over its roac from Montpelier to Barre, struck the plaintiff's intestate at a grade crossing while he. as a traveler, was driving across the railroad track. His death was the result of injuries so received, and ensued almost immediately thereafter. On the evidence at the first trial, this court held as a matter of law that the plaintiff's intestate was guilty of contributory negligence, and that there was no negligence on the part of the defendant which was a proximate cause of the catastrophe. The plaintiff's counsel insists that this holding of the court was wrong. However, in this same case that holding may not be reviewed. Dietrich v. Hutchinson, 75 Vt.

139, 41 Atl. 1039; Sherman v. Esty Organ Co., 69 Vt. 355, 38 Atl. 70; Amsden v. Atwood, 68 Vt. 322, 85 Atl. 811; St. Johnsbury, etc., R. Co. v. Hunt, 59 Vt. 294, 7 Atl. 277; Childs v. Insurance Co., 56 Vt. 609; Baker v. Belknap's Estate, 89 Vt. 168; Sturges v. Knapp, 36 Vt. 439; Stacy v. Central Vermont R. Co., 32 Vt. 551.

The principle that a decision in a case by the court of last resort becomes the law of that case is so well established as to make a discussion a work of supererogation. The doctrine is not that of stare decisis nor yet that of res judicata though akin to each. It rests for its absolute integrity upon sound public policy which does not permit the parties to a case to go again and again to the Supreme Court upon the same question. There must be an end to litigation. The principle is applied in cases like this-that is, in cases in which the decision sought to be reviewed is a holding that on all the evidence the plaintiff cannot recover. We do not find any warrant in reason or authority for treating such a decision, as is here criticised, as in any way exceptional. It is, nevertheless, the desire of courts to rectify any mistakes into which they may fall through oversight when they can do so without contravening public policy and without working further injustice. And so in many jurisdictions there are provisions by which an application for a rehearing may be made and heard, and so this court has established a conservative practice under which for sufficient cause shown a rehearing may be had. Town School District v. District No. 2, 72 Vt. 451, 48 Atl. 697; Ir re Ruggle's Will, 73 Vt. 358, 51 Atl. 8; Davis v. Nelson's Estate, 73 Vt. 881, 50 Atl. 1094. Th' practice was recognized in State v. Franklin. County Savings Bank, 74 Vt. 246, 52 Atl. 1069, as appears from the opinion in Van Dyke v. Drew. 81 Vt. 399, 70 Atl. 593, 1103, where a rehearing was sought under a recent statute applicable to chancery cases.

During the oral argument of this case one of the counsel for the plaintiff stated that the matter ot an application for a rehearing was considered, but was not acted upon. It is agreed by counsel on both sides that the evidence on the tria! which we are now considering was the same as the evidence on the former trial except that one Lowe, who did not testify on the former trial, was a witness on the latter trial. An examination of the testimony of this witness, in connection with all the other testimony, shows that his testimony did not tend to vary in any material respect the case as it was formerly presented to this court. Indeed the argument of the plaintiff is throughout a criticism of the former decision and an assertion of its unsoundness.

be reviewed. Dietrich v. Hutchinson, 75 Vt. The propositions advanced by the plaintiff 389, 56 Atl. 6; McKindly v. Drew, 71 Vt. are not open for consideration. On the evi-

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

dence, the court below was bound to apply the law of the case as determined in this court and take the action which it did. Judgment affirmed.

33 Vt. 276)

STATE BOARD OF HEALTH V. VILLAGE OF ST. JOHNSBURY et al.

(Supreme Court of Vermont. Caledonia. July 2, 1909.)

1. Health (§ 194) - Actions - Proper Par-TIES-DEFENDANT.

In an action by the state board of health

against a village and others to enforce an order of the board prohibiting the furnishing and use of the village water for domestic purposes, the village clerk who was merely a recording, and not an administrative, officer, was not a

proper party defendant.

[Ed. Note.—For other cases, see Health, Cent. Dig. §§ 17-23; Dec. Dig. § 19.*]

2. HEALTH (\$ 19*)-ACTION BY STATE OFFI-

OERS—Cosrs.

A dismissal of the bill as to the village clerk would be without costs, inasmuch as the board were acting in their official capacity as state officers, and the state does not pay costs in cases distinctively of public concern.

[Ed. Note.—For other cases, see Health, Cent. Dig. §§ 17-23; Dec. Dig. § 19.*]

8. HEALTH (\$ 19*)-ACTIONS-PROPER PARTIES -Defendants

The bill alleging that the village trustees had the management and control of the village affairs, including its water system, subject to the ultimate control of the village, so that they could be decreed against in their official capacity, if necessary, they were proper parties defendant, though not charged with anything amics. thing amiss.

[Ed. Note.—For other cases, see Health, Cent. Dig. §§ 17-23; Dec. Dig. § 19.*]

Dig. §§ 17-23; Dec. Dig. § 19.*]

4. Health (§ 19*)—Purity of Water—Regulations of Board of Health—Enforce—Ment—Parties Who May Sue.

P. 8. 5495, 5496, gives the state board of health general oversight of waters used by cities and villages as sources of water supply and authorizes the board to prohibit any village, etc., from using water from any given source whenever in the board's opinion the water is so contaminated that its use would endanger public health. Held, that an action against a village and others to enforce an order of the board prohibiting the furnishing and use of village water for domestic purposes was properly brought by the board, and not by the state. the state.

[Ed. Note.—For other cases, see Health, Cent. Dig. §§ 17, 18; Dec. Dig. § 19.*]

5. CONSTITUTIONAL LAW (§ 63*) — DELEGATION OF POLICE POWER—EXTENT OF POWER. The Bill of Rights in the Constitution declares that the people of the state by their legal representatives have the sole and inherent right of governing and regulating the internal police of the state, and the right, retained by the state muon becoming a member of the by the state upon becoming a member of the Union, embraces such reasonable miles Union, embraces such reasonable rules and regulations established directly by legislative enactment as will protect the public health and enactment as will protect the public health and safety, and the state may invest local or state boards, created for administrative purposes, with authority in some proper way to safeguard the public health and safety, the method of accomplishing results being within the discretion of the state, provided the powers of the general government are not infringed nor any constitutional provision of the state or United

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 108, 109; Dec. Dig. § 63.*]

6. Constitutional Law (§ 83*) - Personal LIBERTY.

The personal liberty secured by the Constitution does not import an absolute right in each person to be at all times wholly free from restraint, but such liberty is subject to such reasonable conditions as may be deemed by the governing authority to be essential to the safety, health, peace, and morals of the community.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 150; Dec. Dig. § 83.*]

7. CONSTITUTIONAL LAW (§ 70°)—JUDICIAL POWEE—INQUIRY INTO POLICY AND WISDOM.

POWEE—INQUIRY INTO POLICY AND WISDOM.

OF LEGISLATION.

Where the Legislature has exercised its discretion in providing a method for protecting the public against disease under the police power, it is not for the courts to determine as to the mode likely to be most effectual, unless what the Legislature has done comes within the rule that if a statute purporting to have been enacted for the protection of the public health, safety, or morals has no just relation to those objects, or is unquestionably a plain invasion of constitutional rights, it is the court's duty to so declare, and give effect to the Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 131; Dec. Dig. § 70.*]

8. CONSTITUTIONAL LAW (§ 83*) — POLICE POWER—PERSONAL LIBERTY.

P. S. 5495, 5496, giving the state board of health general oversight of waters used by cities and villages as sources of water supply, and authorizing the board to prohibit any village, etc., from using water from any given source whenever in the board's opinion the water is so contaminated that its use would endanger public health. does not prescribe at water is so contaminated that its use would endanger public health, does not prescribe at method of protecting the public health under the police powers so palpably violative of the constitutional right of personal liberty as to warrant interference by the courts, and the board had power thereunder to prohibit the funcishing and use of village water for domestic nishing and use of village water for domestic, use where it was so contaminated and impure that its use for domestic purposes was a menace to the public health.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 150; Dec. Dig. § 83.*]

9. CONSTITUTIONAL LAW (\$ 316*)—DUE PRO-CESS OF LAW—BOARDS OF HEALTH—ORDERS -FINALITY,

P. S. 5496, gives the state board of health power to prohibit any village from using water from any source whenever in the board's opinion the water is so contaminated that its opinion the water is so containinated that its use would endanger public health, and provides that the court of chancery may, upon application by the board, enforce any order which the board may make under the section. Held, that board may make under the section. Held, that the statute does not make the board's order final and conclusive so as to give the court no authority to inquire into its correctness, but gives the court a discretion to the proper exercise of which it must proceed on inquiry and render judgment only after trial; and hence a hearing by the board before making the order was not essential to due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 938; Dec. Dig. § 316.*] 10. HEALTH (\$ 11*)—PROTECTION OF PURITY OF PUBLIC WATER SUPPLY — BOARD OF

HEALTH-ORDERS-ENFORCEMENT. The order of the board is not invalid as incapable of enforcement, since, if the court

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

thinks the board's order ought to be enforced, an order of its own would supervene upon it, and be of such a character that its enforcement would enforce the order of the board.

[Ed. Note.—For other cases, see Health, Dec. Dig. § 11.*]

11. HEALTH (§ 10*)—ORDERS OF BOARD OF HEALTH—NOTICE—SUFFICIENCY.

A notice by the state board of health served upon village trustees, who were the chief executive officers of the village, that "You are hereby prohibited from furnishing or permitting to be furnished any water taken from the above-described water source, * * * " etc., was notice to the village, especially where the village was the only furnisher of water from that source for any purpose.

[Ed. Note.—For other cases, see Health, Cent. Dig. § 8; Dec. Dig. § 10.*]

Appeal in Chancery, Caledonia County; Alfred A. Hall, Chancellor.

Bill by the State Board of Health against the Village of St. Johnsbury and others. Decree for orator, and defendants appeal. Reversed and dismissed as to one defendant, reversed pro forma as to the others, and remanded.

Argued before ROWELL, C. J., and MUN-SON, WATSON, HASELTON, and POW-ERS, JJ.

Elisha May and Harry Blodgett, for appellants. Robert W. Simonds, State's Atty., for appellee.

ROWELL, C. J. This is a bill in chancery brought by and in the names and official capacity of the persons composing the state board of health against the village of St. Johnsbury and divers takers of water resident therein for the enforcement of an order made by the board prohibiting the furnishing and the use of the village water for domestic purposes till such a time. The order was made and issued in July, 1906, and recited that the board found and was of the opinion that the water taken from the Passumpsic river at the point where the village was then taking it, and as supplied by it to the inhabitants thereof by its water system, was so contaminated, unwholesome, and impure that the use of it for domestic purposes endangered the public health; and it prohibited the drawing and the use thereof for said purposes until, in the opinion of the board the danger ceased. But it expressly permitted the drawing and use for laundry purposes, flushing water-closets, sprinkling lawns, and streets, watering gardens, and for stable purposes. The order was served on the trustees of the village, but not on the village itself, on the school directors, and 134 takers, a large number of whom obeyed it, but many did not, and they are defendants. After the bill was brought, the village itself, its newly elected trustees, and its clerk were made defendants. The statute under which the order was made gave the board the general oversight and

by any cities, towns, villages, or public institutions, or by any water or ice companies in this state as sources of water supply, and of all springs, streams, and water courses tributary thereto, and authorized the board to prohibit any town, city, village, public institution, individual, or water or ice company from using water or ice from any given source whenever in its opinion the same was so contaminated, unwholesome, or impure that the use thereof endangered the public health. The statute as it was when the bill was brought, and as it now is, provides that the court of chancery "may" on application therefor by the board enforce any order, rule, or regulation that the board may make under and by virtue thereof. P. S. 5496.

The defendant Elisha May demurs to the bill for that under its allegations the board has no authority to maintain the bill in its own name; that the statute does not provide for notice of a hearing by the board, nor for notice of any action by it to condemn the water; and that it does not allege that any notice was given in these respects. The village, its three trustees who were made defendants after the bill was brought, and Preston E. May, its clerk, jointly demur for want of equity, and because the bill does not charge them nor any of them with any shortcomings nor wrongdoings, nor contain any prayer for relief against them, and because said May is not a proper party. They further demur for substantially the same causes assigned in the demurrer of the defendant Elisha May. The bill discloses no reason for making Preston E. May a party defendant, except that he is clerk. But that is no reason, for he is a mere recording officer, and not an administrative officer. The bill should be dismissed as to him, but without costs, for the orators are acting in their official capacity as state officers, and to make them pay costs would be making the state pay costs. which it does not do in cases distinctively of public concern certainly. But the trustees are proper parties, though not charged with anything amiss, for the bill alleges that they have the management and control of the affairs of the village, including the water system, subject to the ultimate control of the village, and therefore they can be decreed against in their official capacity if need be-North Troy School District v. Town of Troy, 80 Vt. 24, 66 Atl. 1033. And the village is, of course, a proper, if not a necessary party, for it owns the water system in question. It is objected that the bill should have been brought by the state, and not by the board. But we construe the statute to mean that it may be brought by the board.

brought, the village itself, its newly elected trustees, and its clerk were made defendants. The statute under which the order was made gave the board the general oversight and care of all waters, streams, and ponds used

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

mains and taken into the houses, the board had no authority to punish those who used it for domestic purposes; that the owners of the houses had the right to drink it, and their tenants had the same right, even though forbidden by them; that the order cannot be enforced against either, nor can either be dealt with by the court for contempt; that the board could, at most, only stop the village from pumping water into its mains, but that the court cannot effectually enforce the order even if binding without notice or opportunity to be heard, nor make the order prayed for until it has heard all the matters in issue; and that the bill does not present any issue that the defendants can answer, and demand a trial de novo as to the fitness of the water for domestic purposes. As to personal liberty, our Bill of Rights declares that government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single man, family, or set of men who are a part only of that community. Closely allied to this fundamental proposition is the further declaration that the people of the state by their legal representatives have the sole, inherent, and exclusive right of governing and regulating the internal police of the state. This right the state did not surrender when it became a member of the Union, but retains it still; and that right, to say the least, embraces such reasonable rules and regulations, established directly by legislative enactment, as will protect the public health and the public safety. And the state may invest local or state boards created for administrative purposes with authority in some proper way to safeguard the public health and the public safety. The way in which these results are to be accomplished is within the discretion of the state, provided the powers and functions of the general government are not thereby infringed, nor any constitutional provision of the state nor the United States.

We come now to consider more especially what personal liberty is as secured by constitutional provision; and on this question we refer to Jacobson v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, which affirms the legality of compulsory vaccination for the prevention of smallpox. There the plaintiff in error insisted that his liberty was invaded when the commonwealth subjected him to fine and imprisonment for refusing to submit to vaccination; that the compulsory vaccination law was unreasonable, arbitrary, and oppressive, and therefore hostile to the inherent right of every free man to care for his own body and health in such way as to him seemed best; and that the execution of such a law was nothing short of an assault upon his person. But the court said that the liberty secured

water was furnished by the village in its by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be at all times and in all circumstances wholly free from restraint; that there are manifold restraints to which every person is necessarily subject for the common good; that on any other basis organized society could not exist with safety to its members; that society based on the principle that every man is a law unto himself would soon be confronted with disorder and anarchy; that real liberty could not exist under the operation of a principle that recognizes the right of each individual person to use his own whether in respect of his person or his property. regardless of the injury that might be done to others; that that court had more than once recognized it as a fundamental principle that persons and property are subject to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state, of the perfect right of the Legislature to do which no question was ever raised, nor on general principles ever can be raised as far as natural persons are concerned. It is said in Crowley v. Christensen, 137 U. S. 86, 11 Sup. Ct. 13, 84 L. Ed. 620, that the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority essential to the safety, health, peace, good order, and morals of the community; that even liberty itself, the greatest of all rights, is not unrestrained license to act according to one's own will; that it is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others, and is, therefore, liberty regulated by law. And this court said in Lawrence v. Rutland Railroad Co., 80 Vt. 370, 383, 67 Atl. 1091, 15 L. R. A. (N. S.) 350, concerning the right to contract, that it is not an absolute right, but subject, on general principles, to such reasonable restraint as the public good requires; that it is the general right to acquire property and by necessary implication the general right to contract concerning it, that the Constitution protects; but that the protection does not make those rights absolute in all respects, for if it does, what becomes, the court asks, of the police power, which inheres in every free government, and is based on the maxim that you shall so use your own property as not to injure the rights of others, which is a universal and pervading obligation, and a condition on which all property is held, the application of which to particular conditions must necessarily be within the reasonable discretion of the Legislature; and that, when such discretion is exercised in a given case by means appropriate and reasonable, not oppressive nor discriminatory, it is not subject to constitutional objection.

It is to be noted that the demurrer admits

the truth of the allegation of the bill that many analyses of the water showed it to be contaminated, unwholesome, and impure, and of such a character and quality that its use for domestic purposes was a menace and a danger to the public health. If the mode adopted by the state for the protection of the public health and safety of its local communities proves to be objectionable, inconvenient, or even distressing, to some, if nothing more can reasonably be affirmed against the statute, the answer is that it was the duty of the constituted authorities primarily to keep in view the welfare and safety of the many, and not to permit their interests to be subordinated to the wishes nor the convenience of the few. But there is, of course, as said in the Jacobson Case, a sphere within which the individual may assert the supremacy of his own will, and rightfully deny the authority of the government to interfere with its exercise. It is equally true, however, that in every case where the constituted authorities are charged with the duty of conserving the welfare and safety of the general public the rights of the individual in respect of his liberty may at times under the pressure of great danger be subjected to such restraint, to be enforced by reasonable rules and regulation, as the safety of the general public may demand. And it is not for the courts to determine as to the mode likely to be most effective to protect the public against disease, unless that which the Legislature has done comes within the rule that if a statute, purporting to have been enacted for the protection of the public health, the public safety, or the public morals, has no just relation to those objects, or is unquestionably a plain, palpable invasion of constitutional rights, in which case it is the duty of courts so to adjudge, and thereby give effect to the Constitution. But the statute under consideration cannot be said to be palpably in conflict with the Constitution, state nor federal; nor can it be confidently asserted that the means prescribed by it have no just relation to the protection of the public health and the public safety. It must be held, therefore, as the case is presented, that the board has authority, if properly exercised, to restrain the defendants as it did.

But it is said that it did not properly excree reversed pro forma as ercise its authority in this behalf, for that

its proceedings lack due process of law, in that no notice of its proposed action was given nor opportunity to be heard afforded. The defendants do not claim, as we understand their brief and could not well claim, that notice and an opportunity to be heard before the board were essential to due process of law, unless the order is final; but they claim that it is the intention of the statute to make it final and conclusive, and to give the court no authority to inquire into its correctness, but only to enforce it. But the statute does not mean that. It says that the court "may" enforce the order. This evidently means, not that it must enforce it as a duty, but only that it may enforce it or not in its discretion, to the proper exercise of which it must proceed on inquiry, and render judgment only after trial. So the order is not final and conclusive, and the bill presents an issue that the defendants can answer, and they may answer, and have a trial on the merits, as agreed by counsel.

The objection that the order cannot be enforced if valid is not sustainable, for, if the court thinks it ought to be enforced, an order of its own will supervene upon it, and be of such a character that its enforcement will enforce the order of the board.

It is further objected in a supplemental brief that the order of the board is not against the village, that notice of it was never served upon the village, and that consequently it cannot be enforced against the village. But notice of it was served upon the trustees of the village, and that was notice to the village, as they were its chief executive officers. Nichols v. City of Boston, 98 Mass. 39, 93 Am. Dec. 132. So notice to the president of a bank concerning matters within the sphere of his official authority is notice to the bank. 'Porter v. Bank of Rutland, 19 Vt. 410, 425. And the language of the order clearly embraces the village. It is: "You are hereby prohibited from furnishing, or permitting to be furnished, any water taken from the above-described water source for domestic purposes in any way until," etc.and the village was the only furnisher of water from that source for any purpose.

Decree reversed as to Preston E. May, and bill dismissed as to him without costs. Decree reversed pro forma as to the other defendants. Cause remanded. (83 Vt. 297)

FLINT V. HOLMAN.

(Supreme Court of Vermont. Orange. July 2, 1909.)

1. LIBEL AND SLANDER (§ 7*)—WORDS ACTIONABLE PER SE—"STOLEN FROM TOWN."

Where defendant charged that plaintiff had "stolen from the town," and there was no prefatory averments or innuendo explaining the words "had stolen," they would be construed in accordance with their common acceptation to inneed the property and was therefore languages. import larceny, and were therefore slanderous

[Ed. Note.—For other cases, see Label and Slander, Cent. Dig. §§ 17-78; Dec. Dig. § 7.*] 2. LIBBL AND SLANDER (§ 100*)—PRIVILEGE

DEFENSES.

Where the occasion on which defendant charged plaintiff with having stolen from the town was one of qualified privilege, but defendant denied having spoken the words and negatived any knowledge that would justify them, the question of privilege was eliminated.

[172] Note Wor other cases, see Libel and

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 255; Dec. Dig. § 100.*]

8. LIBEL AND SLANDER (\$ 124*)—WORDS SLANDEROUS PER SE-INSTRUCTIONS—DEFENSES.

Where, in an action for using words slanderous per se concerning plaintiff, defendant merely denied speaking the words, there was no question for the jury concerning their meaning, and the court properly charged that, if plaintiff proved the speaking of the words as charged, he was entitled to recover.

[Ed. Note.—For other cases, see Libel and Slauder, Dec. Dig. § 124.*]

4. LIBEL AND SLANDER (\$ 104*)-OTHER STATE-MENTS-MALICE.

MENTS—MALICE.

In an action for falsely charging plaintiff with stealing from the town, evidence that thereafter, on the same day, defendant called witness, and stated to him, "I suppose you think it was a pretty broad statement I made to-day." and, on receiving an affirmative reply, further said, "I can prove it," and stated several transactions in which he claimed plaintiff had defrauded the town, was admissible to show malice.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 286-288; Dec. Dig. §

Exceptions from Orange County Court; Willard W. Miles, Judge.

Action on the case for slander by Herbert F. Flint against A. E. Holman. Defendant pleaded the general issue and a verdict, and judgment being rendered for plaintiff, and an order having been entered overruling defendant's motion in arrest of judgment, he brings exceptions. Affirmed.

Argued before ROWELL, C. J., and MUN-80N. WATSON, HASELTON, and POW-ERS. JJ.

March M. Wilson and R. M. Harvey, for plaintiff. N. L. Boyden and David S. Conant, for defendant,

MUNSON, J. The declaration charges that the defendant said of the plaintiff that he "had stolen from the town." There are no prefatory averments, and no innuendo explanatory of the words "had stolen." The

words spoken were not actionable in themselves. It is certainly actionable to charge one with stealing; and, if the defendant's claim can stand, it must be upon the theory that the words which import a taking lose their actionable quality when applied to a taking from a town. If the town were an entity incapable of owning property that is the subject of larceny, this view might prevail, but we apprehend there is no ground short of this on which the claim can be sustained. It is doubtless true that the business affairs of a town are so much more prominent in the minds of its citizens than its property holdings that words of this character are very generally used and understood as referring to fraudulent dealings. instead of larcenies. But the law will give such words their ordinary meaning unless they are used in a connection that gives them a different meaning; and to say that the stealing was from the town does not give the word a different meaning, for towns have property that may be stolen as well as individuals. Every town owns records and books of account, and may have bank bills in its treasury. Many towns own machines and tools for use upon their highways. Every town owns at times materials delivered for the building or repair of bridges. It is true that the name of a town indicates a locality as well as a quasi corporation capable of holding personal property; and this is made the basis of a suggestion that the words. "he had stolen from the town," might have been used in the sense of going away secretly. But the question here is not whether the words are capable of being used in that sense, but whether the words in their ordinary sense import a larceny, and it is very clear that they do.

The defendant excepted to the charge that the question of privilege was not in the case. The charge was correct; for, while the occasion was one of qualified privilege, the defendant was not in a position to profit by it. He did not justify the words by pleading or evidence, but denied having spoken them, and negatived any knowledge that would justify them. Clemons v. Danforth, 67 Vt. 617, 32 Atl. 626, 48 Am. St. Rep. 836; Kidder v. Bacon, 74 Vt. 263, 52 Atl. 822. It was not error to instruct the jury that, if the plaintiff had proved the speaking of the words charged, he was entitled to recover. There was no question for the jury regarding the meaning of the words. They were to be taken as having been used and understood in their ordinary sense, unless the defense introduced evidence giving them a different meaning. But here the defendant denied the speaking of the words, and so had nothing to explain. The testimony referred to by counsel related to statements made by the defendant at a later hour and defendant moved in arrest, for that the different place, and was introduced by the

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

above referred to were properly received in evidence. The circumstances made them admissible, even if they were not similar in character to those declared upon within the meaning of the rule stated in Cavanaugh v. Austin, 42 Vt. 576. It seems that later in the same afternoon the defendant called the witness to him and said, "I suppose you think it was a pretty broad statement I made to-day," and, upon receiving an af-firmative reply said further, "I can prove it," and went on to state several transactions in which he claimed plaintiff had defrauded the town. The manner in which the defendant brought up the subject, and connected these matters with what he had said on the occasion in question, made the later statements admissible as evidence of malice. The charge did not directly limit the use of this testimony, but no exception was taken to a failure in this respect.

Other claims, not specifically noticed, are disposed of by the views above expressed. Judgment affirmed.

(83 Vt. 814)

STATE V. ANDREWS.

(Supreme Court of Vermont. Washington. July 2, 1909.)

WITNESSES (\$ 306*)—PRIVILEGE OF WITNESS—Answers Tending to Criminate Witness.

The privilege of refusing to answer a ques-

In a privilege or retusing to answer a ques-tion on the ground that it would tend to crim-inate the witness is strictly personal, and can be asserted by no one but the witness; and, while the court may instruct the witness as to his privilege, it is error to exclude evidence material to the defense for the protection of the witness, unless the latter claims protection.

[Ed. Note.—For other cases, see Witnesse Cent. Dig. §§ 1058-1060; Dec. Dig. § 306.*]

Exceptions Washington County from Court: Zed S. Stanton, Judge.

Elhanan Andrews was convicted of furnishing intoxicating liquor without authority, and excepts. Exceptions sustained, judgment and sentence reversed, and cause re-

Benj. Gates, State's Atty., for the State. M. M. Gordon, for respondent.

MUNSON, J. Mahoney, the state's witness, testified that the respondent took a bottle of whisky from his pocket and gave him a drink. It was the theory of the defense, and the testimony of the respondent when he took the stand, that the respondent had no liquor with him, and that Mahoney was the one who produced the whisky and did the giving. Respondent's counsel undertook, in his cross-examination of Mahoney, to get some admissions in line with this theory, but the state's attorney objected to his inquiries on the ground that the witness was entitled to protection, and the court exwas entitled to protection, and the court ex- [Ed. Note.—For other cases, see Intoxicating cluded the testimony as evidence that would Liquors, Cent. Dig. § 392; Dec. Dig. § 253.*]

plaintiff to show malice. The statements tend to incriminate the witness. The wit ness made no claim of privilege.

> It is not necessary to inquire what the situation would have been if the witness had claimed the privilege of silence on the ground that his answers would tend to criminate him. The respondent was entitled to the benefit of the proposed examination if the witness was willing to answer, even if there were legal grounds on which the witness might have refused to answer. The privilege, if it existed, was strictly personal, and could be asserted by no one but the witness. The court might properly have instructed the witness as to his privilege, but could not exclude evidence material to the defense for the protection of the witness unless the witness claimed protection. No claim of privilege having been made by the witness, the exclusion of the testimony was

> Exceptions sustained, judgment and sentence reversed, and cause remanded.

> > (82 Vt. 287)

STATE . INTOXICATING LIQUOR. (Supreme Court of Vermont. Bennington. July 2, 1909.)

1. Jury (§ 21*)—RIGHT TO JURY TRIAL—CON-DEMNATION OF LIQUORS—NATURE OF PRO-CEDING— "PROSECUTIONS FOR CRIMINAL OFFENSES."

Proceedings for the seizure and condemna-tion of liquors alleged to be unlawfully kept for sale are not "prosecutions for criminal offenses" within the constitutional provision giving a right to trial by jury in such prosecutions, but are civil proceedings in rem to fix the status of the property.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 134-136; Dec. Dig. § 21.*] [Ed. Note.-

2. Intoxicating Liquons (§ 250*)—Searches and Seizures—Weight of Evidence.

In a proceeding for the seizure and condemnation of intoxicating liquors alleged to have been kept for unlawful sale, the state is not required to prove the keeping for sale beyond a reasonable doubt, but only by a fair preponderance of the evidence.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 387; Dec. Dig. § 250.*]

3. Intoxicating Liquors (\$ 248*)-Seizure

AND CONDEMNATION—ISSUES.

Where a proceeding in rem for the seizure and condemnation of liquors was instituted by the signing of a complaint by a grand juror of the town, complainant's authority depending on matters dehors the record, could only be put in issue by plea.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. \$3 368, 370; Dec. Dig. \$248.*]

INTOXICATING LIQUORS (§ 253*)—SEIZURE—

PREJUDICE—EVIDENCE.
Where a warrant in proceedings in rem where a warrant in proceedings in rem to condemn intoxicating liquors with a return thereon was put in evidence, the claimants were not prejudiced by oral testimony of the officer concerning his acts. under the warrant which neither tended to contradict nor vary his return.

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sale, and declares that if the owner or keeper of the liquor is unknown to the officer, and no one is found in possession or custody of it, the owner or occupant of the building or apartment in which liquor is found shall be apprehended, if known to the officer, or can be ascertained by him. Held that, where liquor selzed under such act was found in the possession and keeping of the respondents, its seizure operated as notice to the claimant, and, where he forthwith appeared and was fully heard in resistance of the forfeiture, the act was not unconstitutional as to him for failure to provide for notice to the owner of the liquor selzed unfor notice to the owner of the liquor seized unless known to the officer.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930; Dec. Dig. § 309.*]

6. Intoxicating Liquobs (§ 251*)—SEIZUBE AND FORFEITURE—OWNERSHIP—EVIDENCE.

In a proceeding for the seizure and for-felture of intoxicating liquors alleged to have been wrongfully kept for sale, evidence held to warrant a finding that the liquor belonged to a firm operating the saloon in which the liquor was kept, and not to the claimant.

[Ed. Note.-For other cases see Intoxicating Liquors, Cent. Dig. \$ 389; Dec. Dig. \$ 251.*]

APPEAL AND ERBOR (§ 1047*)-EVIDENCE-

PREJUDICE.

Where the court required one of the defendants to produce an insurance policy, and over his objection received the policy in evidence for whatever purpose it was thought proper, and stated that it would indicate the purposes later, but was not requested to do so, and it did not appear that any use was mode of the it did not appear that any use was made of the policy as evidence, the error, if any, in compelling its production, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4133; Dec. Dig. § 1047.*]

Exceptions from Bennington County Court; Seneca Haselton, Judge.

Proceeding by the State for the condemnation and forfeiture of intoxicating liquors under Acts 1904, p. 129, No. 115. From a judgment of condemnation, Merle S. Pike and others bring exceptions. Affirmed.

Argued before ROWELL, C. J., and MUN-SON, WATSON, and POWERS, JJ.

W. J. Meagher, State's Atty., for the State. O. M. Barber and E. H. Holden, for respondent and claimant Pike.

ROWELL, C. J. This is a proceeding based on a grand juror's complaint to a justice for the seizure and condemnation of intoxicating liquor kept for sale contrary to law. The officer seizing the liquor apprehended and brought before the justice Edward Morrissey and Thomas Morrissey, in whose keeping and custody he found the same. Merle S. Pike appeared before the justice, and filed his written claim to the liquor as absolute owner thereof, and therein gave as a reason why it should not be adjudged forfeited that he was engaged in the lawful sale thereof under and by virtue of a second-class license | question in fact tried. State v. Intoxicating

5. Constitutional Law (§ 309*)—Seizure duly issued to him and then in force. But of Liquors—Notice—Statutes.

Pub. Acts 1904, p. 129, No. 115, regulating the keeping and sale of intoxicating liquors, provides for the seizure and condemnation of liquor alleged to be illegally kept for sale, and declares that if the owner or keeper of the liquor is unknown to the officer and no. upon forfeited and condemned it, whereupon the respondent and Pike appealed to the county court, where they demanded a trial by jury, which was denied. They now say that this was error, for that the proceeding is criminal, and therefore that they had a constitutional right to such a trial. But this is not an open question in this state, for, whatever the law is in other jurisdictions to which we are referred, it is settled law here that such proceedings are not "prosecutions for criminal offenses" within the meaning of the constitutional provision giving a right to a trial by jury in such prosecutions, but are only proceedings in rem to fix the status of the property, and therefore essentially civil, and not criminal. This precise point was so ruled in State v. Intoxicating Liquor, 55 Vt. 82, and that case is still the law of this state on that point. See State v. Klondike Machine, 76 Vt. 426, 57 Atl. 994.

But the respondents say that, though this is not a criminal proceeding, still the fact that they were keeping the liquor for unlawful sale should have been found beyond a reasonable doubt, and not by a fair balance of the evidence, as the court found it. But this is not so even if the finding involves something criminal, which we do not decide; for, if it does, the only effect of that would be to add to the other testimony favoring the respondents the evidential weight of the presumption of innocence. Bradish v. Briss, 35 Vt. 326; Fire Association v. Merchants' Nat. Bank, 54 Vt. 657, 668. The state offered to show by the officer who served the warrant what he did under it. The respondents and Pike claimed that, to make the warrant legal, it was incumbent on the state to prove that the signer of the complaint was at the time a grand juror of Sunderland, the town in which the liquor was sefzed, and had qualifled as such, and objected to the admission of the testimony for want of such proof, and also for that the return on the warrant was the best evidence of what was done under it. The objection was overruled, and the testimony admitted, to which the respondents excepted. The witness answered that he took possession of the liquors he found in the place kept by the Morrisseys; that he went into the building and found the Morrisseys in possession; that there was a counter there and barrels of different kinds of liquors, which he named. But the authority of the complainant was not in issue, as it was not necessarily involved in the nature of the proceeding, and could be put in issue only by plea, as it depended on matter dehors the record; and there was no plea, nor was the

•For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Liquor, 38 Vt. 387; State v. Intoxicating Liq- | their voluntary stay, and, further, accord-: uor, 44 Vt. 208. No possible harm could have come to the respondents by allowing the officer to testify what he did under the warrant, for it was in the case with the return thereon, which showed for itself what was done under the warrant, and there was nothing in the testimony tending to contradict nor to vary the return.

It is objected that the statute on which the proceeding is founded is unconstitutional because it nowhere provides for notice to the owner of the liquor seized unless he is known to the officer making the seizure. It ·is said that the previous statutes providing for the selzure and condemnation of liquor. and whose constitutionality has been upheld by this court, have had a provision for some kind of notice in such cases. But none of them had a provision for any kind of notice except by summons, only when no one was known who could be notified in that way, not only the owner, but the keeper and possessor as well, in which case a written notice of the proceedings was to be posted in some public place for such a time. But now, if the owner or keeper of the liquor is unknown to the officer, and no one is found in possession or custody of it, instead of posting a notice of the proceedings, the owner or occupant of the building or apartments in which the liquor is found is to be apprehended if known to the officer or can be ascertained by him. .This mode of notifying the owner in the event named is a substitute for the former mode of notifying him by posting the proceedings in the like event. So it cannot be said that the statute is essentially different in this respect from what it was when its constitutionality was upheld by the court.

But to consider the matter farther. The : theory of the law is, as said in Windsor v. McVeigh, 93 U. S. 274, 23 L. Ed. 914, that all property is in the possession of its owner in person or by agent, and therefore that its seizure will operate to impart notice thereof eto him; and, if it does, that he has a right to appear and be heard respecting the charges for which its forfeiture is claimed. Now here, the liquor being found in the possession and keeping of the respondents, its seizure did operate to impart notice thereof to Pike, who appeared forthwith as claimant, and has been fully heard. This certainly ought to bind him. In State v. Intoxicating Liquor. 44 Vt. 208, the officer returned that he summoned the claimants, but did not tell how. They appeared and objected to the sufficiency of the return in this respect. But the court said it was not necessary to decide that question, for, if no service at all was made upon a claimant, he could voluntarily appear and make claim, and, if he did, the proceedings would be as well based on his claim as on the most perfect service; that as the claimants in that case had, after objecting to the return, remained in court and made claim, the pro-

ing to Johnson v. Williams, 48 Vt. 565, Pike would be bound though he received no notice and had not appeared. That was trover against the officer who destroyed the plaintiff's forfeited liquor. There the keeper of the liquor was summoned pursuant to statute, as here the keepers were apprehended pursuant to statute. But the plaintiff had no notice of the proceedings until after the whole were concluded, which he offered to prove, but was not permitted. This court said that all the notice required was given; that the person to whose keeping the plaintiff had intrusted his property was notified; that, if he failed to appear to contest an adjudication of forfeiture, or to notify the plaintiff so he could appear for that purpose, the consequences of such failure must fall upon the plaintiff; that it did not avoid the legality of the proceeding, nor change the status of the property as fixed by the adjudication.

The bill of exceptions says that the state was permitted to introduce evidence of divers acts and sayings of the Morrisseys that tended to prove, and that the state claimed did prove, that the liquors in question belonged to them, and were in their possession and subject to their dominion. And this is not denied in the brief for the defense, except it says that there was no evidence to show that Thomas Morrissey had anything to do with the sale of liquor in Sunderland other than as the servant and agent of Pike, and had no other interest nor ownership in the business at the time of the seizure, and never had. But nothing is vouched in support of this claim except the testimony of Thomas Morrissey himself, who testified to that effect as to his connection with the business. But that can hardly be taken as disproving as to him the statement of the bill of exceptions as to the tendency of the evidence of the divers acts and sayings of the Morrisseys that the state was permitted to introduce. And, on looking into the state's testimony on this point, especially that of Mr. Bacon, the insurance agent, we think it cannot be said that that statement is not true as to Thomas Morrissey as well as to Edward Morrissey.

But it is strenuously contended that there was no evidence to support the finding that Pike was not the owner of the liquor. The question being whether there was any evidence, it will be sufficient if there was some that tended to support the finding, and that there was cannot be doubted. The state called one Guyette as a witness, who testified that Pike told him on a certain occasion when the matter of his taking out a license came up that he was not going to run the business himself, but was going to transfer the license, but did not really say to whom, although the witness knew whom they were talking about; that, on the witness's saying that that could not be done, Pike said it could, for they had transferred one in Arlingceedings thereafter were well founded on ton; that Mr. Morrissey transferred one to a

man from Brandon; that on the witness's further saying that, if that was done, the liquor could not come in Pike's name, but would have to come in the name of Cullinan and Morrissey, Pike said he could not see why it could not come in his name, whereupon the witness said if they got their liquor to come in his name for them to sell there, they being nonresidents, almost anybody could have liquor come, and that he did not think it was likely it was so, and that Pike said he did not really. Now, the state claimed that that was just what Pike did in the beginning, transferred the license to Edward Morrissey and Thomas Cullinan, both of whom lived in Arlington, and that they carried on the business on their own account and for their own benefit, and not for Pike, until Cullinan died on June 27, 1907, when Thomas Morrissey, who also lived in Arlington, came into the business as part owner with his brother Edward, and continued therein in that capacity till the liquor was seized. And, further, it appeared that from the first the money derived from and used in and about the business was deposited in the bank in the name of Morrissey & Cullinan, and drawn against by them while Cullinan lived, and that even after that the account was kept in the same way down to the time of the seizure, which was July 19, 1907, after which it was kept in Pike's name; and he testified that it was kept in the name of Morrissey & Cullinan as a matter of convenience, as he was not at the saloon all the time, but was at work for his father by the month, and because he did not know that they could sign his name to checks, but supposed he had to draw his own checks. It further appeared that Edward Morrissey and Cullinan bought the building in which the saloon was kept for the purpose of using it as such if Pike got a license, but it appeared that Pike agreed to save them harmless in the transaction. It also appeared that, after Cullinan's death, the Morrisseys got the liquor insured in the name of Edward Morrissey and Cullinan in the same policy that the building was insured: but Pike testified that one time when Morrissey and Oullinan were talking about getting the building insured he told them he wanted his stock insured, and they said they would have it insured, that it came to his knowledge later, without saying when, that he had paid for the insurance, but that he never saw the policy till the week before he was testifying, and never knew till then that the stock was put into their policy. Thus it appears that there was evidence to support the finding that Pike was not the owner of the liquor in question, unless we except the eight barrels of beer that he put in the day of the search, which the officer delayed a little that | tion be done.

he might seize them. It appeared that this beer was bought and paid for by Pike, and it is especially objected that there was no evidence to support the finding that the Morrisseys were engaged in keeping it for unlawful sale. But that question was not to be tried by itself alone, nor controlled by the nearness of time to the seizure and the fact of purchase and payment by Pike, for the liquor had usually, ostensibly at least, been bought and paid for by him; but was to be tried with the rest of the case, and viewed in the light of all the evidence, and, being thus tried and viewed, the court found nothing to differentiate the status of this beer from that of the rest of the liquors, and so classed it with them in its findings. It is obvious from what has been said that it cannot be adjudged that there was no evidence to support this action of the court.

When the insurance agent Bacon was on the stand in the state's opening, and had testifled to having, as such, issued a policy on the building where the liquor was kept and its contents at the request of the Morrisseys, the state asked that they be ordered to produce the policy, that the state might use it in evidence. Thereupon Edward Morrissey, in whose possession and control the policy was, objected that as to him the proceeding was in its nature and effect so far a criminal proceeding that he could not be compelled to produce evidence against himself. But the court ordered its production, and it was produced and put in evidence by the state, to which exception was taken. In this connection counsel for the defense told the court that they purposed to put the policy in evidence in their defense, but insisted that they could not be compelled to produce it against their will, and inquired if it was received as evidence against Pike. The court said it would receive it for whatever purpose it was thought proper, and that it would indicate to counsel on both sides what those purposes were; that, when it had heard all the evidence and had considered the matter, it would indicate to counsel for what purpose it would use it; that it had been received for any legal purpose, and the court would not look at it until that question had been discussed. But it does not appear that the question was discussed after that, nor that anything further was said about the matter in any way, nor that the court made any use of the policy as evidence, and the fair inference is in the circumstances that it did not, and therefore, in no view, does error in respect of the matter affirmatively appear.

Judgments and order for destruction affirmed. Judgment against the Morrisseys for costs of search and seizure. Let execution be done.

(82 Vt. 269)

BLODGETT V. CENTRAL VERMONT RY. CO.

(Supreme Court of Vermont. Chittenden. July 2, 1909.)

1. RAILBOADS (§ 235*) — ENTERING DEPOT— CONSTRUCTION OF STATUTE — "INTO,"

V. S. 3921, inflicting a penalty if a person having control of a detached engine or engine with a passenger train attached runs it into or with a passenger train attached runs it into or through a passenger depot at a speed exceeding four miles an hour, was intended to apply only to passenger depots so constructed as to cover over the main tracks of the railroad into and through which trains running on such tracks must pass, a mode of construction in vogue when the statute was passed; the word "into" being used in the sense of "inside of" or "with-in" and "through," meaning from end to end or from side to side of into or out of at the onor from side to side of, into or out of at the opposite, or at another point.

[Ed. Note.—Fo Dec. Dig. § 235. -For other cases, see Railroads,

For other definitions, see Words and Phrases, vol. 4, p. 3734; vol. 8, p. 6967.]

2. RAILBOADS (§ 327*)—PERSON APPROACH-ING TRACK—DUTY TO LOOK AND LISTEN.

It is the duty of a traveler nearing a rail-road crossing to look and listen for approaching trains, and to make such vigilant use of his sight and hearing as a careful and prudent man would make under the same circumstances.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*]

8. RAILROADS (§ 327*)—Crossing Accidents

---Negligence

A peddler killed at a railroad crossing by A peddler killed at a railroad crossing by being struck by a train was about 72 years old with good sight and hearing, and in good health and very active. The day of the accident was warm and pleasant, and there was nothing over his ears to prevent him from hearing. The warm and pleasant, and there was nothing over his ears to prevent him from hearing. The horse he was driving was old, very quiet, and easy to manage. He was acquainted with the railroad in the vicinity and with the crossing, and while approaching the crossing was looking at the horse, and did not look upon the track, where he had the opportunity, until the horse was partly on the crossing, though, when he was 16 feet from the track, the approaching train would have been plainly in view, and the horse would still have been 4 feet from the nearest rail. Held, that he was negligent, precluding a recovery. ing a recovery.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*]

4. RAILBOADS (§ 335*)—Crossing Accident Concurrent Negligence.

Concurrent Negligence.

Decedent, having negligently approached a railway crossing without looking for an approaching train, discovered it when his horse was just stepping on the crossing. The horse was undisturbed by the noise of the train and under complete control. The accident could have been prevented by backing the horse three or four feet for which there was ample time, but, instead, decedent, after partly stopping the horse, negligently urged it forward. The engineer after discovering decedent's peril did everything possible to avert the accident. Held that, even if the engineer was negligent in not seeing the horse before it reached the crossing, at a point where it could have been seen before it was no longer possible to avoid the accident, decedent's continuing negligence of the same dedecedent's continuing negligence of the same de-gree as the engineer's would bar recovery, since

negligence of each party was the proximate cause of the injury, there can be no recovery. [Ed. Note.—For other cases, see Railros Cent. Dig. §§ 1086-1088; Dec. Dig. § 335.*] see Railroads,

Exceptions from Chittenden County Court; Willard W. Miles, Judge.

Action by William J. Blodgett, administrator, against the Central Vermont Railway Company. Judgment for plaintiff, and defendant excepts. Reversed, and judgment rendered.

Argued before ROWELL, C. J., and TY-LER, MUNSON, WATSON, HASELTON, and POWERS, JJ.

Cowles & Moulton and E. C. Mower, for plaintiff. C. W. Witters, C. S. Palmer, and R. E. Brown, for defendant.

WATSON, J. At the close of the plaintiff's evidence, the defendant moved for a verdict on the grounds (1) that there was no evidence tending to show negligence on the part of the defendant; and (2) that the undisputed and unconflicting evidence showed contributory negligence on the part of the intestate. The case is here on exception to the overruling of this motion. The facts herein stated appear from or are supported by the

The intestate, a man about 72 years of age, while driving across defendant's railroad track at a highway crossing at West Berlin in the afternoon of May 18, 1905, was struck by defendant's engine drawing the mail train, so called, north-bound, and instantly killed. The train was running at about schedule rate of speed, 45 miles an hour. The depot at that place is a building about 25 feet in length and a little less than that in width. It stands 62 feet south of the crossing where the intestate was killed. wholly on the east side of the main track and about 9 feet from the east rail. There is a platform toward the track extending north and south beyond the building, the whole length of which is 134 feet. The northerly end of this platform comes to the highway. West Berlin is not a regular stopping place for any passenger trains. It is à flag station for some trains, but the one in question never stops there except to leave passengers coming from beyond Springfield, which happens only two or three times a year, and perhaps not at all for a year, "once in a great while." By section 3921 of Vermont Statutes: "If

a person having control of a detached engine or an engine with a passenger train of cars attached, runs such engine or such passenger train into or through a passenger depot at a speed exceeding four miles an hour,-he shall be fined ten dollars." Counsel for plaintiff contend that, as the train at the time in question was being run at a greater rate of speed than is permitted by this statute, if not negligence as a matter of law, it must at least be where there has been mutual negligence, and the a circumstance which constitutes some evi-

[•]For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

dence of negligence on the part of the defendant, citing Kilpatrick v. Grand Trunk Railway Co., 72 Vt. 263, 47 Atl. 827, 82 Am. St. Rep. 939, s. c., 74 Vt. 288, 52 Atl. 531, 93 Am. St. Rep. 887; Grand Trunk Railway Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; and other cases. Except that this section of the statute is applicable, no claim is made that the speed of the train was excessive. The law of section 3921 was first enacted in 1860. At that time there were in this state and hitherto have been passenger depots so constructed as to cover over the main tracks of the railroad into and through which trains running on such tracks must pass. We think that statute was intended to apply only to such depots. It is difficult to see how the words "into or through," as there used, can have reference to passenger depots of any other construction. "Into" is there used in the sense of inside of, within. It expresses entrance or a passing from the outside of a thing to its interior parts. The word "through" means from end to end, or from side to side of; into or out of at the opposite. or at another point; between the side or walls of; within; as to pass through a door, or to go through an avenue. See Webster's International Dictionary.

The intestate was a peddler driving a single horse hitched to an open wagon with a small box containing his goods fitted into the rear end of the wagon body. East of the crossing in question the highway over which he was traveling is a gradual ascent to the railroad. At a distance of 328 feet east of the east rail a person traveling over the highway toward the crossing has a plain view of the railroad track from the depot southerly some 1500 or 1600 feet. The track there is elevated considerably above the level of the land, and is in plain view for the whole distance to the crossing, except as the vision is obstructed by the depot. Going westerly from a point in the middle of the road 41 feet east of the east rail to the crossing, the view of the track southerly is thus obstructed until within 24 feet of the east rail. There the track can be seen past the westerly end of the building for a distance of 115 feet. At 20 feet from the east rall the track is visible for a distance of 1601/2 feet; and, when within 16 feet, the track is in full view practically as far southerly as it is from any place hereinbefore named. It was conceded by the plaintiff in argument that all signals required by law and more were given on the train. When the engine was about half way between the whistling post for the crossing and the station, the engineer, looking beyond the depot on its easterly side, saw the intestate on the highway driving toward the railroad. Thereupon he sounded a second whistle for the crossing. The team about the same time went behind the depot, and was seen no more by the engineer until it was on the crossing in front of the engine. It was argued that the engineer should have seen the team after it came in view on the westerly side of the depot before it went on the crossing and in season to have prevented the accident, and that a failure so to do is a circumstance from which a jury may infer negligence. We will assume without deciding this to be so, and pass to the question of contributory negligence.

The undisputed evidence shows that the intestate's senses of sight and hearing were good; that he was in good health and very active; that the day of the accident was warm and pleasant, and there was nothing over his ears to prevent him from hearing; that the horse he was driving was 12 or 13 years old, very quiet, easy to manage, and not easily frightened by a train of cars or anything: and that during the last six or seven years of his life he averaged to drive over the crossing in question once in four or five weeks, by reason of which he was acquainted with the railroad in that vicinity, also with the crossing and its surroundings. The horse was walking at a fair gait in the middle of the road as it went past the depot and approached the crossing. The intestate was looking at the horse, and did not look up the track southerly until the horse was partly on the crossing. When the horse was some five or ten feet from the track, two witnesses who were on the opposite side of the track and a short distance away saw the intestate driving toward the crossing, and hallooed to him, saying, "The cars are coming," at the same time throwing up their hands to attract his attention, but the noise from the train was such that the witnesses were not sure that he heard their voices, nor did they know that he saw their demonstrations. The point where the intestate's view was first obstructed by the depot is about 41 feet east of the east rail, and from there in the middle of the traveled road the track is visible 600 feet southerly, and a moving train of cars can be seen 1,000 feet further. When the intestate was 16 feet from the east rail, the approaching train must have been plainly in view, and the horse yet a distance of 4 feet from the nearest rail. A stop might have been made at this place of safety until the train had passed. But, instead of thus avoiding the danger, the intestate without making vigilant use of his senses of sight and hearing recklessly drove on the crossing in front of the train. The rule making it the duty of a traveler nearing a railroad crossing to look and listen for approaching trains, and to make such vigilant use of his sight and hearing in so doing as a careful and prudent man would make in the same circumstances, was fully laid down in Manley v. Delaware & Hudson Canal Co., 69 Vt. 101, 37 Atl. 279, also in Carter v. Central Vermont R. R. Co., 72 Vt. 190, 47 Atl. 797, and need not be here repeated. In the latter case it is said that if by the vigilant use of his eyes and ears the plaintiff might have discovered and avoided the danger, and omitted such vigilance, he was guilty of contributory negligence, and that he was chargeable with such knowledge of the approach of the train as he might have obtained by the exercise of that degree of care, which in the circumstances of danger he was bound to use. There seems to be no escape from the conclusion that the intestate was guilty of negligence which contributed to the accident and precludes a recovery by the plaintiff, unless the evidence tends to show the defendant guilty of such subsequent negligence as in the circumstances renders it liable.

It is urged by the plaintiff that, when the 'intestate's horse first came in view on the westerly side of the depot, it was visible to the engineer, and would have been seen by him had he been in the exercise of requisite care, before the intestate, sitting 12 feet back from the horse's head, could look past the depot and see the approaching train; that consequently the defendant had the last clear chance to avoid the collision; and that, since the engineer was negligent in failing thus to see the team, this negligence was the proximate cause of the accident, and the negligence on the part of the intestate in driving on the crossing was remote, and will not defeat a recovery. Again assuming that the defendant was negligent in not thus seeing the intestate before he drove on the crossing, yet it does not follow that the last clear chance was with the defendant. On the contrary, the undisputed testimony of the witnesses who saw the accident shows that the intestate had an equal opportunity to avoid a collision. We have already noted the intestate's negligence in driving on the track without first making proper use of his senses to ascertain whether there was approaching danger. So far as the evidence shows, he did not look to see whether a train was coming or not until his horse was just stepping on

the crossing, or its forward feet were on the plank of the crossing. The horse was still walking, was undisturbed by the noise of the train, and was under the complete control of the intestate. On seeing the train, the intestate at first partly stopped the horse, or pulled it back, as though to back up, and then urged it forward. At that time the accident could have been prevented by backing the horse three or four feet off the crossing to a place of safety. This the intestate had time to do, for, in fact, the team subsequently moved forward at a walk far enough to place the horse entirely over the crossing before the collision, by reason whereof it escaped injury. Thus is clearly appears that the intestate's negligence was continuous to the time when the engineer discovered the team on the track, after which everything possible was done by the defendant's servants in the management of the train to prevent a collision. So, even though as assumed the engineer was negligent in not seeing the team after it was visible on the westerly side of the depot before the time when it were no longer possible for him to avoid the accident, the intestate's negligence was of the same degree and concurrent during all of the same time, to say nothing of his negligence later, and no recovery can be had. In Trow v. Vt. Central R. Co., 24 Vt. 487, 58 Am. Dec. 191, upon examination of authorities, it was held that when there has been mutual negligence, and the negligence of each party was the proximate cause of the injury, no action can be sustained, and this is the established doc-

It follows that the motion for a verdict should have been granted.

Judgment reversed, and judgment for the defendant to recover its costs.

MUNSON, J., concurs in the result.

(82 Vt. 316)

LIBBY v. CANADIAN PAC. RY. CO. et al. (Supreme Court of Vermont. Orleans. July 2, 1909.)

1. RAILBOADS (\$ 94*)--"Crossings."

A railroad crossing of roads in its primary and natural sense is an intersection in the same plane, and does not include an underpass which obviates the necessity of a crossing. In a broader sense the word covers all the means by which a traveler passes from one side of an obstructing line to another.

[Ed. Note.-For other cases, see Railroads,

Dec. Dig. \$ 94.*

For other definitions, see Words and Phrases, vol. 2, pp. 1763, 1764; vol. 8, p. 7624.]

2. RAILBOADS (§ 102*)-"FARM CBOSSINGS"-

STATUTES.

The "farm crossings" required to be constructed by general railroad law (P. S. 4450), providing that a corporation operating a railroad shall construct and maintain farm cross ings and cattle guards at all farm and road crossings sufficient to turn cattle, are surface crossings.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 311; Dec. Dig. § 102.*

For other definitions, see Words and Phrases, vol. 3, p. 2698.]

3. RAILROADS (§ 103°) - FARM CROSSINGS

CATTLE GUARDS.
P. S. 4450, requiring railroads to construct farm crossings and cattle guards sufficient to turn cattle, does not require that every farm crossing shall be so constructed as to need cattle guards.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 103.*]

4. RAILBOADS (\$ 67°)—EMINENT DOMAIN (\$ 243°)—RIGHT OF WAY—ACQUIREMENT—

-CROSSINGS. DAMAGES-

Where land is acquired for a railroad right of way, it will be presumed that the damages incident to the use of farm crossings for cattle, etc., were considered in fixing the compensation paid for the right of way, whether it was acquired by agreement or compulsory proceedings.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 07;* Eminent Domain, Dec. Dig.

5. RAILROADS (§ 102*)—CROSSINGS — NATURE AND KIND—STATUTES.

P. S. 4451, relating to railroad crossings, declares that, if the parties cannot agree on the plan, manner, or number of farm crossings, the same shall be determined by commissioners, but, if the cost exceeds the value of the land to be accommodated thereby, the commissioners need not order such crossings to be made, but shall award reasonable damages in lieu thereof. Held, that the commissioners referred to were those appointed by two judges of the Supreme Court for the appraisal of land damages and the establishment and location of crossings preliminary to the work of construction.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 102.*]

6. Railroads (§ 102*)—Farm Crossings—Un-derpass—Railroad Commissioners—Juris-

DICTION.

P. S. 4450, provides that a corporation operating a railroad shall maintain farm crossings for the use of adjoining landowners and cattle guards at all farm and railroad crossings sufficient to prevent cattle and animals from getting on the railroad, and 4611 gives to the board of railroad commissioners jurisdiction of all matters respecting the construction and maintenance of proper fences, cattle guards, and sioners had no jurisdiction to readjust a system of farm crossings on existing railroads so as to require the substitution of an underpass for cattle for a grade crossing.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 102.*]

Appeal from Order of Railroad Commissioners.

Petition by F. J. Libby before the Railroad Commissioners to compel the Canadian Pacific Railway Company and others to construct an underpass cattle crossing. From an order of the commissioners granting the petition, the railroad company appeals. Order vacated, and cause remanded.

F. E. Alfred and Wm. B. C. Stickney, for appellant. Cook & Williams, for appellee.

MUNSON, J. The petitioner seeks by this proceeding to secure the construction and maintenance of an underpass for use in the driving of his cattle to and from their pasture apart from and in addition to the regular farm crossing now existing and necessary to be maintained for the other purposes of the farm. The railroad commissioners considered that jurisdiction of this matter was given them by No. 126, p. 138, Acts 1906, and ordered the construction and maintenance of an underpass of specified dimensions and material. The defendants claim that the action of the commissioners was unauthorized. The statute governing the construction and operation of railroads provides that "a person or corporation owning or operating a railroad shall construct and maintain farm crossings of the road for the use of the proprietors of lands adjoining the railroad, and cattle guards at all farm and road crossings sufficient to prevent cattle and animals from getting on the railroad." P. S. 4450. Section 23, No. 126, p. 144, Acts 1906 (P. S. 4611), gives the board of railroad commissioners jurisdiction in all matters respecting "the construction and maintenance of proper fences, cattle guards, and farm crossings," respecting "the maintenance of the tracks, frogs, switches, gates, signals. culverts, bridges, and other structures of wood or iron over openings, and rolling stock and equipment, so as to accommodate the public," and so that the road "may be operated with safety and in compliance with law," and respecting "the manner of operating railroads and conducting the business thereof so as to be reasonable and expedient. and to promote the security, convenience and accommodation of the public, and to prevent violations of law and unjust discrimination, usurpations or extortions." The petitioner claims, in substance, that the authority to make this order is directly conferred by the provision regarding farm crossings and cattle guards; that, if not, it is within the jurisdiction given the commisfarm crossings. Held, that the railroad commissioners, in the general terms quoted above.

over all matters that pertain to the maintenance and operation of the property in its relation to the public safety; that in any event the provision regarding farm crossings may properly be construed to cover this authority in view of the broadly remedial purpose manifested in the more general provisions. The commissioners find that the petitioner's crossing is on a heavy grade over which trains going one way pass at great speed, and that a curve in the track above the crossing obstructs the view of an approaching train; that the crossing is unsuitable and unsafe for use in the driving of cattle to and from pasture, and that the safety of the traveling public is endangered by such use; that the driving of the petitioner's cattle across the track at any other point on his land would be fraught with danger to the petitioner, his cattle, and the public; that the construction of cattle guards in connection with the crossing would reduce the danger to some extent, but not enough to justify the continuance of its use for the crossing of cattle; that an underpass will subserve the safety and convenience of the petitioner, and also promote the security of travelers.

The terms "farm crossings" and "cattle guards." used in the provision giving the railroad commissioners jurisdiction of the subject, are the terms by which the duty of construction and maintenance was imposed upon railroads by the act of 1849, and by which the requirement has been continued in subsequent revisions. A crossing of roads in the primary and natural sense of the word is an intersection of them in the same plane, while an underpass is a structure which obviates the necessity of a crossing. In a broader sense the word covers all the means by which the traveler passes from one side to the other of an obstructing line. The farm crossings indicated by the general railroad law are surface crossings, for the cattle guards required in connection with them are to prevent cattle from straying from the crossings along the track. But this statutory connection of cattle guards with farm crossings does not require that every farm crossing be so constructed as to need cattle guards. In fact, this view is precluded by the statute itself, for the requirement of cattle guards applies to road crossings as well as farm crossings, and other sections of the statute authorize road crossings not at grade. One of the provisions just referred to is now embodied in P. S. 4422, and this section is cited by the petitioner in support of his contention, but without indicating the bearing claimed for it. The original provision was that a turnpike road or other way laid out to cross an existing railroad might be so made as to pass "under or over" it. Acts 1849, p. 87, No. 41, § 26. It was held in Central Vermont Railroad Co. v. Royalton, 58 Vt. 234, 4 Atl. 868, that this enactment deprived towns of the

right to build highways over a railroad at grade. The section was then amended by inserting the words "or across," and adding a provision that, if the road was laid to cross at grade, the railroad company might have a hearing before commissioners as to whether the crossing should be at grade or otherwise. Acts 1886, p. 15, No. 20. This jurisdiction was transferred to the railroad commissioners by section 13, No. 118, p. 119, Acts 1906.

An extensive jurisdiction over existing highway crossings was given the railroad commissioners by No. 125, p. 134, Acts 1906 (P. S. 4544-4550). This act looks to the gradual elimination of grade crossings, beginning with selections from those deemed most dangerous. It authorizes the commissioners to act upon the petition of the selectmen of a town or of the directors of a railroad corporation, or upon their own initiative in the absence of an application. It requires every corporation operating more than 80 miles of single track to remove at least one grade crossing every year for each 80 miles of road or fraction thereof exceeding 40 miles, and every corporation operating less than 80 miles to remove at least one grade crossing every year, and provides for an apportionment of the expense among the state, the town, and the railroad company, or between the state and the company if the commissioners act upon their own motion. Provision is also made for relieving a railroad company from the statutory requirement on a finding of the commissioners that its financial condition will not warrant the outlay. The matter of farm crossings, where the landowner and the company failed to agree regarding them, was originally determined in connection with the allowance of land damages by the commissioners appointed for that purpose. Acts 1849, p. 42, No. 41, \$ 46; P. S. 4451. The relation between these duties is illustrated by the latter part of the section, which provides that, when the cost of a farm crossing will exceed the value of the land to be accommodated, the commissioners may refuse to order the crossing and award damages in lieu thereof. Ordinarily the damages allowed the landowner were determined with reference to the injury he would sustain while in the enjoyment of such facilities of crossing as the commissioners gave him. See Thorpe v. Rutland & Burlington R. R. Co., 27 Vt. 140, 148, 62 Am. Dec. 625. In this case the right of way was conveyed to the railroad company by the orator's grantor some years after the road was built, and this is alleged to have been done in connection with an existing agreement for the maintenance of an underpass for cattle, which agreement the commissioners fail to find. This seems to indicate that possession was taken, and the roadbed and crossing constructed, under some agreement of the parties, and without the action of commissioners. But whether

the land was taken by agreement or by compulsory proceedings it is to be presumed that the incidental damages were considered in fixing the compensation. Norris v. Vermont Central R. R. Co., 28 Vt. 99.

The matter to be determined under P. S. 4451, is the plan, manner, and number of the farm crossings to which a landowner is en-If the parties cannot agree upon these, the commissioners are to determine them. The commissioners referred to are the commissioners to be appointed by two judges of the Supreme Court for the appraisal of land damages, and it is apparent from this that the statute contemplates a determination of the number, style, and location of the crossings preliminary to the work of construction. This provision has not been repealed unless by implication, and the revisers have not undertaken to determine this question, but have embodied the section in the Public Statutes with a note referring to section 4611. This, as we have seen, gives the railroad commissioners jurisdiction in all matters respecting the construction and maintenance of cattle guards and farm crossings. Now, whatever else may be included, does this cover a readjustment of the system of farm crossings on existing roads? This is the question really presented; for the order involves increase of number and change of construction, and is based upon findings that could properly be made in a great number of cases. It seems clear that this jurisdiction cannot be based solely on the use of the word "construction." If the act authorizing the elimination of highway grade crossings had not been passed, and if highway crossings had been included in the clause in question, so that the commissioners had been given jurisdiction in all matters respecting both farm and highway crossings, it would hardly be claimed that the commissioners could require a railroad company to substitute an underpass for a grade crossing on the application of selectmen and an appropriation of whatever land might be needed for any change in the approaches. By the second clause above quoted the commissioners are given jurisdiction in all matters respecting the maintenance, among other things, of the tracks, and of culverts, bridges, and other structures of wood or iron over openings; the word "construction" not being used. It is probable that an underpass is within the class of structures described; and it is true that the jurisdiction conferred by this clause is given with express reference to the safe operation of the road; but there is nothing in this that can be held to confer a broader jurisdiction over the subject of farm crossings than is conferred by the clause already considered. We find nothing in any of the provisions relied upon by the petitioner that indicates an intention to confer this authority. The fact that the claimed jurisdiction extends

over matters originally determined in connection with the allowance of land damages affords some reason for believing that an intention to confer it would have found expression in some definite provision. In the absence of any definite expression of intention, other legislation of the same session already referred to is entitled to special consideration. The jurisdictional fact is that the use of this crossing as a driveway for cattle is a source of danger to the petitioner and to the traveling public. The same might be said of its use for the drawing of loads of hay, logs, and other bulky and heavy materials; and such a finding would have afforded the same basis for the requirement of a full underpass that the present finding does for the order made. If the commissioners have jurisdiction to order this underpass for cattle, they have jurisdiction to require the substitution of underpasses for farm crossings generally, and underpasses available for all farm purposes may require expenditures as great as do many of the openings for highways. The provision thus construed would authorize a series of expensive alterations of farm crossings, to be carried on contemporaneously with a series of like changes of highway crossings, which alone require an expenditure so considerable that provision was made for the contingency of financial inability. In view of the greater risk of accident attending the use of grade crossings of the latter class, and of the manifest purpose of the Legislature to proceed with their elimination as rapidly as the resources of those charged with the expense will reasonably permit, it is difficult to find in the general language of the later act of the same session an intention to give this further jurisdiction.

The order is vacated; but the petition is sustained on the allegation that the crossing has no cattle guards and the prayer for general relief, and the case is remanded for the action of the board in that behalf.

Judgment accordingly.

ROWELL, C. J., not sitting.

(75 N. J. E. 586)

SPARKS et al. v. FORTESCUE et al. (Court of Errors and Appeals of New Jersey. June 21, 1909.)

EQUITY (§ 430*)—OPENING DECREE. A petition to open a decree in the Court of Chancery cannot be filed after the expiration of the statutory period within which an appeal can be taken from such decree.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1034-1038; Dec. Dig. § 430.*] (Syllabus by the Court.)

Appeal from Court of Chancery.

Bill by Amelia R. Sparks and Emma Ross against Thomas H. Fortescue and Clarence Ross. Decree for defendants. 67 Atl. 391. Complainants appeal. Reversed.

See, also, 69 Atl. 185, 73 Atl. 241.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Thomas E. French, for appellants. T. J. by this court, and it was held that such a Middleton and J. J. Orandall, for respond-

VROOM, J. On November 2, 1903, the complainants under the statute filed a bill to quiet title. The defendants filed separate answers, and the case came on regularly for a hearing at the May term, 1904, of the Court of Chancery. On the 18th of May, 1904, a final decree was advised by Vice Chancellor Pitney, which was filed May 27, 1904. On May 17, 1907, nearly three years later, the defendant Clarence Ross filed a petition in the Court of Chancery setting forth: That he was a debtor of the defendant Fortescue, and that said Fortescue had begun a suit at law by attachment in this state against petitioner, and seized the identical lands and tenements described in the said bill of complaint. That Fortescue had employed counsel to represent himself and petitioner, and that he had filed answers to the bill. That, after the testimony of the complainant had been taken before the master, said counsel advised petitioner and his mother, and other witnesses who were present at the hearing, ready to be sworn and give their testimony, that no evidence on their part was necessary. That upon this advice they did not proffer themselves as witnesses, and a decree went against them practically by default. The petitioner also set up in his petition that a similar suit is now pending against his brothers and sisters, and which has not been decided, and is willing to enter into a stipulation to submit to the same decree against himself as shall be made against them. Upon this petition an order to show cause was allowed by Vice Chancellor Leaming, directed to the complainants. They did not appear on the return of the rule, and the Vice Chancellor advised an order granting the prayer of the petition and opening and setting aside the decree of May 18, 1904.

This order cannot be sustained. time of the making of the decree in this cause the 111th section of the chancery act (Rev. 1902, Act April 3, 1902 [P. L. p. 545]) was in force, and it provided that all appeals from final decrees on bills to quiet title should be made within three months after filing the decree appealed from. decree was dated May 27, 1904, and the time for taking the appeal expired August 27, 1904. Manifestly no appeal would lie, and defendants sought by petition to open the decree upon the theory contended for on the argument, that such petition or application to open a decree would not be an appeal in any sense. Any question, however, as to this method of procedure has been settled in this court. In Cook v. Weigley, 69 N. J. Eq. 836, 65 Atl. 480, a petition was filed in the Court of Chancery to open a decree

petition should not be entertained, and that the only proceeding by which such a decree could be challenged was by a bill of review. The situation in the present case is clearly the same. If a petition to open a decree cannot be filed after an appeal has been taken and decided, it ought not to be permitted to be filed after the time within which an appeal can be taken has passed. Had the defendants, however, instead of filing a petition, proceeded by bill of review, as suggested in Cook v. Weigley, supra, they would have been met with the decision of this court in Watkinson v. Watkinson, 68 N. J. Eq. 632, 60 Atl. 931, 69 L. R. A. 397, where it was held that, although there is no express statutory limitation as to the filing of bills of review, the analagous limitation of the right of appeal should govern, and a bill of review cannot be filed after the lapse of three years from the final decree (the limitation of three years was changed by the revision of the chancery act of 1902, supra), except in case of new or newly discovered matter. And, even if not barred by the limitation as above stated, it is difficult to see upon what ground permission to file a bill of review could be based. There is no allegation of pretense of any new or newly discovered evidence or of any special equity which could give the court the discretionary power to make the order. Watkinson v. Watkinson, supra.

But it was contended on the part of the defendants that the complainants had no standing in this court to review the order appealed from because they had failed to appear on the return of the rule to show cause. In support of this contention the case of Townsend v. Smith, 12 N. J. Eq. 350, 72 Am. Dec. 403, is relied on. That case held that where a defendant does not appear at the hearing before the Chancellor, the case having been regularly noticed for argument, he cannot appeal from the decree thus rendered in his absence. This case follows the decision in Gelston v. Hoyt, 13 Johns. (N. Y.) 576, but an examination of both cases, and the authorities cited, shows clearly that what was decided applied only to the absence of a party at the hearing of the case, and that this view has since Townsend v. Smith, supra, been again taken in this court, is manifest from the opinion in Decker v. Ruckman, 28 N. J. Eq. 614, where Knapp, J., said: "If the cause had been regularly set down for hearing and noticed for argument. a failure to appear would have placed the appellants in the position of the parties in Townsend v. Smith, 12 N. J. Eq. 350, 72 Am. Dec. 403, upon the ground that, if the defendant voluntarily absents himself from the hearing, it may fairly be presumed that no defense is insisted on." When, however, upon a petition to open a decree, which in which had been appealed from and affirmed no sense can be construed as a hearing of

the cause within Townsend v. Smith, supra. it is apparent upon the very face of the petition that it is unmeritorious, and in my opinion the complainants were entirely justice.

5. Dedication (§ 5*) — Public Way Over land may dedication of a public way over land may opinion the complainants were entirely justice. tified in ignoring the order to show cause. They had a right to rely that what ought to be done would be done. This question, however, need not be determined; it appearing that the respondents elected to answer the petition of appeal, instead of moving to dismiss it as they might have done. In thus answering they have submitted the case to this court on its merits, and have waived any right (if such they had) to dismiss the appeal. This is the rule laid down by this court at the November term last of this court in State Council of Jr. O. U. A. M. v. Enterprise Council No. 6, 72 Atl. 19.

The decree below should be reversed, with

(77 N. J. L. 659)

TRENTON WATER POWER CO. v. DON-NELLY.

(Court of Errors and Appeals of New Jersey. July 2, 1909.)

1. NAVIGABLE WATERS (§ 22*)—UNAUTHOR-IZED DAM BY WATER POWER COMPANY—EF-

PECT AS TO COMPANY'S RIGHTS.

Where a water power company is fully authorized to divert the waters of a river into an artificial raceway and appropriate them to its sole and exclusive use free from any public right or easements therein, the company's construction of a dam of a character not authorized does not render the diversion unlawful nor op erate as a surrender to the public of its exclusive right to use the water of the raceway con-ferred on it by the Legislature.

[Ed. Note.—For other cases, see Navigable Waters, Dec. Dig. § 22.*]

2. NAVIGABLE WATERS (§ 19*) — PASSING AROUND OBSTRUCTIONS—RIGHTS OF PUBLIC.

The right of the public to use a raceway to

and the right of the public to use a raceway to pass out of a river around an obstruction and back into the river again, providing it can be done, arises out of the necessity of the situation, and is restricted thereto, and such right cannot be stretched so as to justify navigation of the raceway throughout its whole course, where the limited right cannot be exercised owing to existing physical conditions.

[Ed. Note.—For other cases, see Navigable Waters, Dec. Dig. § 19.*]

Waters, Dec. Dig. § 19.*]
3. HIGHWAYS (§ 82*)—RIGHTS OF TRAVELERS IN PASSING AROUND OBSTRUCTIONS.

The right of travelers to leave a highway to pass around an obstruction placed therein by an adjoining landowner arises out of the necessity of the situation, and is restricted thereto, and is only exercisable over the land nearest the obstruction and for such a distance as is reasonably required for passing around it, and it does not entitle the traveler to pass over the whole or as much of the landowner's property as he sees fit, or to cross it to reach a destination not on the highway. tion not on the highway.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 291; Dec. Dig. § 82.*]

4. Dedication (§ 4*)—Limitation of Public Uar.

A dedication may be for a limited public

[Ed. Note.-For other cases, see Dedication. Dec. Dig. § 4.*]

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 2; Dec. Dig. § 5.*]

6. Dedication (§ 50*)—Extent When Im-PLIED FROM ADVERSE USER.

The extent of a dedication, when it is implied from an adverse public user, is measured by that user; or, in other words, it is measured by the actual enjoyment of the public easement. [Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 91-94; Dec. Dig. § 50.*]

7. DEDICATION (\$ 50°)—Use of RACEWAY FOR NAVIGATION—LIMITATION THEREOF.

Where the use of a raceway, from which a dedication might be presumed, was only by rowboats propelled by hand, the right of the public to use it for navigation, so far as it springs from dedication, is limited to navigating it with such boats, and does not justify its use by a power hoat. by a power boat.

[Ed. Note.-For other cases, see Dedication, Dec. Dig. § 50.*]

Error to Supreme Court.

Suit by Trenton Water Power Company against Frederick W. Donnelly to test defendant's right to navigate a raceway with a power boat against plaintiff's objection. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Linton Satterthwait, for plaintiff in error. James & Malcolm G. Buchanan, for defendant in error.

GUMMERE, C. J. The Trenton Water Power Company is the successor to the property and franchises of the Trenton Delaware Falls Company, a corporation chartered by the Legislature in 1831 and authorized to erect a wing dam in the Delaware river between the mouth of the Assanpink creek and the head of Wells Falls, and to cut a raceway therefrom along and near the bank of the river to a point below Trenton Falls. Act Feb. 16, 1831 (P. L. p. 133). The wing dam was required by the charter to be so constructed as not to impede the passage of fish, rafts, arks, and boats in the river; and the sole purpose for which it and the raceway were authorized to be constructed was the supplying of water power for mills and manufacturing plants. The Delaware Falls Company, in pursuance of the authority so conferred, constructed a wing dam in the river at Scudders Falls, and a raceway from the dam to the lower part of the city of Trenton, a distance of about seven miles. There is no navigable outlet at the lower end of this raceway; the water being returned to the river over a dam or spillway. The present suit was brought by the Trenton Water Power Company to test the right of the defendant, Donnelly, to navigate this raceway with his power boat against its objection. There was a verdict and judgment for the plaintiff.

The defendant at the trial offered to show

that the plaintiff company, some 15 or more years prior to the commencement of the suit, had so altered the construction of its wing dam as to completely obstruct the passage of boats in the river at that point. The trial court, deeming this testimony irrelevant and immaterial, excluded it, and this judicial action is made the pasis of the first assignment of error. The defendant insisted in the court below, and contends here, that this testimony was competent for the reason that the effect of the construction and maintenance by the plaintiff of an unlawful obstruction to the navigation of the river which diverted the waters thereof into its raceway would be to entitle him, as one of the public, to use the raceway for navigation throughout its whole length. He bases this contention principally upon the principle underlying cases like Dwinel v. Barnard, 28 Me. 562, 38 Am. Dec. 507, namely, that, if a person obstructs the flow of the waters of a navigable stream over their accustomed bed and turns them into a new channel, the right of the public to navigate such waters is not thereby terminated, but is exercisable upon the waters flowing through the new channel. In our opinion the principle promulgated in the line of cases referred to is not applicable to that now under consideration. The cases in which it has been declared deal with the effect of the diversion of a stream upon the public right of navigation where such diversion has not been authorized by the public. In the present case the plaintiff had full authority from the Legislature of the state to divert the waters of the Delaware into its artificial raceway and appropriate the waters so diverted to its sole and exclusive use free from any public right or easement therein, and the diversion is not rendered unlawful by the construction of a dam of a character unauthorized by the plaintiff company, nor does such unauthorized act operate as a surrender to the public of the right of exclusive user of the waters of the raceway conferred upon the plaintiff by the Legislature.

Defendant further contends that this testimony was competent for the reason that the obstruction of the navigation of the river by the plaintiff without legal authority entitled the public to use the raceway for the purpose of passing around the obstruction. His argument in support of this contention is that, where a public highway is obstructed by an adjoining owner, the public is entitled to enter upon the property of the obstructor for the purpose of passing around the obstruction; and that, as the Delaware river is a public highway, the principle applies in the present case as fully as it does in cases where the highway is laid over the land. It may be conceded, for the purpose of deciding this case, that the total obstruction of the navigation of the river by

would justify the public in using its raceway for the purpose of passing out of the river around the obstruction and back into the river again, provided that this coulc be done, and for the same reason that justifies persons traveling upon a public road, when they come upon an obstruction placed in it by an adjoining landowner, in leaving the highway and passing around the obstacle over the property of said landowner; but the right in such cases arises out of the necessity of the situation, and is restricted to It is only exercisable over the necessity. the land nearest to the obstruction and for such a distance as is reasonably required for passing around it. It is not broad enough to entitle the traveler to pass over the whole or as much of the landowner's property as he sees fit, or to cross it for the purpose of reaching a destination not upon the highway along which he is traveling. As has already been stated, there is no navigable outlet over the plaintiff's raceway into the river except at its point of intake at Scudders Falls. It is impossible therefore for the public to make use of it for the purpose of passing around the obstruction which it was sought to show it had placed in the river. Conceding that the public would have a right to use the raceway for the purpose indicated, if it was possible to do so, that right cannot be stretched so far as to justify the navigation of the raceway throughout its whole course; and the fact that such limited right cannot be exercised owing to the existing physical conditions cannot operate to create the broader right now contended for by the defendant. The rejected testimony was, in our opinion, properly excluded by the trial court.

The defendant further contended that there had been a dedication by the plaintiff of its raceway to public travel thereon by boats, shown by its long-continued public user for that purpose, and that for this reason he was justified in plying upon it with his power boat. The trial court held that the defendant had failed to show such a dedication as entitled him to use a motor boat upon the raceway, and so instructed the jury. Upon this instruction the second and last assignment of error, relied upon, is rested. Passing the question whether the plaintiff can dedicate its raceway to public use as a water highway, in view of the restriction as to user contained in its charter, and admitting that a dedication may be presumed from the use of it which was shown to have been made by the public, we nevertheless are of opinion that the defendant's justification has not been made out. It is entirely settled that a dedication may be for a limited public use. A dedication of a public way over the land of the dedicator may be limited to use by travelers on foot only, or to horses unattached to vehicles, or the plaintiff, without legislative authority, in any other way which the dedicator sees

fit. Poole v. Haskinson, 11 M. & W. 827; Mercer v. Woodgate, L. R. 5 Q. B. 26; Arnold v. Blaker, L. R. 6 Q. B. 433; 9 Amer. & Eng. Ency. of Law (2d Ed.) p. 75; 13 Cyc. p. 460. The user of the raceway, from which a dedication might be presumed was only by rowboats of various kinds, canoes, and scows-all propelled by hand. The extent of the dedication, when it is implied from an adverse public user, is measured by that user; in other words, the dedication is commensurate with the actual enjoyment of the public easement. Carlisle v. Cooper, 21 N. J. Eq. 594, and cases cited. That being so, the right of the public to use this raceway for the purpose of navigation, so far as it springs from the plaintiff's dedication, is limited to navigating it with boats of the kind mentioned, and propelled by hand, and does not justify its use by power boats.

The judgment under review will be affirmed.

(77 N. J. L. 668)

TRENTON WATER POWER CO. v. WALKER.

(Court of Errors and Appeals of New Jersey. July 2, 1909.)

Error to Supreme Court.
Suit by the Trenton Water Power Company against Samuel Walker to test defendant's right with a power boat tion. Judgment for to navigate a raceway with a power boat against plaintiff's objection. Judgment for plaintiff, and defendant brings error. Affirmed.

Linton Satterthwait, for plaintiff in error. James & Malcolm Buchanan, for defendant in

GUMMERE, C. J. The judgment under review will be affirmed, for the reasons set out in the opinion in this court in the case of Trenton Water Power Company v. Donnelly (delivered at the present term of the court) 73 Atl. 597.

(79 N. J. L. 67)

In re HERRON.

(Supreme Court of New 1909.) Jersey. July 16

981*) — DISCHARGE — CRIMINAL LAW

GROUNDS—INSANITY.

A prisoner in the state prison under sentence of death is not entitled to his discharge therefrom because, upon an inquiry by the trial court, it was found that at that time his mental condition was inconsistent with his execution.

[Ed. Note.—For other cases, see Crim. Law, Cent. Dig. § 2497; Dec. Dig. § 981.*]

Application of Archibald Herron for writ of habeas corpus. Writ denied.

Argued June term, 1909, before BERGEN, VOORHEES, and REED, JJ.

Charles D. Cowenhoven, for petitioner. Theodore B. Booraem, Prosecutor of the Pleas for Middlesex County, for the State.

REED, J. Archibald Herron was convicted in Middlesex county court of over and ter-I ceases to exist, to make out, sign, and deliv-

miner of murder in the first degree and sentenced to the punishment of death. Subsequently an inquiry was entertained by the trial court into the mental condition of the condemned defendant, for the purpose of ascertaining whether he was afflicted with a mental disorder of a degree and type which, by the rules of common law, was inconsistent with his execution. The trial court found that he was so afflicted, and by its order remanded the prisoner to the custody of the keeper of the state prison with a reprieve until a further order of the court. The defendant's counsel has sued out this writ to test the right of the keeper of the state prison to retain the defendant in his custody.

The disposition of the defendant, whose execution has been so arrested because of his mental derangement, is the question now presented. It is quite manifest that he cannot be sent to an asylum for the insane. It was stated in the opinion delivered in Re Herron (N. J. Sup.) reported in 72 Atl. 133, that the finding by the trial court that a person sentenced to death was so mentally deranged that his execution should be arrested afforded the prisoner only a temporary immunity, and that, upon the prisoner recovering the requisite degree of sanity, he could then be executed. In Re Hadfield reported in 27 State Trials, 1281, it was considered that, even in the case of an acquittal on the ground of insanity, all the trial court could do, in the absence of some statutory authority, was to remand the prisoner to the prison whence he came. There is no statutory authority in this state for the imprisonment of a prisoner sentenced to capital punishment in any place other than the state prison. It was decided in Re Herron, supra, that the insanity of such a prisoner could not be decided under section 13 of the act of July 5, 1906 (P. L. p. 722), which statute provides for the removal of imprisoned convicts to a hospital for the insane. There is no other statute in this state which permits the transfer of such a prisoner from the state prison to an asylum. It follows therefore that the prisoner must remain in the custody of the keeper of the state prison or be entirely discharged from imprisonment. The latter course is unrecognized by any practice at common law, and is inconsistent with the fact that the sentence of the prisoner is only temporarily arrested. It is inconsistent with the provisions of the electrocution act (P. L. 1906, p. 112). By this statute it is enacted that the keeper of the state prison is bound to keep the person sentenced to death in confinement after the warrant of the presiding judge of the trial court is received by him. It further enacts that, if the execution of the sentence within the time appointed shall by any cause be prevented, it shall be the duty of the judge, as soon as such cause

er another warrant. So from the time of the | true, and that it was error to direct a verdelivery of the first warrant, and with it of the prisoner, to the principal keeper of the state prison, until the infliction of the punishment of death, the person so sentenced shall be kept in confinement, unless he shall be lawfully discharged from such sentence.

The petitioner in this case has not been discharged from his sentence. As already remarked, the execution of the sentence has only been stayed. The prisoner has been reprieved until a further order of the trial court, and further warrant directed to the keeper of the state prison.

The prisoner is remanded to the custody of the principal keeper of the state prison.

(77 N. J. L. 779)

BATURA et al. v. McBRIDE.

(Court of Errors and Appeals of New Jersey. July 6, 1909.)

EVIDENCE (§ 417*) — FRAUD (§ 53*) — PAROL EVIDENCE — CONTRADICTING WRITTEN CON-TRACT-FALSE REPRESENTATIONS--Evidence.

At the Supreme Court—circuit—trial of this case, the plaintiffs offered certain material testimony (referred to at length in the following opinion) tending to establish their right to a verdict for substantial damages. The trial judge overruled the offers as inadmissible, and at the close of the plaintiffs' evidence, on the defendant's motion, directed a nonsuit.

Held, that such exclusion and direction was error, and that the judgment below should be reversed, and a venire de novo awarded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874–1899; Dec. Dig. § 417;* Fraud, Cent. Dig. § 49; Dec. Dig. § 53.*]

(Syliabus by the Court.)

Error to Supreme Court.

Action by Klementina Batura and others Judgment for against Thomas McBride. defendant, and plaintiffs bring error. Reversed.

See, also, 75 N. J. Law, 480, 68 Atl. 113.

J. J. Stamler, for plaintiffs in error.

VREDENBURGH, J. Two circuit trials of this cause have occurred, and the proceedings of the second trial are now presented for review. This court has decided, upon error brought by the plaintiffs, that the judge erroneously directed, at the former trial, the jury to find a verdict for nominal damages in favor of the plaintiffs, and thereupon reversed the judgment entered upon postea. Such direction of the trial judge was put upon the ground that there was no evidence upon which the jury might estimate any damages. The opinion of this court in that case is reported in 75 N. J. Law, 480, 68 Atl. 113, and holds specifically that there was evidence to go to the jury as to the value of the houses and lands purchased as they were in fact, and as they would have been if the representation as to the leasehold values, upon which the suit was founded, had been i the parties.

dict for nominal damages.

At the trial now brought in review before us, the judge, at the close of the plaintiffs' evidence, directed a nonsuit, and the plaintiffs have duly assigned error to such disposition of their cause. The legality of this judgment is challenged by the plaintiffs upon the ground that certain evidence offered by them and essential in law to establish their right to a verdict for substantial damages was illegally excluded by the rulings of the judge; their contention being that the evidence offered was legal and relevant and should have been received by the court and submitted to the jury. Since it is probable that the case will be again tried, it is of importance to determine specifically the legality of the testimony offered. The substantial issue in controversy related to the calsity of defendant's statements communicated to the plaintiffs, upon the strength of which the plaintiffs claimed they were induced to purchase and acquire of defendant certain real estate at the price of \$16,000. The material averments of the plaintiffs' declaration were to the effect that the defendant, intending to deceive and defraud the plaintiffs, had falsely and fraudulently represented to them that the property sold by him to them produced a rental of \$142 every month, whereas, in truth, such rental was only \$132 per month, and that the plaintiffs' damages by reason of such misrepresentation was the value of this monthly excess of \$10 for the unexpired term of the lease-a period of about four years. To prove these averments the plaintiffs relied largely upon the statements of the defendant made directly by him to one of the plaintiffs who was called as a witness in her own behalf. She was asked by her counsel the following question, viz.: "Q. Did you see Mr. McBride before the deed was given for the property to talk to him about the lease, and how much rent the lease was to bring?" Objection was made by the defendant's counsel to the question on the ground, as stated by him, "that the contract was the evidence of the agreement of the parties in this connection," and the court thereupon overruled the question. Again, she was asked: "Q. Did you, or not, meet Mr. McBride in Mr. Schmidt's office, before you paid the balance of the purchase price for the property and talk to him about the Weidenmayer lease, and how much the rental of the store was?" The same objection was made, as above, and was again sustained by the court. It will be conceded that the propounded questions were clearly material and admissible in support of the plaintiffs' declaration, unless the answers called for might have tended either to contradict or vary the terms of the written contract for the purchase of the property entered into between

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1997 to date, & Reporter Indexes

Upon turning to this contract, which was introduced in evidence and is printed in full in the record before us (dated April 25, 1906), it is apparent that it is entirely silent upon the subject sought to be inquired into, i. e., the amount of the rental payable under the lease in question. The only reference in the contract to the lease is contained in the following brief words, viz.: "The premises are conveyed subject to a lease on the corner store, held by Geo. Weldenmayer of the city of Newark." The plaintiffs' suit was not founded upon any alleged breach by the defendant of the terms of the written contract, but upon matter arising dehors the written agreement. Recovery of damages was sought by the plaintiffs because of the alleged false oral representation by the defendant to the plaintiffs respecting the amount of rent payable to the owner of the reversion by force of the lease. As to this the contract did not speak, and the minds of the contracting parties had not met in the agreement, the amount of rent not being specified in it, and it is therefore clear that properly responsive answers of the witnesses to the questions proposed could not have tended to either contradict or vary any of the terms of the paper in question. The action of the trial court in overruling these material questions is plainly unsustainable.

From the record of the trial below it also appears that many questions were asked by the plaintiffs' counsel of the witness Adolph Reitman tending to show that both before and after the contract for the sale of the property was signed, but before the property was acquired by the plaintiffs, the defendant had made false representations to the witness respecting the amount of the rent in question, that the defendant intended the witness should communicate such representations to the plaintiffs, and that he (the witness) had done so. The court overrules many of these questions, finally holding that representations made after the parties had already bound themselves could not influence them, and that such representations to be admissible must have been made "before the signing of the contract." Substantially the same reasoning was expressed afterwards by the judge in his grant of the motion to nonsuit. This conclusion, and the reason given for it by the court, seem to me to be untenable. The point of time upon which, under this view, the legality of the questions asked of the witness depended, was the date of the signing of the contract of sale (April 25, 1906); the view taken being that representations of the defendant, made after the execution of the contract of sale, although before the plaintiffs acquired legal title to the property, could not, from a legal point of view, be deemed to have influenced the conduct of the plaintiffs in the acquisition of the property.

But this reasoning, it seems to me, bears only upon the weight, and not upon the ad-

missibility, of the testimony. At the date of the signing of the contract the plaintiffs had paid but \$300 of the \$16,000 of the consideration for the property. The \$15,700 balance of the money due the defendant under the contract was still unpaid, and was not payable until May 25, 1906, the day fixed for the delivery of the deed. False representations by the defendant to the plaintiffs as to the rental value of the leasehold included in their purchase, made to them at any time before the last date, would, we must presume, furnish a continuing inducement to them to pay the purchase money and acquire complete legal title and possession of the property. While the signing of the contract gave them an equitable ownership, they were not, by the very terms of the agreement, entitled to the possession of the property, nor to any deed of conveyance until the whole \$16,000 was paid upon a future day named in the contract. If they, at the closing of their purchase, had not been deceived by the defendant as to the fact that the represented rental return exceeded the actual, they could, and presumably would, have then insisted upon their legal right to an abatement or reduction of the purchase price to the extent of the value of such difference (subject, of course, to a proper adjustment or discount of the present value of the rentals payable on future dates), and could have avoided the circuity of action and consequent expenses of the pending litigation. These false representations, whether held out to them before or after the contract was signed, presumably led the plaintiffs to pay the defendant a sum of money larger by the amount of said rental excess than was justly due him at the closing of the transaction. It is no answer to say that the plaintiffs were bound by their contract to take the deed and pay the purchase money. They were only bound in case the contract itself was valid, and there was evidence before the court justifying an inference that the contract itself had been fraudulently obtained. The evidence of false representations between the execution of the contract and the delivery of the deed was relevant also as rendering more probable the testimony as to similar representations prior to the execution of the contract.

I think the questions asked of Reitman as to the defendant's representations concerning the rent, which were communicated by the former to the plaintiffs, whether before or after the contract was signed, were competent. There can be no doubt under the evidence that Reitman was acting as the agent of both parties throughout the entire transaction, and therefore representations made by either party to him when communicated to the other party were, as against the person making them, properly evidential. Irrespective of the testimony that was thus improperly rejected, the plaintiffs, at the close of their proofs, had made out a prima facie case of deceit.

We also think that Exhibit P-1, which established the fact of Reitman's agency for the defendant, was improperly excluded, and that Exhibit P-4 was admissible as proof of the actual amount of rent to which defendant was entitled.

The judgment below should be reversed, and a venire de novo awarded.

(81 N. J. L. 723)

GREEN v. TÓWN OF IRVINGTON. (Court of Errors and Appeals of New Jersey. June 14, 1909.)

1. EMINENT DOMAIN (§ 277*)—REMEDIES OF LANDOWNER—ACTIONS—CONDITIONS PRECEDENT.

Section 63 of the town act of 1895 (Gen. St. 1895, p. 3539, \$ 214), providing that an owner of real property, who shall have presented written objections to an award for such property taken at the time designated in the notice of the time fixed by the town council for hearing objections to the confirmation of the report, may, if he is dissatisfied with the council's determination, commence an action on contract against the town, was complied with where an owner first submitted his objections, and the owner was not required to present them at the original meeting.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 277.*]

(Syllabus by the Court.)

2. Words and Phrases—"Adjourned Meeting."

An "adjourned meeting" is not a new meeting, but a mere continuance of an original meeting.

Error to Supreme Court.

Action by Francis S. Green against the Town of Irvington. A judgment for plaintiff was affirmed by the Supreme Court (69 Atl. 485), and defendant brings error. Affirmed.

Riker & Riker, for plaintiff in error. Herbert Boggs, for defendant in error.

TRENCHARD. J. This is a suit to recover the value of a strip of land along the front of plaintiff's lot, condemned by the defendant, the town of Irvington, for the widening of Stuyvesant avenue, and the damage done to the remainder of the lot by the taking. The action was brought by the plaintiff below under the provisions of the sixty-third section of the town act of 1895 (Gen. St. 1895, p. 8539, § 214), which provides that, whenever any person who shall have presented objections to an award as provided in section 61 of the act shall be dissatisfied with the determination of the council, he may bring an action on contract against the town, in the Supreme or circuit court, for the value of the land taken and the damage done by the taking. Section 61 (section 212) of the act provides the method of laying out streets and of awarding damages to landowners. The commis-

each piece of land taken and the damage done to the owners by the taking and make a report of such estimate and appraisal to the town council, and notice is given by advertisement of the time and place when and where the council will meet to hear and consider any objections to the award which may be presented in writing, and all objections at such time and place presented in writing the council shall consider and adjudicate upon, and the awards made in said report may be corrected accordingly. The undisputed proofs taken at the trial showed that the town council of Irvington fixed June 6, 1905, as the time to hear objections to awards. At that time the hearing was adjourned to June 13, 1905, then to June 20th, and then to June 27, 1905. On June 27, 1905, the plaintiff appeared before the council and presented written objections to the confirmation of the award to him, and at that meeting the award to him was confirmed, notwithstanding his objections. He thereupon brought this suit. At the trial the jury found a verdict in favor of the plaintiff, and the Supreme Court affirmed the judgment entered thereon. This writ of error brings up for review the judgment of the Supreme Court.

The contention of the defendant at the trial and in the Supreme Court was, and here is, that the plaintiff did not comply with the requirements of the sixty-first section of the statute, in that he did not present his objections in writing at the time fixed for the hearing and specified in the notice, to wit, June 6, 1905, and therefore cannot maintain an action under section 63 of the act. We think there is no merit in that contention. The meeting of June 27. 1905, at which the plaintiff's written objections were presented, was an adjourned meeting of the meeting fixed for June 6, 1905. An "adjourned meeting" is not a new meeting, but a mere continuance of an original meeting. State v. Jersey City, 25 N. J. Law, 309, 312; Staates v. Borough of Washington, 44 N. J. Law, 605, 611, 43 Am. Rep. 402. Any business which might have been transacted at the original meeting may be transacted at the time to which the meeting is adjourned. Dillon, Mun. Corp. (4th Ed.) § 287; Staates v. Borough of Washington, 44 N. J. Law, 605, 611 43 Am. Rep. 402; Stiles v. Lambertville, 73 N. J. Law, 90, 92, 62 Atl. 288.

have presented objections to an award as provided in section 61 of the act shall be dissatisfied with the determination of the council, he may bring an action on contract against the town, in the Supreme or circuit court, for the value of the land taken and the damage done by the taking. Section 61 (section 212) of the act provides the method of laying out streets and of award-ing damages to landowners. The commissioners of assessment appraise the value of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the filing of said map and report to be printed in the official newspaper of the town, or, if there be none, in a newspaper published in the county and circulating in the town, for the period of two weeks, which notice shall contain a general description of the improvement intended, of the land to be taken, and of the land to be assessed therefor, and shall state the time and place when and where the council will meet to hear and consider any objections to said report or to the improvement, which may be presented in writing." Gen. St. 1895, p. 3538, The council are to meet to hear and consider objections which may be presented in writing. The council did meet on June 6, 1905, for this purpose, and adjourned the meeting for that purpose from time to time to June 27, 1905. The meeting of June 27, 1905, was then clearly a continuance of the original meeting of June 6, 1905, fixed for the purpose of doing the very business done at this adjourned meeting. As was said by the Supreme Court, the very purpose of continuing a meeting such as that of June 6th is to afford time to all parties who desire to object to the confirmation of the award to submit their objections and be heard thereon; a single sitting of council being usually insufficient for that purpose. The statute nowhere says that the objections must be filed at a particular time, but merely that the council shall meet to hear and consider objections presented. For these reasons we think, as the Supreme Court thought, that the presentation by the plaintiff of his objections was made in strict compliance with the statute.

This view renders unnecessary the consideration of the question whether the acceptance by the town council of plaintiff's objections, and action thereon, might be regarded as a waiver by the town of its right to insist upon a strict observance by the objector of the statutory condition. We therefore have not considered that question. All other assignments of error argued are sufficiently disposed of in the opinion of Chief Justice Gummere in the Supreme Court, reported in 69 Atl. 485.

The judgment of the Supreme Court should be affirmed.

(75 N. J. Et. 542)

VULCAN DETINNING CO. v. AMERICAN CAN CO.

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

Injunction (§ 194*)—Trade Secrets—Prof-EXTENT OF ACCOUNTING.

TIS EXTENT OF ACCOUNTING.
Where defendant making use of complainant's secret process did not know that it was infringing upon complainant's rights until it acquired notice thereof by complainant's filing of a bill to restrain further use of the process, but continued the user thereof after such notice.

profits made by defendant through the use of the process from the date of filing the bill up to the time of taking the account, but not for profits made before the filing of the bill; defendant's user before that time not amounting to wrongdoing.
Note.—For other cases,
Dan Dig. § 1

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 414; Dec. Dig. § 194.*]

Appeal from Court of Chancery.

Bill by the Vulcan Detinning Company against the American Can Company. Decree for complainant (69 Atl. 1103), and defendant appeals. Reversed for modification,

R. V. Lindabury, for appellant. Robert H. McCarter (Henry Wollman and Edward S. Seidman, on the brief), for respondent.

GUMMERE, C. J. The bill in this case prayed for an injunction restraining the defendants from using a secret process of the complainant for detinning tin scrap, and also for an accounting of the profits made by the defendants through the use of that process. The case went to a hearing on bill, answer, replication, and proofs, and resulted in a decree of dismissal. On review by this court the decree was reversed, and it was held that the relief prayed for in the complainant's bill should be decreed by the Court of Chancery, with the single exception of the prayer for an accounting, which matter, not having been argued before this court, was sent back to be disposed of in the court below. Upon the return of the case to the Court of Chancery, application was made for the taking of an account of the profit made by the defendants through their use of the complainant's secret process; and, after argument before Howell, V. C. (to whom the matter was referred), it was ordered that the defendants account to the complainant for all profits made by them directly or indirectly in, through, or in connection with, detinning tin scrap, or tin cans, at the factories of the American Can Company, and elsewhere, and a reference was directed to a special master of the court to take the account of such profits from the time that detinning was commenced at either of said factories, until the time of the taking of the account. From this order the American Can Company appeals.

The first point raised by counsel on the argument before us is thus stated in his brief: "The right of a complainant to an accounting in equity for the profits made by a defendant in the use of property depends upon the title of the complainant to the property so used, and it appears in the present case that the complainant had no title to the process used by the American Can Company." A reference to our earlier opinion in this case (67 Atl. 339, 12 L. R. A. [N. S.] 102) shows that it has already been determined that, as between the parties to this litigation, the complainant is the rightful possessor of the secret process for detinning scrap, complainant was entitled to an accounting of and is entitled to protection against the de-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fendant in its user. If the soundness of the abstract principle contained in this contention of the appellant be conceded, the complainant is within it.

It is further insisted on behalf of the appellant that a complainant is not entitled to an accounting against a defendant for profits made by the latter in the use of a secret process belonging to the complainant, unless such use was made with fraudulent intent; and it is said that no such intent appears in the case. If by this proposition the appellant intends to assert that where the user is begun in good faith, without any knowledge on the part of the defendant that he is infringing on the rights of the complainant, the defendant is entitled to continue it without incurring liability to the complainant until the termination of a litigation instituted by the complainant to establish his right to be protected against the defendant's unlawful user, we cannot assent to it. In our opinion the rule which comes nearest to doing complete justice between the parties to such a litigation as this is that laid down by Lord Westbury in the case of Edelsten v. Edelsten. 1 De G. J. & S. 199, viz., that, so long as the defendant continues the user without notice that in doing so he is infringing upon the rights of the complainant, he is under no obligation to account to the latter for the profits made through such user; but that, if he continues the user after receiving notice of the rights of the complainant, the complainant is entitled to an accounting from him of all profits made by him after receiving such notice. And the reason of the rule would seem to be that, so long as the defendant remains in ignorance of the fact that he is using the property of the complainant, he is innocent of wrongdoing; but, just as soon as he receives notice of the complainant's rights, he becomes a wrongdoer if he persists in such user. And he is none the less a wrongdoer because, after receiving notice, he refuses to recognize the rights of the complainant, and puts the latter to a litigation to establish them.

In the present case the proofs do not make it clear that the American Can Company, when they first engaged in the detinning of scrap by the use of the complainant's secret process, had knowledge of the fact that they were infringing on the complainant's rights by doing so; for although, as we stated in our former opinion, it was manifest from the proofs that the president of the can company had such knowledge, that knowledge should not be imputed to the corporation for the purpose of establishing fraud on its part; but after the complainant filed its bill in this cause, and spread its whole case before the can company upon that pleading, the latter had full notice of the complainant's rights, and, in continuing the user of the secret process after that notice, it became a willful wrongdoer.

We conclude therefore that the complainant is entitled to an accounting from the can company of all profits made by it through the use of the secret process, from the date of the filing of the bill in this cause up to the time of the taking of the account. On the other points raised by this appeal we concur in the opinion filed by Vice Chancellor Howell in the court below.

As the order appealed from requires the can company to account for all profits made by it from the inception of its use of the secret process, there will be a technical reversal for the purpose of modifying the order to the extent which we have indicated.

(78 N. J. L. ST.

GILLMAN et al. v. TOWN OF BLOOM-FIELD et al.

(Supreme Court of New Jersey. July 17, 1909.)

1. MUNICIPAL CORPORATIONS (§ 321°)—PUBLIC IMPROVEMENTS—ASSESSMENTS.

Under Town Act (3 Gen. St. 1895, p. 3542, § 223) § 72, the court cannot on certiorari review an ordinance for improvement of a street after the contract the sentence. the contract therefor has been awarded by the council of the town.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 840; Dec. Dig. § 321.*]

2. MUNICIPAL CORPORATIONS (§ 488*)—PUB-LIC IMPROVEMENTS - ASSESSMENTS - ESTOP-

Where property owners knowing that street improvements were on a line varying from the line of the old road acquiesced therein without objection, they cannot thereafter object to the assessment on the ground of such variation.

[Ed. Note.-For other cases. see Municipal Corporations, Cent. Dig. § 1149; Dec. Dig. § 488.*]

3. Dedication (§ 18*)—Acts Constituting. Where a property owner through whose land a street was laid out assisted in finding a monument from which the survey was run, and obtained from the contractor for the improvement top soil from the road as improved, and whose was the contractor to the survey was run. subsequently conveyed the land by deed, recog nizing the street as a graded monument, such acts constitute a dedication.

[Ed. Note.-For other case see Dedication. Cent. Dig. \$\$ 33-36; Dec. Dig. \$ 18.*]

4. DEDICATION (§ 18*)—ACTS CONSTITUTING.
Where a landowner knew of the proposed location of a street through her land, and, when she objected to the improvement, put the same on a ground other than as to location, and after the grading was completed conveyed part of the land adopting the street graded as a monument and conveyed subject to the rights of the town in such street, her acts constituted a dedication.

[Ed. Note.—For other cases, see D Cent. Dig. § 33-36; Dec. Dig. § 18.*] -For other cases, see Dedication,

5. Dedication (§ 20*)—Acts Constituting.
Where a landowner over whose land a
street was improved was taken over the proposed line of the improvement knew where it was to be, and raised no objection, this constituted a dedication.

[Ed. Note.—For other cases, see Dedication, Dec. Dig. § 20.*]

6. MUNICIPAL CORPORATIONS (§ 488*)-PUB-LIC IMPROVEMENTS - ASSESSMENTS - ESTOP-

Where an owner of land after an assess ment for street improvement was confirmed con-

changing and grading the street, he recognized the changed line of the street, and cannot object to the assessment.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 488.*]

7. MUNICIPAL CORPORATIONS (§ 429°)—PUB-LIO IMPROVEMENTS—PROPERTY SUBJECT TO ASSESSMENT.

Where a street was improved on a line varying from the lines of the old road, a property owner cannot object to an assessment on the ground that his land does not abut on the street as improved and that the old road lies between, where his grantor owned on both sides of the old as well as of the new road, and there-fore had the fee subject to the public easement. [Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 429.*]

Certiorari by Lena Gillman and others against the Town of Bloomfield and others to review an assessment for street improve-Assessment affirmed.

Alexander P. Maxwell and Joseph L. Munn, for prosecutors. Chandler W. Riker (Riker & Riker, on the brief), for defendants.

SWAYZE, J. I ought in justice to myself to say that the long delay in deciding this case has been due to the fact that counsel at the argument obtained leave to file briefs, and I have been waiting to receive them. I have not yet been favored with a brief by the prosecutors, but since the delay is or may be prejudicial to the town, and one of the counsel for the prosecutors, Mr. Maxwell, has been written to and spoken to on the sulject, I think I ought not to wait longer for his brief.

As far as concerns the ordinance for the grading of Myrtle avenue, I am precluded from considering the objection by section 72 of the town act (3 Gen. St. 1895, p. 3542, § 223), since the certiorari was allowed after the contract had been awarded. If my attention had been called to the fact that the writ removed the ordinance, I should have vacated the allocatur in that respect. The same section would apply to the certiorari to remove the assessment but for the allegation that the whole proceeding after the passage of the ordinance was beyond the jurisdiction of the town authorities, for the reason that the street which was improved was a different street from that mentioned in the ordinance. I express no opinion upon the question whether section 72 of the town act applies for the reason that the meritorious question in the case was fully argued, and my view makes it unnecessary to decide the question whether the prosecutors' right to relief is barred.

The meritorious question is whether the prosecutors can be assessed for the grading of a street called Myrtle avenue which does not correspond exactly with an old road laid out by surveyor, which had come to be known by the name, when the petition for the im-

veyed the same subject to an assessment for improved as a public road already laid out. The evidence satisfies me that the improv-

ed street does in fact vary from the lines of the old road, and I incline to think the witnesses are right who make this variance as much as one hundred feet at the extreme point. All of the prosecutors, however, knew of the line on which the street was to be improved, and made no objection on that ground. They acquiesced in the improvement upon the lines which were actually followed. I think that, after the town has spent the money, it does not lie in the mouth of the prosecutors to object on this ground. The only difficulty I have had has been with the question whether the prosecutors could be assessed for the improvement in case the land was private property, and not a public road. It would be hard to say that landowners should be assessed for benefits if the owners of the land which was taken had still the title and could exclude the public from the improved street. The facts, however, are such that this difficulty disappears. The variance from the lines of the old road is through the lands of Payne, Gillman, and Hummell. Payne assisted in finding a monument from which the new survey was run and sought and obtained from the contractor top soil from the road as improved, and subsequently conveyed to the Alpha Investment Company by a deed which recognized Myrtle avenue as graded as a monument. Gillman knew of the proposed location, and, when she made objection to the making of the same, put her objection on an entirely different ground. After the grading was completed, she conveyed part of her land to Gillert by a deed which adopted Myrtle avenue as graded as a monument and conveyed "subject to the rights of the town of Bloomfield in Myrtle avenue for public purposes, if any said town has." Gilbert conveyed a portion of the tract so conveyed by a deed which adopted as a monument Myrtle avenue as now opened and now monumented. Hummell was taken over the proposed line of the improvement, knew where it was to be, and raised no objection. These facts suffice to effect a dedication as against all the landowners through whose land the line of the street as graded runs under the rule of Smith v. State, 23 N. J. Law, 712. Kiernan v. Jersey City, 10 N. J. Law, 483, and O'Brien v. King, 49 N. J. Law, 83, 7 Atl. 34, are illustrations of the application of the rule. In the words of Justice Lippincott in N. Y. & L. B. R. Co. v. South Amboy, 57 N. J. Law, 252, 258, 30 Atl, 628, there has been an actual enjoyment by the public of the use for such length of time that the public accommodation would be materially affected by a denial or interruption of enjoyment.

Another consideration leads to sustaining the assessments against Payne. His deed to provement refers to the street proposed to be the Alpha Investment Company made after

Tor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

406,283 60

this assessment was confirmed conveyed "subject to assessment for changing and grading Myrtle avenue." He thus recognized the changed line of the avenue and the existence of the assessment.

It is suggested, also, on behalf of Gilbert that she is not assessable because her land does not abut on Myrtle avenue as graded, since the old road lies between. Such is not the fact. Her grantor, Gillman, owned on both sides of the old as well as of the new road, and therefore had the fee subject to the public easement. She conveyed to Gilbert bounding on the new road. But, even if she had conveyed bounding on the old road, Gilbert would have owned to the center of that road, which for a part of the distance would carry her to the line of the new road, and there is nothing to show that the assessment exceeds the benefits even under that aspect of the case.

The assessment must therefore be affirmed with costs.

(77 N. J. L. 757)

INHABITANTS OF CITY OF TRENTON V. STANDARD FIRE INS. CO. OF NEW JERSEY et al. (two cases).

(Court of Errors and Appeals of New Jersey. June 14, 1909.)

1. Taxation (§ 200*) — Stock in Foreign Corporations—Statutory Provisions.

Tax Act April 8, 1903 (P. L. p. 394), exempts from taxation stocks of corporations of other states held by citizens of this state, when taxes have been actually assessed and paid on the corporation's property in its own state within 12 months.

[Ed Note.—For other cases, see Taxation Cent. Dig § 319; Dec. Dig. § 200.*]

2 TAXATION (§ 230*)—FIRE INSURANCE COM-PANY—REINSURANCE RESERVE.

The reinsurance reserve of fire insurance companies, required by the department of insurance to be set apart and maintained by such companies, is not as such exempt from taxation under the tax act of 1903. The liabilities on policies issued and outstanding, being merely contingent, should not be deducted from the gross assets to ascertain the capital and accumulated surplus.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 230.*]

(Syllabus by the Court.)

Error to Supreme Court.

Certiorari by the Inhabitants of the City of Trenton against the Standard Fire Insurance Company of New Jersey and others to review a judgment of the State Board of Equalization of Taxes. From a judgment of the Supreme Court (68 Atl. 1111), modifying the action of the board, both parties bring error. Affirmed as to both parties.

Charles E. Bird, William A. Lord, and Collins & Corbin, for City of Trenton. Huston Dixon and John W. Griggs, for Standard Fire Ins. Co.

VOORHEES, J. These are cross-writs of error to review a judgment of the Supreme Court restoring and reducing a tax imposed May 20, 1906, by the taxing authorities of the city of Trenton upon the Standard Fire Insurance Company, which tax had been set aside by the Board of Equalization of Taxes.

The assessors of Trenton levied a tax assessment against the company amounting to \$245,477.81. This assessment was arrived at in the following manner:

The total assets of the company were.... \$553,750 \$1

The following deductions were made therefrom:

Balance assessed by the city for taxation \$245,477 81

An appeal was taken to the county board of taxation, which sustained the assessment, and thence a further appeal to the Board of Equalization of Taxes. The latter appeal was made on the ground that the assessment above mentioned was in fact made upon the reinsurance reserve fund of the company, amounting to \$246,903.05, which reserve was claimed by the company to be a liability, and not an asset, and therefore not properly taxable, and also upon a further ground that in the assessment were included stocks held by the company in corporations outside of this state, to the value of \$183.921, which were not properly taxable by the laws of New Jersey because taxes had been actually assessed and paid upon the property of said companies where located within 12 months next before May 20, 1906. The Board of Equalization set aside the assessment in toto, holding that the reinsurance reserve should have been treated as a liability, and not as a part of the accumulated surplus of the company. To remove the finding of the Board of Equalization setting aside the assessment, a writ of certiorari was sued out by the city of Trenton. The Supreme Court ordered that the judgment of the Board of Equalization of Taxes be reversed, and that the assessment levied by the taxing authorities of the city of Trenton for personal property other than bank stock be reduced from \$245,477 .-81 to \$61,556.81, which it fixed and determined as the amount of taxes for which the company was legally liable. This reduction resulted from the determination of the court that the stocks of corporations of other states. amounting to \$183,921, were exempt from taxation. The court also declared that, in the absence of anything to show that the insurance reserve was invested in taxable securities, it must be assumed that it was actually invested in the securities exempt.

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

From this judgment of the Supreme Court these cross-writs of error have been taken, by the city to reverse the judgment as to the exemption from taxation of foreign stocks, and by the company to reverse the assessment imposed, as it alleges, upon the reserve fund.

Whether or not the stocks of corporations of foreign states are exempt from taxation will depend upon the construction to be put upon the tax act of April 8, 1903 (P. L. p. 394). The tax act of 1868 provided "that all real and personal estate within this state, whether owned by individuals or by corporations, shall be liable to taxation," and then exempted from taxation "stocks and other personal estate owned by citizens of this state situate and being out of this state upon which taxes shall have been actually assessed and paid within twelve months next before the date prescribed by law for commencing the assessment." P. L. 1866, p 1079, § 5. This act continued on the statute book until the revision of 1903, which exempts "the personal property owned by citizens or corporations of this state situate and being out of the state upon which taxes shall have been actually assessed and paid within twelve months." There are some changes in verbiage made by the act of 1903. In the second section it provides for taxation of "all property real and personal within the jurisdiction of this state not expressly exempted by this act or excluded from its operation." The act of 1866 exempted from taxation "stocks and other personal estate." The act of 1903 exempts the "personal property," and the question arises whether these verbal alterations worked a change in the law. The act of 1903 is a revision. The act of 1866 had been construed by the courts, and had been acted upon by the bar and the tax officials as exempting the stock in foreign corporations, owned by residents of this state, when the corporations had paid taxes on their property in their own states. Smith v. Ramsey, 54 N. J. Law, 546, 24 Atl. 445; De Baun v. Smith, 55 N. J. Law, 110, 25 Atl. 277. It is perfectly well settled in this state that a clear intention to change the existing system of law must be manifested when a revision and re-enactment of the body of statutory law takes place. State v. Anderson, 40 N. J. Law, 226. In the case in hand the exempting section contains the exact words of the previous statute, save that the words "personal property" are substituted for the words "stocks and other personal estate" in the older act. They are equivalent, for personal property embraces stocks and other personal estate.

It is agreed in this case that the foreign corporations, the stocks of which the defendant holds, paid taxes which had been assessed upon their real and personal property in their respective states within 12 months before May 20, 1906. Is the payment of taxes upon the property of the corporations a pay-

ment upon the stock to bring such stocks within the exemption provided for in the act of 1903? A tax levied upon the stock of a corporation, and a tax assessed against the property thereof, was held in State v. Branin, 23 N. J. Law, 500, to be a tax levied twice upon the same thing, for "the stock is the representative of the property, the certificate of stock being only evidence of title to the property, and worthless except as such evidence; and a tax upon the stock is in fact a tax upon the property it represents." This deliverance was made before the enactment of the tax act of 1866, and the Legislature passed that act having in view the adjudication. of the Supreme Court upon that subject; so that, when it enacted that stock of foreign. corporations should be exempt from taxation, "upon which taxes shall have been actually assessed and paid," it must be held to have meant taxes paid upon the property which the stock represented. Our later cases (Smith v. Ramsay, 54 N. J. Law, 546, 24 Atl. 445, and De Baun v. Smith, 55 N. J. Law, 110, 25 Atl. 277), have so held.

It is objected, however, that we are not at liberty to imply an exemption in construing the act of 1903, because of the words introduced into the revision, making all property taxable "not expressly exempted by this act or excluded from its operation," and that the revision did change the law. This language, however, is deemed to be the fair equivalent of the act of 1866, which provided for the taxation of "all real and personal estate," and defined that the term "personal estate" should be construed to include "stocks in cornorations whether said personal estate be within or without this state." The revision in the special exempting sections has simply substituted the words "personal property" for the words "stocks and other personal estate." The wording of the remainder of the section in each of the acts is identical. The language in each act is peculiarly applicable to stocks in foreign corporations. The later act, being a revision, naturally is more concise, but condensation, accomplished by the use of a single phrase legally and naturally embracing several previously specially enumerated objects, cannot be said clearly to specify an intention tochange a pre-existing system. The added words, in section 2 of the revision, "or excluded from its operation" must also be dealt with. They cannot apply to railroads and canals, for these are among the special exemptions. May they not be reasonably construed to apply to property before the revision excluded by construction from the former act? Whether this view be tenable or not, the words must be given some effect, and show an intention that exemption in express words of enumeration was not intended by the revisers in all cases to be necessary in order to exclude property from the operation of the act.

In Jersey City Gaslight Co. v. Jersey City,

exemptions of a similar character: "Though the provision of the act of 1868 that the stockholders shall not be taxed for the stock has been characterized as an exemption, it is not such in any sense. It is merely a declaration of the intention of the Legislature that the property of the corporation, being taxable in the hands of the company, shall not be again taxable in the hands of the stockholders. A provision so manifestly just will not be held to be repealed, unless the intention to repeal it is clearly apparent." It seems clear that before the revision of 1903 a public policy, as indicated by the above quotation, obtained in this state; and, as was said by the Supreme Court in this case: "Our Legislature evidently thought it unjust that the property of the corporation should be taxed, and the certificates of stock representing the shares of the individual stockholders therein should be taxed also." The revision of 1903 was enacted with this policy, against what, in effect, is an unjust double taxation, definitely settled by the decisions of our courts. Stocks of foreign corporations owned here, and admittedly personal property within the jurisdiction of this state, upon the property of which located in foreign states taxes have been paid within the time prescribed by the act, are exempted from taxation under section 8, subd. 1, of the General Tax Act of 1903. The judgment of the Supreme Court, therefore, so far as the writ of error prosecuted by the city is concerned, must be affirmed.

The Insurance Company seeks to reverse the judgment on the ground that it has been taxed upon its reinsurance reserve fund. The Supreme Court held: "There is nothing to show that the reinsurance reserve was invested in taxable securities, * * * and it - * must be assumed, in the absence of evidence to the contrary, that it . was actually invested in the other securities which were deducted and not assessed." from the gross assets of the company, \$653,-760.81, we deduct the reserve (treating it as a liability), \$246,903.05, the balance, \$406.857.76, would be the capital and accumulated surplus for the purposes of taxation before any exemption.

The exemptions actually allowed were:

Bonds	\$307.915
Real estate mtgs	67,450
Stocks of foreign corps	183,921

It will thus be seen that the exemptions would exceed the capital and surplus by more than \$150,000. It is manifest that nearly two-thirds of the reserve fund were actually invested in exempt securities. The company, which is possessed of knowledge as to what securities have been set aside to represent this fund, has refrained from disclosing whether the other one-third of the exempt securities has not been so appropriated, and has preserved silence in that regard; and

46 N. J. Law, 194, it was said, concerning so it is not certain that this fund is not comexemptions of a similar character: "Though posed entirely of nontaxable securities.

Passing, however, to the merits of the company's contention, it is perceived that the eighteenth section of the act of 1903 provides that: "Every fire insurance company * * * shall be assessed * * * upon the full amount of its capital stock paid in and accumulated surplus; the real estate belonging to every such corporation, however, shall be taxed in the taxing district where said real estate is situate, and the amount of assessment upon such real estate shall be deducted from the amount of any assessment made upon the capital stock and accumulated surplus." Tax Act 1903, § 18. The case shows that the reinsurance reserve is a fund composed of the portions of the gross premiums of policies in force which have not been earned by the company. It is insisted that its maintenance is made obligatory by the fifty-sixth section of the insurance law of April 3, 1902 (P. L. p. 407), by providing that, when the insurance department finds that the assets of a stock insurance company, "after charging it with an amount requisite for the reinsurance of all its outstanding risks and with its other liabilities, including capital stock, up to the minimum amount required by this act, amount to less than such minimum amount of capital stock," such company may be enjoined and a receiver appointed. For the purposes of this case it may be assumed that this statute has the effect claimed for it. The principal purpose of the fund is to enable a company to rid itself of liability for further possible claims in the event that continued excessive losses may threaten to wipe out its surplus accumulations and impair its capital below the statutory minimum, or to an extent that might endanger the security of the,"unburned" policy holders; the capital and surplus being the only funds out of which losses can be met. In such a case the company, by paying back to the holders of policies unearned portions of their premiums for the unexpired terms of the policies, or by paying the same over to another company for assuming the risks, would be relieved of its obligations under its contracts of insurance. This description is more applicable to an asset of the company set apart on its books to an amount equal to the cancellation value of its policies than it is to define a liability or debt. The fund is in the possession and control of the company, is invested by it in interest-bearing securities, and the profits yielded are substantial, and inure to the corporation. It seems not to be he'd on any trust, nor is it chargeable with any liability, other than that with which the capital and surplus are charged. It is a part of the surplus reserved from dividends. It may never be called upon to provide for the reinsurance of the company's risks or pay losses.

To ascertain the capital and accumulated surplus it is necessary to find the true value of the gross assets, and from such value deduct the debts and liabilities. The remaind-



N. J.)

er will be the value of the capital and of the | 2. RELEASE (\$ 55°) - EXECUTION - PRESUMPsurplus, if any. The question arises, then, should the reserve fund be counted as a liability? In the case of People's Fire Ins. Co. v. Parker, Receiver, 34 N. J. Law, 479, affirmed 35 N. J. Law, 575, it was held by this court that the term "accumulated surplus," in its application to stock companies, is well understood to refer to the fund they have in excess of their capital and liabilities, and that the word "liabilities" there used means fixed liabilities, not contingent, citing State v. Utter, 84 N. J. Law, 493. An assessment, levied against the unearned premiums as a part of the accumulated surplus of the company, was in that case affirmed. The liabilities and losses upon policies issued and unexpired is not a fixed and definite liability, but merely contingent, and as such it should not be deducted from the gross assets in order to ascertain the capital stock and accumulated surplus. The company seeks to distinguish the facts in the present case from those in that above cited, by insisting that by the laws now in force the company is compelled to maintain this fund, while when the above case of People's Fire Ins. Co. v. Parker, Receiver, was decided, the setting aside of the fund was a mere voluntary act on the part of the company, and that what was once a mere fund from which to return a portion of the premium to an insurer has now become a fixed and definite fund, required to be set aside and put beyond the control of every company by the commissioner of insurance. It is not perceived how the compulsory maintenance of this fund alters its character. Capital stock must be kept intact, and is also liable for the debts of the company. Assuming that its maintenance is prescribed by law, the liabilities to losses upon policies issued and unexpired, for which it is set aside, are not by that fact changed or made different from those described in the People's Fire Insurance Case. The status of these liabilities as to whether they were contingent or fixed was the point considered in that case as determining the exemption or taxation of the fund. See Kenton Ins. Co. v. City of Covington, 86 Ky. 213, 5 S. W. 461.

Under the authority of People's Fire Ins. Co. v. Parker, Receiver, therefore, the judgment of the Supreme Court upon the writ of error sued out by the company must likewise be affirmed.

(78 N. J. L. 72)

MAYOR, ETC., OF JERSEY CITY V. NORTH JERSEY ST. RY. CO.

(Supreme Court of New Jersey. July 16, 1909.) 1. Release (§ 55*) - Execution - Presump-

A release may in a proper case be presumed from lapse of time, provided the person presumed to have executed it had authority to do so. [Ed. Note.—For other cases, see Release, Dec. Dig. 1 55.*]

TIONS.

It will not be presumed from lapse of time that a municipal corporation executed a release, unless authority to execute a release is shown. [Ed. Note.—For other cases, see Release, Dec. Dig. § 55.*]

3. Release (§ 12*)—Voluntary Release.
A release may be without consideration.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 18; Dec. Dig. § 12.*]

MUNICIPAL CORPORATIONS (§ 871°)—AID TO PRIVATE CORPORATIONS — CONSTITUTIONAL PROHIBITION.

Under Const. art. 1, §§ 19, 20, as amended in 1875, providing that no donation shall be made by the state or any municipality to a corporation, etc., the Legislature may not authorise municipal aid to private corporations, whether such aid is a direct pecuniary aid or by means of a release from a pecuniary burden.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1817; Dec. Dig. § 871.*]

5. MUNICIPAL CORPORATIONS (§ 987*)-TAXA-TION EXEMPTIONS-LEGISLATIVE AUTHORITY.

A municipality cannot exempt persons or property from taxation nor give up any source of revenue without legislative authority.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2003; Dec. Dig. §

MUNICIPAL CORPORATIONS (§ 956°)—LEVY OF TAXES—STATUTORY AUTHORITY.

A municipal corporation can levy no taxes, unless the power is plainly and unmistakably conferred, and the statutory mode must be pursued.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2010; Dec. Dig. § 956.*1

7. LICENSES (§ 32°)—STREET RAILWOADS—LICENSE FEES—FAILURE TO COLLECT—EFFECT.
The failure of the officers of a city to assert

a claim against a street railway company for license fees due under an ordinance granting to it the right to construct and operate its road does not bar the claim for such fees until limitations have run.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 32.*]

8. STREET RAILBOADS (§ 49*) - LEASES - LI-CENSE FEES.

CENSE FEES.

A street railway company operating a street railroad as lessee, as authorized by the traction act of 1893, section 16 (P. L. p. 314) of which provides that all debts, liabilities, and duties of the lessor shall attach to the lessee, is liable to pay license fees which are a liability against the lessor.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 49.*]

9. Street Railroads (§ 69*)—License Fees. An ordinance granting to a street railway company the right to construct and operate a street railroad through the streets of a city, on condition that it pays the city annually a license fee of \$10 for each car, requires the payment of \$10 for each car, regardless of the route over which it runs.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 69.*]

Action by the Mayor and Aldermen of Jersey City against the North Jersey Street Railway Company. Judgment for plaintiff.

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes 73 A.-39

James J. Murphy and Harry Lane, for plaintiff. Frank Bergen, William D. Edwards, and Sherrerd Depue, for defendant.

SWAYZE, J. This is the same case that has previously been before the court on demurrer. 70 N. J. Law, 360, 57 Atl. 445; 71 N. J. Law, 367, 59 Atl. 15; 72 N. J. Law, 383, 61 Atl. 95. The pleas not already disposed of are two: (1) Nil debet; (2) release. The issues joined on these pleas were originally tried before Justice Fort and have been argued before me on the evidence then taken.

The plea of release is thought to be sustained by proof that no license fees have been exacted or collected by the city since 1867, and the failure to rebut any presumption arising therefrom. The defendant relies on the language of Mr. Justice Dixon in 70 N. J. Law, 363, 364. Justice Dixon undoubtedly there suggested that a release might be presumed if there were no circumstances to rebut the presumption; but he was then dealing only with the question of pleading. What he actually decided was that a release would not be presumed on demurrer merely because the declaration showed that no license fees had been paid since 1868. A release, he held, must be specially pleaded. He was not called upon to consider what proof would be required to establish a release. In a proper case a release may be presumed from lapse of time. Such a case was Given v. Wright, 117 U. S. 648, 6 Sup. Ct. 907, 29 L. Ed. 1021. But in order that a release may be presumed it is essential that the party who is presumed to have executed the release should have authority to do so. When that party is an individual, as in the cases cited, no difficulty arises. An individual of full age may execute a release, as well as make a contract; but when the party is a municipal corporation, as in the present case, the authority to execute a release must appear before the execution can be presumed. Justice Pitney hinted at this difficulty in the opinion reported in 72 N. J. Law, 392, 61 Atl. 95. To my mind it is insuperable. The plea fails to aver any consideration for the release, and, since a valid release may be executed without any consideration, it is not necessary to assume that there was any. A release may well be voluntary. The exact question then may be thus stated: Is it competent for a municipality without express legislative authority to give away to a private corporation a portion of the city's revenues, not merely revenues then due, but revenues to accrue in the future for years thereafter. To state this question is to answer it. The doubt has never been whether such an act required express legislative authority, but whether it was even within the power of the Legislature to authorize such a donation. Since the decision in Loan Association v. Topeka, 20 Wall. 655, 22 L. Ed. 455, it has been thought beyond the power of the Legislature itself to authorize municipal aid to private was a release. The more natural inference

corporations, and certainly such aid has been impossible since the amendments to our Constitution in 1875. Article 1, §§ 19, 20. I cannot distinguish in principle between direct pecuniary aid, and aid by means of a release from a pecuniary burden. T am equally unable to distinguish between a release of the city's claim to revenue from license fees, and its claim to revenue from taxation. A municipality cannot exempt persons or property from taxation without legislative authority. Cooley on Taxation (2d Ed.) 200, 201; 12 Am. & Eng. Ency. (2d Ed.) 283, note 2. That is the necessary result of the principle that a municipal corporation can levy no taxes unless the power be plainly and unmistakably conferred (Dillon, \$ 763), and the statutory mode must be pursued (Dillon, § 769). So strictly have our courts construed this power of exemption that we have held that the statutory authority to a municipality to issue bonds exempt from taxation was abrogated by our constitutional amendment of 1875. Merchants' Ins. Co. v. Newark, 54 N. J. Law, 138, 141, 142, 23 Atl. 305. The reason that municipal corporations cannot without express authority exempt property from taxation is that the effect of such exemption is to increase the burden upon those who are not so favored. The same effect follows where the municipality gives up any source of revenue, and the same reasoning is applicable. I am not pointed to any statutory authority which permitted Jersey City to release the defendant from the payment of these license fees, and, in the absence of such power, a release is not to be presumed.

A somewhat similar case relating to taxes is Wells v. Savannah, 181 U. S. 531, 21 Sup. Ct. 697, 45 L. Ed. 986, where the city leased certain lots on ground rents, and did not tax them for nearly a century. The court said: "We are unable to see that any contract of exemption has been proved. payment of taxes on account of property otherwise liable to taxation can only be avoided by clear proof of a valid contract of exemption from such payment, and the validity of such contract presupposes a good consideration therefor. If the property be in its nature taxable, the contract exempting it from taxation must, as we have said, be clearly proved. It will not be inferred from facts which do not lead irresistibly and necessarily to the "The different existence of the contract." annual ordinances for taxation passed by the common council, exempting from taxation thereunder the leased lots, were but exemptions for the year in which the ordinance was passed, and there can be no plausible claim urged that they, one or all, constituted any contract for exemption beyond the time of each specific ordinance."

The same reasoning is applicable here. The failure to exact the license fees does not lead irresistibly to the conclusion that there is that the financial officers failed to assert | license fees was a matter of contract, and the city's claim; but such failure would not bar the claim until the statute of limitations had run, and here there was no express exemption or release as in Wells v. Savannah. That case was subsequently approved in Savannah, etc., Railway v. Savannah, 198 U. S. 392, 25 Sup. Ct. 690, 49 L. Ed. 1097, and in Metropolitan St. Ry. Co. v. New York, 199 U. S. 1, 25 Sup. Ct. 705, 50 L. Ed. 65. One of the headnotes in the latter case is: "The omission of the Legislature for one year, or for a series of years, to tax certain classes of property, otherwise taxable, does not destroy the power of the state to subject them to taxation when it sees fit to do so." The decision goes upon the ground that the taxing power is of vital importance; but the same arguments which prevented the courts from presuming an exemption from taxation prevent me from presuming a release of one source of the public revenue. I therefore decline to find as requested in requests No. 1 and No. 2.

It is further urged by the defendants that they are no longer operating under the franchises of the Jersey City & Bergen Railway, which were assumed by the Court of Errors and Appeals to have expired with the charter of that company in 1884. Jersey City v. North Jersey St. Ry. Co., 74 N. J. Law, 774, 67 Atl. 113. The argument is that it is settled by the case cited that the source of the defendant's franchise is the act of 1893, known as the "Traction Act" (P. L. p. 302), and hence there can be no liability to pay the license fees which were to be paid in consideration of the expired franchise of the Jersey City & Bergen Railroad. The argument overlooks the fact that something more was necessary to give the defendants their present franchise than the mere enactment of the act of 1893. That act itself required the Consolidated Traction Company, as a condition precedent, to secure the consent of the owners of the then existing street railway. This consent was as necessary as the certificate of incorporation itself, and it was granted, as it necessarily must have been, upon the terms set forth in section 16 of the act. Among those terms was the provision that all debts, liabilities, and duties of the lessor company should attach to the lessee, and be enforced against and enjoyed by the latter to the same extent and in the same manner as they were enforceable against or enjoyed by the lessor. At the date of that lease, the Jersey City & Bergen Company was enjoying the same franchise that it had exercised prior to the expiration of its original charter. As the Court of Errors and Appeals said in 74 N. J. Law, 780, 67 Atl. 113, the city authorities treated the railway as a street railway legally existing with the city's consent. Since the liability of the Jersey City & Bergen Company to pay these

was a payment for the right to run its cars, I think it is an irresistible inference that by continuing to exercise the franchise and to run its cars the company impliedly promised to pay the fees. That obligation was an existing liability at the time of the lease, which under the provisions of section 16 became a liability of the lessee. Consequently I find for the plaintiff and against the defendant that the defendant owes the plaintiff.

The amount is to be ascertained. plaintiff claims \$10 for each car for each section of track authorized by a separate ordinance. This I think erroneous. The true meaning is that \$10 shall be paid for each car, regardless of the route over which it runs. The argument of the defendant seems to me unanswerable that otherwise the defendant could lessen the amount of the payment by running fewer cars over each section. and yet make as many trips, since the several sections would be shorter. Obviously this would be to the public detriment, and a construction ought not to be adopted which would hold out so great a pecuniary inducement to poorer service. It certainly could not have been the intention to treat each separate section of track as a separate railway.

The amount of the debt, upon the principles I have adopted, is a mere matter of calculation. If counsel cannot agree, I will settle it upon notice. The plaintiff is entitled to judgment for the amount when ascertained. I will afford counsel an opportunity to have exceptions taken and sealed to my rulings.

(30 R. I. 132)

ROBINSON v. MORRIS & CO.

(Supreme Court of Rhode Island. 1909.)

1. DAMAGES (§ 132*)—EXCESSIVE DAMAGES—INJURIES TO PERSON.

A recovery of \$3,250 for personal injuries is not excessive, where plaintiff's left side was injured, the bones of his head and face broken, one ear nearly torn off, an arm and shoulder injured, and his nervous system shocked; some of his injuries being permanent and disfiguring. [Ed. Note.—For other cases, see Dam Cent. Dig. §§ 372-385; Dec. Dig. § 132.*] see Damages,

2. EVIDENCE (§ 123*)—RES GESTÆ—PART OF SAME TRANSACTION.

In an action for personal injuries by the running away of defendant's team and the striking of plaintiff by the defendant's wagon, evidence to show which way the horses went immediately after the accident is admissible as part of the res gestæ.

[Ed. Note.—For other cases, see Evide Cent. Dig. §§ 351-368; Dec. Dig. § 123.*] see Evidence,

3. MUNICIPAL CORPORATIONS (§ 706*) — USE OF STREETS—LIABILITY FOR INJURIES FROM NEGLIGENT USE-EVIDENCE.

Plaintiff, while standing on a street, was struck by a wagon belonging to defendant, which was hitched to a runaway team. In an action for the resulting injuries a witness testified that he saw defendant's team running away, that the wagon began to swing, and that

[•]For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

he saw the wagon strike plaintiff; that it was then going in a sigzag direction south, that the horses were going about 12 miles an hour, and that witness went out and picked up plaintiff, but did not follow the wagon. Held, that the evidence was not inadmissible, as relating to a time after the accident.

[Ed. Note.—For other cases, Corporations, Dec. Dig. \$ 706.*] see Municipal

4. MUNICIPAL CORPORATIONS (§ 706°)—USE OF STREETS — LIABILITY FOR INJURIES FROM NEGLIGENT USE—ACTIONS — ADMISSIBILITY OF EVIDENCE.

In an action against the owner of a team for injuries caused by their running away in a public street and swinging the wagon against plaintiff, evidence that after the accident the witness saw the driver take a weight out of the wagon and put it on one of the horses was admissible as showing that the weight and hitch rope were intact and capable of being used after the accident; the team not having been hitched before the accident.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 706.*]

5. Witnesses (§ 248*) — Examination — Responsiveness of Answer.

SPONSIVENESS OF ANSWER.

In an action for personal injuries caused by the running away of defendant's team and the striking of defendant's wagon against plaintiff, counsel for defendant, in cross-examining one of plaintiff's witnesses, asked what plaintiff was doing at the time of the accident. Held, that a reply that "it looked to me as though he turned north to go back, jumped back quick, and this wagon * * struck him and knocked him down, * * * " is responsive, and is not open to the objection that the witness did not tell him what he saw, but how it looked.

[Ed. Note.—For other cases, see Witnesses.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 861-863; Dec. Dig. § 248.*]

6. MUNICIPAL CORPORATIONS (§ 706*)—USE OF STREEIS—LIABILITY FOR INJURIES FROM NEGLIGENT USE — ADMISSIBILITY OF EVI-

In an action for injuries to plaintiff from being struck by defendant's wagon, while defendant's team was running away in a public street, evidence to show that the driver had employed a person to hold one of the horses of the team prior to the time of the accident is admissible; the team, at the time they started to run away, not being fastened.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 706.*]

7. APPEAL AND EBROR (§ 1051*)—HARMLESS EBROR—Admission of Evidence.

Defendant's team was left by its driver in

Defendant's team was left by its driver in a public street without being hitched, and ran away, and plaintiff was injured by being struck by the wagon as the team passed him. Held, that the admission in evidence of ordinances of the city forbidding horses to be left unfastened in any street, and making it the duty of every person having control of any horse attached to any vehicle to use every effort to prevent such animal or vehicle from running against any person, did not harm defendant, as Gen. Laws 1896, c. 74, § 4, provides that every person having charge of a team attached to any wheel carriage, who shall negligently leave the wheel carriage, who shall negligently leave the same to go at large in any highway, shall be fined, is a public statute of which the court takes judicial cognizance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4169; Dec. Dig. § 1051.*]

8. MUNICIPAL CORPORATIONS (§ 705*) — USE OF STREETS—LIABILITY FOR INJURIES FROM NEGLIGENT USE.

It is negligence for the driver of a team hitched to a wagon to leave them unfastened in a public street for a period of from three to ing that every person having charge of any

five minutes in the busiest part of the day, when the street is crowded, knowing that one of the horses was nervous and inclined to be frightened at automobiles.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1515; Dec. Dig. § 705;* Highways, Cent. Dig. §§ 460–469.]

9. MUNICIPAL COBPORATIONS (\$ 706*) — USE OF STREETS—LIABILITY FOR INJURIES FROM NEGLICENT USE.

Evidence, in an action for personal injuries from being struck by a wagon attached to a runaway team belonging to defendant in a public street, held sufficient to take the case to the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 706.*]

10. MUNICIPAL CORPOBATIONS (\$ 705°)—USE OF STREETS—RIGHTS OF VEHICLES AND PE-DESTRIANS.

Vehicles do not have the right of way over pedestrians on public streets.

[Ed. Note.—For other cases, Corporations, Dec. Dig. § 705.*] see Municipal

11. TRIAL (§ 260*)-INSTRUCTIONS - REPETI-

Where the court has correctly charged up-on an issue, a request for special instructions is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.•]

12. Damages (§ 158*)—PLEADING—ISSUES.
In an action for personal injuries, plaintiff in his declaration stated that his jaw was fractured, and after setting out a number of other injuries stated that he was otherwise seriother injuries stated that he was otherwise seriously and permanently injured internally, and was injured and permanently disfigured externally, and that he suffered great pain and agony, and became and was sick, sore, lame, and disordered, and so remained for a long time, to wit, from thence hitherto, and that he had been incapacitated from performing any labor, and for a long time to come he would continue to suffer further great pain, and would be further incapacitated from performing any labor, and that he had been and was greatly and permanently injured and disabled by reason and in consequence of the premises. Held, that the declaration is sufficient to cover claims for neryous shock, neryousness, and the loosening or yous shock, nervousness, and the loosening or disarranging of the teeth.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 441-446; Dec. Dig. § 158.*]

13. Damages (§ 210*)-Instructions.

In an action for personal injuries, caused by being struck by defendant's wagon attached to a runaway team in a public street, a request to charge that plaintiff could not recover for bronchitis or expenses incident thereto, because he had not alleged the same in his declaration, was properly refused, where there was nothing in the record to indicate that plaintiff was seeking damages for the bronchitis, and the fact that he had that disease came out in his testimony only as a part of his physical history since the accident.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 210.*]

14. TRIAL (\$ 252*)-Instructions on Doubt-FUL POINTS.

A requested instruction on a matter of fact which is involved in much obscurity is correctly

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

15. MUNICIPAL CORPORATIONS (§ 705*)—USE OF STREETS—LIABILITY OF INJURIES FROM NEGLIGENT USE.

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

wheel vehicle of any kind, or sled, or sleigh, with any kind of team, who shall negligently or willfully leave the same to go at large in any highway, shall be fined \$5, the owner of a team is liable for damages caused by leaving them unfastened in a public street, although an ordinarily prudent man under the same circumstances would have left them unfastened; and horses left in a highway must be either properly hitched, properly weighted, or there must be somebody in immediate attendance upon them, so near to them that they can control their movements, or can readily reach them so as to secure them in case of danger. secure them in case of danger.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1515; Dec. Dig. § 705;* Highways, Cent. Dig. §§ 460-469.]

Exceptions from Superior Court, Providence and Bristol Counties; Willard B. Tanner. Judge.

Action by Oel F. Robinson against. Morris & Co. Verdict for plaintiff, and defendant alleges exceptions. Exceptions overruled, and case remitted to the superior court, with direction to enter judgment on verdict.

John W. Hogan, for plaintiff. Waterman, Curran & Hunt (Lewis A. Waterman, of counsel), for defendant.

DUBOIS, C. J. This is an action of trespass on the case for negligence, brought by the plaintiff to recover damages for personal injuries which he received in collision with a wagon drawn by a pair of runaway horses belonging to the defendant company. The accident occurred on the morning of the 24th day of April, 1905, on Canal street, in the city of Providence. The case was tried before a jury in the superior court, and resulted in a verdict for the plaintiff, wherein damages were assessed in the sum of \$3,250. The defendant filed a motion for a new trial in the superior court, which was denied by the judge who presided at the trial, and the case is now before this court upon the defendant's bill of exceptions, containing 32 grounds, whereof the first eight relate to the rulings of said judge in admitting certain evidence against the objection of the defendant. The ninth ground is based upon the refusal of the trial judge to direct a verdict for the defendant. Fifteen grounds, viz., from the tenth to the twenty-fourth, both inclusive, relate to the refusal of said justice to charge the jury in accordance with the defendant's requests. The next three specify certain alleged errors of the trial judge in his charge to the jury, and the balance have reference to the decision of the judge denying said defendant's motion for a new trial.

The evidence discloses the facts that on the day in question a teamster, in the employ of the defendant company, left their team of horses, consisting of a bay horse, of mature years and good habits, and a young black horse, brought to Providence from the West a few months before, which was known by the servants and agents of the defendant company to be nervous and shy and accident, as it does not seem to me it throws.

inclined to be frightened by automobiles. harnessed to one of their large, uncovered, and empty express wagons, unhitched and unattended, while he went into the place of business of the defendant, where he intended to remain but a few moments. It appeared that a hitch rope and weight were in the wagon. During the absence of the teamster. the black horse was frightened by a passing. automobile, and the fright resulted in a runaway, in which both horses participated. The horses ran along Canal street, which was lin-. ed with teams on both sides, towards Market Square-not in a straight line, however, but in a serpentine or zigzag manner, so that, as the horses ran, the wagon struck against various other horses or vehicles, first on one side of the street and then on the other. At the time of the starting of the runaway the plaintiff was going from his place of employment at the What Cheer Beef Company. on Canal street, to the restaurant of one. Gardner, which was on the opposite side of the street, but nearer Market Square than . the beef house of the What Cheer Company; that he was crossing Canal street diagonally, and had gotten six or eight feet out from the curb when his attention was attracted to these horses, and he stepped back out of their way, and they passed him safely, and. the wagon also would have cleared him, if; the same, in its zigzag course, had not struck. another wagon on the opposite side of the street, which caused it to slew around and strike the plaintiff, with the hub of the off hind wheel, on the outside of his left leg, about four inches above the knee, causing him to be thrown up several feet from the ground and against another wagon, and then to fall and to sustain several injuries on the left side, including injuries to his head and face, the bones of which were broken, to his ear, which was nearly torn off, to his arm and . shoulder, and shock to his nervous system. For these injuries, some of which are permanent and disfiguring, we cannot say that. the jury awarded excessive damages. We: therefore pass to a consideration of the defendant's exceptions.

The first and second exceptions relate to the ruling of the court in permitting testimony to be given as to the direction taken by the horses immediately after the accident. We see no error in the ruling. It was clearly a part of the main narrative, a portion of the res gestæ.

The third exception is without merit. It, was taken during the testimony of Emor E. Carpenter, and arose as follows: "Q. 11. What attracted your attention to the accident? A. I heard a noise and looked out. Q. 12. What did you see? A. I saw this pair. of horses running away, of Morris & Co.'s. Q. 13. What happened as they went by? A. Well, the wagon began to swing. Mr. Waterman: I object to what happened after the Waterman: As I remember the answer to the former question, he said he heard a noise at the time of the accident, and then something apparently following. The Court: Well Mr. Waterman, I have ruled, admitting what happened immediately after, and I make the same ruling, and give you an exception. (Defendants' exception noted. Question 13 and answer thereto, as given by witness, read by stenographer.) Q. 15. Go ahead. A. I see it strike Mr. Robinson. Q. 16. In what direction was the wagon traveling when it struck Mr. Robinson? A. South, towards Market Square. Q. 17. In a straight line or otherwise? A. Kind of crossways, zigzag. Q. 18. Did you see the wagon strike Mr. Robinson? A. Yes, sir. Q. 19. Will you tell the jury where he was and what happened to him when it struck him? A. He was going across the street to the restaurant. Q. 20. Go ahead. A. The wagon came down and began to zigzag, and the horses just grazed him, and the rear wheel, the hub, struck him, and he went up in the air about 10 feet, and came down and struck on this other wagon. Q. 21. What kind of a wagon was it that he struck against? A. A small market wagon. Q. 22. How fast were these horses going when they struck him? A. I should say about 12 miles an hour. Q. 23. What did you do when you saw the accident? A. I went out and picked him up. Q. 24. Did you follow the wagon down? A. No, sir." It clearly appears that the testimony does not relate to any time after the accident.

The fourth exception was to question 54 asked of the witness Max Smith, as follows: "Will you tell what you saw the driver do (after the accident and with reference to the horses concerned in the runaway) with reference to the weight when he went back to the store? A. When he got back to the store, he took the weight out of the wagon and put it on the black horse." This was perfectly proper testimony to show that the weight and hitch rope were intact and capable of being used after the accident.

The fifth exception is founded upon defendant's objection to the answer of George E. Johnson, a witness for the plaintiff, to question 200 asked by counsel for defendant in cross-examination, as follows: "And what was Mr. Robinson doing at the time? A. I saw him when he stepped out from behind these other teams, and just then this wagon slewed to one side, and it looked to me as though he- Q. 201. Tell what you saw; not how it looked. Mr. Hogan: I think the witness is entitled to tell his answer in his own way, and I object to Mr. Waterman cutting off his answer in the middle of it. Mr. Waterman: He has already told what he saw. The Court: We all know that, when a witness is telling what he sees, it is a shorthand method of telling what he sees by telling how it looked to him. It is simply his

any reasonable light. Q. 14. Go ahead. Mr. | swer read by stenographer.) The Court: Defendant's exception noted. A. As though he turned north to go back, jumped back quick, and this wagon, the back of this wagon, struck him and knocked him down, up against the other teams, and I couldn't see after that, because I ran to get out of the way." The answer was responsive and unobjectionable. The justice of the superior court was clearly right in his ruling.

The sixth exception is to the following ruling of the court: "If he [George E. Johnson] was employed to hold that horse, he may say so. Q. 209. Were you or not? A. Yes sir." The horse, referred to, was the black horse concerned in the runaway. The person by whom the witness was employed was the defendant's driver Nelson, and the time of the employment was anterior to that of the runaway in question. It was perfectly proper to show that the defendant's driver recognized the necessity for exercising control and restraint over this horse. There is no merit in the exception.

The seventh exception is ineffectual, for after it had been taken, and while the subject thereof, viz., a letter, written by the plaintiff concerning the time, place, circumstances of, and witnesses to his accident, was being read by his counsel, the following proceedings were had relative to the same: "Mr. Waterman: My objection is to what other people saw. I note an exception to the general admission, but it is in another sense what other people say. The Court: At this part of the case I do not think it is admissible. Mr. Waterman: I ask that it be ruled out. I think that covers about everything. The Court: It may be stricken out. Mr. Hogan: This letter is signed by Mr. Robinson himself. You object to any more of it being read; all right. The Court: I think the part that is hearsay should be ruled out. Mr. Waterman: I think that as it is in the whole thing ought to be filed among the papers, just as certain other papers. Court: As soon as I give you what you want, you do not want it. It is hard to please both of you."

The eighth exception is founded upon the defendant's objection to the plaintiff's introduction in evidence of ordinances of the city of Providence of 1899, as follows: "Mr. Hogan: Ordinances of the City of Providence, c. 1, § 1: 'No horses, sheep, hogs, goats or cattle shall go at large, loose, or unfastened in any street or highway within the limits of the city.' Chapter 20 of the Ordinances-that is on page one. Chapter 20 of the Ordinances, section 15, on page 53: Every person having control of any horse or other animal, attached to any vehicle, and every person having control of any bicycle, tandem, tricycle or any vehicle, shall use every effort in his power to prevent such animal or vehicle from running against or afoul report of what he saw. (C. Q. 200 and an- of any person, vehicle or thing, whatsoever.'

No harm was done by the admission of the to the jury, provided that the plaintiff ofordinances, although their provisions are not as applicable to the situation as those of Gen. Laws 1896, c. 74, § 4: "Every person having charge of any wheel carriage of any kind, or sled or sleigh, with any kind of team, who shall negligently or willfully leave the same to go at large in any highway shall be fined five dollars." This is a public statute, of which the court takes judicial cognizance. The defendant's driver in leaving the team, composed in part of a nervous horse, which he knew was liable to start and run through fear of an automobile, unhitched and unattended in a public highway, where automobiles were apt to come and did come, did leave them to go at large when he went away, having done nothing to prevent them from going at large in his absence. It would be negligent to leave any team of horses at such a time and in such a place and under such circumstances so unrestrained; but, with the knowledge that he had of the proclivities of one of the animals in the team, it was recklessness amounting to willfulness for him to leave them for a period of from three to five minutes in the busiest part of the day in a crowded street, where human life and limb might be thereby imperiled, to say nothing of the injury to themselves and other animals and the damage to property that might result from their going at large or running away. Rev. St. 1857, c. 47, "Of Traveling on Highways," in section 4 contains the same provisions. More than half a century ago, in a sparsely settled community, at a time shortly after the advent of steam railroads, in the days of stage coaches and omnibuses, and before horse cars had been thought of, and hence long before their evolution into electric cars could have been dreamed of, the Legislature saw fit to require such care to be taken in the use of the highways as they then existed and as they then were used. There is no reason for relaxing such precautions in these days of increasing travel by modern agencies of speed and danger upon the public highways. There is every reason for requiring a strict compliance with such reasonable rules.

The ninth exception is to the refusal of the court to direct the jury to return a verdict for the defendant. The court certainly should not have directed a verdict, unless there was an overwhelming preponderance of evidence in favor of the defendant. course, it was necessary for the plaintiff to prove that at the time of the accident he was in the exercise of due care, that the defendant was negligent, and that he received injuries in consequence of such negligence. Proof that the defendant's servant in charge of the team was negligent in leaving the team to go at large was evidence of the defendant's negligence. Proof that the plaintiff was injured by the runaway team so permit-

fered evidence tending to prove that he was in the exercise of due care. Proof of where the plaintiff was going when he was overtaken and struck by the defendant's wagon, how he was going, the manner in which he looked and listened, what he did, how he stopped in time to avoid the horses, the manner in which he was caught by the wagon, were circumstances for the jury to weigh in determining whether he was exercising such care as an ordinarily careful and prudent man would have exercised at the time and place and in the circumstances. The court rightly refused the motion.

The tenth, eleventh and twelfth exceptions relate to the refusal of the court to charge as follows: "Fourth. Vehicles have the right of way over pedestrians on public highways. Fifth. Vehicles have the right of way over pedestrians on public highways between intersecting streets. Sixth. Vehicles have the right of way over pedestrians on public highways at the point where the plaintiff was crossing." The defendant does not press these exceptions in his brief or argument. and presents no authority in support of them. The requests were rightly refused by the court.

The thirteenth, fourteenth, and fifteenth exceptions are founded upon the refusal of the court to charge the jury as follows: "It was the duty of the plaintiff to look and listen for approaching vehicles before going upon the street, and if he failed to do so, and was injured in consequence thereof, he cannot recover." "It was the duty of the plaintiff to look and listen for approaching vehicles before attempting to cross the street." "It was the duty of the plaintiff to show by a preponderance of testimony that he looked and listened for approaching vehicles before crossing the street, and if he failed to do so, and this contributed to his injury, the verdict must be for the defendant." The foregoing requests were properly refused. The jury had been correctly charged upon the subject by the court.

The sixteenth, seventeenth, and eighteenth exceptions relate to the refusal of the court to charge as follows: "The plaintiff can only recover for injuries to his knee, leg, the fracture of his jaw, partial severance of his ear, and for the pain and suffering incident thereto, and the medicines and medical attendance necessary to heal and cure his injuries." "The plaintiff cannot recover for the nervous shock, or nervousness, as he has not alleged the same in his declaration." "The plaintiff cannot recover for the loosening and disarrangement of his teeth, as he has not alleged the same in his declaration." The portion of the plaintiff's declaration that relates to his injuries and damages reads as follows: "So that he was injured in and about his knee and leg, and he was struck in ted to go at large was sufficient proof to go the head, so that his jaw was fractured and

broken, and his ear was, to wit, partly severed from his body, and he then and there became unconscious, and so remained for a long time, and he was otherwise seriously and permanently injured internally, and was injured and permanently disfigured externally, and he then and there suffered and endured great pain and agony, and became and was sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, from thence hitherto, and has been put to great expense for medicines and medical attendance in endeavoring to heal and cure his said injuries, and he has been incapacitated from performing any labor, and for a long time to come he will continue to suffer further great pain and agony, and will be further incapacitated from performing any labor, and will be put to further great expense for medicines and medical attendance, and he has been and is greatly and permanently injured and disabled by reason and in consequence of the premises and of the negligence of the defendant company, its agents and servants, in manner aforesaid." The charge of the court relative to this subject was as follows: "Gentlemen, it is your duty to find that the defendant was liable before you come to the question of damages. You must first determine whether or not the defendant is liable as charged. Unless you find that he was, of course it is your duty to find for the defendant; but, if you find that he was, that the defendant was guilty of negligence, and that the plaintiff was free from negligence which contributed to the injury, then it is your duty to find for the plaintiff, and you should then take up the question of damages, and, if this company is liable, they are liable to reimburse this man for such injuries as he suffered, and such as rather—natural consequences of the injuries that he suffered. They are liable to reimburse him for pain and suffering, for medical expense caused in curing the injuries which resulted from this accident, and for any disfigurement, if there is any, gentlemen, he is entitled to compensation. I find, gentlemen, on examining the declaration, that there does not seem to be any count in there for loss of wages. I shall therefore be obliged to say to you that you cannot take that into consideration; but for pain and suffering, and for disfigurement, and for expenses, doctor's expenses, medical expenses, dentist's expenses, and nurses, and for medicine, he is entitled to recover, if this defendant is liable. I think, gentlemen, that is all I need say to you." The charge in this particular, although brief, is comprehensive; and the declaration is sufficiently explicit to cover claims for nervous shock, nervousness, and loosening or disarrangement of the teeth.

. The nineteenth and twentieth exceptions are based upon the refusal of the court to charge as follows: "The plaintiff cannot recover for the bronchitis, or expenses incident

thereto, because he has not alleged the same in his declaration." "If the plaintiff's trip South was made necessary by the bronchitis, or by the nervousness of the plaintiff, he cannot recover the expenses of that trip, because he has not alleged in his declaration that he was caused to have bronchitis or nervousness." The former of the foregoing requests was entirely unnecessary. There is nothing in the record to indicate that the plaintiff was seeking to recover damages for the bronchitis. The fact that he had that disease came out in the testimony as a part of his physical history since the accident. It may have indicated a weakened condition of the plaintiff, which rendered him less capable for the time being of coping with physical ailments. It certainly was not made the subject of a substantive claim for damages. The request was rightly denied. The latter request was also properly refused, because, as we have already decided, the declaration covers claims for damages arising from nervousness.

The twenty-first exception must be overruled, as the court had already charged as requested by the defendant.

The twenty-second exception relates to the refusal of the court to charge as follows: "The plaintiff is not entitled to recover on account of the bronchitis, or any expense that he went to in curing himself of the bronchitis, as the accident was not the proximate cause of the bronchitis." The request was properly denied by the court. It was no part of the duty of the court to ascertain and instruct the jury as to the origin of the bronchitis suffered by the plaintiff, or to instruct them whence it did not arise. It was an attempt to obtain from the court an instruction to the jury upon a matter of fact involved in much obscurity.

The twenty-third and twenty-fourth exceptions have reference to the denial of the court to charge the jury as follows: "If an ordinarily prudent man would not have hitched these horses at the time and place and under the circumstances in question, the defendant was not guilty of negligence in failing to hitch the horses." "If an ordinarily prudent man would have left these horses standing as these horses were left standing at the time and place and under the circumstances in question, the defendant was not guilty of negligence." These requests were properly refused. The duty of all men, prudent or otherwise, is defined in Gen. Laws 1896, c. 74, 4, hereinbefore set forth.

The twenty-fifth exception is to the following portion of the charge of the presiding justice to the jury: "Well, gentlemen, it is the law as I understand it that horses which are left in a highway must be either properly hitched, properly weighted, or there must be somebody in immediate attendance upon them, so near to them that they can control the movements of the horse by their voice, or can readily reach the horse's head

so as to secure him in case of danger." The exception is without merit. The court correctly stated the law of the state upon the subject.

The twenty-sixth exception was taken to the following portion of the charge of the court: "And I can only reiterate to you, gentlemen, my understanding of the law that it is necessary either to have a horse properly secured or else to have somebody in immediate attendance upon him, so as to exercise control over the horse by voice or by action." The charge is an admirable statement of the law, and the exception must be overruled.

The twenty-seventh exception is to a portion of the charge of the presiding justice as follows: "If the circumstances are so that it would not have done him any good to look or listen, then, gentlemen, he would be excused from doing so; but otherwise not." This was but a portion of the charge of the judge upon that branch of the subject. The entire charge in reference to the duty of the plaintiff to look and listen was complete and correct.

The twenty-eighth, twenty-ninth, thirtieth, thirty-first, and thirty-second exceptions are based upon the denial of the presiding justice to grant the defendant's motion for a new trial based upon the following grounds: "The verdict is against the law. The verdict is against the evidence, and the weight thereof. The verdict is against the law and the evidence, and the weight thereof. The damages awarded in said cause were grossly excessive and unjust. The defendant has discovered new and material evidence, which it had not discovered at the time of the trial of sald cause, and which it could not have discovered at said time by the exercise of reasonable care."

No affidavits of newly discovered evidence have been filed, and, no mention of the existence of any having been made, we presume that this ground was inserted in the motion out of abundant caution, as a foundation for such a claim if it should materialize.

We have already decided that, in view of all the evidence relating to injuries and damages, the amount awarded by the jury is not excessive.

The verdict is neither against the law nor the evidence, or weight thereof. On the contrary, it is amply supported by the same. The gross negligence of the defendant's servant inflicted upon the plaintiff serious injuries, which might have been fatal, through no fault of his, and a jury has awarded him merely compensatory damages therefor. The verdict ought not to be disturbed.

The defendant's exceptions are overruled. and the case is remitted to the superior court, with direction to enter judgment on the verdict.

(30 R. L. 1719) CO-OPERATIVE BLDG. BANK V. HAWKINS.

(Supreme Court of Rhode Island. July 7, 1909.)

1. Evidence (\$ 265*)—Admissions—Conclu-SIVENESS.

Where the location of defendant's lot on a certain tract of land depended on the construction to be given to the description in a mort-gage and the mortgagee's deed to defendant, her admission as to the location of certain buildings on the lot in a bill in equity with reference to the property was an admission based on a con-clusion of law, and was therefore not binding on her in an action of trespass quare clausum for the removal of the buildings.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 265.*]

2. DEEDS (§ 119°) — BOUNDARIES (§ 40°) — QUESTIONS FOR JURY.

The construction of deeds to determine the description of the land conveyed is a question for the court, but the location of the boundaries on the ground is for the jury.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 342, 343; Dec. Dig. § 119; Boundaries, Cent. Dig. § 196–204; Dec. Dig. § 40.*]

8. DEEDS (§ 111*)-DESCRIPTION-CONSTRUC-TION.

In construing the description in a deed, the intention of the parties is to be ascertained, and if definitely expressed in the instrument the expression should control; but if the description is ambiguous in any particular the parties' intention in that particular should be sought for by a consideration of all the calls of the description, the state of the property, and the circumstances under which the deed was

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 309-315; Dec. Dig. § 111.*]

4. Boundaries (§ 8°)-Definite Calls-Ex-TENSIONS.

Where the calls of a description are definite and clearly expressed in the instrument, they should not be extended to conform to an intention which might be discovered from other parts of the description or from extrinsic evidence; the chief purpose being to develop the true intent of the language used.

[Ed. Note.—For other cases, see Boundaries, Dec. Dig. § 3.*]

5. Boundaries (§ 8*)—Fixed Monuments—Courses and Distances.

Fixed monuments in boundaries will control courses and distances, and metes and bounds expressed with certainty will include the land within them.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 18, 20; Dec. Dig. § 3.*]

6. Boundaries (\$ 5*)-Monuments - Exist-ING LINE.

An existing line of an adjoining tract may constitute a monument.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 44½; Dec. Dig. § 5.*]

7. Deeds (§ 113*)—Description—Construc-

A mortgage described a lot as beginning at a point "about" 315 feet from D. street, and 363 feet from M. street, land running westerly, bounded northerly by land of the grantors, 100 feet to the land of C.; thence southerly, bounded westerly by C.'s land 50 feet to a corner; thence, turning at right angles, said land runs easterly, bounded southerly by the land of the grantors, 100 feet to a corner; thence, turning at right angles, said land runs northerly, bound-

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ed easterly by land of the grantors, 50 feet to the first-mentioned boundary, together with all buildings and improvements thereon, etc. Thereafter, to prevent foreclosure proceedings, the land was conveyed to the mortgagee by the same description, and she took possession, including the whole of the dwelling house, part of which was not within the boundaries of the tract. Held, that the word "about," as so used, was not equivalent to "at," but indicated that only approximation of the distance of the beginning line from the street was intended: and.

14. BOUNDARIES (§ 2*) — DESCRIPTION —

"ABOUT."

The word "about," as used to define the location and beginning point in the description of certain land, should be construed, if possible, in such a manner as to carry out the meaning and intent of the grantor.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 2; Dec. Dig. § 2.*]

Exceptions from Superior Court, Proviginging line from the street was intended: and. only approximation of the distance of the be-ginning line from the street was intended; and, it appearing from the description that the lot conveyed was not to extend more than 100 feet east of C.'s land, extrinsic evidence and general expressions in the description were ineffective to override such definite calls and extend the lines of the lot to include the whole house within the boundaries.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 113.*

For other definitions, see Words and Phrases, vol. 1, pp. 21-28.]

8. Adverse Possession (§ 13*)—Elements.
In order to establish title by adverse possession, claimant must have been for the statutory period in uninterrupted, quiet, and actual seisin and possession of the land, claiming the same as his sole and rightful estate in fee.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 65-76; Dec. Dig. § 13.*]

9. Adverse Possession (§ 50*)—Continuity -Interruption.

Where defendant, as plaintiff in a former suit, admitted in her bill that the defendant had title to the land on which certain portions of a house and barn therein specified were located, such admission interrupted the continuity of her adverse possession of the land on which such portions then stood.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 50.*]

10. Adverse Possession (§ 68*) — Hostile Possession—Grantee of Mostgagor.

I'ossession by the grantee of a mortgagor under a warranty deed will not be deemed adverse the statement of the statem verse to the mortgagee, without an explicit de-nial of holding under him, brought to his no-tice, as the mortgagor and his assigns hold in privity with the mortgagee and in subordination to his rights.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 63.*]

11. EVIDENCE (§ 358*)-DOCUMENTARY EVI-DENCE-PLATS.

Plats showing the location of a house and barn with reference to the land in controversy according to plaintiff's claim were properly admitted.

[Ed. Note.—For other cases, see Hent. Dig. § 1500; Dec. Dig. § 358.*]

12. Trespass (§ 45*)—Evidence—Material-ITY-NEGOTIATIONS.

In trespass quare clausum, evidence as to defendant's reason for filing a prior bill of equity against plaintiff concerning the property, and as to the nature of negotiations for settle-ment of the differences, was immaterial.

[Ed. Note.—For other cases, see Trespass, Dec. Dig. § 45.*]

13. TRESPASS (§ 11*)—REMOVAL OF BUILD-INGS

Plaintiff was entitled to damages for the removal of a portion of a house which extended over defendant's boundary line onto plaintiff's land.

[Ed. Note.—For other cases, se Cent. Dig. § 9; Dec. Dig. § 11.*] see Trespass,

dence and Bristol Counties; George T. Brown, Judge.

Action by the Co-operative Building Bank against Emma A. Hawkins in trespass for breaking and entering plaintiff's close. Verdict for plaintiff, and defendant brings exceptions. Sustained.

Dexter B. Potter, Alfred S. Johnson, and Arthur P. Johnson, for plaintiff. James A. Williams, for defendant.

SWEETLAND, J. It appears from the testimony: That on February 1, 1894, one Annie Campbell was the owner of a tract of land on the westerly side of Main street, near Dudley street, in the city of Pawtucket. That said tract measured 200 feet on said Main street and extended westerly 463 feet to land of one H. Conant, on which land of Conant it measured 179 feet. So far as appears from the testimony, said tract had not been platted into lots. On said February 1, 1894, the said Annie Campbell was erecting a dwelling house upon said tract near its southwest corner. On said February 1, 1894, said Annie Campbell mortgaged a portion of said tract to this defendant, Emma A. Hawkins, as security for a negotiable promissory note for the sum of \$1,800. Duncan H. Campbell, the husband of said Annie Campbell, joined with her in said mortgage deed and note. The portion of said tract mortgaged to Emma A. Hawkins was described in said mortgage deed as "a certain lot or parcel of land, situated in the city of Pawtucket, bounded and described as follows: Beginning at a point about 315 feet distant from Dudley street and 363 feet distant from Main street, said land runs westerly, bounded northerly by land of these grantors, 100 feet, to the land of H. Conant; thence southerly, bounded westerly by said Conant land, 50 feet, to a corner; thence, turning at right angles, said land runs easterly, bounded southerly by land of these grantors, 100 feet to a corner; thence, turning at right angles, said land runs northerly, bounded easterly by land of these grantors, 50 feet, to the first-mentioned bound-together with all the buildings and improvements thereon, and is a part of the premises conveyed to Annie Campbell by deed from Mary A. Sullivan, dated May 3, 1889, and recorded in Pawtucket records in B 50, p. 115, to which reference is hereby made." Said mortgage deed from Duncan H. and Annie Campbell to Emma A. Hawkins was recorded in

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It appears from the testimony that at the time of said mortgage said lot therein described was not marked by bounds placed upon the land, by fences, or in any other manner. On April 18, 1894, the said Annie Campbell mortgaged the whole of said tract to the plaintiff in this case, the Co-operative Building Bank, for the sum of \$14,000. The said Duncan H. Campbell joined in the mortgage deed and note. The mortgage to the Co-operative Building Bank was recorded in the land records of Pawtucket on May 15. 1894. On July 15, 1896, to prevent the commencement of foreclosure proceedings, which for some reason she did not wish to have taken, the said Annie Campbell, then a widow, conveyed by deed to Myron H. Hawkins, for Emma A. Hawkins, the premises described in the mortgage deed to Emma A. Hawkins; and thereupon, on said July 15, 1896, the said Myron H. Hawkins, for Emma A. Hawkins, took possession of certain land upon said tract, including a part of the land which the plaintiff alleges in its declaration to be its close, and including the whole of the dwelling house, which, as before stated in this opinion, was in process of erection on February 1, 1894, and continued in possession of said land and said dwelling house until October 22, 1906. On April 14, 1897, the said Emma A. Hawkins, to protect her interest, foreclosed the premises described in the mortgage deed to her, and as attorney for the mortgagor conveyed said premises to herself by mortgagee's deed. On November 20, 1897, the Co-operative Building Bank foreclosed the said mortgage of Duncan H. and Annie Campbell to it, and as attorney for the mortgagor conveyed said tract in said mortgage described to itself by mortgagee's deed. On December 27, 1897, the said Co-operative Building Bank conveyed the entire tract, described in said mortgage and in said mortgagee's deed to it, by deed to one Blodgett, and on the same day the said Blodgett gave to said Co-operative Building Bank a mortgage back upon said entire tract. On March 13, 1901, having foreclosed the mortgage of said Blodgett to it, the Co-operative Building Bank, as attorney for the mortgagor, conveyed the entire tract to itself by mortgagee's deed.

In February, 1903, the plaintiff, the Cooperative Building Bank, proceeded to plat said tract into streets and lots, and attempted to apply to said land the description of the lot contained in the mortgage deed of Duncan H. and Annie Campbell to Emma A. Hawkins; and in so attempting to apply said description to the land the plaintiff took as the place of beginning, as the northeast corner of said lot, a point exactly 363 feet west of Main street and exactly 315 feet south of Dudley street, in said Pawtucket, and the plaintiff has so delineated a certain

the land records of Pawtucket on February | Hawkins, upon its plat, which said plat was recorded in the land records of said Pawtucket on March 25, 1903. Under the construction of said description so adopted by the plaintiff, the dwelling house, before referred to, extends beyond the lines of said lot and onto land which the plaintiff alleges in its declaration to be a part of its close; said extension being more than 7 feet along the south side of said house and about 7 feet along the east side of said house. On February 13, 1903, the defendant, Emma A. Hawkins, having been informed of the claims of the plaintiff as to the location of said dwelling house with reference to the lines of her said lot, joined with her husband in a bill in equity against the Co-operative Building Bank, drawn by a solicitor other than her attorney in the case at bar, and filed the same in the appellate division of the Supreme Court. Said bill was signed by said Emma A. Hawkins and her husband, but was not sworn to by either. Said bill averred the ownership by said Emma A. Hawkins of the lot described in the mortgagee's deed to her, and the ownership by the Co-operative Building Bank of the remainder of said tract, and further averred that "at about the time said mortgage deed was given by Duncan H. Campbell and Annie Campbell to said Emma A. Hawkins, a dwelling house, a barn, and other improvements were erected upon the land in question in this suit, and these buildings were so placed upon said property that the southerly portion of the barn projects beyond the lot included in the mortgage to said Emma A. Hawkins about 11/3 feet its entire length, and the southerly portion of the dwelling house projects about 71/4 feet at the front and nearly 8 feet at the rear, * * * and practically all of the piazza across the front of the house and the front steps are not upon the land included in the mortgage and deed to Emma A. Hawkins." The complainants in said bill also averred that the Co-operative Building Bank at that time threatened to cut off "so much of said buildings and improvements as are not upon the land described in the deed to Emma A. Hawkins, or to barricade that portion of the buildings so that they cannot be used by tenants and occupants of the other portions of said buildings." In said bill the complainants sought by way of relief that the court in equity should order the sale of all the property referred to in the mortgagee's deed to Emma A. Hawkins and so much of the adjoining land of the respondent in said bill as should justly and fairly be sold, and to have the proceeds of such sale and also the amounts theretofore collected by Emma A. Hawkins as rentals upon said property apportioned between Emma A. Hawkins and the respondent in the bill in such proportion as the court shall determine to be just and equitable. A demurrer to said bill in equity was sustainlot as the lot of the defendant, Emma A. ed, and said bill was afterwards ordered

now pending in said court.

At some time between October 22, 1906, and November 22, 1906, by direction of said plaintiff, Emma A. Hawkins, said dwelling house was moved from its position at that time and placed within the lines of the lot delineated as her lot on the plat of the plaintiff. On December 11, 1906, the plaintiff at bar commenced this action in trespass against the defendant, and its declaration alleges, in four counts, slightly differing in language, that the defendant broke and entered its close and with force and arms by her servants and agents raised from their foundations and removed from said close a portion of a dwelling house and a portion of another building which were standing upon said close and were the property of the plaintiff. The defendant pleaded the general issue, and also that at the time of bringing the suit the defendant had been for the space of more than 10 years in the uninterrupted, quiet, peaceable, and actual seisin and possession of the dwelling house and other building described in the declaration, and the land upon which said dwelling house and other building stood during all of said time, claiming the same as her own proper, sole, and rightful estate in fee simple, by reason whereof said defendant acquired a good and rightful title to said dwelling house and other building and the land upon which the same stood.

At the trial of said action before a jury in the superior court the justice presiding instructed the jury that the only question for them to determine was as to the amount of the plaintiff's damages. The jury returned a verdict for the plaintiff for \$682. The defendant filed a motion for a new trial on the ground that the verdict in said case was against the evidence and the weight thereof, that the verdict in said case was against the law, and that the damages awarded to the plaintiff in said case were excessive. Said motion for a new trial was denied by the justice presiding in the superior court. The case is before this court upon the defendant's bill of exceptions. Before taking up the defendant's bill of exceptions in detail and in order, it will be of advantage to consider certain fundamental questions involved in the principal exceptions.

First. As to the effect, upon the location of her lot, of the defendant's admissions contained in the bill in equity, signed by herself and her husband: In the case at bar the defendant does not deny that the dwelling house and barn were moved by her, as the plaintiff alleges. If the defendant's allegations in her bill in equity are to be taken as conclusive against her upon the question as to the location of the lines of her lot, then there was no matter before the jury except as to the amount of damages, unless the defendant had acquired title to the whole they stood by adverse possession. The de- be a question of law, to be decided upon the

transmitted to the superior court, and is | fendant claims that the allegations of the bill in equity in this regard are not binding upon her. It is the uncontradicted testimony of the defendant, given at the trial, that she had no personal knowledge of the exact location of the lines of her lot at the time she signed said bill in equity, that at the time she received said mortgage deed from Duncan H. and Annie Campbell there were no bounds placed upon the land, that the bill in equity was drawn by her solicitor as the result of investigation of the land records made by him, that she thinks that she did not read the bill before she signed it, and that she did not swear to it. The location of the defendant's lot upon said tract depends upon the construction which shall be given to the description contained in the mortgage and mortgagee's deed to her. The construction of these deeds is a question of law to be determined by the court, and the admission of the defendant as to the location of said buildings, with reference to her lot was an admission based upon a conclusion of law.

It was held in Crowell v. Bebee, 10 Vt. 33, 33 Am. Dec. 172, that "an admission by a party of a mistaken line for the true one has no legal effect upon his title, and that a mutual recognition of a wrong line adjoining proprietors and their acquiescence in such line, unless accompanied by possession of one or both according to it, and that continued for 15 years, are not conclusive as to their respective rights." In Hawley v. Bennett, 5 Paige (N. Y.) 111: "The decision of the Vice Chancellor that the admissions of Bennett while he remained in possession under his deed, and which were wholly inconsistent with the written evidence of his title, could not be received in evidence to destroy such legal title, was correct, as those admissions were unquestionably made under a mistake of the law as applicable to the case." In Crockett v. Morrison, 11 Mo. 3: "It is also true that a tenant's declarations are inadmissible to affect a documentary title and that such testimony would be a plain violation of the statute of frauds. * * * It is well settled that the admission of a party in relation to a question of law is no evidence. Such admissions do not make the law either one way or the other, and where the matter admitted involves a question of law, as well as fact, it falls within this rule, and is therefore incompetent proof." In Rice v. Ruddiman, 10 Mich. 137: "Though it was admitted by both parties that 'for the purposes of the trial Lake Muskegon should be considered an arm or estuary of Lake Michigan, and part and parcel thereof, and not as a widening or continuation of Muskegon river,' I . m inclined to consider this rather as the admission of a conclusion of law from the facts than as a mere admission of fact. Whether this lake is to be considered a part of Lake Michigan or as a widening of the Muskegon of said buildings and the land upon which river, so far as it might be material, would

facts of the case, and no admission of the upon which it stood. The land which is esparties could bind the court as to the law." See, also, Jackson v. Shearman, 6 Johns. (N. Y.) 19; Jackson v. McVey, 15 Johns. (N. Y.) 234; Solomon v. Solomon, 2 Ga. 18; City of Detroit v. Beckman, 34 Mich. 125, 22 Am. Rep. 507; Machem v. Machem, 28 Ala. 374.

We are of the opinion that the allegations of this defendant in her bill in equity do not affect her title to any part of the land which upon a construction of her deed shall be found to be within the description therein contained. The effect of the allegations of the bill in this respect should be distinguished from their effect upon any claim of title by adverse possession which may be made by the defendant to land which is not contained within her lot as described in the

The second fundamental question to be considered is as to the construction which should be given to the description contained in the mortgage and mortgagee's deed to the The testimony shows that, bedefendant fore the defendant loaned the money to Annie Campbell and took the mortgage from Duncan H. and Annie Campbell, the said Annie Campbell showed to the defendant the dwelling house then in process of erection; and it is a question, to be determined from the language of the deed and from the circumstances of the transaction, whether or not it was the intention of the parties to the mortgage that the same should cover the whole, and not merely a portion, of this dwelling house. In this connection the language of the description in said mortgage should be considered, wherein the mortgagor conveys the land, "together with all the buildings and improvements thereon." While these words alone cannot be permitted to extend the grant and to override the definite calls of the description, such words may be considered with advantage in determining the intention of the parties. As was held in Carville v. Hutchins, 73 Me. 229: "When grant of land is made with fixed and definite metes and bounds, capable of being ascertained on the face of the earth, it seems clear that it cannot be enlarged so as to include adjoining land by the mere addition of the words 'together with the buildings thereon standing,' although such adjoining land is covered by corners of the buildings referred to." When the boundaries set out in the description are not definite, this and similar expressions may be given legal effect. In Lewellen v. Williams, 14 Wis. 687, a mortgage described the premises conveyed as "the three-story brick building now occupied by them as a store" and "situated on land described as follows: Lot No. 1, in block No. 9, in the village of Whitewater." point of fact the store covered, not only lot No. 1, but also the west two feet of lot No. 10, in that block. The court held that there can be no doubt that the intent of the parsential to the use of a building will pass by a conveyance of the building, if it appears that such was the intention of the parties,

In construing the description contained in the deed, the purpose should be to find the intention of the parties. When this is clearly and definitely expressed in the instrument, that expression must control. If the description itself is ambiguous or uncertain in any particular, the intention of the parties in that particular may be sought from a consideration of all the calls of the description, of the state of the property, and of the circumstances in which the deed was made. This court, in an opinion written by Chief Justice Ames, said, in Deblois v. Earle, 7 R. I. 26: "The cardinal rule in the interpretation of all instruments, guaranties included, is 'to read the writing' and, taking its language in connection with the relative position and general purpose of the parties, to gather from it, if you can, their intent in the questionable particular." Scheible v. Slagle, 89 Ind. 323; Dawson v. James, 64 Ind. 162; Chapman v. Hamblet, 100 Me. 454, 62 Atl, 215; Kimball v. Semple, 25 Cal. 440; Roberti v. Atwater, 43 ('onn. 540; Wooster v. Butler, 13 Conn. 309; Rosenberger v. Wabash Ry. Co., 96 Mo. App. 504, 70 S. W. 395; Hall v. Eaton. 139 Mass. 217, 29 N. E. 660; Murdock v. Chapman, 9 Gray (Mass.) 156; Lovejoy v. Lovett, 124 Mass. 270; Goodyear v. Shanahan, 43 Conn. 204.

It appears, also, that the parties to the deed have given by their acts a construction to the description in question as one covering the whole house; for when, to prevent foreclosure proceedings under the mortgage, Annie Campbell conveyed the said lot by deed containing a like description to Myron H. Hawkins, for Emma A. Hawkins, the said Myron H. Hawkins entered into possession of the whole house under said deed, and without objection from Annie Campbell continued to collect the whole rent for the benefit of Emma A. Hawkins. This court has held in Hiscox v. Sanford, 4 R. I. 55, that when the proper construction of written instruments is doubtful, when the language is ambiguous, when it is uncertain in what sense particular terms or expressions are used by the parties, evidence as to the practical construction put upon the grant by the parties is often admitted with great benefit and to the advancement of justice.

In considering the terms of the description in question, certain of the calls are definite. and must be held to indicate the intent of the parties, clearly expressed in the instru-These positive calls should not be extended to conform to an intention which might be gathered from other parts of the description or from extrinsic evidence. "The chief purpose of construction is to develop ties was to convey the store and all the land | the true intent of the language, and that intent should always be given paramount force | proper application of the description to the when it has been discovered." Rosenberger v. Wabash Ry. Co., 96 Mo. App. 504, 70 S. W. 395. And "another principle is that description about which there is the least certainty must yield to those of greater certainty." Roberti v. Atwater, 43 Conn. 540. And as a general rule known and fixed monuments and boundaries will control courses and distances, and metes and bounds expressed with certainty will include the land within them. Nichols v. Turney, 15 Conn. 101. The description calls with the utmost certainty for a lot, in form a rectangle, with north and south lines each 100 feet long, and with east and west lines each 50 feet long, and with the west line conforming to the west line of the whole tract of which it is a part, and also conforming to the east line of the land of H. Conant. The call for the west line bounded by the land of H. Conant must have controlling force in the nature of a monument. An existing line of an adjoining tract may as well be a monument as any other object. Abbott v. Abbott, 51 Me. 575. The west line determines the location of the east line, which must be parallel with and 100 feet from the west line.

It thus appears clearly that the intention of the definite language of the description is that the lot conveyed shall not extend more than 100 feet east of the Conant land. Though from the general expressions contained in the description and from extrinsic testimony it might be made to appear that it was the intention of the parties to include within the lines of the lot the whole house and the land thereunder, such evidence should not be permitted to override the definite calls of the description which restrict said lot within a line of 100 feet east of the Conant land. It might be stated in this connection that the easterly side of the body of the said dwelling house, as it was built, coincided substantially with a line 100 feet east of the Conant line; and it does not appear from the testimony whether the piazza and front steps, which extend to the east of such line, were built at the time of the execution of said mortgage to the defendant, or whether they were a part of the original construction of said house. The uncertainty in the application of this description to the land arises from the indefiniteness of the call as to the point of beginning, or the easterly terminus of the north line, which determines the location of said north line and also of the south line parallel with and 50 feet from it, and fixes the location of the lot upon the tract. This point must lie in the line 100 feet east of the Conant line, and according to the terms of the description is about 315 feet distant from Dudley street. If no force is conceded to the word "about." there is no indefiniteness in the description, and the lot as delineated on the plat of the Co-operative Building Bank represents a should stop at the end of the 216 rods, the

land. If, however, from other parts of the description and from the circumstances existing at the time of the execution of the deed, to which the parties presumably had reference, the purpose of the parties in the use of the word "about" can be ascertained, such effect should be given to that word as will carry out the intention of the parties.

The justice presiding at the trial in the superior court ruled that this word should not be held to render the description uncertain, but should be considered as equivalent to the word "at." In some circumstances this has been held a proper construction of the word, as in Simms' Lessee, v. Dickson, 3 Tenn. 137, Fed. Cas. No. 12,869, where "As to the word 'about,' the court said: used in the grant, I am of the opinion that it does not make the land uncertain. It has always been determined that the word 'about' signifies in an entry or grant 'at,' unless something can be shown to evidence a contrary intention." The word "about," occurring in a description in deeds, has received judicial consideration and construction in a number of cases. The word was considered in a line of cases calling for a construction of the descriptions in certain entries and preemptions in the wilderness at the time of the settlement of Kentucky (Kincaid v. Blythe's Heirs, 5 Ky. 479; Grubbs v. Rice, Id. 107), and in the opinion of Marshall, C. J., in Johnson v. Pannel's Heirs, 2 Wheat. 206, 4 L. Ed. 221. The result of these cases is that the vague words, "about," or "nearly," and the like, occurring in the descriptions of distances, are to be considered in giving effect to the intention of the parties, but are to be rejected if there are no other words rendering it necessary to retain them, and that then the distances mentioned are to be taken as positive. The case of Purinton v. Sedgley, 4 Mo. 283, is to the following effect: In a deed to the ancestor of the grantors in the deed under consideration, the southerly line of the land conveyed is described as "running an east-southeast course, parallel with the northerly line aforesaid, about 216 poles, more or less, to the Abagadasset river aforesaid." In a deed of the heirs of this grantee, conveying a whole or part of the land conveyed to their ancestors, the southerly line is described as "running east-southeast about 216 poles," without reference to said river as the terminus. Exactly 216 poles would not extend to the river. The majority of the court held that this deed should be construed with reference to the former deed, and the intention was found to extend this line to the river; that the word "about," in connection with other circumstances, may have been used, and probably was used, because the exact distance from or to the river was not known when either deed was written, whereas, if the intention of the grantors had been that the third line or course

word "about" was not only superfluous, but | should be given to the estimated measurement improper and deceptive. In Hall v. Eaton, 139 Mass. 217, 29 N. E. 660, a line described in the deed as "61 feet, more or less," was permitted to be extended to over 80 feet to carry out the intentions of the parties, as expressed in other parts of the description; the court saying: "The question to be determined is the intention shown in the language of the deed, in the light of the situation of the land and the circumstances of the transaction, and sometimes with the aid of declarations and conduct of the parties in relation to the subject-matter." In Iverson v. Swan, 169 Mass. 582, 48 N. E. 282, in deeds from a common grantor, the boundary line between the plaintiff and defendant was described as at right angles to a certain street. Plaintiff showed that, if the line was drawn at a right angle, the defendants' southeasterly boundary would be 531/2 feet, instead of "about 50 feet," as in the deed. The court held there was no conflict "between the angle and the measurement, since the measurement does not purport to be exact, but on its face is only a rough estimate, prefaced by the word 'about.'" In Atkins v. Bordman, 2 Metc. (Mass.) 457, 37 Am. Dec. 100, and 20 Pick. (Mass.) 291, the court considered a reservation in a deed of "a gate or passageway of about five feet wide." The court, in an opinion written by Shaw, C. J., says: "Although the gate was described as 'about five feet wide,' there was no warranty of its width, and no words declaring that he should have the width of the way as it then existed, or any equivalent expression; and the word 'about' indicates that it was not intended to be definite. It was therefore the right of a suitable and convenient passage for purposes indicated." In Maryland Construction Co. v. Kuper, 90 Md. 529, at page 548, 45 Atl. 197, at page 201, the court says: "The use of the word 'about' indicated that the parties only contracted for a number of feet that would be a near approximation to those mentioned, and negatives the conclusion that entire precision was intended."

The use of this word in descriptions, as in its ordinary use, indicates that exactness is not attempted and that an estimate is intended to be given, rather than a precise measurement; that the parties are trying to provide that their main intention as to the grant shall not be defeated by a precise description in some particular wherein precision is not then possible to them. When the word appears in a description, as in that under consideration, it is notice to all that to carry out the intention of the parties an elasticity may be given to the call in regard to which the parties have not considered it advisable to be exact. In the construction of such a description the main intention of the parties should be sought, and if the intention can be discovered, and it is not in conflict with the express language of the description, as will carry out the intention of the parties. The defendant in the case at bar contends that a consideration of the rest of the description and the surrounding circumstances warrants the conclusion that the parties intended to so locate the lot, described in the mortgage to the defendant, as to include therein the whole of the dwelling house then in process of construction, and that, as the exact distance from Dudley street was not known to them, they sought to carry out their intention by roughly estimating that distance, rather than to imperil their intention by an attempt at exactness. If it should be found that it was the intention of the parties to include the dwelling house in the lot covered by the mortgage, the discrepancy of seven or eight feet between the exact and the estimated distance from Dudley street would not be so great as to defeat the intention of the parties.

The question arises whether the determination as to the intention of the parties is for the court or for the jury. It is a familiar rule that what are the boundaries of land conveyed by a deed is a question of law, where the boundaries are is a question of fact. The court must determine the first, and the jury must ascertain the second. Abbott v. Abbott, 51 Me. 575; Clark v. Wagoner, 70 N. C. 706; Wooster v. Butler, 13 Conn. 309; Reid v. Proprietors of Locks, 8 How. 274, 12 L. Ed. 1077. When the calls of the description are definite and unequivocal the construction by the court amounts to a location of the boundaries. When, as in the case at bar, the description is indefinite in some particular and the intention of the parties must be sought, it is the duty of the court to construe the language of the deed and to declare the intention of the parties so far as their intention appears in the instrument, and it is the duty of the jury, governed by the instructions of the court as to the legal intent of the language of the deed, to determine, if possible, the intention of the parties in the questionable particular from a consideration of the evidence as to the state of the property at the time of the making of the deed and the circumstances surrounding the transaction.

The remaining general question to be considered is as to the defendant's claim of title by adverse possession to all the land upon which the house and barn stood, without regard to whether the whole of said land was or was not included within the lines of the lot mortgaged. This question would, in any event, have a bearing upon the title to the land under such part of the dwelling house as lay east of a line 100 feet east of the Conant line, as such land is clearly beyond the lot as described in the mortgage deed; and if it should be decided that the easterly end of the north line of said lot should be taken as exactly 315 feet south of such construction, within reasonable limits, Dudley street, this question would have a

bearing upon the title to the land under the southerly portion of the barn and dwelling house. On July 15, 1896, Annie Campbell conveyed to Myron H. Hawkins, for Emma A. Hawkins, "a certain lot or parcel of land, with all the buildings and improvements thereon, situated in the city of Pawtucket," described as in the mortgage deed to the defendant, and on said July 15, 1896. Myron H. Hawkins, for Emma A., took possession of the dwelling house and barn, and began to collect the rent for the same, and continued to do so until the sale under foreclosure. when Emma A. bought in the property described in said mortgage to her and continued to hold possession and to collect rent therefor until October 22, 1906, when she moved the buildings as before set forth. The defendant, because of the privity existing between Myron H. Hawkins and herself, seeks to tack the possession of Myron H. upon her own subsequent possession, and claims a possession of all the land in dispute adverse to the plaintiff for more than the statutory period of 10 years. Under the statute, in order to acquire a title by adverse possession, it is necessary that the claimant should have been for the statutory period in the uninterrupted, quiet, peaceable, and actual seisin and possession of the land, "claiming the same as his, her or their proper, sole and rightful estate in fee simple." On February 13, 1903, the defendant, by the allegations of her bill in equity, signed by her and filed in court, admitted the title of this plaintiff to the land upon which certain portions of the house and barn, therein specified, at that time stood. These admissions of title in the plaintiff interrupted the continuity of the defendant's adverse possession, if any had commenced to run in her favor.

In Stump v. Henry, 6 Md. 201, 61 Am. Dec. 300, the court holds that, if the title of one is upon possession alone, then it must be adverse, exclusive, and continuous for more than 20 years. It surely is not when by the admissions in his bill in equity he admitted that the land was sold under execution upon a judgment against himself within 20 years. In Horton v. Davidson, 135 Pa. 186, 19 Atl. 934, the court held that the defense of adverse possession fails when there was a distinct recognition of plaintiff's title by the defendant in a letter written by him. Daveis v. Collins (C. C.) 43 Fed. 31, the court says: "The moment that the person in possession of the premises acknowledges that he is not the owner, the running of the statute, in common language, is broken, and the 20 years or whatever time has been, counts for nothing." In Lamb v. Foss, 21 Me. 240, the written admission by a person, claiming adverse possession, that land in question belonged to another, would be a voluntary submission to that title and a surrender of any

City of St. Paul v. Chicago, etc., Ry. Co., 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 459, 34 L. R. A. 184, held a recognition by the occupant of the title of the owner will break the continuity of claim, as well as the continuity of possession, although the occupant continues in possession of the premises; and in such case he must begin de novo if he would claim the benefits of the statute. And see Robinson v. Bazoon, 79 Tex. 524, 15 S. W. 585; Olson v. Buck, 94 Minn. 456, 103 N. W. 335; Deppen v. Bogar, 7 Pa. Super. Ct. 434; Lovell v. Frost, 44 Cal. 471; Miller v. Keene, 5 Watts (Pa.) 348.

Further, it appears that, without the admission of this plaintiff's title made in the bill in equity, the defendant cannot be held to have title by adverse possession against the plaintiff of any of the land in question. The defendant claims an entry into possession of the dwelling house under a grant to Myron H. Hawkins from Annie Campbell, who had previously given a mortgage of the whole tract to the Co-operative Building Bank, which mortgage was then subsisting and was a first mortgage as to all land not included within the term of the mortgage previously given to the defendant. court in Doyle v. Mellen, 15 R. I. 523, 8 Atl. 709, adopted the opinion of Whittington v. Flint, 43 Ark. 504, 51 Am. Rep. 572, that "possession by the grantee of a mortgagor under a deed of warranty will not be deemed to be adverse to the mortgagee without an explicit denial of holding under him brought to his notice. The mortgagor and his assigns hold in privity with the mortgagee and in subordination to his rights." And see cases cited in Doyle v. Mellen, supra. and also Devyr v. Schaefer, 55 N. Y. 446; Watts v. Creighton, 85 Iowa, 154, 52 N. W. 12, Maxwell v. Hartmann, 50 Wis. 660, 8 N. W. 103; Harding v. Durand, 36 Ill. App. 238; Chouteau v. Riddle, 110 Mo. 366, 19 S. W. 814; Lowry v. Tilleny, 81 Minn. 500, 18 N.

We now come to a consideration of the exceptions of the defendant contained in her bill of exceptions. The first and second exceptions are to the admission in evidence of two plats prepared by the engineer of the plaintiff, from his field notes, on which plats the lot of the defendant is delineated in accordance with the claim of the plaintiff as beginning at its northeast corner, exactly 315 feet south of Dudley street. As these plats show the location of the house and barn with reference to the land according to the plaintiff's claim, there was no error in their admission. Exceptions are overruled.

20 years or whatever time has been, counts for nothing." In Lamb v. Foss, 21 Me. 240, the written admission by a person, claiming adverse possession, that land in question belonged to another, would be a voluntary submission to that title and a surrender of any rights acquired by any prior possession. In Bank laid claim to any part of this house?"

-and a question as to the nature of negotiations carried on between the plaintiff and the defendant for a settlement of matters in controversy, which negotiations did not result in a settlement of the differences of the parties. Each of these questions appears to be immaterial, and the exceptions are overruled.

The sixth exception set out in the bill is to a ruling of the justice, and an exception thereto by the defendant, appearing on page 71 of the transcript. There does not appear upon said page any ruling or exception, and the counsel for the defendant in his argument or in his brief has not pointed it out to the court. The sixth exception is not con-

The seventh exception is to the instruction of the justice to the jury that the only question before them was as to the amount of the plaintiff's damage. This exception should be sustained. The plaintiff was clearly entitled to damages for the removal of that portion of the house which extended over a line 100 feet east of the Conant line onto the 'land of the plaintiff, and the jury should have been so instructed. But whether the southerly portion of the house and barn was on the land of the plaintiff or the defendant, and hence whether its removal by the defendant constituted a trespass on the close of the plaintiff, were questions for the jury, as has been indicated before.

The eighth exception was to the refusal of the justice to charge the jury as requested in defendant's first, third, fourth, fifth, and sixth requests. These requests are as

"(1) That the word 'about,' in the defendant's deed wherein is the language 'about 315 from Dudley street,' should be construed. if possible, in such manner as to carry out the meaning and intent of the grantor with reference to the house and lot conveyed or intended to be conveyed."

"(3) That the jury is entitled to consider, and should consider the evidence introduced in this case upon the question of the defendant's peaceful, adverse possession of the land and part of the house standing thereon claimed by the plaintiff, and that if the jury find that the defendant was in the peaceable and adverse possession of said land and part of the house standing thereon for 10 years prior to bringing this suit then the defendant is entitled to a verdict.

"(4) That it is for the jury to say, from all the testimony in this case, whether or not the defendant is guilty of trespass in this

"(5) That if the jury find from the evidence that the defendant for the space of ten years was in the uninterrupted, quiet, peaceable, and actual seisin and possession of the land upon which the house in question stood and the land upon which it stood.

"(6) The jury is instructed that, before it can find a verdict in damages for the plaintiff, it must determine whether or not the defendant is guilty of trespass as alleged in the declaration."

The refusal of the first request was error. The court's ruling as to the other requests was proper. As to the fourth and sixth requests, the jury were properly instructed that the defendant was guilty of trespass in removing from the land of the plaintiff the piazza and front steps and such other portions of the dwelling house as extended onto the land of the plaintiff on the easterly side of the house.

The ninth exception, which was to the decision of the justice denying defendant's motion for a new trial, should be sustained.

The defendant's exceptions are sustained. as above specified, and case is remitted to the superior court for a new trial.

(30 R. L 53)

BAYNES v. BILLINGS et al. (Supreme Court of Rhode Island. July 8,

1909.) 1. TRIAL (§ 139*)—DIRECTION OF VERDIOT—DIRECTION FOR DEFENDANT.

A verdict should not be directed for defend-ant, if on any view of the evidence plaintiff can recover.

[Ed. Note.—For other cases, see 7 Dig. §§ 332, 338; Dec. Dig. § 139.*] Trial. Cent.

2. MASTEE AND SERVANT (§ 284*)—INJURIES—ACTIONS—JURY QUESTION—SCOPE OF SERV-ANT'S AUTHORITY.

In an action for injuries to an elevator pas senger, while on top of the car at the request of the elevator operator to replace a screen, by being caught between the open door and the elevator frame upon the starting of the car by the operator, whether defendant's instructions to the operator authorized him to request plaintiff to assist in replacing the screen keld for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 284.*]

3. MASTER AND SERVANT (\$ 88*)—EXISTENCE

of Relation.

If an elevator operator was authorized to request plaintiff, a passenger, to go upon the roof of the car in order to replace a screen to prevent objects from falling upon himself and passengers, plaintiff was not a trespasser while doing so, but was a servant of the owner for the time being.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 148; Dec. Dig. § 88.*]

MASTER AND SERVANT (§ 201*)—MASTER'S LIABILITY—CONCURRENT NEGLIGENCE.

The master is liable for injuries to a servant, caused by the concurrent negligence of himself and a fellow servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 515-534; Dec. Dig. § 201.*]

MASTER AND SERVANT (§ 192*)—FELLOW SERVANT—THE RELATION.

A passenger, who went upon the roof of the elevator cage at the request of the elevator operator in order to replace a screen to prevent objects from falling into the car, was a fellow servant of the operator, so that he could not recover against the owner for the former's negligence in starting the car and injuring plaintiff while he was on the roof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 380; Dec. Dig. § 192.*]

6. MASTER AND SERVANT (§ 204*)—INJURIES TO SERVANT—DEFENSES—ASSUMED RISK.

In an action by one who was a passenger on an elevator, but went upon the top of the car at the operator's request to replace a screen, so that he was a servant for the time being, and was injured by the operator starting the car while the elevator door was open, the doctrine of assumed risk was not a defense under Gen. Laws 1896, c. 108, \$ 16, as amended by Pub. Laws 1902, p. 44, c. 973, \$ 2, requiring every passenger elevator to be fitted with a device to prevent the car from being started before the doors were closed, and providing that it shall be no defense to an action against the owner for injuries caused by his failure to comply with the statute that the injured person knew the elevator was being operated in violation of the statute or continued to ride thereon with such knowledge.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 204.*]

7. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—JURY QUESTIONS—CONTRIBUTORY NEGLIGENCE.

In such action, whether plaintiff was negli-

gent held for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

8. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—JURY QUESTION—NEGLIGENCE. In such action, whether defendant was neg-

In such action, whether defendant was neg ligent held for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 286.*]

Exceptions from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Judge.

Action by Thomas F. Baynes, by his next friend, against Henry A. Billings and others. Verdict directed for defendants, and plaintiff excepts. Exceptions sustained, and cause remanded for new trial.

John W. Hogan and Philip S. Knauer, for plaintiff. Vincent, Boss & Barnefield and Alexander L. Churchill, for defendants.

JOHNSON, J. The defendants were the owners of a building in the city of Providence known as the "Billings Block." The several floors of this building were used for business purposes and leased to different parties. Warren & Williams, jewelers, occupied the fourth floor, and the plaintiff was employed by that firm as an errand boy. The building was provided with a passenger elevator for the use and accommodation of tenants. This elevator at the time of the accident, July 11, 1904, was being run by a boy named William George. Upon the day of the accident the plaintiff, and another boy named Gaynor together entered the elevator at the street floor. Gaynor at that time was in the employ of the Western Union Telegraph Company, and had a message for delivery to a firm that occupied the fifth floor.

Gaynor had previously been employed in the Billings Block. After the plaintiff and Gaynor were safely on board, the elevator ascended to the fifth floor; the plaintiff remaining therein. The elevator then waited, at the fifth floor, for Gaynor to deliver his message and return, and the plaintiff still remained therein. Then the elevator descended to the fourth floor, where the plaintiff was employed, and he then alighted, and at the request of the elevator boy went upon the top of the elevator to arrange, straighten, or put in place a screen designed to protect people in the elevator from any objects that might fall down the elevator well. To enable the plaintiff to gain access thereto, and to leave the top of the elevator when he had finished, the elevator was lowered by George so that the top was on a level with the fourth floor. While the plaintiff was engaged upon the top of the elevator, the bell was rung at the fifth floor and the elevator started upward, and the plaintiff, in attempting to get off the moving elevator, was caught and injured. The case was tried in the superior court, with a jury, November 3, 1908, and at the conclusion of the testimony the court directed a verdict for the defendants.

The plaintiff has filed his bill of exceptions upon the following grounds: "(1) To the ruling or decision of said justice at the trial of said action in granting the defendant's motion for the direction of a verdict for the defendants at the close of the plaintiff's testimony, as shown on page 71 of the transcript of testimony, etc., filed herewith. (2) To the ruling or decision of said justice at the trial of said action in directing the jury to return a verdict for the defendants at the close of the plaintiff's testimony, as shown on page 72 of the transcript of testimony, etc., filed herewith."

The statement in the grounds of exception that a verdict was directed at the close of the plaintiff's testimony is not correct. Testimony was offered on behalf of the defendants. The court first stated, in the absence of the jury, that he would direct a verdict and note an exception. Later, when the jury had been brought back, the court directed a verdict, and, after the verdict was rendered for the defendant, noted the plaintiff's exception. The plaintiff has set forth grounds of exception both to the statement of the court on page 71 and to the direction of the verdict on page 72 of the transcript, which accounts for there being two grounds of exception to the same import. An additional count to the declaration was withdrawn at the opening of the case, and the trial proceeded upon the original declaration.

The plaintiff's declaration alleges that the defendants were the owners of the building known as "Billings Block," at No. 21 Eddy street, in said city of Providence, and that

an elevator for the carriage of passengers was then and there provided, maintained. and operated in said building, and that the defendants were negligent in not providing and keeping in repair for said elevator some suitable device to prevent the elevator car from being started until the door or doors opening into said elevator shaft were closed, as is provided and enacted under the provisions of section 16, c. 108, of the General Laws of 1896, as amended by chapter 921, p. 830, of the Public Laws passed November 29, 1901, and as further amended by section 2, c. 973, p. 44, of the Public Laws passed April 3, 1902. The plaintiff then avers that while he was rightfully in said building as the employé of Warren & Williams, and rightfully and lawfully upon said elevator, and in the exercise of due care, and while in the act of leaving and stepping from said elevator, the door at the fourth floor of said building being open, then suddenly said elevator shot up, catching him between the jamb of the door and the elevator cage, by reason whereof plaintiff was injured, etc.

Section 16, c. 108, Gen. Laws, provides that: "Every passenger elevator shall be fitted with some mechanical device to prevent the elevator car from being started until the door or doors opening into the elevator shaft are closed." Chapter 921 of the Public Laws retains the words above quoted; the changes effected by that chapter relating entirely to other matters. Chapter 973 of the Public Laws also retains the same words, without either qualification or modification; but some new provisions are added, among which are the following: "In all cases in which any person shall suffer injury * * in consequence of the failure of the lessee or owner or owners of any building to comply with the provisions of this and the preceding section, * * * such lessee and owner or owners shall be jointly and severally liable to any person so injured in an action of trespass on the case for damages for such injury. * * * It shall be no defense to said action that the person injured had knowledge that any elevator was being operated in said building contrary to the provisions of this and the preceding section, or that such person continued to ride in said elevator with said knowledge."

It was shown that the defendants were the owners of the building and elevator involved in the suit at the time the accident occurred; that the plaintiff, at the time of the accident, July 11, 1904, was about 13 years old, and was acting as an errand boy for Warren & Williams, who occupied rooms on the fourth floor of the building in question; that the elevator was a passenger elevator; that the plaintiff was returning to the place of business of his employers, and while riding upon the elevator was requested by the operator to adjust the screen on the top of the elevator; that after he alighted at the

fourth floor the elevator was lowered by the operator with the door open, so that he could step on the top of it, and he did so; that while he was on the top of the elevator, and while the door was open, the operator started the elevator, and he was caught between the top of the elevator and the doorway, and was injured. There was testimony that the elevator could be moved, when the doors into the shaft were open, three or four weeks before the accident. It was so moved on the day of the accident to allow the plaintiff to get on the top. George, the elevator boy, was employed by the owners of the building. George was 19 years old at the time of the trial November 5, 1908. He was therefore about 15 years old at the time of the accident. The defendants did not offer any testimony as to the matter of the elevator being fitted with the device required by the statute, or as to whether the elevator could or could not be started when the door was open. The defendants testified as to instructions to the elevator boy and as to the authority given him.

"Q. And will you Henry A. Billings: please state what this boy was employed by you to do? A. To run the elevator. Was he employed to do anything else? Nothing. Q. Did he have any authority to make arrangements about fixing the elevator? A. Not at all. Q. Did you give him any instruction at any time with reference to boys about the elevator? A. I gave him orders, when I hired him, not to have boys fooling around the elevator, and I told him to keep the boys away, and not have them around it at all. * * * C. Q. Well, I want you to testify as to what you remember, Mr. Billings. It is easy to say that you probably had something to do about it. Will you tell the jury what was said to the boy George by yourself? Just repeat what you said to him. A. About what his duties were? C. Q. Yes. A. Attend to the elevator and run it, look out for things, and keep the boys away from it. C. Q. That was all? A. That is what I told him." In answer to the question, "If it [the screen] got misplaced, wouldn't it be attending to the elevator to put it back in place?" he answered: "Why, it was his duty to do it, or else the engineer who had charge of the place would do it. I don't know whether it would be the boy's business to do it or not." Later he testified that he thought "it would be the engineer's duty. C. Q. So far as your instructions to this boy went, you didn't give him any instructions about what he should do in case any part of the elevator should get out of order? A. I don't know as I ever gave the boy any instructions about it. C. Q. You left it to his own judgment what to do, if anything got out of order? A. I suppose he would report to me. C. Q. You gave him no instructions what to do in case it got out of order? A. No, sir; I did not. C. Q.

Then you left it to his judgment what to | make up his mind, on behalf of the company. do in case anything got out of order, didn't you? A. I think it was that way, then."

Frank Billings testified. "C. Q. What instructions did you ever give him in case anything got out of order? A. I never gave him any instructions at all." Later he said that the boys that run the elevator always go to the engineer if there is anything out of the way, that he told him to go to the engineer, that he didn't mean that he gave him no instructions at all, and finally: "C. Q. Did you leave it to his own judgment for anything he didn't need the engineer for? A. I told him, if there was anything he wanted the engineer for, to get him. C. Q. And left it for him to say whether he needed the engineer or not; is that right? A. I suppose so."

A verdict should not be directed, if on any view of the testimony the plaintiff can recover. Upon the testimony the plaintiff was lawfully in the building, and was lawfully riding in the elevator, when, on his arrival at the fourth floor, he was requested, upon alighting, to go upon the top of the elevator and adjust the screen. This screen was intended to keep things from failing into the top of the elevator and upon persons in the elevator. The plaintiff, at the request of the operator, went upon the top of the elevator, after it had been lowered by the operator so that its top was even with the floor. It was thus lowered while the door was open, and when the plaintiff had adjusted the screen, and was in the act of leaving the top of the elevator through the open door, a bell rang, and the operator started the elevator upward, and the plaintiff was thereby injured. The plaintiff, when asked what was the matter with the screen, said: "It had been half off, just turning around, half off, liable to fall through." According to his testimony, then, the screen, intended to protect passengers from objects which might fall from above, had turned, and had itself become a source of danger, liable to fall through. Under such circumstances, was it unreasonable that the operator should ask the plaintiff to go on the top and fix the screen, when its condition menaced the safety of the operator and passengers in the elevator? Is it clear that any instructions were given to the operator which would preclude such action on his part? The testimony of the defendants as to the instructions to the operator is confused and conflicting. In Poulton v. London & South Western Railway Co., L. R. 2 Q. B. 538, cited by this court in Staples v. Schmid, 18 R. I. 229, 26 Atl, 195, 19 L. R. A. 824, Blackburn, J., says: "There can be no question that where a railway company, or any other body, have upon the spot a person acting as their agent, that is evidence to go to the jury that that person has authority to do all those things on their behalf which are right and proper in the exigencies of their business-all such things as somebody must Tex. 77, 51 Am. Rep. 637.

whether they should be done or not; and the fact that the company are absent and the person is there to manage their affairs is prima facie evidence that he was clothed with authority to do all that was right and proper, and if he happens to make a mistake. or commit an excess, while acting within the scope of his authority, his employers are responsible for it."

It is also to be noted that the obligation to provide and maintain the device mentioned does not grow out of contract or depend upon invitation by the defendants. It is imposed by the statute. If the defendants had leased the building to another, with a stipulation that the lessee should keep the building in repair in all respects, including the elevator, and a tenant or a servant of the lessee had been injured because the elevator was operated without a suitable device to prevent its being started until the door or doors opening into the elevator shaft were closed, the defendants would still have been liable, as well as the lessee.

Under the circumstances shown, was not the question as to what instructions were really given by the defendants to the operator a question of fact to be passed upon by the jury? We think it was. Was it not a question for the jury whether the instructions authorized the boy, under the conditions shown, the displacement of the screen, with the attendant danger to passengers, as well as to the operator himself, to seek the assistance of the plaintiff, himself a passenger on the elevator, although his use as such of the same for the time being had just ceased when he alighted at the fourth floor? We cannot say that it was not. If the authority was sufficient, then the plaintiff was on the top of the elevator by right, and was not a trespasser, or mere interloper. In such case the rule is stated in Wood, Master and Servant, § 455, as follows: "A person who voluntarily and without any employment undertakes to perform a service for another stands in the same relation as a servant for the time being, and is regarded as assuming all the risks incident to the business. And this is so even though the service is not wholly voluntary, but is induced by request of a servant in the defendant's employ." See, also, Johnson y. Ashland Water Co., 71 Wis. 553, 37 N. W. 823, 5 Am. St. Rep. 243; Wischam v. Richards, 136 Pa. 109, 20 Atl. 532, 10 L. R. A. 97, 20 Am. St. Rep. 900; Street Railway Co. v. Belton, 43 Ohio St. 224, 226, 1 N. E. 333, 54 Am. Rep. 803; Barstow v. Old Colony R. Co., 143 Mass. 535, 10 N. E. 255; Osborn v. Knox R. Co., 68 Me. 49. 28 Am. Rep. 16; Stevens v. Chamberlin, 100 Fed. 378, 40 C. C. A. 421, 51 L. R. A. 513; Penn. R. Co. v. Gallagher, 40 Ohio St. 637, 48 Am. Rep. 689; Louisville, etc., R. Co. v. Ward, 98 Tenn. 123, 38 S. W. 727, 60 Am. St. Rep. 848; Mayton v. Texas, etc., R. Co., 63

In Johnson v. Ashland Water Co., supra, the court says (page 556 of 71 Wis., page 824 of 37 N. W. [5 Am. St. Rep. 243]): "It is claimed by the learned counsel for the appellant that the complaint does not state a cause of action, because it shows that the plaintiff was a mere volunteer in the work in which he was engaged at the time he received his injury. Under the allegations of the complaint, the plaintiff was engaged in the defendant's work at the request of the man in .charge of the work; and although it may be said that his employment was for a mere temporary purpose, and that the plaintiff was not expecting any pay for the work done, and in that sense the employment was voluntary, still, being in the defendant's employment at the request of its servants or foreman, he was not a trespasser, and he was, for the time being, the servant of the defendant, and entitled to the same protection as any other servant of the defendant, and probably subject to the same risks of injury from the negligence of his fellow servants. This seems to be the rule established by the authorities and is supported by considerations of justice."

Where an injury to a servant, who is free from contributory negligence, is caused by the concurrent negligence of the master and a fellow servant, the master is liable. Venburr v. Lafayette Worsted Mills, 27 R. I. 89, 60 Atl. 770; Weeks v. Fletcher, 29 R. I. 112, 69 Atl. 294.

If the elevator had been equipped with a device which would prevent the elevator car from being started until the door opening into the elevator shaft had been closed, it would not have been possible for the plaintiff to go upon the top of the elevator when requested to do so by the operator, because the elevator could not have been dropped down with the door open so as to permit him to get upon the top. The operator testified that the elevator could be moved "if you put your finger on the button," and that the "safety button," as he called it, "was on the side of the door in the shaft the lock is on." He does not state whether the button was pressed, or whether the pressing of the button would detach the device only during the time of its being pressed, or would detach it until means were taken to reattach the device. If the elevator was equipped with a device to prevent the starting of the elevator while the door was open, and such device was in working order, it is evident that such button must have been pressed, and such pressure must have detached the device, and left it unattached during the lowering of the elevator to a point where the plaintiff could get upon the top, as the operator could not have kept his finger upon the button while lowering the elevator to that position. It is evident, also, from the testimony of the operator, that if there was such a button it was

subject to his control, so that he could detach the device at will. If the plaintiff had not been on the top of the elevator when the operator started the same in response to the bell, he would not have been injured. He cannot avail himself of the negligence of the operator against the defendants, because for the time being he was a fellow servant with the operator. If, however, the negligence of the defendants concurred with that of the operator in causing the injury, the defendants would be liable. As was said in Weeks v. Fletcher, 29 R. I. 112, 115, 69 Atl. 294, 295: "The neglect of the defendants, if it existed, was continuous and coincident in time with the act of the fellow servant."

The doctrine of assumed risk cannot be received as a defense in this action. The statute provides: "It shall be no defense to said action that the person injured * had knowledge that any elevator was being operated in said building contrary to the provisions of this and the preceding section, or that such person continued to ride in said elevator with such knowledge." Leahy v. U. S. Cotton, 28 R. I. 252, 255, 66 Atl. 572, 573. As was said by this court in Weeks v. Fletcher, supra: "Such language will bear no restricted construction. The act is for the benefit of all persons, whether in or out of the elevator, who are upon the landlord's premises as employés or by his invitation. If the neglect of any of its provisions causes damage to such person without his fault, the act gives him a right of action therefor."

The case should have gone to the jury on the questions of the plaintiff's due care and of the defendant's negligence. The direction of a verdict for the defendant was error.

The plaintiff's exception is sustained, and the case is remitted to the superior court for a new trial.

(110 Md. 233)

OFFUTT v. JONES.

(Court of Appeals of Maryland. Feb. 10, 1909. On Rehearing, June 28, 1909.)

1. Trusts (§ 160*)—Trustees—Appointment—Proceedings—Parties.

The court may appoint a trustee in place of a trustee named in a will, who refuses to serve, without making all the parties in interest parties to the proceeding.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 208; Dec. Dig. § 160.*]

2. TRUSTS (§ 178*)—MANAGEMENT OF TRUST ESTATE—DIRECTING INVESTMENTS—PROCEEDINGS—PARTIES.

Where the court assumed jurisdiction of a trust estate created by a will, whereby testator gave a specified sum in trust to invest and pay the interest to a son for life, and, on his death, to pay the principal to his wife and children in the proportions they will take under the law, and appointed one a trustee on the refusal of the person named in the will to serve, it had power to order the purchase of real estate as an investment for the benefit of the estate, and to direct a sale of the realty and its reconversion

For other cases see same topic and section NUMBER in Dec. & Am. Digz. 1907 to date, & Reporter Indexes

into personalty, without making all persons interested in the fund parties.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 232; Dec. Dig. § 178.*]

3. TRUSTS (§ 1931/2*)—SALE OF TRUST PROP-ERTY—PROCEEDINGS—PARTIES.

A sale of trust property for reinvestment may be ordered by the court whenever, on a full presentation of the facts, it determines in its discretion that such course will be for the interest of the beneficiaries, without making the beneficiaries parties.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 246; Dec. Dig. § 193½.*]

On Rehearing.

4. TRUSTS (§ 160*)—TESTAMENTARY TRUSTS— APPOINTMENT OF TRUSTEE—JURISDICTION OF COURT.

A will whereby testator gave to a trustee a A will whereby testator gave to a trustee a specified sum in trust to invest and pay the interest annually to a son for life, and on his death to pay the principal to his wife and children in the proportions prescribed by law, is not within Code Pub. Gen. Laws 1904, art. 16, § 90, providing that, where a person dies leaving real or personal property to be sold for the payment of debts or other purposes, and shall not appoint any trustee, or if the person appointed refuses, the court may appoint a trustee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 207; Dec. Dig. § 160.*]

5. TRUSTS (§ 160*)—MANAGEMENT OF ESTATE
—APPOINTMENT OF TRUSTEES—PARTIES.

Where a suit is merely to recover or regulate the investment of trust funds without affecting the relations between the trustee and the cestui que trust, the latter are not necessary parties

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 208; Dec. Dig. § 160.*]

6. TRUSTS (§ 160*)-APPOINTMENT OF TRUS-TEES-PARTIES

The beneficiary for life in a trust estate petitioned the court for the appointment of a trustee, on the refusal to act of the trustee named in the will creating the trust. The only other person then in being interested in the estate was the executrix, who knew of the proceedings, and could have intervened therein. Held, that the appointment of a trustee was religious. that the appointment of a trustee was valid, though the executrix was not made a party.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 208; Dec. Dig. § 160.*]

Appeal from Circuit Court for Montgomery County, in Equity; James B. Henderson. Judge.

Proceedings for the sale of real estate by Frances M. Jones, trustee. From an order overruling exceptions to a sale and confirming it, Willie G. Offutt appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE. SCHMUCKER, BURKE, WORTHINGTON, JJ.

Thomas Dawson and Alexander Kilgour, for appellant. Robert B. Peter, for appellee.

BRISCOE, J. This is an appeal from an order of the circuit court for Montgomery county, overruling exceptions, ratifying and confirming a sale of real estate made by Frederick W. Jones, trustee, to one Julian Hite Miller, of Montgomery county.

record, and appear to be these. Hilleary L. Offutt, of Montgomery county, departed this life in the year 1878, leaving a last will and testament, which was duly admitted to probate by the orphans' court of Montgomery county on the 17th day of September, 1878. The will and testament contains the following bequest: "I give and bequeath to William L. Dunlop, of Georgetown, D. C., the sum of nine thousand dollars, to be held by him in trust, and to be by him invested in such manner as he may deem most prudent and safe, the interest arising therefrom to be applied by him annually for the maintenance and support of my son, Willie G. Offutt, for and during his natural life, and the same to be free from all liability for any debts which may now exist against the said Willie G. Offutt or which may be hereafter contracted by him; and in the event that the said Willie G. Offutt should be married and die, leaving a wife and child or children. then the said nine thousand dollars is hereby directed to be paid over to the wife and child or children in the proportions which they would take under the laws of Maryland, if the same had belonged to the said Willie G. Offutt; and in the event he should die, leaving a child or children begotten in lawful wedlock him surviving, then the said nine thousand shall be paid over to such child or children; and in the event he should die leaving a wife and no child or children him surviving, then the said nine thousand shall be held by the trustee, and the annual interest arising therefrom paid over to the wife for and during her natural life; and upon the death of the said Willie G. Offutt and a failure to leave a wife and child or children, as above stated, I then will and direct that the said nine thousand dollars shall be distributed amongst the parties named hereafter in the residuary clause of this. my will, and in the proportions therein set William L. Dunloy, declined to accept the trust, and upon the petition of Willie G. Offutt, and the answer of Dunlop, the circuit court for Montgomery county, on the 8th of February, 1879, appointed Frederick W. Jones, of Georgetown, D. C., trustee, in place of Dunlop, to collect and receive the sum of \$9,000, and to hold and invest the same and to pay out the income derived therefrom according to the provisions of the will. On April 17, 1879, Jones, trustee, who had qualified, as such, according to the requirements of the order of appointment, filed a petition in the circuit court for Montgomery county alleging, among other things, as follows: "Your trustee and petitioner would further represent that the said Willie G. Offutt is in no business, and that it would be to his interest and advantage to have a portion of said sum of \$9,000 invested in a farm and farming implements and stock to carry The facts of the case are set out in the on the same, in order that said Willie G.

Offutt might have the use and benefit thereof. | the order of February 17, 1879, was a change Your petitioner would therefore pray your honorable court to pass an order authorizing and empowering him to invest a portion of said sum of nine thousand dollars, not to exceed \$6,000, in purchasing a farm and supplying the same with stock and farming implements for the use and benefit of said Willie G. Offutt, under the provision of the last will and testament of Hilleary L. Offutt, deceased." On the same day the court, passed the following order: "Ordered that the prayer of the petitioner be granted, and that Frederick W. Jones, the within-named trustee, be and he is hereby authorized and empowered to expend a sum not exceeding \$6,-000 of the \$9.000 devised in trust to, and for the use of, the said Willie G. Offutt by the last will and testament of said Hilleary L. Offutt, deceased, in purchasing a farm and supplying the same with stock and farming implements for the use and benefit of said Willie G. Offutt." It appears that the farm which is here the subject-matter of this controversy was purchased by the trustee under the order here set out, and Offutt resided thereon until the year 1890. Subsequently, on the 3d of March, 1890, the circuit court for Montgomery county, upon a petition by the trustee, Willie G. Offutt, and his wife, for reasons stated therein, directed and ordered the trustee, Jones, to sell the real estate and personal property, heretofore purchased by him, and to hold the funds of the sale, or sales, upon the trusts created by the last will and testament of Hilleary L. Offutt, deceased. On April 9, 1890, the trustee sold and conveyed the farm in question to Julian Hite Miller, for the sum of \$10,000, but never reported the sale to the court. It further appears that on July 20, 1891, one Mills Dean was appointed trustee, in the place and stead of Frederick W. Jones, deceased, and upon the death of Dean Bettie Offutt, the wife of Willie G. Offutt, was by an order of court, passed on the 31st of July, 1896, appointed trustee, and on the 21st of May, 1908, reported the sale of the property for the ratification of the court. Afterwards, on the 15th day of June, 1908, exceptions were filed to the sale by Willie G. Offutt, Bettie C. Offutt, his wife, and two of their children. Mrs. Offutt, one of the exceptants, is also the trustee who reported the sale, and states in her petition that she had no personal knowledge of the facts stated in the report, the affidavit thereto was inadvertently made, and that Jones, the trustee, had no power to make the sale. The ratification of the sale is objected to for several reasons, but those mainly relied upon by the appellants are: First, because the court was without jurisdiction of the parties or subject-matter in passing the order dated February 8, 1879, on the petition of Willie G. Offutt, appointing Frederick W. Jones, trustee, in place of Wm. L. Dunlop, who declined to accept the trust; and, secondly, that the purchase of the farm by Jones, trustee, under | the terms of the order held upon the trust

of the investment into real estate, and the subsequent sale, the one here in question, was passed in a cause wherein none of the parties in interest in remainder in fee were parties to the proceedings.

The questions here presented are without serious difficulty. Whatever confusion and conflict may exist in the decisions in other states as to the notice necessary to confer jurisdiction upon a court of equity to appoint a trustee whenever there is a vacancy and the declaration of trust fails to provide a method therefor, there can be none in this state. By section 90, art. 16, Code Pub. Gen. Laws 1904, it is provided, where any person dies and leaves real or personal property to be sold for the payment of debts or other purposes, and shall not appoint any person to sell and convey the same, or if the person appointed dies or neglects or refuses to execute such trust, the court, upon the petition of any person interested in the sale of such property, may appoint a trustee to sell and convey the same, and apply the money arising from the sale to the purposes intended. This section of our present Code (1904), which was originally enacted as far back as 1785 (Laws 1785, c. 72, § 4), has been repeatedly before this court for construction, and as late as Kennard v. Bernard, 98 Md. 518, 56 Atl. 793, it was held, under the provisions of the Code (article 16, \$ 79 [now section 90]). upon the petition of any person interested in the property, the court may appoint the trustee. Fulton v. Harman, 44 Md. 251; Zimmerman v. Fraley, 70 Md. 566, 17 Atl. 560; Sloan v. Safe Deposit Co., 73 Md. 245, 20 Atl. 922. The case of Hawkins v. Chapman, 36 Md. 84, relied upon by the appellants, is entirely unlike the case at bar. In that case the bill was filed practically to foreclose a deed of trust which had been executed for the purpose of securing and indemnifying certain parties named therein for certain securityships which they had entered into, and the court very properly held that the heir at law must be made a party. The petition in the case at bar was filed in a proceeding simply for the appointment of a trustee to execute certain trusts and powers, under a will where the person appointed declined and refused to execute them. There is no force, then, in the objection here urged to the ratification of this sale, and the appointment of Jones trustee in the place of Dunlop was validly made.

The second objection we think is also without merit. It clearly appears that the court assumed jurisdiction of the trust estate by its order of February 9, 1879, appointing Jones trustee, and there can be no question that it had power, by its order of April 17, 1879, to direct an investment of all or a portion of the fund in real estate. The purchase of the land was simply an investment for the benefit of the trust estate, and was by

created by the will. The property left in trust consisted of a bequest of \$9,000 personal property, and the manifest object and purpose of the will was that the fund should remain personalty because the will provides that should he (Offutt) be married and die leaving wife and children, then the fund was thereafter to be paid by the trustee to the wife and children, in the proportions which they would take under the laws of Maryland. While the money was invested in land, it was to be held as personalty, and, treating it here as such for the purposes of the trusts under the will, it was clearly not necessary to make all persons interested in the fund parties to the proceeding.

The order of March 3, 1890, directed the sale of the land which was held for the benefit of Offutt, and its reconversion into personalty, and the trustee was to hold the proceeds of the sale, upon the trusts created by the will. In Dunnington v. Evans et al., 79 Md. 92, 28 Atl. 1097, it is said: "While it may be conceded that ordinarily a court of equity should not order a sale of trust property without notice to the cestuis que trust, yet it is equally well settled that under our chancery practice a sale for the purpose of a reinvestment may be ordered whenever, on a full presentation of the facts, the court having jurisdiction over the administration of the trust estate may, in its best judgment and judicial discretion, determine such a course to be for the interest of the beneficiaries. To require an original proceeding by petition or bill against the cestuis que trust, the appointment of guardians ad litem, the taking of testimony, and in general the same proceedings as on a bill for sale, would not only cause great delay, but unnecessary expense in making investments by trustees. While there may be many cases in which the court would deem it proper to give the cestuis que trust notice before ordering a sale for reinvestment, yet we do not think such a course is necessary to confer jurisdiction for such a purpose. In the case we are examining the sale was made, as we think fully appears by the petition filed by the trustee, for the purpose of getting rid of property not considered a good investment for the reasons set forth in the petition, and for the purpose of reinvesting the proceeds. The court having the authority to order the sale, and reinvestment of the proceeds, all the parties are bound." And to the same effect are the cases of Long v. Long, 62 Md. 33, and Burroughs v. Gaither, 66 Md. 185, 7 Atl. 243. We fail to find in the record any sufficient ground for vacating the sale. There is nothing that discloses irregularity, fraud, or misrepresentation, and the sale appears to have been fairly made.

For the reasons given, the order of Court overruling the exceptions and ratifying the sale, will be affirmed.

Order affirmed, with costs.

On Reliearing

The motion for reargument of this case will be overruled. We find no reason for disturbing the decree passed by this court on the 10th day of February, 1909, affirming the final order of ratification of sale passed by the circuit court for Montgomery county, or the conclusion reached by us, at that date, upon the merits of the controversy. The opinion, however, filed in support of the decree affirming the order appealed against, will be modified in so far as the decision turned upon the application of Acts 1785, c. 72, § 4 (Code Pub. Gen. Laws 1904, art. 16, § 90). This section of our present Code (article 16, § 90) applies where any person dies and leaves real or personal property to be sold for the payment of debts or other purposes the court upon the petition of any person interested in the sale of such property, may appoint a trustee to sell and convey the same, and apply the money arising from the sale to the purposes intended. Fulton v. Harman, 44 Md. 251; Kennard v. Bernard, 98 Md. 518, 56 Atl. 793; Sloan v. Safe Deposit Co., 73 Md. 245, 20 Atl. 922.

We all agree, upon a further consideration. that the provisions of Mr. Offutt's will, wherein he bequeathed the sum of \$9,000 to be held by Dunlop "in trust and to be by him invested in such manner as he may deem most prudent and safe, the interest arising therefrom to be applied by him annually for the maintenance and support of his son, Willie G. Offutt, for and during his natural life," do not fall within the application of the statute above cited. But apart from this. we are of the opinion that the appointment of Frederick W. Jones as trustee, in place of Dunlop, on the 8th of February, 1879, under the facts of this case, was a valid appointment, and the absence of the executrix as a party was an omission and irregularity that did not render the appointment void. The only objection urged by the appellant to its validity is the supposed want of jurisdiction in the court to pass the order making the appointment, because of the absence from the case of necessary parties. The jurisdiction of a court of equity in a proper case to fill a vacancy in a trusteeship is admitted by the appellant, and is fully supported by authority. Hawkins v. Chapman, 36 Md. 97. While the general rule in suits respecting trust-property undoubtedly is that the cestul que trust, as well as the trustee, are necessary parties, this court has recognized the doctrine that, where the suit is simply to recover or regulate the investment of the trust funds, and does not affect the relations between the trustees and the cestul que trust, the latter are not necessary parties. Stewart and Duffy, Trustees, v. Firemen's Ins. Co., 58 Md. 564; Dunnington v. Evans, 79 Md. 92, 28 Atl. 1097; Miller's Equity, § 44.

In 22 Ency. of P. & P. pp. 25-28, the following general statement of the law will be

found supported by numerous authorities: "It is undoubtedly proper and usual in most cases to call those more immediately interested before the court that they may be heard in the appointment of a new trustee. But this is not necessary, and the failure to do so will not render the appointment void. In a proceeding simply for the appointment of a trustee to execute trust duties and powers, where no settlement of accounts is involved, it is a matter of discretion with the court as to whom and what, if any, notice shall be given. Where an accounting and settlement by the former trustee is also sought, all parties in interest are necessary parties, and upon this ground many of the cases holding that notice is necessary may be distinguished. It is usually held that the proceedings for the appointment of a new trustee in the case of a vacancy in the trust are summary, and that the proper form of application is by petition, and not by formal bill." But, assuming it was necessary to make all persons in interest parties to the proceeding for the appointment of a new trustee to succeed Dunlop, on February 8, 1879, now over 30 years ago, and inquiring who were the persons interested in the trust estate at that time who could have been made parties, we find, as the appellant admits, they were Anna M. Offutt, the executrix of the will, who had the trust fund in her hands, and the cestui que trust then in

Under the facts of this case the executrix must have known of the existence of the proceedings for the appointment of the new trustee in ample time to have intervened therein for the protection of the trust fund if she had desired to do so. The renunciation of the trust by Dunlop was filed in the orphans' court, where she was administering her husband's estate, before or on the day of the institution of the proceedings for the appointment of the new trustee by Willie G. Offutt, and can it be argued that she was unaware of the fact? Furthermore, the demand upon her by Jones, as the new trustee for the trust fund fully advised her of the fact that he claimed the fund as Dunlop's successor. She was thus warned before she parted with the trust fund, and in ample time to have called in question, if she had desired to do so, the propriety of the selection of Jones as trustee. She was as fully bound by the order appointing the new trustee as if she had been a formal party to the case. Her absence from the case as a formal party can therefore afford no just ground for denying the jurisdiction of the court to pass the order.

In Albert v. Hamilton, 76 Md. 811, 25 Atl. 843, it is said the rule is established "that persons who are directly interested in the avail themselves of their rights, are concluded by the proceedings as effectually as if they were parties named in the record." Robbins v. Chicago, 4 Wall. 672, 18 L. Ed. 427; Parr, etc., v. State, 71 Md. 236, 17 Atl. According to the record, Willie G. Offutt, who was a party to the proceeding, is the only cestui que trust who appears with certainty to have been then alive. The ages of his children, as testified to in the record, show that none of them had been born. The testimony does not show that he had been married in February, 1879. If he was married, his wife has participated in so many acts of acquiescence and ratification since then that she cannot now be heard to question the validity of Jones' appointment. We are therefore of the opinion there was no loss to the trust estate by the formal absence from the proceedings of any one who could have been brought before the court at the time of Jones' appointment as such trustee; and, in view of this fact, the appellants cannot be permitted, upon merely technical grounds, to call in question, after an expiration of 22 years, the validity of Jones' appointment as trustee, and to disturb the title of those who in reliance upon its validity parted in good faith with the purchase money of the farm sold by him.

For these reasons, the motion for reargument of the case will be overruled.

Motion overruled, with costs.

(111 Md. 264)

UNITED RYS. & ELECTRIC CO. OF BAL-TIMORE v. MAYOR, ETC., OF BALTIMORE et al.

(Court of Appeals of Maryland, June 29. 1909.)

1. Taxation (§§ 150, 151*)—Public Service Coeporations — "Franchise" — "Easement"—"Property."

A street railway company exercising the right obtained from a city to construct its tracks in the streets thereof, and operate cars thereon, by actually constructing and maintaining its tracks and operating cars thereon, obtains there-by an easement, which is property subject to taxation, while the unexercised right is a fran-chise, which, separately considered, is not prop-erty in the sense that it is of substantial value for direct taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 268, 269; Dec. Dig. §§ 150, 151.

For other definitions, see Words and Phrases, vol. 3, pp. 2305-2311; vol. 8, pp. 7646, 7647; vol. 3, pp. 2929-2941; vol. 8, p. 7666; vol. 6, pp. 5706-5710; vol. 8, pp. 7768-7770.]

2. Taxation (§ 153*)—Public Service Corporations—Lasements—"Gross Earnings Tax.

The gross earnings tax imposed on a street railway by Acts 1882, p. 357, c. 229, includes as an element thereof a tax on the easement of the company in the streets of a city pursuant to a grant to it of the right to construct its tracks in the streets and operate cars thereon, and the tax is on the corrotation itself means. sult, and have knowledge of its pendency, and the tax is on the corporation itself measured by the amount of business done from year and who refuse or neglect to appear and to year, intended as a substitute for a direct tax

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

on all of its intangible property, and no fur-ther assessment on its easement can be made without express legislative authority.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 153.*

For other definitions, see Words and Phrases, vol. 4, p. 3167.]

8. TAXATION (§ 151*)—PUBLIC SERVICE COR-PORATIONS—EASEMENTS—VALUATION. The test of the taxable value of an ease-

ment of a public service corporation exercising its right to maintain tracks in the streets of a right to maintain tracks in the streets of a city and operate cars thereon is its producing value to the corporation, and the assessable value can only be determined by looking to all the elements in any way reflecting the utility of the easement, the original cost of the franchise, the cost of operating the road, the gross earnings, the amount of car service required, the amount of capital stock invested, and the amount of taxes paid on the tangible property.

[Ed. Note.-For other cases, see Taxation, Dec. Dig. § 151.*]

Appeal from Baltimore City Court; Alfred S. Niles, Judge.

Proceedings by the Appeal Tax Court of Baltimore city for the assessment for taxation of street easements used and occupied by the United Railways & Electric Company of Baltimore, in the city of Baltimore. From an order of the Baltimore city court, sustaining the assessment in part, the company appeals. Reversed and remanded.

See, also, 107 Md. 250, 68 Atl. 557, 14 L. R. A. (N. S.) 805.

Argued before BOYD, C. J., and BRIS-COE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, THOMAS, and HEN-RY, JJ.

Joseph C. France and Bernard Carter, for appellant. Sylvan H. Lauchheimer and Edgar Allan Poe, for appellees.

WORTHINGTON, J. The principal question presented by this appeal is whether the street easements used and occupied by the appellant in the city of Baltimore are subject to valuation and assessment by the appeal tax court of that city for the purposes of taxation under the existing laws of this state. A somewhat similar question was before this court in the case of Consolidated Gas Company v. Baltimore City, reported in 101 Md. 541, 61 Atl. 532, 1 L. R. A. (N. S.) 263, 109 Am. St. Rep. 584, and again on a second appeal in a case between the same parties involving the same question, reported in 105 Md. 43, 65 Atl. 628, 121 Am. St. Rep. In both these cases this court held that, whilst the easements enjoyed by the gas company in the highways of Baltimore city were taxable, yet that the method pursued in valuing them was improper, and the assessment therefore invalid. In the present case the appellant does not dispute the right of the appeal tax court to value and assess the easements enjoyed by public service corporations generally in the streets of Baltimore city, but contends that the tax

by Acts 1882, p. 857, c. 229, is in lieu of and in substitution for any other tax on its intangible property, whether it be termed franchise or easement. There was much discussion at bar, as there is also in the briefs of counsel, as to the exact signification of the words "franchise" and "easement": and there is no doubt some confusion of thought in regard thereto arising from the occasional want of precision in the use of these terms by persons dealing with the subject. But we think that in this state the confusion no longer exists, the two words having been clearly distinguished by the opinion of this court in the Gas Co.'s Case, 101 Md. 541, 61 Atl. 532, 1 L. R. A. (N. S.) 263, 109 Am. St. Rep. 584, supra, where McSherry, C. J., said: "The right to occupy the streets with gas mains is a franchise, the actual occupation of them in that way pursuant to the franchise is the acquisition of an easement." In other words, as defined by this court, the right to use the streets for some special purpose is a franchise, and the actual user of them for that purpose is an easement. If the appellant obtain from the city of Baltimore the privilege or right of putting down its tracks, and running its cars over and upon a certain street in that city, but does not for a while exercise such privilege or right by laying its tracks and running its cars thereon, it would possess "the naked, slumbering, unused franchise" merely, which, separately considered, is not property in the sense that it is of substantial value for the purposes of direct taxation. Whenever the appellant should exercise that right or privilege, however, by laying its tracks and operating its cars thereon, then there would spring into existence the easement, which is now generally recognized as property; a new kind of property, it is true, invisible, intangible, and elusive, yet of substantial value and amenable to taxation. On June 20, 1908, this intangible property of the appellant was assessed by appeal tax court for the purposes of taxation at \$11,214,460. Upon appeal to the Baltimore city court under section 170 of the Baltimore city charter, the amount of the assessment was reduced to \$2,611,925.81.

The railway company has brought this appeal, conceding, as we have said, that under the decisions of this court such property is subject to taxation, but claiming that in this case the tax on gross receipts, above mentioned, known as the park tax (because the proceeds are required to be applied to the maintenance of the public parks of the city), is itself a complete and adequate tax on the easements enjoyed by the railway company in the highways of Baltimore, and that these easements are thereby exouerated from any further taxation under the existof 9 per cent. on its gross receipts imposed ing laws of the state. The answer of the

•For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

city to this contention may be divided into use of the streets, and not merely the right three principal heads.

First. They cite the language of this court in Sindall's Case, 93 Md. 536, 49 Atl. 645, where it was said: "The taxing power is never to be presumed to be surrendered, and therefore every assertion that it has been relinquished must, to be efficacious, be distinctly supported by clear and unambiguous legislative enactment. To doubt is to deny exemption." We do not think, however, that this is a satisfactory answer to the appellant's contention. What appellant claims is not exemption, but exoneration. It does not contend that the stafe has surrendered its right to further tax the easements in question, but, that having taxed them in the manner prescribed by Acts 1882, p. 357, c. 229, further legislative action is necessary before an additional burden of taxation can be lawfully imposed upon them.

Second. On the part of the city it is further said that the park tax is a tax upon the special franchise to use the streets merely, and is not a tax upon the actual user of them. In other words, that the park tax is, in fact, only an annual rental paid for the exercise of the franchise, and not a property tax at all. The three park tax cases reported in 71 Md. 405, 18 Atl. 917, 84 Md. 16, 35 Atl. 17, and 107 Md. 250, 68 Atl. 557, 14 L. R. A. (N. S.) 805, are cited in support of this proposition. We, of course, affirm what was said in those cases, to the effect that the park tax was a franchise tax exacted in exchange for the privilege accorded the street railway companies to lay their rails and run their cars upon city streets. But the language of these cases must be considered with reference to the questions then before the court. In none of them was any question concerning the separate taxation of easements as distinguished from franchises presented. In fact, so closely related are special franchises and easements, the one to the other, that until easements came recently within a few years past to be recognized as a distinct species of property subject to taxation these terms were frequently used as synonymous. Indeed, in the New York statute which was passed in 1899, expressly authorizing the taxation of this new kind of property by amending its tax laws, what this court has defined to be an "easement" is termed (in the statute) a "special franchise." In construing that statute, the Court of Appeals of New York in an opinion by Mr. Justice Vann speaks of this property as newly discovered property, consisting of "special franchises" or privileges unseen, without form or substance, and for that reason never before brought under the taxing power. People v. Tax Commissioners, 174 N. Y. 441, 67 N. E. 69. Besides this, Judge Boyd in 107 Md. 250, 68 Atl. 557, 14 L. R. A. (N. S.) 805, supra, speaking for this court, says: "The

to use them which may never be exercised." We do not think, therefore, that the three park tax cases can fairly be said to deny the contention that the 9 per cent. tax on gross receipts did include as an element thereof a tax upon the easements enjoyed by the appellant in the highways of Baltimore city. If we consider the amount paid to the city by virtue of such tax, the contention of the appellant appears still more reasonable. It appears from the record that in 1907 the tax upon gross receipts amounted to the sum of \$435,065.84, which at a tax rate of 2 per cent, the approximate rate prevailing in the city of Baltimore, is equivalent to a direct tax upon an assessment of \$21,753.292. Besides the above tax on gross receipts, the appellant also paid for 1907 city taxes on its tangible real and personal property the sum of \$91,995.15, also a license tax on its cars of \$4,289, and for paving between its tracks and two feet on each side thereof the sum of \$71,334.06, making a total of over \$600,000 paid by the appellant in taxes and charges of different kinds to the city of Baltimore. or for its benefit for one year. But, leaving out of consideration the additional burdens and charges above mentioned, and having regard to the tax on the gross receipts imposed by Acts 1882, p. 357, c. 229, alone, when we reflect that such tax reaches every nook and corner of value in the easements, as well as in the franchises of the corporation, that the amount of the tax is equivalent to a direct property tax on an assessment of over \$20,000,000, that there could scarcely have been a thought in the legislative mind at that time (1882) of taxing the easement separately as property distinguished from the franchise, and that, in fact, no effort was made to tax easements for a period of 25 years thereafter, we think the inference is irresistible that the Legislature did not then contemplate a tax on the easements enjoyed by the street car companies now composing the appellant in addition to the gross receipts tax which by that act it imposed upon them. A tax on gross receipts necessarily involves the idea of the user of the franchise, for without such user no receipts would be earned.

property by amending its tax laws, what this court has defined to be an "easement" is termed (in the statute) a "special franchise." In construing that statute, the Court of Appeals of New York in an opinion by Mr. Justice Vann speaks of this property as newly discovered property, consisting of "special franchises" or privileges unseen, without form or substance, and for that reason never before brought under the taxing power. People v. Tax Commissioners, 174 N. Y. 441, 67 Plaust v. Bid. Ass'n, 84 Md. 186, 35 Atl. 890, Md. 250, 68 Atl. 557, 14 L. R. A. (N. S.) 805, and others, are cited by the appellant. But we do not deem it necessary to decide this real consideration for the (park) tax is the

tax in the sense that term is employed by the solicitors for the city, but as a tax upon the corporation itself measured by the amount of business which it does from year to year and intended as a substitute for a direct tax upon all of appellant's intangible property. In Philadelphia & Reading R. R. v. Pennsylvania, 15 Wall. 284, 21 L. Ed. 146, the Supreme Court says: "It is not to be questioned that the states may tax franchises of companies created by them, and that the tax may be proportioned either to the value of the franchise granted, or to the extent of its exercise; nor is it deniable that gross receipts may be a measure of approximate value, or, if not, at least of the extent of enjoyment." The extent of the enjoyment of the franchise furnishes a satisfactory basis for ascertaining the amount of the tax to be paid for the easement, as well as for the franchise, and we are unable to say that in passing Acts 1882, p. 357, c. 229, the Legislature intended to distinguish between these two so closely connected kinds of intangible property. In the Gas Company's Cases, 101 Md. 547, 61 Atl. 532, 1 L. R. A. (N. S.) 263, 109 Am. St. Rep. 584, Id., 105 Md. 43, 65 Atl. 628, 121 Am. St. Rep. 553, this court decided that the usable value of the easement is its real value; and no better method of ascertaining the usable value of an easement seems yet to have been devised than that of taxing the gross receipts of the company enjoying the easement. In their brief counsel for the appellant say: "We concede that the Legislature under its reserved power can change the existing method whereby the appellant's street easements or franchises contribute their share to the public burden. But this reserve power has not been delegated to the appeal tax court." And to this proposition we assent. We hold, therefore, that, as to the easements enjoyed by the appellant in the streets of Baltimore city upon which the park tax is earned and paid, no further assessment thereon for the purposes of taxation can be lawfully made without express legislative authority, and that consequently the assessment of them by the appeal tax court and by the Baltimore city court on appeal is illegal and void.

We find nothing in the case of New York v. Tax Commissioners, 199 U.S. 1, 25 Sup. Ct. 705, 50 L. Ed. 65, cited by appellee, at war with the views herein expressed. That case is the same above referred to as having been decided by the Court of Appeals of New York, and reported in 174 N. Y. 441, 67 N. E. 69, supra. The case was carried to the Supreme Court of the United States upon a writ of error, where the decision of the New York Court was affirmed. Mr. Justice Brewer, speaking for the Supreme Court in that case, said: "The rule of strict construction applies to state grants, and, unless there is an express stipulation not to tax, the right is reserved as an attribute of sovereignty."

tax was never intended as a commutation in the exercise of its attribute of sovereignty amended the tax laws, and in express terms added "special franchise" to the other taxable property of the state. In that case, as in this, the Legislature had previously imposed a tax upon the gross receipts of the complaining companies, but in that case there was further action by the Legislature authorizing the assessment, while here there is none. The clear distinction between the gas company's cases, supra, and the case at bar, is that in the former the Legislature provided for no tax upon the corporation that could be regarded as a substitute for a direct tax upon its intangible property, while in the present case it did so provide. As to the 14 miles of easements of appellant in the city of Baltimore located on turnpikes and private ways, and upon which no gross receipts tax is paid, we think these are subject to taxation by the appeal tax court, but we must again declare the method pursued in making the assessment not the proper one to ascertain the taxable value of such easements. The difficulty of the subject is appreciated, but certainly in valuing easements in the annex the cost of the German street franchise of \$6.67 per running foot should not be averaged with the Garrison avenue franchise which cost less than 5 cents per running foot. Indeed, it is not entirely clear just what relation the cost of the franchise bears to the value of the easements. It may very well be considered as an element in ascertaining such value in the first instance, but as was said in 101 Md., supra: "The use to which a franchise permits an easement to be put is an essential element to be considered in placing a valuation on that easement for the purpose of taxation." In other words, the true test of the taxable value of an easement is its producing value to the owners. Simpson v. Hopkins, 82 Md. 478, 33 Atl. 714; Gas Co.'s Case, 105 Md. 57, 65 Atl. 628, 121 Am. St. Rep. 553. This court does not feel called upon to devise a scheme for the taxation of easements, but we think the assessable value of a railroad easement for the purpose of taxation can only be determined by looking to all the elements that in any way reflect the worth or utility of the easement, the original cost of the franchise, at any, the cost of operating the road, the gross earnings, the amount of car service required. as well as the amount of capital stock invested, and the amount of taxes already paid upon its tangible property.

We concur in the views of the court below in regard to the assessment on viaducts, bridges, and trestles, and the valuation of these structures at \$164,500 will not be disturbed. The parties having agreed to an assessment on tracks and appurtenances of \$12,000 per mile per single track, aggregating \$2,800,092, no question in regard thereto is before us for review. But, as we think the appeal tax court has no power under exist-In that case, as we have seen, the Legislature ing laws to further tax the easements of

gross receipts tax is paid, and that the assessment of the 14 miles of easements of turnpikes and private ways was invalid, the assessment thereon of \$11,214,460 by the appeal tax court, and of \$2,611,928.81 by the Baltimore city court, will be, and such assessments are hereby, severally vacated and annulled. The question presented by this appeal, we are aware, is an important one to the taxpayers of Baltimore city, as well as to the stockholders and income bondholders of the corporation, and we have reached our conclusion after the most careful consideration of the whole subject that our time would permit; our labor being lightened by the able and illuminating briefs of counsel, as well as by their oral argument at bar, and also by the very admirable brief submitted by Mr. B. Howell Griswold, Jr., on behalf of the Maryland Trust Company, trustee of the income bondholders. For the reasons assigned, the order of the lower court must be reversed and the amount of the assessment upon the property embraced within this appeal, exclusive of the 14 miles of easements in the annex, is hereby fixed for the year 1908 at the sum of \$2,964,592, that being the sum of the two items of track assessed by the lower court at \$2,800,092, and of viaducts, bridges, and trestles, assessed by the lower court at \$164.500. As to the 14 miles of easements on private ways and turnpikes in the annex, the cause will be remanded to the Baltimore city court for further proceedings in conformity with the views herein expressed.

Order reversed, and cause remanded.

(111 Md. 1)

LOWE V. STATE.

(Court of Appeals of Maryland. 1909.) June 29,

1. CRIMINAL LAW (§ 273*)—"PLEA OF GUIL-

TY"—EFFECT.

A "plea of guilty" is a confession of guilt, and is equivalent to a conviction, and the court must pronounce judgment and sentence as on a verdict of guilty.

[Ed. Note.—For other cases, see Criminal Law. Cent. Dig. §§ 631, 632, 634; Dec. Dig. § 273.*

For other definitions, see Words and Phrases, vol. 6, p. 5408; vol. 8, p. 7756.]

2. CRIMINAL LAW (§ 1023*)—APPEAL—JUDG-MENTS REVIEWABLE.

A judgment, properly entered on a plea of guilty, is in effect a judgment of confession, and is not reviewable on appeal or writ of error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2587; Dec. Dig. § 1023.*]

3. CRIMINAL LAW (§ 273*)-PLEA OF GUILTY -ACCEPTANCE.

To authorize the acceptance of a plea guilty, and judgment and sentence thereon, the plea must be voluntary, and the court should be satisfied that it is voluntary, and that ac-cused understood its effect.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 632; Dec. Dig. § 273.*]

the appellant upon which the 9 per cent. | 4. Criminal Law (\$ 278*)—Plea of Guilty

—ACCEPTANCE.

Where the record affirmatively showed the entry of judgment immediately following the receipt of a plea of guilty, without any determination by the court whether the plea was voluntary and understood, and the record did not show that accused understood the effect of the plea, it was error to receive the plea and page integrated thereon. pass judgment thereon.

see Criminal [Ed. Note.—For other cases, see Crin Law, Cent. Dig. § 632; Dec. Dig. § 273.*]

5. CRIMINAL LAW (§ 1023*)—APPRAL—QUES-TIONS REVIEWABLE.

When a trial court acts on a matter confided to its discretion, no appeal lies from its decision.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2583; Dec. Dig. § 1023.*]

6. Criminal Law (§ 302*)—Plea of Guilty

-Effect.
Where an accomplice, under an agreement with the prosecuting officer, approved by or known to the court, that he shall be immune from further prosecution testifies fully as to the matter charged, the accomplice obtains an equitable right to a suspension of the sentence on his plea of guilty, and the prosecuting officer should enter a noile, or on his failure to do so, the court should continue the cause, to permit accused to apply to the executive for a perior pardon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 388; Dec. Dig. § 302.*]

Appeal from Circuit Court, Frederick County; Glenn H. Worthington and John C. Motter, Judges.

James H. R. Lowe pleaded guilty to a criminal offense, and from a judgment overruling his motion for suspension of judgment and sentence, and from the judgment and sentence, he appeals. Reversed and remanded.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, and THOMAS, JJ.

Edward S. Eichelberger and Hammond Urner, for appellant. Isaac Lobe Straus, Atty. Gen., for the State.

PEARCE, J. This is an appeal from a ruling of the circuit court for Frederick county in the case of the State v. James H. R. Lowe, overruling a motion filed by the traverser, now the appellant, "for suspension of judgment and sentence, and from the judgment of said court in said case." The facts are few and simple, but the question presented is new in this state, and is one of much importance. The appellant was indicted by the grand jury of Frederick county, on February 12, 1909, for burning an unfinished and untenanted dwelling house, the property of Edward H. Walter. At the same time the grand jury indicted George T. Fisher for the same offense. It appears from the record that, prior to the indictment or presentment of either of these parties, the appellant was summoned and called by the state's attorney of Frederick county as a witness for the state, while he was in the custody of the law

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

certain habeas corpus proceedings, upon the petition of said George T. Fisher, and that the appellant "then and there did testify, fully, truthfully, and at length, as to all the facts touching the offense charged in the indictment in this case, which offense was, and is, the same charged against the said George T. Fisher, and which was then and there the subject of inquiry upon said habeas corpus proceedings, and the testimony so given by said traverser was given under a promise, implied in law, of the state's attorney, that the traverser should be immune and exempt from prosecution on account of any matters disclosed in his said testimony given under said implied promise of immunity." It further appears from the record that on February 22, 1909, the plea of "guilty" was entered by the traverser in the case against him; that judgment of guilty was thereupon entered thereon by the court, and that the trial of said Fisher for the same offense was at once taken up and proceeded with; that at the instance of the state's attorney the traverser remained in court for the purpose of testifying as a witness for the state against said Fisher, and that during the afternoon of the same day he was summoned, sworn, and testified in said case fully and truthfully as to his knowledge concerning said charge, and that this testimony was given under a promise of the state's attorney, implied in law, of immunity from prosecution for his participation in said offense. record does not disclose whether Fisher was convicted or not, but the result of his trial cannot affect the question we are to determine. On February 27, 1909, after the conclusion of the trial of Fisher, the motion of the appellant for suspension of judgment in his case was heard, and thereupon his motion was overruled, and he was sentenced by the court to be confined in the Maryland Penitentiary for two years and six months. The state now moves to dismiss this appeal because the record shows that the appellant entered a plea of "guilty," upon which plea the judgment was entered, and that from a judgment by confession no appeal lies.

We have examined the numerous authorities cited by the Attorney General in support of this motion, but in none of them have we found presented the same question presented by the case now before us. The general proposition is no doubt correctly stated in the passages cited by the Attorney General from the Enc. of Pl. & Pr. and from Cyc., and from the cases supporting that text, but this general principle is subject to the qualification which is found in this case. Those passages are as follows: "A plea of guilty is a confession of guilt, and is equivalent to a conviction. The court must pronounce judgment and sentence as upon a verdict of guilty." 12 Cyc. 353. "Where the defendant pleads guilty, it is the right and duty of the court to pronounce upon him the sentence of while the docket entries show that judg-

upon the charge above stated, to testify in the law, without any further proceedings, and without any independent adjudication of guilt." 19 Enc. Pl. & Pr. 437. "It has been held that a party cannot have a judgment, properly entered in a plea of guilty, reviewed either by appeal or writ of error, since such judgment is in effect a judgment by confession." 19 Enc. Pl. & Pr. 505. The case of Edina v. Beck, 47 Mo. App. 234, may be taken as an example of the cases supporting the above text, the court saying: "The appeal was properly dismissed, unless we can hold that a party may appeal from a judgment properly entered against him upon his plea of guilty, which is, in effect, a judgment by confession." The qualification to which we refer is distinctly indicated in the above citation from 19 Enc. Pl. & Pr. 505, and in the quotation from Edina v. Beck. supra, in requiring the judgment to be properly entered in order that the effect of finality shall be given it. That the word "properly" did not refer to the mere form of entry, but related to substance, is made clear in both the above works in the paragraphs immediately following two of the passages above cited. In 12 Cyc. 353, the text continues: "To authorize the acceptance and entry of a plea of guilty, and judgment and sentence thereon, the plea must be entirely voluntary. It must not be induced by fear, or by misrepresentation, persuasion, or the holding out of false hopes, nor made through ignorance or inadvertence. The court should be satisfied as to the voluntary character of the plea before giving judgment and passing sentence, and in some states such an investigation is required by statute. In some states the statute requires the court to admonish the defendant as to the consequences of the plea." In 19 Cyc. 437, the text continues: "Before proceeding to make such plea the foundation of a judgment, however, the court should, and frequently by statute must, see that it is made by a person of competent intelligence, freely and voluntarily, and with a full understanding of its nature and effect, and of the facts on which it is founded."

The bill of exceptions sets forth that at the hearing of the motion of the traverser for suspension of judgment and sentence, it was agreed between the state's attorney and the counsel for the traverser, with the consent of the court, "that the facts alleged in said motion, and the additional reasons filed in support thereof, but not the conclusions of law drawn therefrom, should be admitted and treated as proved for the purposes of said motion and hearing, to the same extent as if said allegations of fact were proven at the hearing of said motion, said motion having been filed and heard pending judgment and sentence in said case." It will be seen that this exception is somewhat in conflict with another part of the record, the exception stating that the motion was heard on February 27th, pending judgment in the case,

ment, guilty, was entered by the court February 22d-five days before the motion was heard, and three days before the motion was made. It thus affirmatively appears from the record that the entry of judgment immediately followed the tender and receipt of the plea, without any such consideration as we have seen should have been given before proceeding to judgment thereon, and it nowhere appears in the record that the traverser understood that the effect of the plea would be taken to be a waiver of the promised immunity from further prosecution, and that he intended thereby to make such waiver. It is impossible to conceive, in the face of his motion, that he did so understand and intend; and, in the absence of evidence that he did, we cannot hold that the judgment was properly entered within the meaning of the authorities relied on by the Attorney General, and if not so entered, this appeal cannot be dismissed.

It was, however, confidently contended that, even if the appeal should not be dismissed for the reason first stated, it must still be dismissed for the reason that the motion to suspend sentence was addressed to the discretion of the court below, and was overruled in the exercise of that discretion, which, when exercised without abuse, cannot be reviewed on appeal or writ of error. It cannot be denied, of course, that when a trial court is acting upon a matter confided to its discretion, there is no appeal from its decision; and so it may be conceded that in ordinary cases the decision of the court as to the suspension of sentence, whether upon the application of the prisoner, or because the court is moved thereto of its own will, is not the subject of appeal. But when an accomplice, under an agreement or understanding with the prosecuting officer, approved by, or known to, the court, that he shall be immune from further prosecution, testifles fully and truthfully as to the whole matter charged, the case is not an ordinary case, coming within the general rule above stated. The effect of such an agreement or understanding, where the condition is fulfilled, is to vest in the party an equitable right which is not the subject of discretion, because it rests upon contract express or implied. In such cases the exercise of discretion begins with considering whether the circumstances of the case are such as to justify the court in permitting the accomplice to be sworn as a witness under an agreement, express or implied, that if he make full disclosure, he shall be exempt from further prosecution, and the discretion ends when he has fully and faithfully performed the condition. In the language of Justice Putnam in Commonwealth v. Knapp, 10 Pick. (Mass.) 477, 20 Am. Dec. 534: "He was safe, if he would be true and faithful in the performance of his engagement." But "the prisoner who does not conduct himself truly is not at liberty to take

made. * * * If they refuse to testify, or testify falsely, they are to be tried themselves, and may be convicted upon their own confession which was made after they were permitted to become witnesses for (the crown) the state." We shall not attempt to go into the learning upon this question which has been so thoroughly gone into by the Attorney General, but shall refer to a few leading cases only, which we regard as controlling.

In U. S. v. Ford, 99 U. S. 594, 25 L. Ed. 399, the Supreme Court, speaking through Judge Clifford, reviewed the authorities, and delivered an elaborate and careful opinion. In that case the traverser pleaded the implied promise of immunity in bar of the prosecution, and the United States demurred to the plea, the demurrer being overruled by the Circuit Court for the Northern District of Illinois, and the Supreme Court reversed the judgment for error in this ruling, holding, as it seems all the authorities hold, that such a plea is not good as a plea in bar. The court, however, quoted with approval the practice as declared by Starkie that, "where accomplices make a full and fair confession of the whole truth, and are in consequence admitted to give evidence for the crown, if they afterwards give their testimony fairly and openly, although they are not of right entitled to a pardon, the usage, lenity, and practice of the court is to stay the prosecution against them, and they have an equitable title to a recommendation to the king's mercy." The court also cited with approval the case of Rex v. Rudd, Cowper, 331, which was an application on habeas corpus by an accomplice, who had testified under an implied promise of immunity, to be admitted to bail pending an application for a pardon, which bail was refused on the ground that she had not made a full and fair disclosure. In delivering the opinion of the court, Lord Mansfield expressly declared that, if she had come under circumstances sufficient to warrant the court in saying that she had a title of recommendation to mercy, they would bail her for the purpose of giving her an opportunity of applying for pardon. In the case now before us it is a concession that this traverser does come under such circumstances, and in Ford's Case, supra, the court proceeded to say that: "If an attempt is made to put the party to trial, in spite of his equitable right to pardon, he may move that the trial be postponed, and may support his motion by his own affidavit, when the court may properly insist to be informed of all the circumstances. Power under such circumstances is vested in the court in a proper case to put off the trial as long as may be necessary, in order that the case of the prisoner may be presented to the executive for decision." The court in that case referred to People v. Whipple, 9 Cow. (N. Y.) 708, and U. S. v. Lee, 4 Mc-Lean, 103, Fed. Cas. No. 15,588, saying that these cases did not support the proposition back the confession which he deliberately for which they were there cited, viz., that

such a plea was good as an absolute bar to | and are no further responsible for the conprosecution, but nevertheless approved expressly the practice indicated in those cases as the proper practice, saying: "Public policy and the great ends of justice, it was said in the second case, require that the arrangement between the public prosecutor and the accomplice be carried out, and the court proceeded to remark that, if the district attorney failed to enter a nolle prosequi to the indictment, 'the court will continue the cause until an application can be made for a pardon,' which of itself is a complete recognition of the usage and practice established in the place of the ancient proceeding of approvement."

In People v. Whipple, supra, is a most learned and convincing consideration of the question we have here. In that case the question arose upon the motion of the district attorney that Jesse Strang, who had just been convicted by the verdict of a jury as a principal in the murder of which Mrs. Whipple, the prisoner at the bar, was charged as an accessory before the fact, should be examined as a witness for the state, and should thereby, upon making full disclosure, become entitled to a recommendation for pardon. The court in the exercise of its discretion inquired into the circumstances of the case, and from them determined that it would be an improper exercise of its discretion to admit him to that privilege, and therefore denied the motion. Judge Duer said: "It is to be considered as if Strang had already been admitted as a witness, had testifled for the people on the present trial, in the character of an accomplice, had told the whole truth to the satisfaction of the court, and by himself or his counsel now claimed of us to suspend the sentence of the law, and recommend him for pardon. • • • Now upon what principle of good faith, public morality, sound policy, substantial justice, equitable right, or strict law, could we deny this claim?" The court said further that, if it could be supposed that the executive would not grant a pardon in such case: "The court would nevertheless be bound most scrupulously to discharge its own obligations as far as they extend and as far as we have power. And if an accomplice perform the condition on which he is admitted as a witness for the people, according to its spirit, we hold ourselves bound in duty and and in conscience to redeem the promise, which the law raises in his favor, to the very letter. When we have done this, we have performed our duty, opinion.

sequences." The proper practice in such cases seems to be quite uniformly settled, as stated in U.S. v. Ford, supra, either for the prosecuting officer to enter a nolle prosequi, or, upon his refusal or failure to take such course, for the court to continue the cause to permit him to apply to the executive for a pardon. Mr. Bishop so states it in his new Criminal Procedure, §§ 1164 and 1166. In the latter section he states that, where the accomplice has been indicted, "he simply pleads guilty, and then testifies. If his testimony is satisfactory, a nolle prosequi, or other form of discharge, follows; otherwise sentence is entered on his plea of guilty." In section 1164. Mr. Bishop says: "As he cannot plead his acquired right in bar if the attorney for the state refuse to recognize it, the court can only continue the case to permit him to apply for a pardon." In State v. Graham, 41 N. J. Law, 20, 32 Am. Rep. 174, Chief Justice Beasley cites with approval the case of U.S. v. Lee, 4 McLean, 103, Fed. Cas. No. 15,588, in which the result was that the court held that, if the district attorney should fail to enter a nolle prosequi, the cause should be continued until a pardon could be applied for, but suggested "that to discontinue the prosecution would be the shorter and better mode," and the court also said in State v. Graham, supra, that the "only dissent from that general line of authorities was the case of Com. v. Dabney, 1 Rob. (Va.) 696, 40 Am. Dec. 717, and that this deviation is in a great measure to be accounted for by the existence of a statute that materially modified the subject."

Our conclusion is that it was error, under the circumstances of this case, to receive the plea of guilty without being satisfied that the accused fully understood its nature and effect, and that he should be permitted to withdraw the plea, if he so elect, so as to give to the state's attorney an opportunity to enter a nolle prosequi if he deems that to be a proper course, or, if he thinks it not proper to do so, that the court may continue the cause until an application for a pardon is submitted to, and acted upon by, the Governor. Should the state's attorney decline to discontinue the case, or should the Governor decline to grant a pardon, this court will have discharged its duty, and will be no further responsible in the premises.

Judgment reversed and cause remanded for further proceedings in conformity with this opinion.

(75 N. H. 594) FIDELITY & DEPOSIT CO. v. BUCKLEY. (Supreme Court of New Hampshire. Coos. June 26, 1909.)

SPECIFIC PERFORMANCE (§ 4*)—CONTRACTS EN-FORCEABLE—MORTGAGE OF REAL ESTATE.

Defendant agreed to mortgage certain real
estate, and plaintiff brought suit for the specific estate, and plaintiff brought suit for the specific performance of the contract, and attached the land as the preperty of defendant, who then had a record title. Defendant's wife subsequently took title subject to the attachment, and was not made a party to the suit for specific performance. Hold that, as she is entitled to preserve her title by satisfying plaintif's claim for damages for defendant's alleged breach of his contract, a decree for specific performance. of his contract, a decree for specific performance will be denied.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 4.*]

Transferred from Superior Court, Coos County; Pike, Judge.

Action by the Fidelity & Deposit Company against Alfred E. Buckley. The court dismissed the bill, and transferred the question whether there was error of law in so doing. Case discharged.

Daniel J. Daley and Herbert I. Goss, for plaintiff. Rich & Marble and Edmund Sullivan, for defendant.

WALKER, J. This is a bill in equity for the specific performance of an agreement to mortgage real estate. The court dismissed the bill, and transferred the question whether there was error of law in so doing. The title to the land in question is in the defendant's wife, who is not a party to this proceeding. Before she acquired her title the land was attached upon this bill in equity as the property of the defendant, who then had a record title. So far as appears from the case, his wife took her title subject to the attachment, and is entitled to preserve it by satisfying the plaintiff's claim for damages for the defendant's alleged breach of his contract. Upon the present state of facts, a decree for specific performance would not be equitable.

Case discharged. All concurred.

(75 N. H. 804)

CUTHBERT et al. v. LAING et al.

(Supreme Court of New Hampshire. Cheshire. June 26, 1909.)

1. WILLS (§ 69*)-NATURE OF WILL. A will is made to avoid, not to carry into effect, the statute of distribution.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 183; Dec. Dig. § 69.*]

2 WILLS (§ 531*)—CONSTRUCTION—DESIGNATION OF SHARES—TAKING PER STIRPES OR PER CAPITA.

ficiaries to the survivors. *Held*, that the grand-children took per capita, and not per stirpes.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1143; Dec. Dig. § 531.*]

Transferred from Superior Court, Cheshire County; Chamberlin, Judge.

Proceedings by John H. Laing and others, as executors, for accounting. A decree of the probate court was affirmed pro forma by the superior court, and Dorothy L. Cuthbert and others excepted. The case was transferred to the Supreme Court. Appeal sustained.

Probate appeal from a decree of distribution. The testator bequeathed the residue of his estate "in equal shares" to his four children and two children of a deceased son, naming the legatees, and directed his executors to pay the shares of the grandchildren to them when they arrived at the age of 21 years. In case of the death of any of the legatees named, their shares were given to the survivors. The probate court decreed one-fifth of the residue to each of the testator's four children and one-tenth to each of the two grandchildren. Upon appeal the decree was affirmed pro forma, and the grandchildren excepted.

Joseph Madden, for plaintiffs. Charles H. Hersey, for defendants.

PEASLEE, J. The claim that the grandchildren take but one share in the estate cannot be sustained. The direction of the will is that the property be distributed in equal shares "to my children * * * and also to my grandchildren." There is no satisfactory evidence that the testator intended the grandchildren to take only the statutory share of their deceased parent. In the provision relating to survivorship he treats all alike. The shares of deceased beneficiaries go to the survivors. If one of the grandchildren had died, its share would have been distributed to all the survivors equally. Had the testator had in mind the statute of distribution, and intended that the two grandchildren should take only their father's share, he would also have provided that in the event of the death of one grandchild its half of its father's share in the estate should go to the other grandchild, to the exclusion of its uncles and aunts.

A will is made to avoid, not to carry into effect, the statute of distribution. If, as the appellees argue, the testator had intended to divide his estate as the statute would cause it to be divided, he could have omitted all of this clause of his will, except the provision that the grandchildren's shares should A testator bequeathed the residue of his be held in trust. If he had had the suggestestate "in equal shares" to his four children and two children of a deceased son, naming the legates, with a direction for payment of the shares of the grandchildren at majority and a provision giving the shares of deceased benegrandchildren as a class take the other for \$100. share, than there is for the contention that the children take as individuals and the grandchildren as a class. But neither construction would carry out the intent expressed in the will. As was said in Farmer v. Kimball, 46 N. H. 435, 440, 88 Am. Dec. 219: "Any inference of an intention to divide the residue by classes is merely conjectural and quite too uncertain to prevent the application of the well-settled general rule. * * Individuals falling within the description of the devisees in the residuary clause take per capita." The persons named and described in the residuary clause all stand alike, and each is entitled to one-sixth of the residue of the estate.

Appeal sustained. All concurred.

(75 N. H. 297)

WHALEN v. PEERLESS CASUALTY CO. (Supreme Court of New Hampshire. Coos. June 1, 1909.)

1. INSURANCE (§ 461*)—ACCIDENT POLICY— "VOLUNTABY EXPOSURE" — WHAT CONSTI - WHAT CONSTI-

TUTES.

"Voluntary exposure" to unnecessary danger or obvious risks within the meaning of an accident policy is a conscious or intentional exposure to a known risk, and not a mere inadvertent or accidental one.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1180, 1181; Dec. Dig. § 461.*

For other definitions, see Words and Phrases, vol. 8, pp. 7346-7350; vol. 8, p. 7830.]

2. INSURANCE (§ 668*)-ACTION ON POLICY-VOLUNTABY EXPOSURE—QUESTION FOR JURY.
In an action on an accident policy, evidence as to plaintiff's voluntary exposure to unnecessary danger or obvious risk held to require

a submission to the jury. [Ed. Note.—For other cases, see Insurance, Dec. Dig. § 668.*]

3. RAILROADS (§ 255*)—ENTRY ON RAILROAD TRACK—NOTICE TO TRESPASSERS.

TRACK—NOTICE TO TRESPASSERS.

To render entry on a railroad right of way punishable as a crime, under Laws 1899, p. 316, c. 75, \$ 1, it must appear that notice warning people not to enter under penalty of law was posted at or near the path where people were accustomed to cross, and was maintained so that those undertaking to enter there could by reasonable care ascertain its contents.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 255.*]

4. INSURANCE (§ 668*)—ACTION ON POLICY-VIOLATION OF LAW—QUESTION FOR JURY.

In an action on an accident policy for injuries to plaintiff while crossing a railroad track, evidence as to whether plaintiff was injured while violating a statute was for the jury. [Ed. Note.-For other cases, see Insurance, Dec. Dig. \$ 668.*]

Transferred from Superior Court, Coos County; Chamberlin, Judge.

Action by Michael Whalen against the Peerless Casualty Company. The trial justice directed the jury to return a verdict for plaintiff for \$20, whereupon the parties agreed, in case the ruling should be held

tute a class taking one share, while the plaintiff for \$100. Judgment for plaintiff

The plaintiff was 57 years old at the time of the trial. He was a resident of Berlin, and had lived for some years in a house westerly of the tracks in the yard above the station of the Grand Trunk Railway. About 2 o'clock in the afternoon of the day of his injury, he left his home to go to another part of the city, proceeding along a path which crossed the railroad tracks and is used by many people in passing through the railroad yard. It was a very stormy day, with the wind blowing from the northwest. The plaintiff testified that before going upon the tracks he looked and listened, but saw and heard nothing. There were three tracks at the place of crossing. As the plaintiff stepped upon the middle track, an engine used in switching backed down upon him, struck him, and cut off one of his legs above the ankle joint. The plaintiff was injured at a point on the railroad near what is called the "home semaphore." At a distance of about 150 feet easterly of the semaphore there was posted a notice, printed in English and French, as follows: "Warning. Keep off the railroad track." A like notice was posted a quarter of a mile west of the semaphore, near Hillside avenue. At a point 150 feet northerly of the semaphore, and near Green street, there was a notice as follows: "Grand Trunk Railway. The public are by law strictly prohibited from walking upon or over the railway track. By order." There was no sign or notice at the place where the plaintiff attempted to cross the track in the path leading through the yard. The plaintiff was unable to read English or French, and testified that he never saw the signs where they were posted. They were in legible condition. Other facts appear in the opinion.

Sullivan & Daley, for plaintiff. John E. Allen and Rich & Marble, for defendant.

BINGHAM, J. At the time the plaintiff received his injury he held a policy in the defendant company, insuring him against the loss of a foot by complete severance at or above the ankle joint, in the sum of \$100, subject to the proviso that, if the injury resulted "wholly or in part from voluntary exposure to unnecessary danger or obvious risk of injury," or resulted from or was received "while violating the law, or violating the rules of a public carrier affecting the safety of its passengers or the public, he should be entitled to receive but \$20. The defendant pleaded the exceptions contained in this proviso in defense of the action; and, upon the submission of the evidence outlined in the statement of the case. the trial justice directed the jury to return erroneous, judgment should be entered for a verdict for the plaintiff for \$20. The par-

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ties then agreed that, in case the ruling directing the verdict should be held to be erroneous, judgment should be entered for the plaintiff. for \$100, with interest from the date of the writ and taxable costs. In directing the verdict the court ruled as a matter of law that the plaintiff's injury resulted from voluntary exposure to unnecessary danger or obvious risk of injury, or resulted from, or was received while, violating the law, or violating the rules of a public carrier. If any one of these rulings was correct, the verdict should be sustained; otherwise it should be set aside, and a verdict entered in accordance with the agreement of the parties.

The meaning of the clause "Voluntary exposure to unnecessary danger," as used in accident policies, has frequently been before the courts. In Keene v. Association, 161 Mass. 149, 151, 36 N. E. 891, the language of the exception was "any voluntary exposure to unnecessary danger, hazard, or perilous adventure," and it was held that the provision did not contemplate "an involuntary exposure to unnecessary danger"; that "a merely inadvertent or unintentional exposure to a danger of this kind is not voluntary, but involuntary. A voluntary exposure * * * implies a conscious, intentional exposure-something which one is consciously willing to take the risk of." In Burkhard v. Insurance Co., 102 Pa. 262, 48 Am. Rep. 205, it was said: "A clear distinction exists between a voluntary act and a voluntary exposure to danger. Hidden danger may exist, yet the exposure thereto, without any knowledge of the danger, does not constitute a voluntary exposure to it. * * The result of the act does not necessarily determine the motive which prompted the action. The act may be voluntary, yet the exposure involuntary. The danger being unknown, the injury is accidental." In Lehman v. Casualty Co., 7 App. Div. 424, 429, 39 N. Y. Supp. 912, 915, it was said that "one cannot be said to be guilty of a voluntary exposure to danger unless he intentionally and consciously assumes the risk of an obvious danger." In numerous other cases the same conclusion has been reached. It is unnecessary to refer to them at length. See Badenfeld v. Association, 154 Mass. 77, 27 N. E. 769, 13 L. R. A. 263; Anthony v. Association, 162 Mass. 354, 357, 38 N. E. 973, 26 L. R. A. 406, 44 Am. St. Rep. 367; Williams v. Association, 133 N. Y. 366, 31 N. E. 222; De Loy v. Insurance Co., 171 Pa. 1, 32 Atl. 1108, 50 Am. St. Rep. 787; Equitable, etc., Co. v. Osborn, 90 Ala. 201, 9 South. 869, 13 L. R. A. 267; Miller v. Insurance Co., 92 Tenn. 167, 21 S. W. 39, 20 L. R. A. 765. The case of Cornish v. Insurance Co., 23 Q. B. Div. 453, relied upon by the defendant, is not in point. The exception there was of accidents happening "by exposure of the insured to obvious risk of injury," not by "voluntary exposure." See Lehman v. 508, 572, 64 Atl. 194. But in this case it

Casualty Co., supra. It appears, therefore, that a voluntary exposure to unnecessary danger or obvious risk, within the meaning of the policy, is a conscious or intentional exposure to a known risk, and not mere inadvertent or accidental one.

Now the evidence upon this branch of the case tended to show that the plaintiff, when he entered upon the tracks of the railroad, was not conscious that he was exposing himself to an unnecessary danger or obvious peril, and that his injury was accidental. He was making use of a path frequented by people in crossing and recrossing the railroad yard. The day was very stormy, with the wind blowing from the northwest. The plaintiff testified that before stepping upon the track he looked and listened, but saw and heard nothing. This evidence was surely not so conclusive that reasonable men must find that the plaintiff consciously and intentionally exposed himself to an unnecessary and obvious danger, and the court erred in withdrawing the question from the jury. Did the plaintiff's injury result from, or was it received while, violating the law, or violating the rules of a public carrier? The plaintiff contends that the clause as to "violating the law" is limited in its application to violations of the criminal law (Cluff v. Insurance Co., 13 Allen [Mass.] 308; Lehman v. Casualty Co., 7 App. Div. 424, 39 N. Y. Supp. 912; Insurance Co. v. Bennett, 90 Tenn. 256, 16 S. W. 723, 25 Am. St. Rep. 685; 1 Cyc. 266), while the defendant contends that it is not thus limited, but extends to, and includes infractions of, the civil law as well. Bradley v. Insurance Co., 45 N. Y. 422, 6 Am. Rep. 115; Bloom v. Insurance Co., 97 Ind. 478, 49 Am. Rep. 469. In the view we take of the case it is unnecessary to determine which of these contentions is right; for the evidence did not warrant the court in ruling that the plaintiff's act in crossing the tracks of the railroad was a violation of either the criminal or civil law. The defendant relies, in support of its contention that the plaintiff's injury was received while violating the criminal law, upon the provisions of section 1. c. 75, p. 316, Laws 1899, and the evidence wherein it appeared that the railroad company had posted notices in its yard'in Berlin, distant from 150 feet to a quarter of a mile from the path where the plaintiff attempted to cross, warning people to keep off the tracks. To render the plaintiff's entry upon the railroad's right of way punishable as a crime, it should appear that a notice warning people not to enter under penalty of the law was posted at or near the path where the plaintiff and others were accustomed to enter and cross, and was maintained in such condition that those undertaking to enter there could, by the exercise of reasonable care, see and ascertain its contents. Brown v. Railroad, 73 N. H.

appeared that no notice was posted at the place where the plaintiff and others were accustomed to cross, that the plaintiff had never seen those which were posted, and that the circumstances were such that it was a question of fact for the jury to decide whether he could have seen them by the exercise of reasonable care and learned their contents. It would also seem that some of the notices, at least, were insufficient in that they did not inform the traveler that entry they did not inform the traveler that entry was forbidden under penalty of the law.

As it might be found that notices were not posted so as to render people crossing where the plaintiff did liable to prosecution and fine, and that the practice of crossing there was such that the railroad knew, or ought to have known, of it, it might also be found that the plaintiff was not a trespasser, and that in entering upon the right of way he violated no rule of law, civil or criminal. Keene v. Association, 161 Mass. 149-151, 36 N. E. 891. The provision in section 1, c. 75, p. 316, Laws 1899, where it says, "and no right to enter or be upon any railroad track shall be implied from custom or user, however long continued," is limited to cases where notice has been posted under the statute forbidding such entry. it could be found that the plaintiff in entering upon the tracks of the railroad was not a trespasser, and might have entered with their permission, it could not be ruled as a matter of law that in so entering he was violating a rule of the corporation.

In accordance with the agreement of the parties, there should be judgment for the plaintiff for \$100. All concurred.

(76 N. J. E. 161)

VARGO et al. v. VAJO et al. (Court of Chancery of New Jersey. May 20, 1909.)

1. Religious Societies (§ 25*)—Meetings.
Evidence, in a proceeding to prevent the property of a religious society from being diverted from its original use, held to show that a meeting of the society, called to determine whether the society should continue to affiliate with the church organization with which it had with the church organization with which it had formerly affiliated, or should connect itself with another society, was regularly called, and that all the proceedings which took place at such meeting were regular and in accordance with the course and practice of the society.

[Ed. Note.—For other cases, see Religious Societies, Dec. Dig. § 25.*]

where a meeting of a religious society is held to determine whether the society shall longer affiliate with the branch of the church with which it had formerly affiliated, or shall connect itself with another, and it is unanimously decided at that meeting to connect itself with another society, and no appeal is taken from such action to any higher judicatory of the church, such action is final, and a subsequent meeting of the society cannot disturb the decision.

[Ed. Note.—For other cases.

[Ed. Note.—For other cases, see Religious Societies, Dec. Dig. § 8.*]

property.

[Ed. Note.—For other cases, see Religious Societies, Dec. Dig. § 25.*]

4. Religious Societies (\$ 25*)-Actions-LACHES.

Where a meeting of a church society is regularly called and conducted, and the society determines at such meeting to terminate its connection with its superior church body and affiliate with another church, there being nothing to prevent such action in its charter, members of the society who do not agree with the majority lose any right which they may possess to bring an action to prevent the society from carrying out its resolution by failing promptly to commence an action, as laches will prevent them from securing fayorable consideration in a court Where a meeting of a church society is from securing favorable consideration in a court of equity.

[Ed. Note.—For other cases, see Religious Societies, Dec. Dig. § 25.*]

Action by John N. Vargo and others against Alexander Vajo and others. Bill dismissed.

Bird & Blackman, for complainants. A. F. Skinner and Morris Cukor, for defendants Vajo and others. Foster M. Voorhees, for the Magyar Altalanos Hitelbank of Budapest.

HOWELL, V. C. The bill in this case is filed for the purpose of obtaining relief against a religious society incorporated by the name of the Magyar Reformed Church of Trenton, and against its officers, with respect to certain real estate and personal property which the complainants claim have been diverted from their original uses. The facts are voluminous.

Some time prior to 1896 a number of Hungarians who resided at Trenton formed a voluntary religious society for the purpose of religious worship. This society was incorporated in that year by the name of the Hungarian Evangelical Reformed Congregation of Trenton, N. J., by the usual certificate signed by five trustees, duly acknowledged and recorded in the office of the county clerk of Mercer county. It was thereby certified that on the 26th day of April, 1896, the Hungarian Evangelical Reformed Church of Trenton, N. J., a Congregation of Christians of the denomination known as the "Reformed Church in the United States," assembled at their house of public worship, and elected trustees with a view of becoming incorporated according to law. For the first few years its affairs seem to have been satisfactorily conducted. It had some difficulty when there was a vacar y in procuring regularly ordained clergyman who were competent to

•For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the Hungarian language. This class of clergymen could not be found in this country: they had to be brought over from the mother land. Yet the congregation prospered to such an extent that about two years after its incorporation it purchased two tracts of land, by two deeds, of which the following are general descriptions: The first deed was made on June 23, 1898, by Edward Connelly and wife to "the Trustees of the Hungarian Evangelical Reformed Congregation of the city of Trenton in the county of Mercer and state of New Jersey, a body corporate creating and existing under and by virtue of the laws of the state of New Jersey, and being part of and connected with the Reformed Church in the United States." The other deed was dated on June 25, 1898, and was made by John Watson and wife to "The Trustees of the Hungarian Evangelical Reformed Congregation of the city of Trenton, county of Mercer and state of New Jersey, a body corporate, created and existing under and by virtue of the laws of the state of New Jersey, and being part of and connected with the Reformed Church in the U. 8." Later on it acquired two other tracts, one by deed dated April 9, 1900, made by Carrie W. Satterthwait to "The Trustees of the Hungarian Evangelical Reformed Congregation of Trenton, N. J.," and the other, dated April 8, 1905, made by John E. Wargo to "The Trustees of the Hungarian Evangelical Reformed Congregation of Trenton." These tracts of land were owned by the society at the time of the events hereinafter mentioned. Upon this land the society had in the meantime erected a church edifice and a parsonage, and there were also some other buildings on the premises, which were let to tenants.

Prior to and at this time there was in existence a church judicatory called "The Reformed Church in the United States" which had some sort of ecclesiastical jurisdiction over a large number of churches. This judicatory was governed by a set of rules called the "Constitution of the Reformed Church in the United States." The Trenton church became affiliated with this judicatory on September 26, 1899, and came under the ecclesiastical jurisdiction of the Philadelphia Classis thereof, and from that time on for a number of years the Trenton church sent delegates to the annual meetings of the Philadelphia Classis. There were many churches affiliated with the Reformed Church in the United States, which were composed of Hungarians, among whom only the Hungarian language was used. These churches petitioned the proper authorities of the Reformed Church in the United States for a direction that they be set off into a Classis to be called the Hungarian Classis, but still under the ecclesiastical jurisdiction of the Reformed Church in the United States, and such pro-

fill the pastorate and at the same time speak was organized, to which the Trenton church was assigned, and with which it became affiliated in June, 1905. This continued to be the situation of the Trenton church until the early part of 1907. It sent its delegates to the meetings of the higher judicatories. It recognized the jurisdiction of the Reformed Church of the United States over it, at least in spiritual matters, and it received annually a contribution from a board of missions which was associated with the Reformed Church in the United States, and was organized for the purpose of assisting its weak churches. This contribution was in the form of an annual addition to the salary of the pastor. The difficulty, however, of procuring properly educated ministers for their church still continued, and it became a subject of rather frequent conversation among the men who formed the consistory of the church; and others who were its interested supporters.

There was during all this time a church organization in Hungary which was named the "Universal Evangelical Reformed Church, of Hungary." This appears by the testimony to have been, and to be, the highest, judicatory of a denomination of Hungarian: Christians. In 1904 Count Joseph Dagenfeld visited the United States in the interest of this Hungarian body, and among the other churches that he called upon was the Trenton church, which he desired to have affiliated with the Hungarian body that herepresented; his reason being that the Hungarian Church was in a position to supply: educated clergymen who spoke the Hungarian language to the weaker churches in the United States, and would also make larger contributions toward the support of: the worshiping assembly than was being: provided by the Reformed Church. Little' or nothing appears to have been done about the matter until the month of February, 1907, yet Dagenfeld's representations and promises were meantime much discussed by the members of the congregation. In February, 1907, the Rev. Alexander Vajo, who was the incumbent of the pastorate of the Trenton church, received a call from a church in Toledo, Ohio, which had a larger congregation, and was perhaps a more important society than the one to which he was ministering. He communicated this? fact to several members of his consistory, who casually met at his house on the evening of Saturday February 16, 1907. The meeting was purely informal, and is not' claimed to have been a meeting of the consistory; but it was decided then and there that the pastor should on the following day, Sunday, February 17th, call a meeting of the consistory at the close of the church' services in the afternoon of that day, and should likewise call a general meeting of the congregation, to be held on Sunday March the 3d, both meetings, that of the consistory and that of the congregation, heceedings were had that a Hungarian Classis ing called for the purpose of discussing two

things: (1) The call which the pastor had received from the Toledo congregation; and (2) the question of dissolving the relations of the church with the Reformed Church in the United States, and becoming affiliated with the Universal Evangelical Reformed Church of Hungary, the sole purpose of the latter being to have better facilities for procuring pastors when necessary, and also to obtain a larger degree of support than could be afforded by the agencies of the Reformed Church.

On Sunday February 17, 1907, the pastor, in accordance with the custom of the church, announced that there would be a meeting of the consistory at the close of the church services. So far as I can see this meeting was regularly called. The by-laws provide that among the duties of the pastor is the duty "to summon the consistorial and congregational meetings and preside over them.' There is no other specific by-law or rule on the subject. At that meeting there was a discussion of the matters for which the meeting was called, and it was decided, without dissent, one at least of the complainants being present, that a general meeting of the congregation should be called, and that Rev. Ladislaus Bede, who in some way represented the Hungarian Church, should be invited to make an explanation of the plan of affiliation with that body. On the morning of that day there were posted on the doors of the church a notice, signed by the pastor and the treasurer, who is also called curator, calling a general meeting of the members of the congregation to be held on Sunday March 3, 1907, for the purpose, among other things, of discussing the proposition to join the Hungarian Society. The meeting was likewise announced from the pulpit, and the object of it stated by the pastor. On February 28, 1907, there was a meeting of the consistory, which likewise appears to have been regularly called. The Reverend Mr. Bede was present. At this meeting it was decided by the consistory, without a dissenting vote, that the congregation should sever its relations with the Reformed Church, and should become affiliated with the Hungarian Church, and that the whole matter should be submitted to the general meeting of the congregation which had already been called for Sunday March 3, 1907.

Besides the by-law above quoted there does not appear to have been any written rule in relation to calling meetings of either the consistory or of the congregation. A custom, however, was shown to have been in vogue in the Trenton church since its organization in relation to each. The pastor testified that his custom of calling the consistory together was, at the beginning of the church service, to request the members of that body to remain after the service had been concluded, and that the method of calling congregational meetings was for the con-

sistory to pass a resolution for the purpose. Then he, the pastor, would announce the meeting from the pulpit two weeks in advance, and a two weeks' notice was always posted on the front door of the church edi-The absence from the constitution of the church of a specific method of calling these meetings must have been deemed to be a defect in the laws of the church, for the reason that the new constitution adopted in 1908 contains definite rules on the subject. The practice which was followed, however, is one which is prescribed in article 40 of the church constitution, which was in force at the time, for calling meetings for certain objects therein specified. It declares: "All matters of this kind must first be investigated and determined by the consistory and then be submitted for final decision to the congregation, a meeting of which shall be convened for the purpose by the consistory on some suitable day." In this case the matter in question was acted upon at a regularly called meeting of the consistory by a unanimous vote, and was then submitted to a general meeting of the congregation to be held on March 3d, which was called by a fair and reasonable notice. In pursuance of the notices given a large number of people who belonged to the congregation assembled after the regular church services on that day; some of the witnesses putting the number as high as 300. The pastor explained the situation to the congregation, and, among other things, he stated that he proposed to have the congregation vote on the question of affiliating with the Hungarian Church, but that if there was one dissenting voice, so far as he was concerned, he would let the matter drop.

There is evidence in the case to the effect that every one of the complainants was present at that meeting, and that when the vote was taken they voted in the affirmative. I find as a matter of fact that, when the question was put by the pastor, he called upon the people present to vote upon it by rising. When this call was made, every person in the room stood up. In order to make sure of the fact the pastor appointed Joseph Horwath, the curator, and John E. Wargo, to ascertain for him how the vote stood. They both say that they walked down the aisles beween the benches to the rear doors; that they had an opportunity to see, and did see, v. hether every one was standing or not; that they returned to the front of the church where the pastor was, and reported to him in a loud voice, which could be heard all over the church edifice, that every person was standing; that is to say, that every one who was present had voted in favor of affiliating with the Hungarian Church. testimony of the pastor, Mr. Horwath, and Mr. Wargo to this effect is corroborated and supported by the testimony of several other witnesses; and, while the complainants contest this position, I am firmly of the conviction that all who were present either voted tory of the church, there can be no secesin the affirmative or remained seated and did or said nothing. After the affirmative vote had been taken, the pastor testified that he called for the negative vote; and, no one appearing to vote in the negative, he declared the resolution carried. John Bona, one of the complainants, testified that he attempted to speak, but that he was prevented from doing so by the pastor. The pastor explains this incident by stating that Bona did not attempt to speak until the close of the meeting, when he was in the act of pronouncing the benediction. Then, of course, it was too late. Up to this point I think the evidence shows very clearly that the meeting, which was supposed to be the decisive meeting, the one held on March 3, 1907, was regularly called, and that all the proceedings which took place at it were regular and in accordance with the course and practice of the religious body in question. I conclude that the vote was unanimous in favor of the secession from the Reformed Church of the United States. But assuming that the vote was not unanimous, and that there was an objection made or a negative vote cast by the six complainants who were members of the congregation, would that be sufficient to invalidate the proceedings taken at the meeting? Assuming that there is a method by which this Trenton church could disconnect itself from the Reformed Church and become affiliated with the Hungarian Church, must it be upon the consent of every member of the church, or by and with the consent of every member of the congregation?

It is very certain that immediately after the meeting objections were made, which came to the ears of the pastor and the consistory, and were also called to the attention of the Classis, which was the next higher judicatory of the Reformed Church. It resulted in another general meeting of the congregation held at the close of the church services on April 7, 1907. The Reverend Mr. Csutoros, the president of the Hungarian Classis of the Reformed Church, was present. He had come for the purpose of making explanations, and endeavoring to ascertain what were the facts about the secession. For this purpose he put the question to the meeting anew. Four objectors arose, John N. Vargo, Mrs. Dubos, Mrs. Yatchi, and John Bona. This meeting, however, was of no effect on the question at issue. That had already been decided. At a meeting of the whole congregation regularly called there had been a unanimous vote in favor of the secession from the Reformed Church and an affiliation with the Hungarian Church, and no appeal was taken from the action of the congregation to any higher judicatory of the church.

The next question that arises is whether the Trenton church had an inherent right to so secede. The complainants say that when once affiliated with the higher judica- management and control of the temporal

sion by any of the units without the consent of the supervising body. This claim makes it necessary to ascertain what the relations of the two bodies really were. The complainants urge that the certificate of incorporation and the two first conveyances to the corporation record the statement that the Trenton Church belonged to the denomination known as the "Reformed Church in the United States," and was a part thereof, and was connected therewith. These statements, however, were all made prior to the time when the church was actually received into the Philadelphia Classis, and while it was an undoubtedly independent religious It has been held, as defendants society. counsel has shown by cases cited in their brief, that such a situation creates a mere voluntary connection, which may be broken at any time by a majority vote of the church. Lawson v. Kolbenson, 61 Ill. 405; Heckman v. Mees, 16 Ohio, 584; Miller v. Gable, 2 Denio (N. Y.) 492. In Watson ▼. Jones, 13 Wall. 679, 20 L. Ed. 666, the Supreme Court of the United States stated the law to be that, where property had been acquired by an independent religious society, the court would not interfere with its disposition of its property. If there is anything in the constitution of the Reformed Church which denies the right of secession without the consent of the supervising judicatory, then it would be the duty of this court to follow the eccleciastical rule, and not permit the secession to take place, except in accordance with the laws of the church. If, however, there is nothing which prohibits such action on the part of the inferior body, this court would not be justified in declaring the secession unlawful, for the reason that there was no prohibition of such action. If, again, the ecclesiastical laws permit this sort of action, then the court will not take cognizance of any proceeding which seeks to restrain the right of the individual church to control its own property.

An examination of the constitution of the Reformed Church in the United States discloses the fact that the ecclesiastical judicatories of that church are (1) the Consistory; (2) the Classis; (3) the Synod, and (4) the General Synod; and, in relation to these bodies, this fundamental law in article 24 provides as follows: "These judicatories shall take cognizance only of ecclesiastical matters; their power is wholly spiritual; they possess the right of requiring obedience to the laws of Christ and of punishing the disobedient by excluding them from the privileges of the church, but not by the infliction of any civil penalties." By article 40 the jurisdiction of the consistory, which is the lowest judicatory, is defined. It is as follows: "To the consistory as such belongs the choice of delegates to represent it in the higher judicatories of the church and the

concerns of the congregation. In the calling of a minister, the judging of a minister or other officers of the church, the purchase or sale of property, the consistory can determine nothing conclusively without the consent of a majority of the congregation present. All matters of this kind must first be investigated and determined by the consistory and then be submitted for final decision to the congregation, a meeting of which shall be convened for the purpose by the consistory on some suitable day."

The jurisdiction of the Classis does not include the management and control of the church property, but does include whatever concerns the spiritual welfare of the several congregations committed to their care which does not come within the power of a conaistory. They decide cases which are brought before them by appeal or complaint from consistories as well as all cases respecting either ministers or congregations which may arise within their jurisdiction and are regularly brought before them, such as the forming of new congregations, the determining of their boundaries when they are contested, the decisions of controversies between existing congregations, and the forming or dissolving of connections as may be requested, or the Classis may deem expedient. The Synod and the General Synod do not appear to have any jurisdiction over the church property at all. In view of the provisions of the twenty-fourth article of the constitution and the absence of any prohibitory mandate in the fundamental church law, I conclude that the government of the Reformed Church in the United States was not Episcopal or Presbyterian in form, but that it was Congregational to the extent that each worshiping unit had the absolute control of its own property, and that its connection with the main body was merely spiritual, disciplinary, and doctrinal. The express renunciation of all other connections by the terms of the twenty-fourth article necessarily lead to this conclusion. The two experts in the ecclesiastical law of the Reformed Church who were called as witnesses both stated that there was not any express rule forbidding seces-

It is argued on behalf of the complainants that the expressions made use of in the certificate of incorporation of the Trenton church, and in the two deeds of conveyance to it, are sufficient in themselves to create a trust in favor of the denomination known as the "Reformed Church in the United States." As to the expression in the charter, I think that that was used merely for the purpose of stating what denomination of Christians the church members belonged to, and as to the expressions in the deeds, it is quite clear that they were at the time not true, because the Trenton church was not received into the Philadelphia Classis of the Reformed Ohurch until a considerable time after these deeds had been executed and delivered.

The evidence shows that after the meeting of March 3, 1907, there was no change whatever in either the form or the substance of the religious teachings, or of the doctrines to which the members of the congregation adhered. There was no dismissal of the pastor, nor any break in the relations between him and the congregation. The congregation continued its identity unchanged and unbroken. except that the complainants and certain of their friends declined to recognize the change. The main body of the people comprising the congregation continued to worship in the same manner as theretofore, and in all respects the situation was unaltered, except that the congregation considered itself affiliated with the Hungarian Church and no longer with the Reformed Church. The case comes within the rule announced by the Supreme Court in Pulis v. Isermen, 71 N. J. Law, 408, 58 Atl. 554. There the question was whether there might be lawfully a secession by the Paramus Church from the Classis of the True Reformed Dutch Church. Mr. Justice Dixon says in the opinion that, inasmuch as the constitution of the True Reformed Dutch Church contained no explicit declaration on the subject of secession, it must be regarded as permitting that right, and, pursuing the subject, he says: "That the Paramus congregation, when by unanimous vote it separated from Classis and Synod, did not ipso facto lose its congregational or corporate character is a proposition supported by the decisions in Doremus v. Dutch Reformed Church, 3 N. J. Eq. 832, and Den v. Pilling, 24 N. J. Law, 653; and if, as we think, it thereby exercised its right of secession, it became an independent congregation. The authority of Classis and Synod over it being thus terminated, the subsequent attempts of the Classis to reconstruct that congregation, or to transfer its franchises to a new congregation, were futile." And the result was that the church which so seceded from the True Reformed Dutch Church was permitted to become a Presbyterian church under the care of the Presbytery of Jersey City.

Much reliance is placed by the complainants on the authority of Den v. Bolton, 12 N. J. Law, 206. That case cannot be regarded as any authority for the present one, because the Chief Justice states in the beginning of his opinion that the case did not require the court to consider or decide what was the effect upon the joint property of a religious society of the withdrawing of the whole or a portion of its members, either with or without a change of doctrine, and their union with some other religious denomination, or their formation of some new sect or some new ecclesiastical arrangement, nor whether those who thus change or withdraw carry with them any portion of the common funds, thus omitting from consideration the very things which are of paramount importance in the case at bar. Counsel for complainants considered that Roshi's Appeal, 69 Pa. 468, 8 Am. Rep. 275, was decisive of the question of the right to secede. A careful examination of the case, however, shows that the proceeding was taken for the purpose of enforcing an express trust, which was impressed upon the land in question in the deed by which the church took title from the individual who had donated the same and devoted it to a particular use. Whatever is said in that case about the right of the secession must be limited to the particular facts under which that question of law was presented.

After the meeting of April 7, 1907, nothing was done by either party looking to a reconciliation of their differences. The consistory and trustees then in office remained in office until the midsummer of that year, when a new consistory was elected, which thereafter took steps to carry out the proposed union with the church in Hungary. Meantime the complainants lay still, and did nothing to prevent affirmative action on the part of the new consistory and trustees. The things which were done in that direction, and for that purpose, must have been known to the complainants. Indeed I can hardly conceive how any important transaction could be had by the prevailing party in relation to church action which could have escaped their vigilance. There is, it is true, no evidence which tends to show that they had actual knowledge of these subsequent transactions, but I think it is fair to assume that they could hardly have taken place without some hint coming to the ears of these objectors.

Up to this time the church was indebted to the Mercer Trust Company on its promissory note for a loan of \$1,300, and to one Grumbolz on a mortgage for \$1,700, making \$3,000 in all. About the midsummer of 1907 the consistory had an opportunity to purchase a piece of land adjoining the church property from Mrs. Martha L. Moore. On August 11th there was a meeting of the congregation, at which the pastor stated that the Moore property could be bought for \$5,050, but that in order to make the purchase it would be convenient that the church should procure a loan of \$8,000, and so fund the said indebtedness and the cost of the Moore property into one loan; that this loan could be had from the Magyar Altalanos Hitelbank of Budapest, Hungary, one of the defendants to this suit. This purchase and the loan were authorized at that meeting. On September 1, 1907, at a meeting of the consistory the pastor reported the purchase of the Moore property, that \$50 had been paid in advance thereon, and that \$200 more was paid on August 27th, and that the balance of \$4,800 must be paid by the 1st of November; that for the purpose of procuring the loan a new charter would have to be procured, which would bind the church to the Hungarian body, and that the property should be transferred to the corporation thus to be organized. In order to effectuate this

step the consistory provided for another congregational meeting to be held on September 8th. At this meeting the pastor stated the necessity of a new charter in order to effectuate the loan, and that it would be necessary to transfer the property to the new corporation. He proposed that the scheme be adopted by the congregation, and that five new trustees should be elected to carry out the plan. The congregation unanimously affirmed the plan, and elected as trustees John E. Wargo, John Pandek, Andrew J. Duch, Alexander Kovach, and Andrew K. Wargo. I repeat that these public events could hardly have taken place among the Hungarians in Trenton without being heard of by the complainants. They permitted the new charter for a new corporation to be filed on October 3d, and by it the Magyar Reformed Church of Trenton to be organized. They permitted the trustees of the Hungarian Evangelical Reformed Church of Trenton to convey its church property to the Magyar Reformed Church of Trenton by deed dated October 1, 1907, which was acknowledged and recorded on October 7, 1907. They permitted the Magyar Reformed Church of Trenton to purchase from Martha L. Moore a tract of land adjoining their property by deed dated October 31. 1907, for the consideration of \$5,050, and they permitted the Magyar Church to borrow from the Hungarian bank through the agencies of the Hungarian Church, on bond and mortgage on all their church property, the sum of \$8,000, a portion of which was used to pay off the indebtedness to Grumholz and the Mercer Trust Company, and the remainder for the purchase of the Moore property. And I say again that these facts must have been known to the complainants, or some of them, because it is in evidence that they, or perhaps a majority of them, attended the church from time to time, and called upon the pastor to assist at their weddings and funerals.

In my opinion if the complainants ever had any cause of action arising out of the facts in this case they lost their right to bring a suit thereon by their inaction after March 3, 1907. If they had, or considered that they had, a cause of action arising out of the circumstances of the meeting which was held on that day, they should at once have prosecuted the same; and, to delay and permit the important transactions above recited to be closed without so much as making inquiry as to what the defendants intended to do, or what they were doing, is such laches as disentitles them to favorable consideration in a court of equity. It should perhaps be stated that, after the organization of the new corporation (the Magyar Church), the identity of the congregation continued; it consisted of the same persons; it was governed by the same rules, and adhered to the same doctrines, and was ministered to by the same pastor as formerly.

The defendants also claim that the six com-

plainants have, by their participation in the proceedings complained of, so far acquiesced as that they ought not now to be heard in opposition. John Noai Vargo was a member of the consistory, attended the meeting of February 17th, and there voted to join the Hungarian Church. He repeated this action on February 28th, and the weight of the testimony is that he was at the meeting of March 3d, and either voted in favor of the secession or remained silent. John Bona was present at the meeting of March 3d, and either voted in favor of the proposition then pending or remained seated. The same may be said of John Scoke, of Joseph Kovach, of George Dubos, and Andrew K. Duch. There is some denial of these allegations, but the weight of the testimony is in their favor. Indeed it was said at the meeting of April 7th, when John Noai Vargo expressed his dissent from the action that had been taken, that he had voted for the proposition on March 3d, and he said in response that he had changed his mind. Some of the complainants have either actually or practically withdrawn from the suit. John Scoke says in his testimony that he was not suing, that they only called him to a notary public because he knew how the church was built, but that he did not sign to sue, and that he never would sue. Joseph Kovach and Andrew K. Duch have actually withdrawn from the suit by paper writings which were put in evidence. Then there is the further fact that these men are mere lummies, whose names are being used by the Reformed Church in the United States in an attempt to hold under its jurisdiction the valuable property which the Trenton church has acquired. This appears in the testimony of John Bona.

There are many other difficult and important questions in the suit which I do not find it necessary to decide. One is the relation which the five trustees who were elected on September the 8th bear to the present organization; it being argued on the part of the Hungarian bank that the case of Doremus v. Dutch Reformed Church, 3 N. J. Eq. 332, goes to the extent of holding them in office, whatever may happen to the other branches of the transaction. Another question is whether the church property of the Trenton church was transferred to the Magyar Church by the deed of October 1, 1907; that is, whether Joseph Horwath, who signed as president, was authorized to execute the deed. Another is perhaps whether the mortgage to the Hungarian bank is a valid lien upon the church lands from the legal standpoint. These questions are not of importance to the present suit, under the view that I have taken of the main part of the case. If the persons who were elected as trustees on September 8th were actually such trustees, I do not under-

stand how Mr. Horwath could have authority to sign the deed.

The result is that the bill should be dismissed, with costs, and I will so advise.

(110 Md. 546)

JOSSELSON v. SONNEBORN et al.

(Court of Appeals of Maryland. June 1, 1909.)

1. JUSTICES OF THE PEACE (§ 150*)-JUBISDIC-

TION--Appeal. Code Pub. Gen. Laws 1904, art. 52, \$ 8, providing that, if defendant in an action before a justice of the peace for injury to lands al-leges in writing that he claims title to the lands. the justice shall take no further cognizance of the case, has no application to a proceeding to recover land for failure of the tenant to pay rent; so that failure of defendant in such a rent; so that failure of defendant in such a proceeding to file such allegations does not affect any right he has on appeal to the Baltimore city court to have the proceeding quashed as one involving title to land, and so not within the jurisdiction of a justice.

[Ed. Note.-For other cases, see Justices of the Peace, Dec. Dig. § 150.*]

2. Justices of the Peace (§ 141*)—Appea Questioning Jurisdiction — Motion -Appeal-TO QUASH.

The jurisdiction of the Baltimore city court on appeal from a justice claimed not to exist because the proceeding involved title to land, and so was not within the jurisdiction of the justice, may be questioned by motion to quash the proceeding.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 141.*]

APPEAL AND EBROR (§ 44*)—APPEAL FROM INTERMEDIATE COURTS.

Appeal lies to the Court of Appeals from the order of the Baltimore city court overruling the motion to quash, on the ground of want of jurisdiction, a proceeding appealed to the city court from a justice.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 44.*]

APPEAL AND ERROR (§ 574*)-CERTIFYING EVIDENCE.

While a bill of exceptions is not allowed in trial of a case on appeal from a judgment of a justice of the peace, the evidence taken before the court below on appeal to it from a justice on a motion to quash the proceeding for want of jurisdiction may be certified to the Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig § 574.*] .

5. APPEAL AND ERROR (§ 44*)—APPEAL FROM INTERMEDIATE COURT.

The Baltimore city court having on appeal from a justice jurisdiction of the parties and the subject-matter, its judgment cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 44.*]

6. JUSTICES OF THE PEACE (§ 36*)-JUBISDIC-

In a proceeding by a lessor against a lessee under Baltimore City Charter, \$\frac{1}{2}\$ 651, 652 (Laws 1898, pp. 489, 490, c. 123), for possession for nonpayment of rent, title to land is not necessarily and directly in issue; so that jurisdiction of a justice cannot be ousted by defendant claiming title.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 36.*]

TERMEDIATE COURTS.

The Baltimore city court on appeal from a justice had jurisdiction to pass on the sufficiency of the affidavit to the complaint made before the justice and the sufficiency of the summons issued by the justice, so that its decision thereon is not reviewable.

[Ed. Note.-For other cases, see Appeal and Error, Dec. Dig. § 44.*]

Appeal from Baltimore City Court; Conway W. Sams, Judge.

Proceedings by Solomon Sonneborn and another against Julius Josselson. From an order and a judgment, defendant appeals. Dismissed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, and HEN-RY. JJ.

J. J. H. Mitnick and William C. Smith, for appellant. Israel S. Gomborov and Eldridge Hood Young, for appellees.

BURKE, J. This is an appeal from the refusal of the Baltimore city court to quash the proceedings in a cause pending in that court on an appeal from a judgment of a justice of the peace, and also from the judgment entered in the case. The record shows that on the 11th of February, 1907, the parties to the cause entered into a written agreement, whereby the appellees rented from the appellant for the term of two years at the monthly rent of \$27, payable in advance on the 11th of each month, a building located at No. 42 South Caroline street, in the city of Baltimore. The appellees, claiming that the appellant in May, 1908, had rented from them at the monthly rent of \$16 payable on the first of each month the whole of said building, except the room used as a store, and had failed to pay the rent which fell due on the 1st of August, 1908, instituted proceedings before a justice of the peace of Baltimore city for the recovery of the possession of the premises. All the parties appeared before the justice on the 7th of August, 1908, and the case was then tried, and judgment was rendered in favor of the appellees for repossession of the premises and \$16 rent found to be due and costs. From the judgment the appellant appealed to the Baltimore city court. The case was tried in that court before a jury, which found their verdict for the plaintiff for the restitution of the premises and \$16 rent overdue and unpaid.

The evidence produced at the trial and set out in the record is most conflicting; but it need not be stated in detail in this opinion. It is sufficient to say that the evidence offered in behalf of the appellees tended to support the claim made by them that they had rented to the defendant the part of the bullding for the monthly rent stated. This was positively denied by the appellant, and the testimony of himself and a number of witnesses adduced in his behalf tended to show

7. APPEAL AND ERROR (§ 44*)—REVIEW—In- | that no such contract of rental as that set up by the plaintiffs was made; but that the appellees had surrendered to the defendant the whole premises except the store, and that he had re-entered and taken possession of the surrendered portion. This controverted question of fact was decided by the jury in favor of the plaintiffs. The defendant then filed a motion for a new trial, and a motion to quash the proceedings, and assigned in support of the latter motion the following reasons: (1) Because the defendant claims title to the premises from which he is sought to be ejected in this case by the plaintiffs as his own property, and claims that he is in occupancy thereof as owner and not as tenant of the plaintiffs, and that the court sitting to hear and determine appeals from the decisions of justices of the peace has no jurisdiction to hear and determine the case; the title to land being involved therein. (2) Because the evidence conclusively shows that the defendant claims title to the premises from which he is sought to be ejected by the plaintiffs as his own property, and claims that he is in occupation thereof as owner, and not as tenant of the plaintiffs, and that the court had no jurisdiction to hear and determine the case because the title to land was involved. (3) Because the papers in the case show that the justice of the peace from whose decision the appeal is taken had no jurisdiction to hear and determine the case. (4) Because the papers failed to show jurisdiction in the justice of the peace to hear and determine the case.

At the hearing of the motion to quash the proceedings, it was agreed by the counsel for the respective parties that the evidence produced and admitted at the trial of the case before the jury should be considered as if the same had been produced and admitted before the court on the hearing of the motion. This evidence is incorporated in the record, and certified to by the judge before whom the case was tried. The court refused to grant a new trial and overruled the motion to quash, and the defendant has appealed. Article 52, § 7, Code, declares that no justice of the peace shall have any jurisdiction in actions where the title of land is involved; and by section 8 of that article it is provided that if the defendant in an action before a justice of the peace for cutting, destroying, or carrying away timber or wood to or from any land in this state, or for doing any other injury to such lands shall allege in writing that he claims title to said lands, or that he acted under a person claiming title to same, whom he shall name in such allegations and shall verify such allegations by oath, the justice shall not take any further cognizance of the case. This section has no application to this case because the action here is not one of the class mentioned therein, and therefore the defendant's rights are in no manner affected

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

by the failure to file before the magistrate; the allegations provided for by that section. The defendant had the right to raise the question of the jurisdiction of the Baltimore city court by a motion to quash, and an appeal will lie to this court from the order overruling the motion. An appeal from such an order has been entertained by this court in Darrell v. Briscoe, 94 Md. 684, 51 Atl. 410, and Benton v. Stokes (decided December 9, 1908, and not yet officially reported) 71 Atl. 532. It is an appropriate method to have the question of jurisdiction of the lower court determined, and, while bills of exceptions are not allowed in trial of cases on appeals , from judgments of justices of the peace (Cole . v. Hynes, 46 Md. 181), the evidence taken before the court below upon the motion to quash may be properly certified to this court as was done in this case. Acts 1898, p. 241, c. 123, gave the defendant a right to appeal to the Baltimore city court at any time within two days from the rendition of the judgment against him, and he availed himself of this right. If that court upon the appeal had jurisdiction of the parties and of the subject-. matter in dispute, its judgment cannot be reviewed by this court. This proposition is too firmly settled by the decisions to be questioned. In Shippler v. Brown, 62 Md. 318, it is held that "the only ground on which an exercise of the revisory powers of this court can be successfully invoked, in a case where the judgment was rendered by an appellate tribunal, reviewing the decision of a justice of the peace, is the want of jurisdiction to consider and determine the question involved in litigation. The principle is too well settled to be controverted that in an appeal from the decision of a justice of the peace the judgment of the appellate court is a finality, unless such court transcends the limits of its jurisdiction." By section 650 of the city charter distress for rent due is abolished in Baltimore city in all cases of demise or agreement of rental for a less term than three calendar months, and by section 651 of the charter it is provided that whenever a tenant under any such demise or agreement of rental, express or implied, verbal or written, of lands or tenements, whether real estate or chattels real within the city limit, shall fail to pay the rent thereunder when due and payable, it shall be lawful for the lessor to have again and repossess the premises granted. Section 652 prescribes the procedure to be taken before the justice for the repossession of the premises under the preceding section.

Passing for the moment the contention of the appellant that the proceedings before the justice do not show a sufficient compliance with the statutory requirements, it is perfectly obvious that the appellees were proceeding under the provisions of the sections mentioned to regain possession of premises alleged to have been rented by them to the appellant, and in such a proceeding it

cannot be said that the title to land is necessarily and directly in issue between the parties. The fact in issue is the demise or agreement of rental. This is the thing affirmed on one side and denied on the other, and is the only direct and necessary issue between the parties. If the contention of the appellant should prevail, the jurisdic-. tion of the lower court could be ousted in every case for the repossession of property under the sections of the city charter mentioned by the defendant simply denying the tenancy, and alleging title to the premises from which he is sought to be ejected. In support of his contention that, by the nature of this action or proceeding, the title to land is directly in issue, counsel for the appellant in their brief and oral argument placed their whole reliance upon the case of Presstman v. Silljacks, 52 Md. 647, which they insisted was identical with the case in hand. But an examination of that case will show that it does not support their position. In that case George Presstman, in 1852, supposing himself to be the owner in fee of certain property in Baltimore city, leased the same to Henry Straus and others for the term of 99 years, renewable forever. These lessees assigned to Adam Senz, and he assigned to John Silljacks, who paid to Presstman the rents reserved until 1877, when he refused to pay any more rent, and Presstman thereupon levied distresses for the rent. Silljacks replevied the property in each case before a justice of peace, one of whom decided in his favor and the other in favor of Presstman. Both appealed, and the decisions in both cases were adverse to Silljacks, who paid the judgments and costs, and then instituted an action of trespass against Presstman for illegal distresses levied by Presstman, whereby he was made to pay certain sums of money unjustly. Presstman pleaded that the whole matter was res adjudicata by reason of the replevin suits and the appeals to the Baltimore city court, and the judgments therein in his favor. The court held that Silljacks was not estopped by the judgments of the Baltimore city court in the replevin cases, because it appeared that before the justices and upon the appeal Silljacks was resting his right to maintain replevin suits solely upon the ground that Presstman's title to the land had expired. There was therefore a direct issue of title to lands involved between the parties, and the court decided that the "Baltimore city court, sitting as appellate tribunal, though hearing the case de novo, had no more power or jurisdiction to pass upon Presstman's title than a magistrate had." It therefore applied the familiar rule that, where the court has no jurisdiction to hear and determine the case, its judgment is a mere nullity, and may be attacked and declared void by a court of competent jurisdiction in a collateral proceeding.

The remaining questions relate to the suf-

ficiency of the complaint made before the convicted or becomes a fugitive from justice, or magistrate, and of the notice or summons in ejectment issued by him. The complaint was made by Eldridge Hood Young, as attorney for the lessor, and is sworn to by It is contended that the affidavit is defective because it does not show that the attorney who made it had knowledge of the facts set forth in the complaint. As to the summons, it is insisted that it is insufficient, because it does not show that the tenancy was for a less term than three calendar Assuming, without so deciding, months. that both the affidavit and the summons are insufficient, these were questions which the appellant submitted to the lower court for its decision. That court had a right to decide them, and its decision, whether right or wrong, cannot be reviewed. The principle so clearly stated by Chief Judge Mc-Sherry in New York Mining Company v. Midland Company, 99 Md. 512, 58 Atl. 217, applies to these objections: "Whatever subject-matter in the controversy the court' below had the right to decide was necessarily a subject-matter within the jurisdiction of that tribunal. Accordingly the inquiry here is, not whether the trial court rightly decided, but whether it had the right to decide; but it did decide it. If it had the right to decide what it did decide, then, though its decision be in point of fact or of law erroneous, it cannot be reviewed, because the statute has conferred no power upon this court to sit in review of such a judg-So the ultimate question is: Were the things complained of and decided below things which the court had jurisdiction to decide?" The Baltimore city court undoubtedly had the right to decide upon the sufficiency of the affidavit and summons. This right was recognized by the appellant by his act in asking its judgment upon those questions by the motion to quash. Without futher prolonging this opinion, our conclusion is that the lower court had jurisdiction of the parties and the subject-matter of the controversy, and therefore the appeal must be dismissed.

Appeal dismissed, with costs to the appellees above and below.

(III Md. 58)

DOWNS v. SWANN et al.

(Court of Appeals of Maryland. June 30, 1909.) 1. CONSTITUTIONAL LAW (§ 83*)—PERSONAL LIBERTY — MEASUREMENT UNDER BERTILLON SYSTEM.

To photograph and measure under the Bertillon system a person arrested on a felony charge, but before conviction, does not violate the personal liberty secured him by the Constitution of the United States or of the state, where it is not directly charged that the police intend to put his photograph in their "rogues' gallery," or to distribute copies of it to the police authorities of other cities, unless he is

propose to apply his Bertillon record to any other use than that of their own department, and the purpose to apply the photograph or record to any other use than that of identification is denied, unless the person arrested is convicted or becomes a fugitive from justice.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 150; Dec. Dig. § 83.*]

2. Constitutional Law (§ 60*) - Police POWER-DELEGATION.

The state may delegate the police power to subordinate boards and commissions, and a reasonable and just exercise by them of the delegated power will be upheld.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 60.*]

8. Municipal Cobposations (§ 181*)—Police

Commission—Power.

Baltimore City Charter (Laws 1898, p. 522, c. 123) § 744, prescribing the duties of police commissioners brings the board within the category of the public agencies, which should be furnished with the most approved means of identification of probable wrongdoers, and it may be assumed that the Legislature, in the imposition of such duties, intended also to con-fer the incidental powers necessary to their discharge.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 463; Dec. Dig. § 181.*]

4. MUNICIPAL CORPORATIONS (§ 180*)—POLICE OFFICERS—LIABILITY TO PERSONS ARRESTED.

A police officer is without right to needlessly or wantonly injure, in any respect, as person whom he is called upon to arrest, and for the infliction of any such injury is liable to the same extent a private individual would be.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 523; Dec. Dig. § 189.*]

Appeal from Circuit Court of Baltimore City: Chas. W. Heuisler, Judge.

Action by William F. Downs against Sherlock Swann and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTH-INGTON, THOMAS, and HENRY, JJ.

Harry B. Wolf, for appellant. Alonzo L. Miles and Luther Eugene Mackall, for appellees.

SCHMUCKER, J. The appeal in this case was taken from an order of the circuit court of Baltimore city dissolving a preliminary injunction theretofore issued by it. The injunction had been issued upon the filing of a bill of complaint to restrain the police authorities of Baltimore city from photographing and measuring the appellant, who had been arrested and was detained by them upon a charge of embezziement of public funds of the city. The defendant, having answered the bill, made a motion to dissolve the injunction. The motion was heard

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

years theretofore been a clerk in the office that, if he should undertake to become a fuof the city register, was arrested by a city detective upon complaint of the register and locked up at the Central Police Station on the charge of embezzling \$1,000 of the money of the city. The police authorities were about to put Downs through the Bertillon system, consisting in part of having his photograph taken, the measurement of his head, height, age, color, and pedigree, together with his finger prints, in order that the record thereof might be preserved for the use of the police department, and it was their intention to take his photograph immediately after his preliminary hearing before the magistrate, and before his trial upon the charge of embezzlement. It is also alleged that there is a rogues' gallery in connection with the police department of the city, where are kept the pictures and photographs of criminals and notoriously bad men who have been tried and convicted of various offenses in different jurisdictions, and that it was the custom of the police authorities to take the photographs of persons arrested for any violations of law, but it does not allege the existence of a custom to put the photographs of unconvicted persons in the rogues' galiery, or charge the defendants with a purpose to put Downs' picture there, but only with an intention to preserve it for the use of the department. It is further alleged that Downs, up until his arrest, enjoyed the confidence and esteem of his employer and associates, and that he will be irreparably injured if the police authorities are permitted to carry out their contemplated acts, which it is charged would constitute a violation of his personal liberty and constitutional rights, and that he is without adequate remedy at law. The appellees, as defendants below, answered the bill, admitting the facts of the arrest and detention of Downs upon the charge of embezzling the public moneys, and that prior to the issue of the injunction it had been their purpose to take his photograph in order to enable them to identify him if it became necessary in any criminal proceeding then pending against him, or that might thereafter be instituted against him. They also admit the conducting by them of a bureau of identification under the superintendence of a lieutenant of police on the Bertillon system, in connection with which they photograph persons arrested for felony or other crimes of the character charged against the plaintiff. And they further say that the practice of photographing and measuring persons so charged prevails in every large city of the country where proper police regulations are well established and enforced, and that when a prisoner is arrested, charged with a crime of the character charged against the plaintiff, who may be released upon bail, it is necessary, to the proper enforcement of police regulations and the securing of the prisoner for trial, that a full

gitive from justice, the police and detective department may be in possession of such information as will enable them to have him identified, wherever he may be found; that the defendants are required in the proper discharge of their duties to run down and arrest offenders who may escape after having been released on bail, and that, if they are not permitted to provide efficient means of identification of persons charged with offenses, their efforts in that direction will become ineffectual and unavailing. Further answering, they say that it is not their practice to publish the photograph of a prisoner who has been arrested upon the first offense, or to place it among the photographs of well known and established criminals, until and unless the prisoner whose photograph has been taken has either been convicted or has undertaken to escape and avoid the payment of his bail, and that such was not their purpose with reference to the plaintiff. It is also averred in the answer that, since the filing of the bill, Downs had been admitted to bail in the sum of \$10,000. but that subsequently upon investigation it was discovered that his alleged embezzlements were of such larger proportions than were disclosed by the testimony taken at the hearing on the first charge, and his crime was of such greater magnitude, that he was rearrested, and was, at the time of the filing of the answer, confined in a cell at the Central Police Station. The issue presented for our consideration

is the property of the dissolution of the injunction upon the case made by the bill and answer. Without stopping to consider whether the appellant had an adequate remedy at law for any invasion, if such there should be, of his personal rights, we will devote our attention to the substantial issue presented by the record. The precise question there presented for our determination is whether the police authorities of Baltimore city may lawfully provide themselves, for the use of their department of the city government, with the means of identification of a person arrested by them upon a charge of felony, but not yet tried or convicted, by photographing and measuring him under the Bertillon system. It is not directly charged in the bill that the police intend to put his photograph in their rogues' gallery, or distribute copies of it to the police authorities of other cities, unless he is convicted or becomes a fugitive from justice, or that they propose to apply his Bertillon record to any other uses than those of their own department of Baltimore city. Furthermore, the answer denies the existence of any purpose to apply the photograph or record of the appellant to any other purpose than that of his identification, if it becomes necessary, in criminal proceedings now pending or hereafter to be instituted against him, unless description of him should be had in order he is convicted or becomes a fugitive from

justice. In our opinion the photographing by the Bertillon process. and measuring of the appellant in the manner and for the purposes mentioned, and the use of his photograph and the record of his measurement to the extent set forth in the answer by the police authorities of Baltimore city, would not constitute a violation of the personal liberty secured to him by the Constitution of the United States or of this state. As was said by the United States Supreme Court in Crowley v. Christensen, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620: "The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from constraint, under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law." In Jacobson v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643. the same high court, in discussing the extent of the police power of the state, declared that it "had more than once recognized it as a fundamental proposition that 'persons and property are subjected to all kinds of restraints and burdens to secure the general comfort, health, and prosperity of the state," and many cases are cited in support of the statement. Similar views upon the limits of the police power have been expressed by this court in a line of cases from Ford v. State, 85 Md. 465, 37 Atl. 172, 41 L. R. A. 551, 60 Am. St. Rep. 337, down to Watson v. State, 105 Md. 655, 66 Atl. 635. It has also been settled by numerous decisions that the state may delegate the police power to subordinate boards and commissions, and that the reasonable and just exercise by them of the delegated power will be upheld. Reetz v. Michigan, 188 U. S. 505, 23 Sup. Ct. 390. 47 L. Ed. 503: Singer v. State, 72 Md. 464, 19 Atl. 1044, 8 L. R. A. 551; State v. Broadbelt, 89 Md. 565. 43 Atl. 771, 45 L. R. A. 433, 73 Am. St. Rep. 209; State v. Knowles, 90 Md. 646, 45 Atl. 877, 49 L. R. A. 695; Scholle v. State, 90 Md. 729, 46 Atl. 326, 50 L. R. A. 411; Watson v. State, 105 Md. 650, 66 Atl.

A person suspected of the commission of a crime may lawfully be arrested by the sheriff or police, and held in custody until a preliminary hearing of the charge against him can be had before a magistrate, and he may then be committed to jail, or held to bail, for the action of the grand jury. Brish v. Carter, 98 Md. 445, 57 Atl. 210; Edgar v. Burke, 96 Md. 722, 54 Atl. 986. He may be exhibited for identification to the person injured by the commission of the crime, if it be one of violence, and we see no good reason why the police authorities may not be furnished with the further and more efficient means of his identification provided

The populous communities which now exist, and the modern facilities for swift and frequent communication and rapid transit, afford hitherto unknown facilities for evading arrest or fleeing from justice, which should be offset in the public interest by providing the agencies, charged with the duty of preserving the public peace and arresting persons reasonably suspected of the commission of crimes, with the most efficient means of detecting and identifying them, consistent with the protection of the accused persons in the enjoyment of that "liberty regulated by law" to which they are entitled. Section 744 of the Baltimore city charter (Laws 1898, p. 522, c. 123) confers upon the police many of the duties which at common law were incident to the office of sheriff. It makes it the duty of the police commissioners of the city, among other things, "to preserve the public peace, prevent crime, arrest offenders and protect the rights of persons and property," also to cause to be followed any person who the board have reason to believe intends leaving the city for the purpose of violating any laws of the state. The burden of those duties brings the board clearly within the category of the public agencies, which should be furnished with the most approved means of identification of probable wrongdoers, and it may be assumed that the Legislature in the imposition of the duties intended also to confer the incidental powers necessary to their discharge. The right of the police authorities to employ the Bertillon process for the identification of convicted criminals has been recognized in most, if not all, of the jurisdictions in which the subject has received consideration, although several courts and text-writers have either questioned or denied the right to subject to that process persons accused of crimes before their trial or conviction. Molineux v. Collins, 177 N. Y. 395, 69 N. E. 727, 65 L. R. A. 104; Schulman v. Whitaker, 117 La. 703, 42 South. 227, 7 L. R. A. (N. S.) 274; Itzkovitch v. Whitaker, 115 La. 479, 39 South. 499, 1 L. R. A. (N. S.) 1147, 112 Am. St. Rep. 272; People ex rel. Gow v. Bingham, 57 Misc. Rep. 66, 107 N. Y. Supp. 1011; People v. York, 27 Misc. Rep. 658, 59 N. Y. Supp. 418; Owen v. Partridge, 40 Misc. Rep. 415, 82 N. Y. Supp. 248; 1 Tiedeman on State and Federal Control of Persons and Property, p. 57. The question in the form in which it is now presented to us formed the subject of recent review in the case of State v. Clausmeler, 154 Ind. 599, 57 N. E. 541, 50 L. R. A. 73, 77 Am. St. Rep. 511, where it was held that a sheriff may lawfully take the photograph, measurement, weight, name, residence, place of birth, occupation, and personal characteristics of an accused person committed to his custody for safe-keeping, if in his discretion it is necessary to prevent the escape of the accused, or to facilitate his

417, the Court of Appeals of the District of Columbia, speaking through Chief Judge Alvey, made a clear and forcible statement of the principles and considerations which led them to the same conclusion at which we have arrived in the present case, in reference to the constitutional privilege alleged to be involved in it. In that case Shaffer had been arrested by the police of the district upon a charge of murder, and upon his trial the prosecution offered in evidence his photograph, taken for purposes of identification by the police officer who had him in custody after his arrest. The evidence was objected to on behalf of the prisoner, and, in passing upon the objection on appeal, the court in their opinion say: "We understand the main point of objection to be that the government had no right to photograph the accused while holding him in custody, for the purpose of using that photograph to have him identified at the trial. This objection is founded upon the theory that the use of the photograph so obtained is in violation of the principle that a party cannot be required to testify against himself, or to furnish evidence to be so used. But we think there is no foundation for this objection. In taking and using the photographic picture there was no violation of any constitutional right. We know that it is the daily practice of the police officers and detectives of crime to use photograpic pictures for the discovery and identification of criminals, and without such means many criminals would escape identification or conviction. It is one of the usual means employed in the public service of the country, and it would be a matter of regret to have its use unduly restricted upon any fanciful theory of constitutional privilege. * * * It could as well be contended that a prisoner could lawfully refuse to allow himself to be seen while in prison by a witness brought to identify him, or that he could rightfully refuse to uncover himself, or to remove a mark in court, to enable witnesses to identify him as the party accused, as that he could rightfully refuse to allow an officer, in whose custody he remained, to set an instrument and take his likeness for the purposes of identification."

For the reasons mentioned in this opinion we will affirm the order appealed from, but we must not be understood by so doing to countenance the placing in the rogues' gallery of the photograph of any person, not a habitual criminal, who has been arrested, but not convicted, on a criminal charge, or the publication under those circumstances of his Bertillon record. Police officers have no right to needlessly or wantonly injure in any respect persons whom they are called upon in the course of their duty to arrest or detain, and for the infliction of any such injury they would be liable, to the injured

In Shaffer v. United States, 24 App. D. C. | person, in the same manner and to the same extent that private individuals would be.

Order affirmed, with costs.

(111 Md. 176)

BALTIMORE & O. R. CO. v. HOWARD COUNTY COM'RS.

(Court of Appeals of Maryland. June 80, 1909.)

1. BRIDGES (§ 21*)—MAINTENANCE IN SAFE
CONDITION—STATUTORY DUTY.
Under Code Pub. Gen. Laws 1904, art.
25, §§ 1, 2, giving the county commissioners
control over county roads and bridges, etc., the county commissioners must maintain in a safe condition an approach to a bridge as well as all other parts of the public roads.

[Ed. Note.—For other cases, Cent. Dig. § 50; Dec. Dig. § 21.*] see Bridges.

2. Indemnity (§ 13*)—Implied Contracts— Joint Tort-Feasors.

Though, as between joint wrongdoers, one paying the whole damages has no right to inpaying the whole damages has no right to in-demnity from the other, a public corporation charged with the duty of maintaining the pub-lic highways in a safe condition has a remedy over against a person so using a highway as to produce an injury for which the public cor-poration was compelled to pay damages, un-less the public corporation was also a wrong-

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 29, 31; Dec. Dig. § 13.*]

Cent. Dig. §§ 29, 31; Dec. Dig. § 13.*]

3. INDEMNITY (§ 13*)—IMPLIED CONTRACTS—
JOINT TORT-FEASORS.

The county commissioners of a county permitted the approach to a bridge in a public highway to remain in an unsafe condition for several years, and a traveler was killed in consequence thereof. A railroad company had changed the location of a highway by raising the surface thereof as it approached the bridge, but had failed to guard the traveling public from going out of the road over the embankment. Held, that the county commissioners, being compelled to pay the damages for the death of the traveler, were entitled to compel indemnity from the railroad company, notwithstanding any principal of pari delicto. standing any principal of pari delicto.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 29, 81; Dec. Dig. § 13.*]

4. INDEMNITY (§ 14*)—IMPLIED CONTRACTS— JOINT TORT-FEASORS — CONCLUSIVENESS OF JUDGMENT.

Where a judgment was recovered against Where a judgment was recovered against the county commissioners for the death of a traveler caused by a defective highway without giving notice of the action to a railroad company guilty of changing the highway so as to make it defective, and the company did not participate in the action, the judgment was not conclusive on the company in an action by the commissioners against it for indemnity, but it was admissible as a part of the case.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 41; Dec. Dig. § 14.*]

TRIAL (§ 90*)—EXCEPTIONS TO EVIDENCE-WAIVEB.

Where no motion was made to strike out evidence admitted subject to exception, the party objecting lost the benefit of his objection.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 236; Dec. Dig. § 90.*]

6. INDEMNITY (\$ 15*)—IMPLIED CONTRACTS—EVIDENCE—ADMISSIBILITY.

In an action by county commissioners against a railroad company for indemnity for being compelled to pay the damages for the death of a traveler caused by defective highway

which had been rendered defective by the rail-road company, the record in the action against the county commissioners for the death of the traveler was admissible to show that an action had been brought and recovery had therein. [Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 44; Dec. Dig. § 15.*]

7. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—Admission of Evidence.

In an action by county commissioners against a railroad company for the amount paid in satisfaction of a judgment for the death of a traveler caused by a defective highway, the error in admitting an agreement between the county commissioners and the railroad company entered into subsequent to the accident with reference to repairing the highway was harm-

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4153; Dec. Dig. § 1050.*]

Appeal from Circuit Court, Carroll County; Wm. Henry Forsythe and Jas. R. Brashears, Judges.

Action by the County Commissioners of Howard County against the Baltimore & Ohio Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial awarded.

Argued before BOYD, C. J., and BRIS-COE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and HENRY, JJ.

Francis Neal Parke and James A. C. Bond, for appellant. John E. Dempster and Guy W. Steele, for appellee.

BRISCOE, J. The question in this case is one of indemnity, and arises in the following manner: On the 13th of September, 1907, Mrs. Agnes Hill, widow of Alexander 8. Hill, late of Baltimore county, deceased, recovered a judgment for \$6,000 and costs for the death of her husband by reason of the alleged negligence of the county commissioners in permitting a public highway to be so maintained as to be unsafe for public travel. The judgment was paid by the county, and this suit is brought by the county against the appellant corporation as the alleged actual wrongdoer to recover the amount it was compelled to pay. The public road where the accident happened was situate in Howard county, and was under the control and supervision of the county commissioners. The road led out of Howard county over the Patapsco river to the village of lichester, in Baltimore county, over and across a bridge, which was used by the citizens of those counties in passing and repassing to and from their respective The bill of particulars filed in counties. the case of Hill v. County Commissioners states that the death of Dr. Hill was caused, first, by the wrongful act, neglect, and default of the county commissioners of Howard county in suffering their public road in Howard county near the village of Ilchester, at the time of the fall and the injuries so sustained therefrom, and for a long time of repair, or so maintained as to be unsafe for travel by reason of defendant having or leaving a steep or dangerous embankment or abutment of the bridge, to wit, the upstream wing or retaining wall thereof without guards, railings, or safeguards, or without sufficient guards, railings, or safeguards, to provide against dangers ensuing from, or which might reasonably ensue from, ordinary and reasonable use of the road as a public highway at the place thereon; and, second, that the death of Dr. Hill was caused by the wrongful act, neglect, and default of the county commissioners of Howard county in suffering the bridge at the Howard county side thereof at the time of the fall and the injury sustained, and for a long time previous thereto, to be and remain with an unsafe and dangerous approach or embankment, to wit, a steep and dangerous retaining wall forming the left or upstream edge of said Howard county approach or embankment of the bridge without guards, railings, or safeguards, or without sufficient or adequate guards, railings, or safeguards, to provide against dangers arising or which might reasonably arise from the ordinary and reasonable use of the bridge and the approach thereof as part of the public highway; and that whilst Dr. Hill was driving as aforesaid on and along the road to and upon the approach and abutment of the bridge at the time and place in Howard county, and while using due and reasonable care and caution, unavoidably drove over the wing or retaining wall of the abutment so forming the edge or side of the approach or abutment of the bridge, and from the fall resulting he received mortal injuries from which death ensued.

The declaration in the present case alleges practically the same negligence against this defendant corporation; that is that in or about the year 1902-1903 the Baltimore & Ohio Railroad company in the relocation of its right of way and the roadbed and tracks of its railroad, under and by virtue of the authority of its charter granted by the state of Maryland, obstructed and changed the location of the highway as it then was, and also dumped or placed large quantities of earth and stones therein, thereby raising the surface thereof as it approached the bridge above the level it had been previously been, and by so doing rendered the road at the approach to the bridge unsafe and dangerous by reason of the fact that the wing walls of the abutments mentioned no longer extended above the bed of the road of sufficient height to guard the traveling public from going out of the road over the embankments thereof into the river below, a distance of about 18 feet; that it was the duty of the defendant to have raised the abutments or wing walls to their former height above the level of previous thereto, to be so constructed, out | the bed of the highway, or to have provided

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guard rails at this point to protect those using the road from going over the embankment, so that all persons (together with their horses, vehicles, etc.) desiring to travel in and upon the road and to cross and recross the bridge might do so with safety by night or by day, white using due care and caution. It also charges that by reason of its failure to raise the abutments or wing walls along the embankments thereof in Howard county to their former height above the level of the highway as they existed before the surface of the same was raised by the defendant, or by placing adequate and sufficient guard rails thereon to provide against the danger ensuing or which might ensue from the use of the road and bridge as a public highway at this place, whereby the citizens of said county and the public generally were unable to pass and repass over the bridge with safety while using due care as they had been accustomed to, and thereby the defendant by this neglect suffered and permitted the plaintiff to become liable to the citizens of the county and the public generally for all damages that might accrue to the property and person of the citizens of the county and the public generally for injuries received in traveling over the highway accruing by reason of the unsafe condition thereof caused by the changing of the roadbed and the surface thereof made by the defendant without guarding and protecting the same. It further alleges that the death of Dr. Hill was caused and occurred by reason of the unprotected and unguarded approach to the bridge and the embankments thereof caused by the action, omission, and work of the defendant corporation, and that the defendant is bound in law to reimburse and pay to the plaintiff the damages and losses it has been compelled to pay out occasioned or accruing by the defendant's wrongful act and neglect. The trial resulted in a verdict and judgment in favor of the plaintiff for the sum of \$6,506 with interest and costs, and from this judgment the defendant corporation has appealed.

There were 32 bills of exceptions reserved at the trial of the case. Thirty of them relate to the admission or rejection of testimony, one to the overruling of the defendant's special exception to the plaintiff's first, second, and fourth prayers, and the remaining exception to the granting of the plaintiff's prayers, and to the defendant's rejected prayers. The duty imposed upon county commissioners in this state under sections 1 and 2 of article 25 of the Code and the legal liability on the part of the county for injuries from a neglect of duty to keep the roads in repair and in a safe condition have been settled by repeated decisons of this court. Balto. Co. v. Wilson, 97 Md. 209, 54 Atl. 71, 56 Atl. 596; Adams v. Somerset Co., 106 Md.

and maintained suitable, safe, and proper | burn, 105 Md. 230, 66 Atl. 31, it was said the duty of maintaining in a safe condition the approach leading to the bridge in question as well as all other parts of the public road clearly rests on the county commissioners. But, while this is true, it is also well settled by the decisions of the Supreme Court of the United States and by those of this court, that the corporation has a remedy over against the party that is in fault, and has so used the highway as to produce the injury, unless it was also a wrongdoer. City of Chicago v. Robbins, 2 Black, 418, 17 L. Ed. 298; C. & O. C. Co. v. Co. Com'rs of Allegany Co., 57 Md. 221, 40 Am. Rep. 430; Eyler v. County Commissioners, 49 Md. 269. 33 Am. Rep. 249; Rowe v. B. & O. R. R. Co., 82 Md. 504, 33 Atl. 761; Wash. Gas Co. v. Dist. of Columbia, 161 U.S. 327, 16 Sup. Ct. 564, 40 L. Ed. 712.

But it is earnestly contended upon the part of the appellant that upon the facts of this case as set out in the record the failure of the appellee to protect its highway from 1903 to 1906 was such a conscious and unlawful default upon its part as to relieve the original wrongdoer, assuming the appellant to have been the original tort-feasor from all liability. In other words, the law will not enforce indemnity between conscious or actual joint tort-feasors. This rule is thus laid down by Mr. Pollock in his work on the Law of Torts, p. 199: "As between joint wrongdoers themselves, one who has been sued alone and compelled to pay the whole damages has no right to indemnity or contribution from the other" if the nature of the case is such that he "must be presumed to have known that he was doing an unlawful act." And Mr. Beven in his work on Negligence in Law, p. 53, says: "The principle that to fix liability for injuries brought about through a complicated state of facts the last conscious agency must be sought, and the consideration that if, between the agency setting at work the mischief and the actual mischief done, there intervenes a conscious agency, which might or should have averted mischief, the original wrongdoer ceases to be liable, afford the clues for the unraveling the cases. On the other hand, it must be borne in mind that, though there may intervene various stages in the development of the mischief, yet, if none of these is due to a conscious volition, the last conscious agent continues to be liable." Upon this question and in the class of cases like the one at bar, however, this court in C. & O. C. Co. v. Co. Com'rs of Allegany Co., supra, said: "We do not perceive from the nature and facts of this case any ground for defeating the appellee's suit because of the principle of pari delicto." And in Washington Gas Co. v. Dist. of Columbia, 161 U. S. 327, 16 Sup. Ot. 568, 40 L. Ed. 712, Mr. Justice White, in delivering the opinion of the court, said: The principle announced in Chicago v. Robbins, supra, "qualifies and re-197, 66 Atl. 695. In Garrett Co. v. Black-strains within just limits the rigor of the rule which forbids recourse between wrong- 171, 63 Atl. 373; Parr v. State, 71 Md. 220, doers. In the leading case of Lowell v. Boston & Lowell Railroad, 23 Pick. 24, 32, 34 Am. Dec. 33, the doctrine was thus stated: 'Our law, however, does not in every case disallow an action by one wrongdoer against another to recover damages incurred in consequence of their joint offense. The rule is: "In pari delicto potior est conditio defendentis." If the parties are not equally criminal, the principal delinquent may be held responsible to his co-delinquent for damages incurred by their joint offense. In respect to offenses in which is involved any moral delinquency or turpitude all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But, where the offense is merely malum prohibitum, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrongdoers." In Brooklyn v. Brooklyn City Railroad, 47 N. Y. 475, 487, 7 Am. Rep. 469, the same rule was applied; the court saying: "Where the parties are not equally criminal, the principal delinquent may be held responsible to a co-delinquent for damage paid by reason of the offense in which both were concerned in different degrees as perpetrators."

This brings us, then, to the consideration of the questions arising upon the rulings of the court upon the prayers and the admissibility of the evidence. There was no error in the ruling of the court in granting the plaintiff's first and second prayers. The first prayer was practically approved by this court in the Canal Case, 57 Md., 40 Am. Rep., supra, and the second submitted the law as applicable to the facts of the case.

The plaintiff's third prayer is clearly objectionable. It reads as follows: "If the jury shall find the facts stated in the plaintiff's first prayer, then they are instructed that, under the pleadings and the evidence in this case, the judgment obtained against the now plaintiff which was offered in evidence is conclusive upon the defendant as to the damages suffered by the said Agnes Hill, widow of the said deceased, of the fact that due care was used by the said Alexander Scott Hill at the time of the accident, mentioned in the evidence, and that the approach to said bridge at said place was unsafe, and dangerous; there being no evidence in the case attacking the validity of said judgment, or its obtention and rendition, or to show that it was obtained by collusion between the parties thereto." In the present case it is admitted that no notice of suit was given the appellant, nor did it participate in the suit between Mrs. Hill and the appellee, wherein the judgment was recovered. Under this state of facts the judgment was clearly not conclusive upon the defendant, but was admissible as part of the plaintiff's case. Key v. Dent, 14 Md. 98; Grafflin v. State, 103 Md.

17 Atl. 1020. In Elliott on Roads and Streets, § 870, it is said: "When a municipality has been compelled to pay damages for injuries sustained by reason of the wrongful acts of a third person which render its streets unsafe, it has a remedy over against him, unless as to such person the corporation is itself a wrongdoer. Where such a remedy over exists, it is customary and proper for the city to notify the original wrongdoer of the pendency of the action against it, and request him to come in and defend. The advantage to the city in so doing consists in the fact that he will then be concluded by the judgment as to the existence of the defect, the liability of the corporation for the injury, and the amount of damages occasioned by the defect. He will not, however, be estopped from showing that he was under no obligation to keep the street in a safe condition and was free from fault. The omission to give such notice does not affect the right of action, but simply imposes upon the city the burden of again litigating the matter and establishing the actionable facts."

For these reasons, there was error also in the granting of the plaintiff's fourth and sixth pravers. The defendant's rejected prayers were demurrers to the evidence, and for the reasons herein stated were properly rejected.

The 30 exceptions reserved by the defendant may be grouped and reduced to 9, and disposed of as follows: The first, second, third, eleventh, twelfth, thirteenth, fourteenth, fifteenth, eighteenth, nineteenth, twentieth and twenty-second exceptions relate to certain alleged changes made by the appellant in the road as the road approached the bridge and the wing wall. The ninth tenth, sixteenth, seventeenth, twenty-first, twenty-third, twenty-fourth, and twenty-fifth relate to the guarded condition of the public road as it approached the bridge before the change. These 20 exceptions present the same character of testimony, and, as it tenders to establish the plaintiff's case, the evidence was properly admitted. The fourth exception presents the ruling of the court admitting as evidence the record of the prior case against the county. This evidence was admitted subject to exception, and no motion appears to have been subsequently made to strike it out. The defendant therefore lost the benefit of its objection. Roberts & Co. v. Bonaparte, 73 Md. 191, 20 Atl. 918, 10 L. R. A. 689. But, apart from this, the record in the first action was proof that the suit was brought and the recovery had. Key v. Dent, 14 Md. 98. There was no error in the rulings on the fifth, sixth, seventh, eighth, and thirtieth exceptions; the evidence set out therein being admissible. The twenty-sixth and twentyseventh exceptions relate to the admission of an agreement between the parties entered into on the 29th of May, 1906, after the death of Dr. Hill. It was as follows: "Whereas, the Baltimore & Ohio Railroad Company,

hereafter called the party of the first part, made certain changes in line of their track at Ilchester Station, Maryland, which necessitated certain changes in the wagon roads at that point, and, whereas, the necessary changes in the wagon roads at this point have not, up to this time, been properly completed to the satisfaction of the county commissioners of Howard county, it is hereby agreed that the party of the first part will widen the wagon road, passing under its bridge at Ilchester Station, to a width of 30 feet on top from the north side of the bridge for a distance of 210 feet south. It is further agreed that the county commissioners will, when this work is completed, give to the party of the first part a formal acceptance, relieving the party of the first part from further expense, either in connection with the construction or maintenance of the county roads in that vicinity." While this agreement was subsequent to the alleged negligence of the appellant corporation, and did not reflect light upon the controversy between the parties, its admission did not injure or prejudice the defendant's case. Its admission was therefore harmless error. There was no such error in the rulings of the court upon the twenty-eighth and twentyninth exceptions as could have injured the defendant. What has been said as to the rulings of the court upon the prayers and the evidence disposes of the demurrer to the plaintiff's declaration, and to the defendant's special exceptions to the prayers.

For the errors committed in granting the plaintiff's third, fourth, and fifth prayers, the judgment will be reversed and a new trial awarded.

Judgment reversed and new trial awarded. with costs.

(111 Md. 808)

THRIFT V. BANNON.

(Court of Appeals of Maryland. June 30, 1909.)

1. Mobtgages (§ 338*)—Injunction against Sale under Power.

MALE UNDER POWER.

To restrain a sale, under a power in a mortgage assigned to defendant, the petition should aver, as required by Code Pub. Gen. Laws 1904, art. 66, § 16, that the mortgage debt and interest had been paid, or that the assignee refused to give credit for any payment thereon, and stated the particulars of any fraud charged therein, and the petitioner must also file a bond, as required by section 18, to protect the assignee in case the injunction should subsequently be dissolved.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1026-1035; Dec. Dig. § 338.*]

2. Mortgages (§ 338*)—Injunction Against Sale under Power.

An averment, in a petition to enjoin a sale under a power in a mortgage, that the interest on the mortgage had been paid was not sufficient. as both principal and interest must be paid, or duly tendered, before injunction can be lawfully authorized.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1030; Dec. Dig. § 338.*]

8. Mortgages (§ 838°)—Injunction against Sale under Power.

The allegation of fraud in a petition to restrain a sale under power in a mortgage was restrain a sale under power in a mortgage was that defendant, cunningly conniving to defeat the just rights of plaintiff, and in fraud of his rights in the premises, and seeking to deprive him of his interest in the real estate mentioned, and set forth in the bill of complaint, had recently, on a specified date, secured an assignment of the mortgage, and had proceeded to advertise the land for sale. Hold not to comply with Code Pub. Gen. Laws 1904, art. 66, \$ 16, providing that the fraud shall be particularly stated. ly stated.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1030; Dec. Dig. § 338.*]

4. MORTGAGES (§ 338*)—Injunction against Sale under Power.

The filing of a bond, as required by Code Pub. Gen. Laws 1904, art. 66, § 18, is a condition precedent to the granting of an injunction against the sale by an assignee under a power in a mortgage.

[Ed. Note.-For other cases, see Mortgages, Dec. Dig. § 338.*]

MORTGAGES (§ 335*)—SALE UNDER POWER—

RIGHTS OF ASSIGNEE.

Where a mortgage antedates by several years deeds alleged to be fraudulent conveyances, which it is sought to have set aside, any litigation in regard to the latter affects only the equity of redemption, and cannot affect the rights of an assignee to sell under the power therein, unless such rights conflict with his duty as one of the joint owners of the equity of redemption.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. 4 335.*1

Appeal from Circuit Court, Anne Arundel County; Jas. R. Brashears, Judge.

Suit by Thomas M. Bannon against Charles W. Green and others, to set aside deeds and for other relief. From an order making James F. Thrift, assignee, a party defendant, and granting a writ of injunction against him, he appeals. Reversed.

Argued before BOYD, C. J., and PEARCE, SCHMUCKER, BURKE, WORTHINGTON. and THOMAS, JJ.

D. G. McIntosh, Jr., for appellant. Robert Moss, for appellee.

WORTHINGTON, J. On June 17, 1907, the original bill of complaint in this case was filed by the appellee, Thomas M. Bannon against Charles W. Green and wife, David G. McIntosh, Jr., James F. Thrift, Seth Hance Linthicum, James S. Armiger, and James P. Bannon, a lunatic.

The allegations of the bill material to this appeal are substantially as follows: That on the 21st day of February, 1891, the plaintiff had purchased a tract of land in fee, consisting of 225 acres, situated in the Fourth election district of Anne Arundel county, adjoining the lands whereon is located the Maryland House of Correction. and that the said lands were conveyed to the complainant by a deed of that date, which was duly recorded. A copy of the deed, filed as an exhibit to the bill, shows that the consideration recited therein was

[•]For ether cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the sum of \$2,000. The bill further avers; that on the same day, to wit, on February 21, 1891, the complainant borrowed of John W. Kaufman the sum of \$1,000 to pay the purchase money for said land, giving Kaufman at the same time a mortgage thereon to secure the payment of the sum borrowed, "which mortgage," it is alleged, "is still unreleased and unpaid." No copy of the mortgage appears in the record, however, and its terms and provisions are therefore not before us. The bill further avers that on the 20th day of March, 1891, the complainant, Thomas M. Bannon, sold a one-half interest in this farm to James S. Armiger, but that in the year 1894 Armiger sold the one-half interest back again to Thomas M. Bannon, who instructed his brother James P. Bannon, an attorney at law, to draw the deed for a reconveyance of the property to the complainant, and also gave his brother \$500 with which to pay Armiger for his interest therein, but that James P. Bannon, against the instructions and wishes of the complainant, and without his knowledge, had the said Armiger to convey said land to himself; that the complainant, being employed by the United States Geological Survey, was frequently called long distances from his home, for long periods of time, and for that reason was induced by his brother to convey said land to Charles W. Green, now one of the defendants in this case, so that, in case a sale of the property should be effected, a speedy conveyance thereof could be made to the purchaser. A copy of the deed of conveyance to Green appears in the record as an exhibit to the bill of complaint, and shows the deed to have been dated July 16. 1901, and to have been made and executed both by Thomas M. Bannon and James P. Bannon, the consideration named therein being "the premises and one dollar," though the premises recite nothing that could be construed a consideration beyond the \$1 named therein. The bill then further avers that, since the said conveyance to Green, he (Green) had frequently acknowledged and recognized the complainant as the owner of the said tract of land, and that the complainant had instructed him not to convey said land to any one, as he was holding it in the hope of selling it to the state of Maryland; that notwithstanding these instructions, Green and wife, on the 11th day of December, 1906, conveyed the property to the defendants David G. McIntosh, James F. Thrift, and Seth Hance Linthicum, in fee, for the nominal consideration of \$1; that until within the last two months before the filing of the bill the complainant had supposed the title to the whole tract was in himself, since he purchased the half interest of Armiger, during all of which time he had paid the interest upon the mortgage debt, and also all taxes on the land. The bill then averred that all three of the deeds

James S. Armiger to James P. Bannon, dated November 14, 1894, (2) the deed from Thomas M. Bannon and James P. Bannon to Charles W. Green, dated July 16, 1901, and (3) the deed from Charles W. Green and wife to David G. McIntosh, Jr., James F. Thrift, and Seth Hance Linthicum, dated December 11, 1906, were without legal consideration, and were fraudulent and void. The prayer of the bill was that these several pretended and fraudulent deeds should be set aside and annulled, and that James A. Armiger be decreed to make a conveyance of his one-half interest in said tract of land to the complainant. Charles W. Green and wife filed their answer to the bill of complaint on January 27, 1908, but Messrs. McIntosh, Thrift, and Linthicum demurred thereto. On December 5, 1908, the complainant filed a petition in the case, setting forth that the interest on the mortgage from Thomas M. Bannon to John W. Kaufman, mentioned in . the bill of complaint, had been paid until February 21, 1909, but the defendant James F. Thrift, cunningly conniving to defeat the just rights of the plaintiff, and seeking to defraud him of his rights in the premises, and of his interest in said real estate, had recently, on October 5, 1908, procured from John W. Kaufman an assignment of said mortgage, and had proceeded to advertise the mortgaged tract of land for sale. petition further alleged that the property in question was already involved in this equity cause, and that James F. Thrift's rights could be adudicated herein. It was further alleged that the sale of the property in the mortgage proceedings would be ruinous to complainant's rights, and destroy his right to have the court pass upon the fraudulent conveyances, and that the property with this cloud upon its title would not sell for one-third its value. The prayers of the petition were that James F. Thrift, assignee, be made a party defendant to the cause, and that an injunction might be issued restraining Thrift from making sale of the real estate, as set forth in the advertisement. On the same day an order was passed making James F. Thrift, assignee, a party to the proceedings; and, although no bond was filed, the writ of injunction was granted as prayed. On January 22, 1909. James F. Thrift, assignee of the mortgage above mentioned, dated February 21, 1891, without having been summoned to appear, voluntarily appeared and filed his answer to the aforementioned petition, denying that the interest on the mortgage had been paid to February 21, 1909, but alleging that in fact such interest had been paid only to August 21, 1908, and that both principal and interest were overdue. The answer to the petition also denied that there was any fraud in the acquisition of the mortgage, denied the appellant's rights under the mortgage could be adjudicated in this above mentioned, to wit: (1) the deed from cause, or that a sale under the mortrights, averring that, as assignee of a mortgage made antecedently to the so-called "fraudulent conveyance," his rights could not be affected by these proceedings, and praying that the order of injunction theretofore passed might be rescinded. out waiting for the action of the court on this answer the appellant on the same day, January 22, 1909, entered an appeal from the order of December 5, 1908, making him a party defendant, and granting the writ of injunction to restrain him from making sale of the real estate as advertised.

The only question presented by this appeal is whether the order of court of December 5, 1908, making the appellant, as assignee, a party defendant, and directing the writ of injunction restraining him from making sale as advertised of the mortgaged premises, was properly passed or not. An examination of the petition for an injunction discloses that it contains no averment, as required by article 66, § 16, of the Code, to the effect that the mortgage debt and interest had been paid, or that the assignee of the mortgage had refused to give credit for any payment thereon. Nor was any fraud, stated with particularity, charged in the petition. Neither did the petitioner comply with section 18, art. 66, by filing an approved bond for the protection of the assignee in case the injunction should subsequently be dissolved. Ordinarily, without these provisions being first complied with, no injunction to restrain the sale of the mortgaged premises could properly be granted. The averment in the petition that the interest on the mortgage had been paid was not sufficient, as both principal and interest, if due, must be paid, or duly tendered, before an injunction for such purpose can be lawfully authorized. As was said in the case of Powell v. Hopkins, 38 Md. 1: "The complainant must pay, or bring into court to be paid, the principal and legal interest before he can claim the intervention of a court of equity." As to the question of fraud, the only allegation in the petition in this case that might be considered an allegation of fraud is that "James F. Thrift, cunningly conniving to defeat the just rights of the plaintiff, and in fraud of his rights in the premises, and seeking to deprive him of his interest in the real estate mentioned and set forth in the said bill of complaint, has recently, to wit, on the 5th day of October, in the year 1908, secured from John H. Kaufman an assignment of said mortgage, and has proceeded to advertise said tract of land for sale." This is not a compliance with the sixteenth section of article 66, which provides that the fraud "shall be particularly stated in the bill or petition for injunc-Besides this, the filing of a bond as

gage would be ruinous to the complainant's required by section 18 is a condition precedent to the granting of an injunction in such cases. In the brief of counsel for appellee it is contended, however, that the above-mentioned provisions of the Code have no application to this case, and that a sale under a power in the mortgage should not be allowed to proceed where the title to the property is in dispute and litigation, so that the sale might either result in a sacrifice of the property, or cloud a title otherwise sought to be established, citing 27 Cyc. 1457. But the answer to such contention is that the mortgage in question antedates, by several years, the deeds alleged to be fraudulent conveyances, which it is sought to have set aside, and therefore any litigation in regard to the latter affect only the equity of redemption, and cannot affect the rights of the appellant as assignee of the mortgage, unless such rights conflict with his duty as one of the joint owners of the equity of redemption, as will now be alluded to.

> It is suggested in the brief of counsel for appellee that the property in question was conveyed to McIntosh, Thrift, and Linthicum in trust for the benefit of the creditors of James P. Bannon, and it is argued that, the property being held in trust, the presumption is that the mortgage was purchased for the benefit of the trust estate. But although the inference could be drawn from the allegations in the original bill that Green held the property in trust for Thomas M. Bannon, yet there is no suggestion even of a trust in favor of James P. Bannon, and under the allegations of the bill it is not apparent how such a trust could arise; but, at any rate, no question of trust is presented by this appeal. Such question may, however, be inquired into and determined by a proper petition, fairly presenting such question to the lower court.

> As we have said, the only question presented for our consideration, by the record is whether the order of December 5, 1908, was properly granted or not, and we hold that it was not. Such order of the lower court will therefore be reversed, the injunction dissolved, the petition dismissed, and the cause remanded for such further proceedings as may be deemed desirable.

> Order reversed, with costs, and petition dismissed.

> > (111 Md. 189)

ROCK CREEK STEAMBOAT CO. v. BOYD. (Court of Appeals of Maryland. June 29, 1909.) 1. Witnesses (§ 269*)—Cross-Examination SCOPE.

Evidence not relating to matters in reference to which a witness testified in his direct examination is not properly admissible upon his cross-examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 949; Dec. Dig. § 269.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2 APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF EVIDENCE. In an action against a steamboat company for damages through failing to stop at a wharf for a passenger holding a round-trip ticket, the erroneous admission of blank forms of a printed bill of lading usually issued by defendant, and containing a list of landings at which defendant's boat stopped, was harnless; it being conceded in the argument that the boat on its conceded in the argument that the boat on its return trip stopped on notice or signal at the wharf from which plaintiff desired to embark, such wharf being among those listed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4164; Dec. Dig. § 1051.*]

3. NEGLIGENCE (\$ 138*)—DAMAGES—INSTRUC-

TIONS

While the simple question whether damages have been sustained by a breach of duty or the violation of a right and the extent of damages sustained are matters for the jury, the court must direct the jury in respect to what elements and within what limits damages may be estimated in the particular action.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 356; Dec. Dig. § 138.*]

4. Carriers (\$ 278*)—Carriage of Passen-gers—Failure to Stop for Passengers— INSTRUCTIONS.

In an action against a steamboat company by a passenger holding a round-trip ticket for damages through failure of defendant to stop at a wharf for plaintiff, whereby plaintiff was com-pelled to walk to his home through a rain and became ill, the refusal of instructions that the proper damages are the cost of the ticket plus any reasonable charge for lodging, or, if plain-tiff was compelled to return to his home that night, the reasonable cost of obtaining a con-veyance, and that he could not recover for any sickness brought about through exposure from a walk voluntarily and unnecessarily taken by him, and that he could not recover on expo-sure to the elements, nor for any sickness in consequence thereof, nor for any time lost, aft-er returning to his home in consequence of such exposure, and the substitution of a charge that the measure of damages was the amount necesthe measure of damages was the amount necessarily expended by plaintiff as the result of defendant's negligence, together with the proportionate cost of the round-trip ticket purchased by plaintiff and not used by him, and that plaintiff and not used by him, and that plaintiff and the proportion of tiff was not entitled to any damages for ex-penses unnecessarily incurred by him, or for sickness or injury resulting from exposure or sickness unnecessarily undergone, was error.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1081; Dec. Dig. § 278.*]

APPEAL AND ERBOR (§ 1068*)—HARMLESS ERROR-INSTRUCTIONS.

In an action against a steamboat company for damages resulting from defendant's failure to stop at a wharf for plaintiff, a passenger holding a round-trip ticket, error in instruc-tions did not require a reversal of the judgment where the smallness of the verdict of \$100 found by the jury satisfied the court that the jury were not seriously misled by the indefiniteness of the instructions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §, 4225; Dec. Dig. § 1068.*]

Appeal from Superior Court of Baltimore City; Henry Stockbridge, Judge.

Action by Charles Boyd against the Rock Creek Steamboat Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before BOYD, C. J., and PEARCE, SCHMUCKER, BURKE, WORTHINGTON. and THOMAS, JJ.

Raymond S. Williams and Jacob S. New, for appellant. Edward A. O'Mara, for appellee.

SCHMUCKER, J. The appellee sued the appellant steamboat company in the superior court of Baltimore city for damages alleged to have been caused by its negligence in failing to stop its boat for him at one of its landings. The declaration alleges, in substance, that the steamboat company, having sold to the appellee a round-trip ticket by its line from Baltimore to Rock Creek and return, carried him by one of its boats to Rock Creek, but the boat failed to stop there for him on its return trip, although he was waiting on the wharf at that place, when it passed by without stopping, and that, in addition thereto, he gave the officers of the boat notice from the wharf that he was there waiting to be taken back to Baltimore. The defendant pleaded that it did not commit the wrong alleged, and the plaintiff joined issue on the plea. On the trial of the case the plaintiff secured a judgment in his favor, from which the steamboat company took this appeal.

There is evidence in the record tending to show that the appellant company owns a steamboat called the "Petrel," which makes two round trips a day from Baltimore to Rock Creek, in Anne Arundel county, stopping at any one of about a dozen private wharfs in the creek when requested or signaled to do so, but not otherwise. On Saturday, December 14, 1907, the appellee purchased a round-trip ticket by the boat for Gray's wharf, one of the private landings on the creek. He went to Gray's by the afternoon boat intending to return that night, but the boat failed to stop for him when it passed the wharf on the return trip at about 6 o'clock in the evening. The evidence is conflicting as to his having requested or signaled the boat to stop for him, but that was a question for the jury.

There was a slight cover of snow on the ground at the time, and it was raining. Several persons living near the wharf offered the appellee lodging for the night after the boat failed to stop for him, but he declined the offers. Having procured some one to row him across the creek to Osborne's wharf. he walked nearly 11 miles through the snow and rain until he reached the Curtis Bay trolley line, by which he returned to Baltimore, arriving at his home about 11 o'clock at night, exhausted by fatigue and drenched with rain. He was quite ill the next day, and, although he returned to his employment, of barkeeper at a rathskeller, on the following Monday he continued to be ill, and on December 27th was obliged to give up his employment, and remained in ill health during the remainder of the winter and the greater

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and afterwards a "stomach trouble of some sort." The time lost from his employment attributed by him to the exposure on his walk home from Gray's wharf consisted of 10 days when he went home on December 27, 1907, and about six weeks during the following summer and two weeks in the fall of 1908. His salary was \$15 a week. During the period referred to he from time to time either called to see or was visited by Dr. Muse, who saw him in all about 30 or 40 times during 1907 and 1908, and expressed the opinion that his sickness was due to exposure and cold. He was also treated from about the middle of November, 1908. by Dr. W. A. Cox, who found him suffering from intestinal trouble, for which he was still treating him at the time of the trial. Cox expressed no opinion as to the probable cause of the plaintiff's illness. There is no evidence of the payment of any money by the plaintiff to his physicians for their services or of other expenses resulting from his

The record contains three bills of exceptions—two to the rulings on evidence and one to the court's action on the prayers.

As the appellant's counsel stated at the hearing before us that he did not press the first exception, it will receive no further notice from us.

The second exception was taken to the admission in evidence over the defendant's objection of a blank form of the printed bill of lading usually issued by the steamboat company for freight received by it for transportation. At the head of the bill was a list of the Rock creek landings, among which was "Cooks," which was admitted to be Gray's wharf. The form was offered in evidence by the plaintiff upon the cross-examination of the manager of the steamboat company who had gone upon the stand in its behalf. As it did not relate to the matters in reference to which the witness had testified in his direct examination, it was not properly admissible upon his cross-examination. Duterra v. Babylon, 83 Md. 538, 35 Atl. 64; Griffith v. Diffenderffer, 50 Md. 478. would have been admissible for the plaintiff as part of his own evidence, accompanied by proof of its publication in some manner by the company, in order to show what were its stations on Rock creek. We do not, however, regard the admission of this evidence as reversible error because it was conceded in the argument that the Petrel on its afternoon return trip stopped at Gray's wharf upon notice or signal, and not otherwise. At the close of the evidence on the trial of the case the plaintiff offered no prayers, but the defendant offered seven. The learned judge below refused all of the defendant's prayers except the first and second, and gave an instruction of his own to the jury. The defendant excepted to the entire action of the court on the prayers, but relied in this court in this case because the plaintiff might have

part of the next summer, first with grippe only upon the rejection of its third and fifth prayers and the giving by the court of his own instruction. The defendant's third and fifth prayers were as follows: Third. "The defendant prays the court to instruct the jury that, if they find for the plaintiff, the only proper damages are the cost of the ticket, plus any reasonable charge for lodging. or, if the plaintiff was compelled to return to the city that night, then as a damage the reasonable cost of obtaining a conveyance to his destination; and the court further instructs the jury that the plaintiff cannot recover any damages for any sickness or injury brought about through exposure incident to a walk voluntarily and unnecessarily taken by him with recklessness and want of care for his own personal safety and comfort." Fifth. "If the jury find for the plaintiff, they will, when estimating his damages, not allow him anything on account of the fact that he was exposed to the elements, nor for any sickness he may have suffered in consequence of such exposure and walk to the cars at Curtis Bay, nor for any time lost as is claimed by him after his return to Baltimore in consequence of such walk and exposure." The instruction given by the court to the jury is as follows: "The court instructs the jury, in case they should find a verdict for the plaintiff under the foregoing instructions, that the measure of damages is the amount of money necessarily expended by the plaintiff as the result of the negligence of the defendant, together with the proportionate cost of the round-trip ticket purchased by the plaintiff and not used by him, and that the plaintiff is not entitled to any damages for expenses unnecessarily incurred by him, or for sickness or injury resulting to him from exposure unnecessarily undergone." The contention of the appellant upon this branch of the case may be succinctly stated in two propositions. The first is that, as the plaintiff offered no prayer on the measure of damages and the defendant's third and fifth prayers stated in a substantial and concrete form the true criteria, deducible from the facts in evidence, for the guidance of the jury in estimating damages, the court erred in rejecting those two prayers and substituting for them his own instruction, which was in abstract terms. and did not direct the jury as to the precise elements or items of damage for which the plaintiff was entitled to recover in this case. but permitted them to, speculate without proper restraint in ascertaining the amount of damages. The second is that the statement in the last clause of the court's instruction that the plaintiff was not entitled to damages for sickness or injury resulting to him from exposure unnecessarily undergone in effect charged the jury that he was entitled to recover for sickness or injury resulting to him from exposure necessarily undergone; and that such an instruction was erroneous

easily escaped all of the exposure he suffered in consequence of his walk home on an inclement night by simply accepting the lodging for the night which the undisputed evidence shows to have been offered him by several persons residing near by the wharf on which he was left by the defendant's passing boat. Upon a close examination of the court's instruction to the jury, it becomes apparent that the difference in principle between it and the rejected third and Afth prayers for which it was substituted is slight, but the application of the principle involved to the situation presented by the evidence is not made as exactly or completely by the instruction as by the prayers. We have held in a number of cases that, "while the simple question whether damages have been sustained by the breach of duty or the violation of right and the extent of damages sustained as the direct consequence thereof are matters within the province of the jury, 'the court must decide and direct the jury in respect to what elements and within what limits damages may be estimated in the particular action." B. & O. R. R. Co. v. Carr. 71 Md. 143, 17 Atl. 1052; Belt R. R. Co. v. Sattler, 102 Md. 605, 62 Atl. 1125, 64 Atl. 507; W. U. Tel. Co. v. Lehman, 105 Md. 318, 67 Atl. 241. In Westn. Md. R. R. Co. v. Martin, 73 Atl. 267, No. 12 on the docket of the present term of this court, we reviewed somewhat at length our previous rulings upon this subject.

In view of all the circumstances of this case, especially the remoteness of some of the facts proven as elements of damage, we think the appellant as defendant below was entitled to have sent to the jury the instructions as to the elements and limits of damages set forth in its third and fifth prayers, and that it was error to reject them and substitute for them the less precise instructions of the court. We do not think, however, that the error is one calling for a reversal of the judgment, as the smallness of the verdict of \$100 found by the jury satisfles us that they were not seriously if at all misled by the indefiniteness of the court's instruction to them. We will therefore affirm the judgment.

Judgment affirmed, with costs.

(111 Md. 252)

CARROLL V. MANGANESE STEEL SAFE

(Court of Appeals of Maryland. June 30, 1909.) 1. TRIAL (§ 178*)-DIRECTION OF VERDICE-Effect of Motion.

Where defendant requests a directed verdict for want of sufficient evidence to entitle plaintiff to recover, defendant's evidence can be looked to only so far as it supports plaintiff's case. [Ed. Note.—For other cases, see Trial, Cent. Dig. § 402; Dec. Dig. § 178.*]

2. PRINCIPAL AND AGENT (§ 17*)—AU
ITY OF AGENT TO EMPLOY SUBAGENT 17*)---AUTHOB-

To entitle plaintiff to recover commissions on a sale made under an alleged agreement with defendant's agent, plaintiff must prove that the agent acted on defendant's expressed or implied authority, authority, or that the agreement was subsequently adopted by defendant or the proceeds accepted with knowledge of the circumstances.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 35; Dec. Dig. § 17.*]

8. Corporations (§ 432*) — Officers — Authority of Secretary.

There is no presumption that the secretary of a corporation has power either to appoint agents or to ratify appointments previously made without authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1726; Dec. Dig. § 432.*]

ESTOPPEL (\$ 95*)—EQUITABLE ESTOPPEL-SILENCE

Plaintiff volunteered to assist defendant's agent in selling a steel safe, and claimed that the agent promised that, if the sale was made, plaintiff should receive compensation. The price asked was \$18,000, but the buyer offered \$13,000, and defendant finally acceded to these terms. The agent on several occasions told plaintiff that, if defendant was compelled to cut the price to the lower figure, there would be no commission for either. Held, that plaintiff by remaining silent when such statements were made, thereby permitting the agent to conclude the sale on terms he might not otherwise have made, was estopped to claim commission.

[Ed. Note.—For other cases, see Estoppel.

[Ed. Note,—For other cases, see Cent. Dig. § 285; Dec. Dig. § 95.*] see Estoppel,

5. PRINCIPAL AND AGENT (§ 24*)—AUTHOR-ITY OF AGENT TO EMPLOY SUBAGENT. Evidence held insufficient to carry to the jury the question of an agent's authority to employ a subagent on commission.

[Ed. Note.-For other cases, see Principal and Agent, Dec. Dig. \$ 24.*]

Appeal from Superior Court of Baltimore City; Henry Stockbridge, Judge.

Action by John N. Carroll against the Manganese Steel Safe Company. Judgment for defendant, and plaintiff appeals. Af-

Argued before BOYD, C. J., and PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and THOMAS, JJ.

R. E. Lee Marshall, for appellant. Alfred J. Shriver, for appellee.

SCHMUCKER, J. The appellant sued the appellee, a foreign corporation, in the superior court of Baltimore city for a commission on the sale of a steel bank vault. At the trial of the case in the court below the presiding judge granted the defendant's prayers, instructing the jury to find a verdict in its favor for want of legally sufficient evidence to entitle the plaintiff to recover. Upon the verdict so rendered a judgment for the defendant for costs was entered, from which this appeal was taken.

The evidence in the record on the part of the plaintiff is substantially as follows: During the year 1904, there was an active competition between companies engaged in building safes and vaults to secure contracts

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

for the erection of those structures in the new bank buildings erected after the great fire in Baltimore city. The appellee, which had its office in New York City and its factory in Plainfield, N. J., participated in that competition through the agency of its engineer and salesman, William Lindgren, who frequently visited Baltimore in that connection. Lindgren on one of his visits to that city, in October, 1904, met on the street the appellant, whom he had previously known, and remarked in the course of the conversation which ensued that he was trying to secure the contract for constructing the safe deposit vault in the new building of the National Bank of Baltimore. Carroll stated that the cashier of that bank was an old friend of his, and that he also knew many bankers and influential people in Baltimore, and might be able to assist Lindgren in securing the contract. The latter replied, ac-"Any busicording to Carroll's testimony: ness that you can get I will see that you are paid a liberal commission for." Carroll answered: "That is all I expect." No rate of commission was mentioned then or at any other time. Carroll went with Lindgren to see Mr. Wilcox, the cashier of the bank, and spoke favorably of him and his company, and expressed the hope that they might secure the contract. He also introduced him to architects and others interested in the erection of the Maryland Life Insurance Company's building and the Baltimore & Ohio Railroad Company's building, and personally interviewed some of those persons in his interest. Neither the efforts of Lindgren or Carroll or of the two combined were of any avail, and no contracts were secured for the appellee in connection with the construction or equipment of any of the buildings mentioned. During these efforts Lindgren sent to Carroll several copies of the "American Banker," containing favorable notices of the appellee and its system of constructing safes and other printed matter and samples of material, which were exhibited by the latter to the savings bank officials. On December 8, 1905, Carroll saw in the Baltimore Sun a descriptive notice of the new building then about to be erected by the Metropolitan Savings Bank. He went at once to see the president and one of the directors of that bank, and called their attention to the system of safes and vaults constructed by the appellee, and also exhibited the book of cuts and samples received from Lindgren, and arranged for an interview between him and them. He then wrote to Lindgren apprising him of what he had done and inclosing him a clipping from the Sun, containing the description of the proposed savings bank building. Lindgren responded to the letter by telegram, and came promptly to Baltimore and opened negotiations with the savings bank people, which ultimately resulted in the erection of the vault in their building by the appellee.

In the negotiations looking to the making of this contract the appellee demanded \$16,000 for the construction of the vault, but the savings bank would not agree to pay more than \$13,000. The appellee finally came to the bank's terms, and a contract was made on June 8, 1906, between the parties for the construction of the vault for \$13,000. During the negotiation which led up to this contract, and before it was signed, Lindgren on several occasions said to Carroll that, if the appellee had to put the price of the vault at so low a figure, there would be no commission in it to either of them. To that statement Carroll replied, according to the testimony of Lindgren and the appellee's witness Geswein, who was present at one of the times when it was made, "I understand that all right," or that "he understood this perfectly." Carroll testified, as already mentioned, that he said nothing, but remained silent when Lindgren told him there would be no commission in it; and for the purpose of the present inquiry his evidence must be taken as true. Lindgren also testified that he had no authority to employ agents or salesmen for the appellee, and that he never employed Carroll as such; that the only arrangement he made with Carroll was a personal one with which the company had nothing to do. He said the arrangement was that Carroll, who was a friend of his, should keep him posted as to what was going on in Baltimore, and introduce him to such persons as he might find it advantageous to know, and that, if a sale resulted from the assistance thus rendered. he "would personally make him some remuneration" out of his own pocket, but his testimony can be looked to, for the purpose of the present inquiry, only to see how far it may be available to support the plaintiff's case. Barabasz v. Kabat, 91 Md. 53, 46 Atl. 337.

We regard the evidence to which we have referred as legally sufficient to go to the jury to show that Carroll assisted Lindgren in securing for the appellee the contract from the savings bank in pursuance of an agreement between them that Lindgren would see that he should receive remuneration for his services in the nature of a commission. In order, however, to enable Carroll to recover against the appellee for his services, it was necessary for him to prove also either that Lindgren in making the agreement in respect to compensation acted on behalf of the appellee with express or implied authority for that purpose, or that the agreement was subsequently adopted or ratified by the appellee or its fruits accepted with knowledge of the circumstances of their acquisition. Of those facts we agree with the learned judge below the record fails to supply legally sufficient evidence. There is no evidence in the record of express authority from the appellee to Lindgren to make any such agreement on its behalf. Nor do we think such authority is to be implied

from the nature of his employment. was the supervising engineer of the appellee, having his headquarters at its factory in Plainfield, N. J., and seems also to have acted as its salesman and solicitor. No authority to employ subagents is ordinarily incident to either of these two branches of service, and, in the absence of proof of special terms of employment, none should be inferred. If we inspect the record for evidence of an adoption or ratification by the appellee of the agreement between Lindgren and Carroll, we find all of Carroll's communications having relation to it were addressed to Lindgren, and, with one exception, all were answered by him individually, although some of the answers were written upon the letter heads of the appellee. The one letter not answered by Lindgren personally was signed "Sidney L. Smith. Secretary Steel Safe Company," but it is dated January 4, 1905, nearly a year before the negotiations with the Metropolitan Savings Bank, which form the subject of the present suit, were begun, and on its face relates solely to an effort then being made to secure a contract from the National Bank of Baltimore. A memorandum following Smith's signature says, "Lindgren is knocked out with a bad cold," for the evident purpose of explaining why Smith, and not Lindgren, had answered Carroll's letter. The contents of the letter plainly show that Smith, the secretary, knew that Carroll was relied on to secure to Lindgren a favorable hearing on behalf of the appellee before the board of directors of the Bank of Baltimore in the effort to get a contract from them. Nothing ever came of Carroll's efforts referred to in that letter, as the appellee did not get the contract from the Bank of Baltimore. Even if that letter amounted to such an acceptance of Carroll's services in that connection as to have entitled him to compensation under his agreement or otherwise, if the appellee had secured the contract from that bank, it, standing by itself, could hardly be construed as having a similar operation upon any services that may have been rendered by him a year thereafter in relation to another and Samuels v. Luckendifferent transaction. bach, 205 Pa. 428, 54 Atl. 1091; 31 Cyc. 1260; Todd v. Bishop, 136 Mass. 386.

Assuming that the character of Smith's letter was such as would have amounted to a ratification of the transaction to which it referred by one having authority to ratify, there is no evidence in the case that Smith as secretary had any such authority, nor is there any presumption that the secretary of a corporation has power either to appoint agents or to ratify appointments previously made without authority. 3 Clark and Marshall on Private Corps. § 704; A. & E. Encycl. 361. The only communication between Carroll and any of the officers of the appellee was in July, 1906, after the contract with the Metropolitan Savings Bank had been made,

and consisted of a request made by Carroll to Mr. Smith, the secretary, for an appointment as special agent of the appellee in Baltimore and vicinity, and a refusal of the request on the part of the appellee. The letter declining to make the appointment is signed in the name of the appellee by "Morris Underhill, Ast. Genl' Manager," and is the only communication to Carroll formally made on its behalf appearing in the record. We may add that we also think that, if the case had been sent to the jury, the court should have granted the defendant's first prayer, which asserted that Carroll was estopped from maintaining this suit by remaining silent, as he admits that he did, on the several occasions, before the signing of the contract with the savings bank, when Lindgren told him that, if the appellee accepted the contract at the price named by the bank, there would be no commission in the transaction for either of them. The doctrine of estoppel in pais by silence is well stated in 16 Cyc. p. 681, as follows: "Estoppel by silence arises where a person who by force of circumstances is under a duty to another to speak refrains from so doing, and thereby leads the other to believe in the existence of a state of facts in reliance upon which he acts to his prejudice." The validity of estoppel in pais, and the fact that it is available in law as well as in equity have been repeatedly recognized by this court. Albert v. Freas, 103 Md. 583, 591, 64 Atl. 282; Atlantic Coal Co. v. Md. Coal Co., 62 Md. 143; Park Association v. Shartzer, 83 Md. 10, 34 Atl. 536; Roland Park Co. v. Hull, 92 Md. 301. 48 Atl. 366. The recent case of Carmine v. Bowen, 104 Md. 198, 64 Atl. 932, presents a forcible illustration of an estoppel by silence. A controversy there existed between a landlord and his tenant as to the latter's right to harvest his crops on the demised premises after the end of his term. The landlord, who denied the tenant's right, happened to come on the premises when the tenant was sowing seed. The tenant said to him, "I don't anticipate any trouble in the cutting of my crop," and the landlord made no reply. In holding that, under those circumstances, he was estopped to deny the tenant's right to harvest the crop, we said, speaking through the late Chief Justice McSherry: "Where a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him * * * Silence is a species of to be silent. conduct, and constitutes an implied representation of the existence of the state of facts in question, and the estoppel is accordingly a species of estoppel by misrepresentation. • • When the silence is of such a character and under such circumstances that it would become a fraud upon the other party to permit the party who has kept silent to deny what his silence has induced the other

an estoppel." The application of what we there said to the facts of the present case requires us to hold that Carroll fatally estopped himself to assert his present claim by remaining silent when Lindgren told him that at the price at which the appellee could that at the price at which the appellee could get the contract there would be no commission for either of them. His silence permitted Lindgren to go on and conclude a contract on behalf of the appellee, under circumstances when it is not reasonable to suppose he would have done so but for that silence, and Carroll cannot now be permitted to speak to the prejudice of the appellee whose agent was thus induced to act on its behalf.

For the reasons mentioned in this opinion, the judgment appealed from must be affirmed.

Judgment affirmed, with costs.

(111 Md. 141)

ANNE ARUNDEL COUNTY COM'RS v. CARR.

(Court of Appeals of Maryland. June 30, 1909.) 1. HIGHWAYS (§ 198*)—BRIDGES (§ 38*)—REG-ULATION AND USE—INJURIES FROM DEFECTS

ULATION AND USE—INJURIES FROM DEFECTS
—DUTY TO REPAIR.
Act 1908. p. 359, c. 654, empowering the county commissioners of Anne Arundel county to control public roads and bridges, and authorizing them to levy taxes and furnish all material for their maintenance, does not relieve the commissioners of liability for the condition of roads and bridges, though all the work is required to be done under the supervision of an engineer. engineer.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 504-507; Dec. Dig. § 198;* Bridges, Dec. Dig. § 38.*]

2. Bringes (§ 46*) — Use for Travel — Ac-

TIONS FOR INJURIES-PLEADING.

A declaration averring that defendant was negligent in allowing a bridge on one of the public roads of the county to be out of repair and unsafe. and that plaintiff was injured by reason thereof, without specifying the particular negligence is demonstrable. negligence, is demurrable.

[Ed. Note.—For other cases, see Bridges, Dec. Dig. § 46.*]

3. NEGLIGENCE (§ 111*)—ACTIONS.

The declaration should always describe the negligence complained of with such a reasona-ble degree of certainty as will give fair notice to the defendant of the character of the claim so as to enable him to prepare for his defense.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 182-184; Dec. Dig. § 111.*]

4. APPEAL AND ERBOR (§ 928*) - REVIEW PRESUMPTIONS—INSTRUCTIONS

In the absence of evidence in the record to support an instruction not specially excepted to, it will be presumed that there was sufficient evidence to support it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3751; Dec. Dig. § 928.*]

5. TRIAL (\$ 253*)—INJURIES ON BRIDGE—IN-STRUCTION IGNORING ISSUE.

An instruction authorizing the jury to find for plaintiff if defendant's bridge was out of re-pair, and plaintiff was injured in consequence thereof, is erroneous for failure to submit the question of defendant's negligence.

[Ed. Note.—For other case, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 103-105; Dec. Dig. § 37.*]

7. Bridges (§ 46*)—Use for Travel—Actions for Injuries—Evidence.

Evidence, in an action for injuries received by the defective condition of a bridge, held to show that the bridge in question was on one of the public roads of the county.

[Ed. Note.—For other cases, see Bridges, Dec. Dig. § 46.*]

8. Negligence (§ 122*)—Actions—Burden of Proof—Contributory Negligence.

Where the plaintiff has made out a prima facie case of negligence and injury resulting, without any negligence on his part directly contributing thereto, the burden is on the defendant to show contributory negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 221-234; Dec. Dig. § 122.*]

9. TRIAL (§ 252*)-INSTRUCTIONS-SUPPORT IN EVIDENCE.

In the absence of evidence of contributory negligence, it is error to instruct that plaintiff cannot recover if he was guilty of contributory negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

10. Bridges (§ 46°)—Use for Travel—In-Juries—Contributory Negligence.

The mere fact that one has frequently driven over a bridge will not justify an inference that he knew it was dangerous or did not use due care in crossing it.

[Ed. Note.—For other cases, see Bridges, Dec. Dig. § 46.*]

11. Negligence (§ 141*)—Actions—Instruc-TIONS.

An instruction that the plaintiff cannot recover if the jury find that the accident could have been avoided by the exercise of due care, without requiring them to find that plaintiff did not use due care, is erroneous.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 382-399; Dec. Dig. § 141.*]

Appeal from Circuit Court, Anne Arundel County; Jas. R. Brashears, Judge.

Action by Eliza S. Carr against the County Commissioners of Anne Arundel County. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before BOYD, C. J., and PEARCE, SCHMUCKER, BURKE, WORTHINGTON. and THOMAS, JJ.

James W. Owens, for appellant. Brady, for appellee.

THOMAS, J. The appellee brought suit against the county commissioners of Anne Arundel county to recover for injuries claimed to have been sustained by her while driving over a bridge on one of the public roads of said county, by reason of the negligence of the defendant in failing to keep the bridge in proper repair. The court below overruled the demurrer to the amended declaration, and the trial of the case resulted in a verdict

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and judgment in favor of the plaintiff for | them free from hindrances and obstructions. \$200, from which judgment the defendant

The declaration, which contains two counts, states, in the first count, that one of the public roads of Anne Arundel county, "to wit, a road leading from the reservoir to Lusby's Schoolhouse, near Chesterfield, in the Second district of said county, was negligently and carelessly suffered by said defendants to be out of repair and unsafe for travel, and by reason of negligence of said county commissioners the plaintiff on or about the 10th day of June in the year 1908, while traveling over said road, and that while the plaintiff was exercising due, proper care and caution, was greatly injured, by reason of the horse she was driving breaking through a bridge on said road, and she being thrown from the vehicle in which she was driving, from which injury the said plaintiff suffered great bodily pain"; and, in the second count, "that one of the bridges on the road leading from the reservoir to Lusby's Schoolhouse, near Chesterfield, in the Second district of Anne Arundel county. which said bridge was then and there a part of said public road, was negligently and carelessly suffered by said defendants to be out of repair and in an unsafe condition for travel, and by reason of the negligence and carelessness of said county commissioners, allowing said bridge to be out of repair and in an unsafe condition for travel, the said plaintiff on or about the 10th day of June, in the year 1908, whilst traveling over said road and bridge, and whilst using and exercising due care and caution, was thrown from the vehicle in which she was riding and was greatly injured, by reason of the horse breaking through said bridge, from which injury the said plaintiff suffered and continues to suffer great bodily pain," etc.

The ground on which the defendant demurred to this declaration is that under Act 1908, p. 359, c. 654, a local law for Anne Arundel county, the defendant is not liable for injuries caused by the condition of the public roads of the county; and counsel for the appellant relies entirely upon the decision of this court in the case of Baltimore County v. Wilson, 97 Md. 207, 54 Atl. 71, 56 Atl. 596. In that case the court was dealing with the Act 1900, p. 1080, c. 685, and, after setting out the several provisions of the act, said: "It is apparent from this synopsis of the act of 1900 that it not only introduces into the management of the public roads of Baltimore county many details of administration not found in the general law, but it deprives the county commissioners of almost the entire charge and control of the roads, and imposes that duty upon a new set of officials, for whose appointment it makes provision. It creates a board of road commissioners for each district, and requires them to 'take charge of all the roads and

to adopt a system for repairing and improving them, and to cause the repairs and improvements to be made, and to purchase the materials requisite for that purpose. road commissioners receive a fixed salary, and are not made subject to the control of the county commissioners in connection with the repair or improvement of the roads or the purchase of materials. On the contrary, the act directs them to report the condition of the roads and improvements made thereon to the road engineer, an independent official appointed by the Governor, and to make monthly statements of their expenditure for labor and material to the same official, to be by him approved, if correct, and handed to the county commissioners, who are then required to order their payment after they have been properly audited. The road engineer, and not the county commissioners, is made the adviser of the road commissioners in the exercise of the charge conferred upon them by the act over all the county roads and bridges. * * * Not only are the persons directly charged with the care of the roads thus made practically independent of the county commissioners, but the power of the latter to levy taxes for the use of the roads is now so limited and restricted as in effect to deprive them of their former discretion as to the application of the funds raised by those taxes."

By the first section of the act of 1908, the county commissioners of Anne Arundel county "are authorized and empowered to control and regulate the public roads and bridges" of the county subject to the provisions of the act. The second section authorizes them to levy taxes for the use of the public roads, etc. The third and fourth sections provide for the appointment by them of a road engineer, and for his removal from office for incompetency, neglect of duty, etc.; and the fifth section provides that he shall have "charge, control and supervision of the working, repairing and reconstructing of the public roads and bridges," and "charge and control of all teams, carts, wagons, machinery, implements and accessories which may be purchased or provided by the county commissioners for the purposes of the act," and that he "shall/employ such labor, teams and implements as may be by him and by the county commissioners deemed necessary in connection with the work on public roads and bridges to be paid for by the county commissioners"; that "he shall not work out or expend upon the roads and bridges of any district of the county a greater amount in any one fiscal year than the amount levied in such district by the county commissioners as a district road tax, nor shall he expend in any fiscal year upon county roads and bridges a greater amount than is levied and appropriated by the county commissioners therefor without first obtaining the written bridges in their respective districts' and keep permission of said commissioners so to do";

that "he shall appear before the county commissioners at their first meeting in each and every month and make a full and exact statement to them of all work done or contemplated by him and of all money expended"; that "he shall not purchase or order any materials of any kind whatever without first making requisition therefor upon the county commissioners and securing their written approval of such requisition, and the county commissioners may either purchase the materials themselves or direct and authorize the county road engineer to do so"; that "he shall make annually in writing a detailed report to the county commissioners of all work done on the public roads and bridges for the year, together with the names of all persons employed by him or under his direction in performing such work, and the amount certified to be due them," etc.

From the above recital of the provisions of the act it is apparent that it does not resemble in any important particular the act of 1900, relating to Baltimore county, and does not possess any of the essential features upon which this court based its decision in Baltimore County v. Wilson. The act of 1908 not only expressly provides that the county commissioners shall have the power to "control and regulate the public roads and bridges" of the county, but authorizes them to levy the necessary taxes and to provide all teams, implements, and materials, etc., for the use of the roads and bridges, the building and repairing of which is to be done under the supervision of the engineer. who is given charge of the teams and machinery furnished by the county commissioners, but who is forbidden to purchase or order any materials of any kind without their approval, to whom he is required to make a report every month of the work done or contemplated, and the evident intention of the Legislature was not to relieve the county commissioners of all liability for the condition of the public roads and bridges, but to secure in their construction, repair, and maintenance the benefit of skilled knowledge and experience.

In the case of County Com'rs v. Duvall, 54 Md. 350, 39 Am. Rep. 393, Judge Brent, speaking for the court, said: "The county commissioners are specially charged by law with the duty of keeping these in good repair and safe for the travel of the public. Tyson's Case, 28 Md. 510; Walter's Case, 35 Md. 394, and cases above cited. If they fail to do so, and injury results, they are liable in an action at law, not by virtue of any liability at common law, but because they are made so by statute. They are not permitted to excuse themselves by the fact that the road supervisor is also required by law to keep the public road in repair, and may be made liable in a penalty or in damages for a failure to do so. Their obli-

and cannot be discharged by the failure of another to do that which they, the commissioners, are required by law to do." This statement of the law was quoted with approval in the recent case of Adams v. Somerset County, 106 Md. 197, 66 Atl. 836.

But while we cannot give our assent to the construction of the act in question contended by the counsel for the appellant, we think the declaration bad for a different The averments are, in substance, reason. that the defendant was negligent in allowing a bridge on one of the public roads of the county to be out of repair and unsafe for use, and that by reason of such negligence, while passing over the same, the plaintiff's horse broke through the bridge and she was thrown out, etc., and are entirely too general. The narr. does not specifically state the negligence complained of; that is to say, in what respect the bridge was out of repair or unsafe. It may have been out of repair and unsafe by reason of faulty construction, broken or decayed timbers or planks, or other conditions, and the defendant was entitled to know the particular negligence for which the plaintiff sought to hold it responsible.

Mr. Poe says (volume 1, § 562): declaration should always describe * * * the tort for which redress is sought, with such a reasonable degree of certainty as will give fair notice to the defendant of the character of the claim or demand made against him, so as to enable him to prepare for his defense." In the case of Gent v. Cole, 38 Md. 110, this court said: "It is one of the first principles of pleading that facts should be stated for the purpose of informing the court, whose duty it is to declare the law arising upon those facts, and to apprise the opposite party of what is meant to be proved, in order to give him an opportunity to answer or traverse;" and, referring to the declaration in that case, that: "The statements of the tortious acts complained of, and of the manner in which they effected the injury to the plaintiff, are altogether too general and indefinite to be good on demurrer." And in affirming the ruling of the court below, sustaining the demurrer to the declaration, this court, in the case of Jeter v. Schwind Quarry Co., 97 Md. 699, 55 Atl. 367, said of the declaration: "It does not specify in what respect the place provided for work was unsafe, or how the want of safety caused the death; it does not specify what tools provided for work were unsafe, in what respect they were unsafe, or how their unsafe condition was connected with the accident."

permitted to excuse themselves by the fact that the road supervisor is also required by law to keep the public road in repair, and may be made liable in a penalty or in damages for a failure to do so. Their obligation is a paramount and pre-existing one,

prayers, the defendant excepted.

Plaintiff's second prayer was approved by the court in the case of Eyler v. County Com'rs, 49 Md. 257, 33 Am. Rep. 249. Plaintiff's third prayer relates to the measure of damages, and is in the usual form where there is evidence tending to show that the injuries sustained were in their nature permanent. There is no such evidence in the record, but as the prayer was not specially excepted to in the court below, we must assume that there was sufficient evidence to support it.

By plaintiff's first prayer the jury were instructed as follows: "If the jury find from the evidence in the case that the bridge on the public road of Anne Arundel county (if they find that the bridge is a part of the public road), mentioned in the declaration, was in bad condition, and not mended and repaired, and that in consequence of such condition of the bridge the horse that the plaintiff was driving broke through the bridge while the plaintiff was traveling over the same on or about the 10th of June, 1908, and in consequence of the horse breaking through said bridge that the plaintiff was thrown out of the roadcart in which she was riding and was injured, then their verdict must be for the plaintiff, provided they shall further find from the evidence that the plaintiff was using due care and caution at the time." That instruction amounted to this: that if the bridge was a part of one of the public roads of the county, and was out of repair, and the plaintiff, while using due care, was injured in consequence of its being out of repair, the defendant was liable, and was clearly erroneous, because of its failure to submit to the jury the question of defendant's negligence.

County commissioners, except where their duties and responsibilities are modified by local laws, are required to keep the public roads and bridges in their county in good repair and safe for the travel of the public, and are liable for injuries resulting from their failure to do so. But we know of no case in this state that goes to the extent of holding that their liability is that of insurers against accidents occurring on the public roads and bridges, and they can only be held liable where the unsafe condition of the road or bridge which caused the accident is due to their negligence in respect to the duties imposed upon them by law. Adams v. Somerset County, supra.

The defendant by its first prayer asked the court to instruct the jury that there was no evidence in the case legally sufficient to entitle the plaintiff to recover, and the defendant claims that the plaintiff failed to prove that the bridge in question was on one of the public roads of Anne Arundel county. This contention is fully answered by the testimony of Mr. William K. Bos-

jection of defendant's first, second, and third road commissioners of Anne Arundel county, and, as such road commissioner, had charge of the roads and bridges in his district, including the road on which the bridge in question was located, and that he rode over and examined the roads and bridges in his district about once a month, including the road and bridge mentioned in this case, and saw that the same were kept in proper repair. It is not necessary, in this connection, to refer to the other evidence in the case, as it is not claimed that the evidence was in other respects legally insufficient, and we think the prayer was properly rejected.

Nor do we find any error in the rejection of defendant's second and third prayers. There was no evidence in the case tending to show that the plaintiff had been guilty of contributory negligence. Plaintiff stated that she had no reason to suspect that the bridge was dangerous, and was not anticipating an accident. There is not a suggestion in the evidence in the record that by the exercise of ordinary care she could have discovered the defect in the bridge, which all the evidence tends to show was a latent defect, or that she was not using due care while driving over it. Witness James Cusak, who was at the bridge immediately after the accident, stated that he examined the plank where the horse broke through, "and found that it was broken on the edge where the two planks came together. That the appearance of the plank on the exposed side did not seem dangerous, but on looking underneath he found that it was considerably decayed." Witness Morgan said that he had seen the bridge before the accident, and it did not seem to need any great repairs, and that after the accident "he saw the plank that Mrs. Carr's horse broke through, and, while it appeared all right on the top, it showed evidence of decay on the other side." And Mr. Boswell, the road commissioner, testified, in substance, that he had ridden over the bridge within a month before the accident, and examined it, and did not discover that it was out of repair or unsafe. To have instructed the jury under such circumstances that if they found that the plaintiff did not use due care, or that the accident could have been avoided by the exercise of due care, she was not entitled to recover, would have amounted to saying to the jury that there was evidence in the case from which they could find contributory negligence on the part of the plaintiff, when in fact there was no such evidence.

Where the plaintiff makes out a prima facie case of negligence on the part of the defendant, and injury resulting from such negligence, without any negligence on her part directly contributing thereto, the burden is on the defendant to show contributory negligence, and, in the absence of any evidence tending to show it, it would be error to grant instructions to the effect that well, who stated that he was one of the if the jury find that the plaintiff was guilty of contributory negligence she cannot recover. B. & O. R. R. v. State, Use of Hauer, 60 Md. 449; Tucker v. Johnson, 89 Md. 471, 43 Atl. 778, 44 Atl. 1004, 46 L. R. A. 181; Balt. & Ohio R. Co. v. Stumpf, 97 Md. 91, 54 Atl. 978; United Rys. Co. v. Biedler, 98 Md. 565, 56 Atl. 813; Consol. Gas Co. v. Getty, 96 Md. 683, 54 Atl. 660, 94 Am. St. Rep. 603.

But these prayers are defective for another reason. Because the plaintiff was "well acquainted with the bridge," in the sense that she had frequently driven over it, it would not follow that she knew it was dangerous or did not use due care in crossing it. Nor would it have been proper to instruct the jury that if they found that the accident could have been avoided by the exercise of due care plaintiff was not entitled to recover, without requiring them to further find that she did not use due care.

It follows from what we have said that because of the errors in overruling the demurrer to the declaration, and in granting plaintiff's first prayer, the judgment below must be reversed, and the case must be remanded for a new trial.

Judgment reversed, with costs, and new trial awarded.

(110 Md. 587)

KOOGLE et al. v. CLINE et al.

(Court of Appeals of Maryland. June 30, 1909.)

1. EVIDENCE (§ 450*)—PAROL EVIDENCE—Ex-PLAINING WRITTEN INSTRUMENT.

In a suit by administrators against decedent's heirs to sell land which had been conveyed to the heirs by decedent by a deed reciting a consideration and the receipt of payment thereof, to pay the consideration named in the deed which had not been paid, parol evidence was admissible that when decedent inserted in the deed the consideration and the recital of its payment, when it had in fact not been paid, he intended thereby to evidence the understanding of himself and the grantees that it was not intended to be paid, the effect of the evidence not being to contradict the terms of the deed, but to explain what would otherwise, on proof that the consideration had not been paid, be a contradiction in its terms.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2068; Dec. Dig. § 450.*]

2 WITNESSES (§ 206*)—PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT.

Evidence of an attorney, as to declarations of a client made to him while he was drawing a deed for the client as grantor in the presence of a grantee, is admissible in a suit by the grantor's administrators to obtain payment of the stated consideration from the grantees.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 764; Dec. Dig. § 206.*]

3. WITNESSES (§ 268°)—Cross-Examination.
Where a witness on direct examination testified as to a conversation between him and another person, the opposite party could on his cross-examination elicit the whole conversation.

[Ed. Note.—For other cases, see Witnesses, Cent. Pig. § 933; Dec. Dig. § 268.*]

4. WITNESSES (§ 130*)—STATEMENTS OF DECE-DENT—COMPETENCY.

In an action by administrators to compel payment of the consideration stated in a deed from decedent to his heirs, defendants could not testify to statements made by decedent in relation thereto unless called and examined by plaintiff in regard thereto under Code Pub. Gen. Laws 1904, art. 35, § 8.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 582; Dec. Dig. § 139.*]

Appeal from Circuit Court, Frederick County, in Equity; John U. Motter, Judge.

Bill by Isaiah Cline and another, administrators of Jacob Shank, against Emma A. C. Koogle and others. Decree for plaintiffs, and defendants appeal. Reversed, and bill dismissed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, THOM-AS, and HENRY, JJ.

Emory L. Coblentz and Hammond Urner, for appellants. Charles P. Levy and J. Clarence Lane, for appellees.

THOMAS. J. The questions presented by this appeal can best be understood by reference to the bill of complaint and answer in the case. The bill, which was filed by two of the administrators of Jacob Shank, deceased, alleges: That Jacob Shank, of Frederick county, died intestate on or about the 27th of July, 1906, and that Isaiah Cline and J. Clarence Lane, with Otho J. Shank, one of the defendants, were duly appointed administrators of the personal estate of the deceased. That in his lifetime the said Jacob Shank granted and conveyed by deed, dated May 4, 1905, a certified copy of which was filed with the bill, 3 pieces or parcels of land, to wit, a farm of about 1571/2 acres, a mountain lot of 68 acres, and a small strip of land, intended as an outlet to the farm, of about onefifth of an acre of land, all located in Frederick county, to five of his children, viz., Otho J. Shank, Lauretta A. S. Flook, Susan K. Haupt, Emma A. C. Koogle, and Fannie C. M. Keller "for and in consideration of the sum of \$8,000," subject to an estate for life in the That since the execution of said grantor. deed the said Lauretta A. S. Flook died intestate, leaving a husband and the following children: Emory Oscar Flook, Mamie C. Flook, Bessie Flook, John J. Flook, Martin L. Flook, Jr., and Otho F. Flook-all of whom resided in Frederick county and were adults, except Martin L. Flook, Jr., and Otho F. Flook. That Otho J. Shank being one of the grantees in said deed, and therefore "a necessary party defendant in his own right in any proceeding to enforce a vendor's lien against said lands, leave of court was obtained to make him also defendant in his capacity as administrator, so that he might not occupy the anomalous position of appearing on both sides of the docket, and thereby of suing himself." That, although the said deed

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

recites that the consideration of \$8,000 has | deed, etc., further say that they "admit that been paid, "yet, in fact and truth, the same has not been paid, but the whole sum of \$8,-000, with interest thereon from the date of the deed, remains due the estate of the deceased," which debt it is the duty of the plaintiffs to collect for the benefit of his estate. That the plaintiffs are entitled to the benefit of an equitable lien on the lands conveyed by the deed for the unpaid purchase money, to wit, the sum of \$8,000, with interest thereon from the date of the deed. That the title to the lands is still in the grantees and their heirs at law, except that the surviving grantees, together with the heirs at law of Lauretta A. S. Flook, deceased, as tenants in common, and disregarding the rights of the plaintiffs, filed a bill of complai t for a decree for the sale of said land for the purpose of partition among themselves, and obtained a decree therefor. That besides the grantees in said deed, the deceased left one other child, Manzella Cline, wife of Isaiah Cline, one of the administrators and plaintiffs in this case, and two grandchildren, viz., Alvey J. Horine and Minnie F. Brinham, wife of Robert E. L. Brinham. All the surviving grantees in the deed, with their wives and husbands, the heirs at law of the deceased grantee, and Otho J. Shank, administrator, etc., were made defendants, and the prayer of the bill was for a decree to sell the property for the purpose of paying the \$8,000 and interest and costs. The deed referred to conveyed the property to the grantees in fee, reserving a life estate for the grantor, and is, in part, as follows: "This deed, made this 4th day of May, in the year nineteen hundred and five, by me, Jacob Shank, of Frederick county, in the state of Maryland, witnesseth: That for and in consideration of the sum of eight thousand dollars (\$8,000.00) to me cash in hand paid by Otho J. Shank, Lauretta A. S. Flook, wife of Martin L. Flook, Susan F. Haupt, wife of Josiah Haupt, Emma A. Koogle, wife of Lloyd M. Koogle, and Fannie C. M. Keller, wife of Edgar B. Keller, all of Frederick county, Maryland, at and before the delivery of these presents, the receipt of which is hereby acknowledged, I, the said Jacob Shank, do hereby grant and convey unto the said Otho J. Shank, Lauretta A. S. Flook, Susan F. Haupt, Emma A. Koogle and Fannie C. M. Keller, subject to the reservation of a life estate hereinafter set forth, all the following described pieces or parcels of land, situated in Frederick county, in the state of Maryland, being," etc. The two infant defendants answered by guardian ad litem. Josiah Haupt, husband of one of the grantees, answered, neither admitting nor denying, etc. A decree pro confesso was passed against Otho J. Shank and wife and Otho J. Shank, administrator, etc., and the remaining defendants in their answer, after admitting the death of Jacob Shank, the appointment

the deed in question recites the payment of a consideration of \$8,000, as therein mentioned, but they deny that said recital of consideration represents any contractual or other liability for the payment of such sum of monney, or any part thereof, by the said grantees to the said grantor, and, while they admit that the amount so recited in said deed was not paid, yet they deny that said recited consideration was or is a debt due the said Jacob Shank or the estate of said decedent, and they aver that no contract, agreement, or understanding was ever entered into by the said grantees with the said grantor for the payment by the former to the latter of the said sum of \$8,000, or any part thereof, and they further aver that said sum of money was not at any time by any of the parties to said deed agreed, proposed, or intended to be paid or collected"; that they deny that the plaintiffs are entitled to the benefit of an equitable lien on the lands conveyed by said deed for the unpaid purchase money named therein; that by an order of said court, passed after the filing of the bill in this case, the trustees appointed in the case instituted for the sale of said property for the purpose of partition were authorized to proceed with the sale and to hold the proceeds of sale to abide the determination of this case; and that, in answer to the eleventh paragraph of the bill, they admit that, "besides the children named as grantees in the deed in question, the said Jacob Shank had one other child and the two grandchildren mentioned in said paragraph, but they deny that they or any of the plaintiffs are entitled to the enforcement of an equitable or other lien against the real estate conveyed by said deed, and they deny that any such equitable or other lien exists, or that any purchase money or interest thereon is due and owing from these respondents or any of them for or on account of said real estate."

A great deal of testimony was taken in support of the respective contentions of the plaintiffs and defendants, nearly all of which was excepted to, and a large part of which has little or no bearing on the issues involved. That part of the evidence to which, as we shall show later on, there is no serious objection clearly shows that, when the deed in question was executed and delivered, it was not intended to create any obligation whatever on the part of the grantees to the grantor, but, on the contrary, it was distinctly understood by the grantor and grantees that it was intended to evidence a gift from the father to his children therein mentioned. Emory L. Coblentz, Esq., who prepared the deed, testified, in substance: That the deceased grantor, Jacob Shank, came to see him at his office in Frederick on the 4th of May, 1905, and told him that he wanted to give the property mentioned in the deed to his five children, the grantees named therein, and of the administrators, the execution of the to convey it to them by deed, reserving a life

done. That he stated that he had already given to his daughter, Mrs. Cline, about an to her, and that he had already given or would provide for his granddaughter, and that, by giving the property mentioned in the deed to the five children named therein, he would not "quite equalize them with Mrs. Cline." That the reason he desired to make the property by a will previously executed by him, was that his brother Peter Shank's "will had been caveated, and he did not want anything of the kind to occur relative to his the property and put it upon record so the whole world could see just what he had done." That witness went into his front office to prepare the deed, and when he came to state the consideration, and "was about to insert a consideration of \$5 and other valuable considerations," he asked the deceased if there was any particular consideration he desired stated in the deed, and he said he wanted it stated as \$8,000; that he wanted to give the grantees the property, but wanted the \$8,000 stated as the consideration so as to show the amount of the gift, but that it was intended as a gift, and was not to be paid, and, to carry out that intention, the consideration was stated to be \$8,000, and the acknowledgment of its payment was written in the deed. That, after the deed was prepared and executed by the deceased, he told witness that he wanted Otho J. Shank, his only son, to have the property after his death, provided he would then pay his four sisters named in the deed each \$2,000, but that Otho was not willing to pay that much. but that he, however, wanted witness to prepare a paper for his four daughter's mentioned in the deed to sign, agreeing to sell their interests to Otho J. Shank upon his paying \$2,000 to each of them, and that he, the dewitness to take the paper out to Middletown the following Saturday afternoon, at which time he would have them call at witness' place and sign it. That he also asked witover to them. That on the following Saturday all of the grantees in the deed came to witness' home in Middletown, when, as requested by the grantor, he read the deed and paper over to them, and the daughters signed the paper which he then gave to Edgar B.

estate for himself, and asked if it could be exception of that part which occurred just after the witness had commenced to write the deed, and, when he asked the deceased equal amount in a property he had conveyed if he wanted any particular consideration named in the deed, he said \$8,000. That, when he went into his front office to prepare the deed he left the deceased and Otho J. Shank sitting in his private office, and that he is not certain that Otho J. Shank was still there when he went back to his private ofthe deed, in lieu of a similar disposition of fice to ask the deceased if he wanted any particular consideration named in the deed, but that all other statements made by the deceased, viz., that he wanted to deed the property to the five grantees as a gift to estate, and that he would make a deed for them, subject to his life estate, his reasons for doing so, that he wanted Otho J. Shank to have the property after his death, provided he paid \$2,000 to each of his sisters named in the deed, and that he wanted the witness to prepare a paper to be signed by his four sisters, were made in the presence of Otho J. Shank. The testimony of Otho J. Shank on cross-examination, when recalled by plaintiffs and examined as to a conversation had with the deceased when they were on their way to the office of Mr. Coblentz to have the deed prepared, corroborates the testimony of Mr. Coblentz to the effect that the intention of the grantor was that the consideration named in the deed was not to be paid by the grantees, and that the deed was to operate as a gift by him to the grantees of the property or consideration named therein.

The learned court below, in a very carefully prepared opinion, after stating that "the plaintiffs rely on the recital of the consideration of \$8,000 in the deed, and that it was never paid. There is no doubt it was never paid, and personally I haven't a particle of doubt it was never intended to be paid; that it was entirely foreign to old Mr. Shank's intention that any of these grantees should pay a single penny of this money, but ceased, would hold the paper, and asked the the difficulty arises when it is attempted to prove it," reluctantly reach the conclusion that under the decisions in McElderry v. Shipley, 2 Md. 25, 56 Am. Dec. 703, Thompson v. Corrie, 57 Md. 197, Christopher v. Christness to take with him the deed, and read it opher, 64 Md. 587, 3 Atl. 296, and M'Crea ▼. Purmont et al., 16 Wend. (N. Y.) 460, 30 Am. Dec. 103, the evidence we have referred to was not admissible for the purpose of showing that the understanding of the grantor and grantees in the deed was that the consideration of \$8,000 mentioned therein was Keller to be delivered to Mr. Jacob Shank. not to be paid. In other words, the conclu-That Edgar Keller then paid him the cost of sion reached by the learned court below, and preparing and recording the deed, and the the proposition of the plaintiffs is, that even witness, at the request of the grantor, had where it is conclusively shown that a father, it recorded the following Monday. That, with the avowed intention of giving cerwhen the deceased came to his office in Fred- tain property to his children, executed a deed erick to have the deed prepared, he was act to them, in which, for the purpose of show-companied by his son, Otho J. Shank, and ing the amount of the gift, he inserted a conthat all of the conversations had with and sideration with an acknowledgment of its statements made by the deceased were made payment, and that they accepted the deed in the presence of Otho J. Shank, with the as a gift without any intention of thereby incurring an obligation to him, they are bound, on demand by his administrators, and proof that it was not paid, to pay the amount so named in the deed as the consideration. If this were so, it would indeed be a reflection upon the administration of justice; and, unless we are constrained by some settled rule of law or positive decision in this state, we cannot yield our approval to such a proposition. In the case of McElderry v. Shipley the plaintiff attempted to show that a mortgage from Shipley to Lister, which professed to secure a debt of \$1,200 from the former to the latter, was by an agreement entered into at the time intended to secure a debt due from the former to the plaintiff, and it was in reference to the evidence offered for that purpose that the court said that the law was "well settled in Maryland that parol evidence is inadmissible in a case like the present to contradict, add to, or vary the terms of a written instrument." In the case of Thompson v. Corrie plaintiff alleged in her bill that the defendants had proposed to her to enter into an agreement that the plaintiff would suffer the defendants, her daughter and her husband, to reside in her house for such time as would be mutually agreeable without paying any money rent, and that in consideration therefor the plaintiff would board and lodge with them, the defendants in the meanwhile paying all the taxes and expenses on the property; that shortly afterwards the defendants requested her to sign a paper in the presence of a witness which they represented contained the agreement proposed, and which they desired to have in writing; that she signed it without reading it or having it read to her, and that some time thereafter she discovered that the paper she had signed was an absolute deed for the property to her daughter; that, "though the deed on its face sets forth a money consideration of \$1,000, the same is false and fraudulent, and that she did not in fact receive any consideration of any kind therefor." The prayers of the bill were that the deed be declared void, that the appellees be decreed to reconvey the property to her, and to account for the use and occupation. The answer of the appellees denied the fraud charged, alleging that the appellant executed the deed with full knowledge of its contents, etc., and that the only consideration for the deed was that the appellant should have a home with the appellees on the property which they were willing to furnish. The court held that the appellant had failed to establish the fraud alleged, and that it followed that there was no ground upon which to set aside the deed, and said "but the same must stand, and the rights of the parties must be determined according to its terms. In the absence of fraud or mistake, the parties are bound by the terms of the writing into which they have voluntarily entered. McElderry v. Shipley, 2 Md. 35, 56 Am. Dec. 703. The question then arises

table relief. The deed upon its face purports to have been made for the consideration of \$1,000. Nothing is better settled than that it is not competent for the parties to prove another consideration different in kind from that stated in the paper. Watkins v. Stockett's Adm'r, 6 Har. & J. 435; Wesley v. Thomas, 6 Har. & J. 24, 28; Cole v. Albers, 1 Gill, 423. It follows that the testimony for that purpose offered by the appellees and which has been excepted to by the appellant must be rejected. The authorities clearly establish the proposition that, although the recital in the deed states that the money consideration therein named has been paid, it is competent to show by parol proof that the same has not been paid. Woollen v. Hillen, 9 Gill, 185, 52 Am. Dec. 690; Bratt v. Bratt, 21 Md. 578. In this case the evidence clearly shows that no part of the consideration named in the deed has been paid to the appellant. She is therefore entitled to recover the same with interest thereon, and to a vendor's lien upon the property for the same, and the bill ought to be retained to enable her to assert this claim under the prayer for general relief." In the case of Christopher v. Christopher the court said: "It is admitted by Philip that he did not at the time of the execution of the leed for the lot on Muir street thus conveyed by his mother to him pay to the grantor the sum of \$200 therein named as the consideration; and the appellee contends that the said sum is still due and owing to her, and was never secured by mortgage or any other evidence of indebtedness. She therefore claims a vendor's lien on this lot, and has filed her bill in equity to set aside both conveyances made by her son to his wife on the ground that they were made with a covinous intent. These deeds have been annulled by a decree in the court below, and an appeal from that decree has brought the matters in controversy into this court for adjudication. The appellants contend that, although no money was paid at the time when the deed for the lot on Muir street was executed and delivered by the mother to the son, the claim of the grantor has been fully satisfied, as the consideration for the conveyance was a pre-existing debt due from the said grantor to the grantee. It is admitted by Philip Christopher that no money was at any time paid by him to the appellee for the property conveyed, but he alleges, and by his own testimony endeavors to prove, that there was an agreement between him and his mother that the deed should be given in consideration of moneys advanced and services rendered and necessaries furnished by him to her. He does not prove how much money was advanced, nor what was the value of the services rendered, nor of the necessaries furnished. This is left to conjecture; and he is contradicted in these particulars by the appellee. whose testimony is corroborated by that of whether the appellant is entitled to any equi- another witness cognizant of the facts, and

who swears that Philip was to pay \$200 in those cases. In the case of Elvsville Co. v. money for the lot on Muir street conveyed to him by his mother. The remaining testimony introduced by the appellants relates to casual conversations had with the appellee some time subsequent to the execution of the deed, in which she spoke of having given the property to her son; two of the witnesses stating that she said he had been kind to her, and that she owed him more than the lot was worth. They do not state that she admitted that she owed him any ascertained sum of money, and these vague and unsatisfactory colloquies are obviously suggestive of doubts in relation to the actual nature of the debt alluded to in statements so ambignous and obscure. Instead of a pecuniary indebtedness, she may have had reference to a debt of gratitude for filial kindness and attention. It is clear that such proof is not admissible to contradict the recital in the deed." It was under such circumstances that the court said "that, when a sum of money is named as the consideration in the recital of a deed, it is not competent to adduce evidence ending to show that the real consideration was a gift from the grantor to the grantee."

Now, it is apparent that the facts in these cases do not at all resemble the facts in the case at bar, and that the language of the court as applied to the facts in these cases has no application to the facts in this case. In McElderry's Case the attempt was made to prove a collateral agreement contradicting and adding to the terms of the mortgage. In Johnson's Case the plaintiff claimed that she did not intend to execute a deed, and that the consideration named therein was false and fraudulent, and that she had not received any consideration at all, and the defendants admitted that the consideration stated in the deed was false and had not been paid, but sought to establish as the consideration an agreement that the plaintiff should have a home with them on the property. And in Christopher's Case, where there does not appear to have been any receipt for the consideration in the deed, the defendants admitted that no money had been paid at the time the deed was executed, but alleged and attempted to prove that there was an agreement between the son and his mother that the deed should be given in consideration of moneys advanced and services rendered and necessaries furnished by him to her, which the court held he had failed to establish. In this case the deed recites that it was made in consideration of \$8,000 paid in cash by the grantees before the delivery of the deed, and the receipt of which is further acknowledged in the deed, and the precise question is whether upon proof that the \$8,000 was not paid these statements in the deed can be explained by parol evidence. This question, while it may be covered by the broad language used in the cases referred

Okisko, 1 Md. Ch. 392, the bill alleged that on the 20th of August, 1846, the complainant executed to the defendants a deed of certain property for the sum of \$25,000; that the defendants had taken possession thereof. and occupied the same ever since; that, although an acknowledgment of the receipt of the purchase money was written on the deed, it had not been paid: and that the defendants were threatening to sell the property without regard to the rights of the plaintiffs. The bill prayed for an injunction restraining the defendants from selling, and that the property might be sold to satisfy the plaintiffs' claim. The answer denies that the purchase money was still due, and in explanation stated that in the month of July, 1845, the Elysville Manufacturing Company, consisting of five Messrs. Eley, the owners of the property in dispute, being in want of means to conduct their operations, agreed with certain merchants in Baltimore that, if the latter would join with them and contribute the sum of \$25,000, the company would convey to the association thus formed the property, and, in consideration thereof, hold a like sum of \$25,000 in the capital stock of the association thus formed; that the sum proposed was raised in pursuance of the agreement; that this association was afterwards incorporated by the name of the Okisko Company; that Elysville Manufacturing Company, by Thomas Eley, its president, subscribed for 250 shares of the capital stock, amounting to the sum of \$25,000, and that his certificate for 250 shares was delivered to the complainants on the execution of said deed, and by them received as the true and only consideration therefor. The chancellor in disposing of this case said: "It is the undisputed law in this state that the receipt in a deed acknowledging the payment of the consideration money may be contradicted, that it is only prima facie proof, and is exposed to be either contradicted or explained by parol evidence, and in this respect constitutes an exception to the general rule, which protects written evidence from the influence of such testimony. Higdon v. Thomas. 1 Har. & G. 139; Wolfe v. Hauver. 1 Gill, 85. But, although the receipt in the deed acknowledging the receipt by the vendor of the consideration may be disproved by parol, and an action maintained by him for the purchase money on the production of such proof, still it is insisted that the opposite party, the vendee, is held to the proof of the consideration expressed; and that be will not be allowed to support the instrument by setting up a different consideration repugnant to that expressed. In the case of Betts v. Union Bank, 1 Har. & G. 175, 18 Am. Dec. 283, the Court of Appeals decided that, where a deed was impeached for fraud, the party to whom the fraud is imputed will not be permitted to prove any other conto, was not presented or decided in either of sideration in support of the instrument. The



consideration offered to be proved in that it, the question is: Shall he be permitted to case was marriage, and the attempt was to set up marriage as the consideration in lieu of the money consideration expressed; but this was decided to be inadmissible, the deed being impeached for fraud. The proof, if admitted, would have changed the deed from one of bargain and sale to a covenant to stand seised to the use of the grantee. In the case of Union Bank v. Betts the disproof of the consideration expressed had rendered the deed fraudulent and void as a bargain and sale, and, by admitting the parol proof offered, this void instrument would have been re-established as an instrument of a different character. In every subsequent case decided by the Court of Appeals. the case of Bank v. Betts is explained in this way; that is, as having decided that, when a deed is rendered inoperative and void by disproving the consideration expressed in it, evidence of a different consideration will not be received to set it up. Clagett & Hill v. Hall, 9 Gill & J. 91; Cole v. Albers & Runge, 1 Gill, 423. But the question presented in this case is of a different description. This deed is not impeached for fraud. as in the case of Union Bank v. Betts and Cole v. Albers & Runge. The complainants in this case maintain the validity of the deed, and seek upon the allegation that the consideration money has not been paid, to enforce its payment by the assertion of the vendor's lien. And the question is whether in a court of equity he can be permitted to assert this lien, and compel payment in this way of the consideration expressed in the deed, if it appears by the evidence that he has been satisfied for the purchase money by receiving something else as an equivalent therefor. In the case of Wolfe v. Hauver, 1 Gill, 84, which was an action of assumpsit to recover the value of lands sold and conveyed, but not paid for, objection was made to the admissibility of parol evidence to disprove the acknowledgment in the deed; but the court admitted it upon the ground that such acknowledgment was only prima facie evidence, and the plaintiff, the vendor, obtained the verdict and judgment. In that case as here the deed was not impeached for fraud, nor was the evidence of nonpayment offered to render it inoperative and void; and the Court of Appeals say: "The introduction of the evidence proposed to be offered neither changes nor affects any right transmitted in the property conveyed by the deed. It operates no change in the legal character of the instrument, nor in any manner affects injuriously any part of the deed, as a conveyance. The receipt of the purchase money is no necessary part of the deed, as it would in every respect be as valid without it as with it.' The deed then being valid, and passing the legal title, and the bargainor therein not impeaching it as fraudulent, but claiming the aid of this court to enforce his lien as vendor

do so, if upon the evidence it is shewn that he has received, not in money, but in something else of value, what at the time he considered as an equivalent for the money? Suppose in the case of Wolfe v. Hauver the defendant, the purchaser, could have shewn that he had paid, and the plaintiff had received, as an equivalent for the \$2.000 (the consideration expressed in the deed) merchandise or other property, and that such was the agreement of the parties at the time the contract for the purchase was made, can it be possible that under such circumstances the complainant could have been allowed to recover a judgment for the purchase money? If he could, where would be the defendant's redress for a wrong so monstrous and palpable? If he could not defend himself at law, because he could not in the face of the deed prove any other than the payment of the moneyed consideration expressed, he would be equally defenseless in equity, because the rules of evidence in regard to explaining or varying or contradicting written evidence are the same in both courts, and thus the court must unavoidably be the instrument in inflicting the grossest injustice. If in the case now under examination the consideration of the deed from the complainant to the defendant, instead of being, as is alleged, \$25,000 of stock in the Okisko Company, had been the conveyance by the defendant to the complainant of real estate of the same value, and each deed had been upon a money consideration expressed, is it possible that upon a bill filed by one of the grantors, claiming the enforcement of the vendor's lien, this court must have given him a decree for a sale of the property upon proof that the moneyed consideration expressed had not been paid? And that the other vendor must in like manner proceed upon his equitable lien to recover his money, which in case of any serious deterioration of the property, from any cause, might be inpossible." This case was affirmed on appeain 5 Md. 152.

In the case of Wolfe v. Hauver, 1 Gill, 84, the court said: "It is a familiar principle that receipts acknowledging the payment of money may be explained or contradicted. * * * The receipt of the purchase money is no necessary part of the deed, as it would in every respect be as valid without it as with it." In the case of Robinet v. Wilson, 8 Gill, 185, the court held that the receipt in that case was never intended by the parties to it to have the operation claimed by the defendant, and said that the unquestioned doctrine of this court is "that receipts are not regarded as written, conclusive evidence, but may be explained or contradicted by oral testimony." case of Shepherd v. Bevin et al., 9 Gill, 36, the court said: "The receipt produced in evidence bears date on the 18th of February, to recover the purchase money expressed in 1843. It professes to be a receipt signed by Joseph Shepherd from Mrs. Mary Shepherd, his guardian, for the sum of \$561.64, being in full for his distributive share of his father's, the late John Shepherd's, personal estate, witnessed before a justice of the peace, and acknowledged before him by Joseph to be his act and deed for the purpose therein mentioned, according to the act of assembly, etc., and testimony was further adduced by the appellant to prove that the money expressed in the receipt was never paid, but retained by the mother in pursuance of the agreement, as part of the contract upon which she was to execute to Joseph a conveyance of the land. To this testimony the infant defendants excepted on the ground that it was offered to vary, explain, or contradict the written instrument of the party, and was therefore illegal and inadmissible. We are of opinion that the objection is not well taken, and that the evidence is clearly admissible to explain the intention of the parties to the paper. * * * Any paper that purports to be a receipt or acknowledgment for the payment of money may be explained." In the case of Homer v. Grosholz, 38 Md. 520, the court said: "It has been settled by various decisions in this state that the recital of the payment of purchase money in a deed or of the receipt of the mortgage debt in a release of mortgage is not conclusive upon the parties, but is always open to explanation." In this state it has been repeatedly held that no matter how absolute a conveyance may be on its face, if the intention be to take a security for a debt or for money lent, the transaction will be regarded as a mortgage and will be treated as such, and that parol evidence is admissible to show that an absolute conveyance was intended as a mortgage. Artz v. Grove, 21 Md. 456; Brown v. Reilly, 72 Md. 489, 20 Atl. 239; Bank of Westminster v. Whyte, 1 Md. Ch. 536; Baugher v. Merryman, 32 Md. 185. In the case of Shugers v. Shugers, 105 Md. 336, 66 Atl. 273, the bill was filed to compel the grantors in a deed to their father to execute a new deed in the place of the one that had been lost or destroyed. The deed recited a consideration of \$2,000, which, the proof showed, had never been paid, and was not intended to be This court affirmed the decree appointing a trustee to execute a new deed for the property, and held that, as it approved that the consideration of \$2,000 mentioned in the deed was not intended to be paid, the grantors were not entitled to a vendor's lien. In the case of M'Crea v. Purmont et al., 16 Wend. (N. Y.) 460, 30 Am. Dec. 103, supra, the court after reviewing at length the decisions in England and America, including the decisions in this state, held that the clause in a deed acknowledging the receipt of a certain sum as the consideration for the conveyance was open to explanation by parol proof, and that parol evidence was admissible to show that the consideration for

the conveyance in that case, which was expressed to be a certain sum of money paid. was a specified quantity of iron, and said that according to the American cases the only effect of a consideration clause in a deed is to estop the grantor from alleging that the deed was executed without consideration, and that for every other purpose it is open to explanation and may be varied by parol proof. In a note to that case-Lawyer's Edition-where a great number of cases are cited, it is stated that: "The consideration clause in a deed may be contradicted or explained, except for the purpose of defeating the deed." In the case of Baird v. Baird, 145 N. Y. 659, 40 N. E. 222, 28 L. R. A. 375, a father deeded property to his two sons, and took a mortgage from each of them. The mother of the two mortgagors died and their father married again, and, after his death, his widow brought actions against the mortgagors to foreclose the mortgages. It appeared from the evidence consisting in part of admissions of the father that he took the mortgages because he feared his sons might lose the property through speculations or otherwise, but that no actual debt was intended to be secured. Counsel for the plaintiff insisted that such evidence was not admissible to defeat the mortgage, but the court held otherwise, and said: "There is no reason that we can perceive for giving to these instruments any greater force or effect than was contemplated by the parties when they were executed and delivered. • Nor do we perceive any good reason why the real purpose and true consideration and object of the mortgages should not be made to appear when the aid of a court of equity is invoked for their enforcement. • • The consideration of an instrument is always open to inquiry, and the party may show that the design and object of the agreement is different from what the language, if alone considered, would indicate. * Parol evidence may also be given to show that a writing purporting to be a contract or obligation was not in fact intended or delivered as such by the parties, Grierson v. Mason, 60 N. Y. 394. So a conveyance absolute in form may be shown as against the heir at law of the grantee to have been made in trust for the benefit of a partnership firm, of which the grantee was a member, and so held by him in trust for the firm. Rank v. Grote, 110 N. Y. 12, 17 N. E. In the case of Ferry v. Stephens, 66 665." N. Y. 321, Stephens agreed to sell certain property to his sister for \$1,100 and she signed a contract to pay the amount. After Stephens' death, she brought suit for specific performance of the contract. The evidence showed that at the time of the making of the contract it was understood by the parties that it was Stephens' purpose to make a gift of the property to his sister, and that to that end he indorsed on the contract a receipt in full of the purchase price, but

that no payment was ever made, and the court held that the primary intention of Stephens was to give his sister the land, and "that the receipt was intended to operate as a forgiving or satisfaction of the plaintiff's obligation under the contract, so as to leave the right of the plaintiff to a conveyance in force as if the debt had been paid." In Fassett's Case, 167 Pa. 448, 31 Atl. 686, it was held that a receipt could be shown to have been intended by a widow as a gift to her son of all arrearages of dower, and in a note to section 2433 of 4 Wigmore on Evidence the case of Velten v. Carmack, 23 Or. 282, 31 Pac. 658, 20 L. R. A. 101, is cited as holding that the consideration in a deed to a married woman could be shown to have been a gift to her by the grantor. It is hardly necessary to say that this is not a case where the deed is impeached for fraud, and the defendant attempts to set up a different consideration from that expressed in the deed, or where, as in Lawson v. Mullinix, 104 Md. 150, 64 Atl. 938, the defendant, in order to make her deed effective, endeavors to show that it was based on a valuable consideration when the deed recites a good consideration, and to thereby give it a force and effect not contemplated by the parties.

Without further prolonging this opinion and without meaning to adopt the decisions of the other courts referred to to the full extent to which they go, it would seem clear upon principle and authority that the defendants had the right to show that when their father inserted in the deed the consideration of \$8,000 paid by the grantees at and before the delivery of the deed, when, in fact, no part of it had been paid, he intended thereby to evidence the understanding of the grantor and grantees that it was not intended to be paid. The effect of such evidence is not to vary or contradict the provisions of the deed, but to explain what would otherwise, on proof that the consideration had not been paid, be a contradiction in its terms. As it was understood by the parties to the deed that the consideration was not to be paid, and receipt of it was therefore acknowledged in the deed, the grantor might have for some reason inserted in the deed as the consideration a very much larger sum than the property was worth, and, according to the contention of the appellants, upon proof that it had not been paid, the grantees would be bound to make good the amount, notwithstanding they never assumed to pay anything. There can be no good reason in law or equity for ignoring the real intention of the parties, and enforcing a contract they never made, and courts have consistently avoided doing so. To permit the plaintiffs to contradict the recitals in the deed, and then deny the grantees the right to explain

them, would impose upon the latter obligations they never intended to assume, and ought not to be sanctioned in a court of justice. We must therefore say, as was said in Shugers v. Shugers, supra, that, as the intention of the parties to the deed was that the consideration was not to be paid, the appellants are not entitled to a vendor's lien. We agree with the court below as to the ad-. missibility of so much of the testimony of Mr. Coblentz as related to statements made by the deceased in the presence of Otho J. Shank, one of the grantees in the deed and defendants in this case. 1 Greenleaf on Evidence (16th Ed.) \$ 245; 4 Wigmore on Evidence, §§ 2311, 2312; Hebbard v. Haughian. 70 N. Y. 54; Hummel v. Kistner, 182 Pa. 216, 37 Atl. 815. As Otho J. Shank, one of the defendants in the case, was called by the plaintiffs and examined as to the conversation had with his father on their way to Frederick to have the deed prepared, the defendants were entitled to cross-examine: him and show the whole conversation. Turner v. Jenkins, 1 Har. & G. 161; Smith v. Wood, 31 Md. 293; 3 Wigmore on Ev. § 2115.

It is not necessary to pass on the other exceptions to the evidence, further than to say that the defendants were not authorized to testify to statements made by the deceased under section 3 of article 35 of the Code, unless called and examined by the plaintiffs in regard thereto.

The decree in this case for the reasons we have stated must be reversed, and the bill must be dismissed.

Decree reversed and bill dismissed, the appellees to pay the costs above and below.

(110 Md. 608)

POSTAL TELEGRAPH-CABLE CO. v. STATE.

(Court of Appeals of Maryland. June 29, 1909.)

1. STATUTES (§ 40°)—INTRODUCTORY CLAUSE—DIRECTORY PROVISIONS.

DIRECTORY PROVISIONS.

Const. art. 3, § 29, providing that the style of all laws shall be "Be it enacted by the General Assembly of Maryland," is directory only, and hence Acts 1908, p. 72, c. 280, entitled "An act—telegraph companies shall show conspicutions on each and every telegram the time it was filed for transmission, and the time it was received at its destination," and proceeding, "Be it enacted by the people of the state of Maryland, represented in the General Assembly," was therefor not invalid for failure to comply therewith.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 44; Dec. Dig. § 40.*]

2. Telegraphs and Telephones (§ 29°) - STATUTORY REGULATIONS—CONSTRUCTION.

Acts 1908, p. 72, c. 280, requiring all telegraph companies transmitting messages in the state to conspicuously show on each telegram delivered the time it was filed for transmission and the time it was received, and making a violation thereof punishable by fine. is mandatory and cannot be waived by the sender so as to re-

the state.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 15; Dec. Dig. § 29.*]

3. Telegraphs and Telephones (§ 79*)

STATUTORY REGULATIONS—OFFENSES.

Acts 1908, p. 72, c. 280, requires all telegraph companies doing business within the state to conspicuously show on each telegram delivered the time it was filed for transmission and the time it was received at the office of destination, and makes a violation punishable by fine recoverable at the instance of the state. Held, that telegraph companies may not shift the expense of complying with such provision to the sender of the message, and that it is therefore no defense to a prosecution for violating such act that the sender refuses to pay for the extra words necessary therefor.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 22; Dec. Dig. § 79.*]

COMMERCE (§ 28°)—INTERSTATE COMMERCE— STATE STATUTES—TELEGRAPH REGULATIONS. Communication by telegram constitutes "commerce" within the regulation of federal authority in so far as it involves transmission of messages from one state to another, but is subject also to state regulation in so far as it concerns transmission of messages wholly intrastate.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 22; Dec. Dig. § 28.*

For other definitions, see Words and Phrases, vol. 2, pp. 1296, 1297; vol. 8, pp. 7606, 7607.]

5. Commerce (§ 59*) — Telegrams — Intra-

STATE MESSAGES—REGULATIONS—STATUTE.

Acts 1908, p. 72, c. 280, requiring telegraph companies engaged in transmitting communications by telegraph in Maryland to show on each and every message delivered the time filed for transmission and the time received at the delivery office, is applicable only to intrastate messages and is therefor not objectionable as an interference with interstate commerce, but is a proper exercise of police power.

[Ed. Note.—For other cases, se Cent. Dig. § 87; Dec. Dig. § 59.*] see Commerce.

Briscoe, J., dissenting in part.

Appeal from Criminal Court of Baltimore City; James P. Gorter, Judge.

The Postal Telegraph-Cable Company was convicted of delivering a telegram on which the time of filing at the place of origin and the time received at destination did not appear, and it appeals. Affirmed,

Argued before BOYD, C. J., and BRIS-COE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and THOMAS, JJ.

Howard Bryant, for appellant. Eugene O'Dunne and Isaac Lobe Straus, Atty. Gen., for the State.

BOYD, C. J. The appellant was convicted of violating chapter 280, p. 72, Acts 1908. There are four counts in the indictment. The first alleges that the company did deliver at the city of Baltimore a telegram dated at Annapolis, Md., to one W. H. Hellewell, without showing on the said telegram the time it was filed at Annapolis for transmission and the time it was received by the company at its office from which it was de-

lieve the telegraph company from prosecution by | livered. The second alleges that it did deliver at Baltimore a telegram dated at Annapolis, on which the time of filing at the place of origin and the time it was received at its destination did not appear under the captions "Time filed," and "Time received." The third alleges that it did fail to show on a telegram dated Annapolis, Md., delivered in Baltimore, the time it was filed at Annapolis for transmission and the time it was received at the office of the company from which it was delivered. And the fourth alleges that it failed to show on the telegram the time of filing it at the place of origin and the time it was received at its destination under the captions "Time filed" and "Time received." A demurrer to the indictment and to each count was overruled, and the company then filed two special pleas to each count. The first plea alleges that the sender of the message notified the company in writing that he would not pay, and he refused to pay, for the extra words to show upon the message the time it was filed for transmission at Annapolis; and, after said notification and refusal to pay, the sender authorized and directed in writing the company not to send with said message the time it was filed at Annapolis for transmission to Baltimore, and he waived the same in writing. The second plea alleges: (1) That the sender refused to pay for the transmission with said message the extra words, to wit, "Time said message was filed for transmission at Annapolis, Md.," which extra words exceed the 10 words in the body of said message, and the law does not require the company to send or transmit said extra words without charge; and (2) that the sender of the message notified the company in writing that he did not want or desire the "Time filed" for transmission sent with the message to Baltimore, and he waived the same in writing. The pleas to the other counts are substantially the same. A demurrer to each of the pleas was sustained, and the case was then submitted to the court on a plea of not guilty. The court found the traverser guilty and imposed a minimum fine of \$10, from which judgment this appeal was taken.

A number of defenses have been urged, and it is claimed that the law is in conflict with the Constitution of this state and with that of the United States. It is also contended that the construction placed upon the statute by the state is not justified.

1. It is urged that the act is unconstitutional and void because in conflict with the clause in the twenty-ninth section of article 3 of the Maryland Constitution, which provides that: "The style of all laws of this state shall be, 'Be it enacted by the General Assembly of Maryland.'" The act was evidently drawn by some one not familiar with the form in use in this state. The title is "An act-telegraph companies shall show

eFor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

conspicuously on each and every telegram ! delivered the time it was filed for transmission, and the time it was received at its destination." It then proceeds: "Be it enacted by the people of the state of Maryland, represented in the General Assembly." If we were passing on this provision for the first time, we might hesitate to hold that it was not mandatory, especially in view of the conclusions reached by many other courts in construing similar provisions. There is certainly much to be said in favor of a strict compliance with a clause in the Constitution which uses such plain, comprehensive language as this one does, although when we remember that every bill before it becomes a law must be sealed with the great seal of the state and be presented to the Governor, who, if he approves it, is required to sign it in the presence of the presiding officers and chief clerks of the Senate and House of Delegates, and other safeguards provided, it must be admitted that there is something to be said on both sides of the question. But the case of McPherson v. Leonard, 29 Md. 377, is conclusive of this, unless it has been overruled, as contended by the appellant. In the enacting clause of the statute then before the court the words "by the General Assembly of Maryland" were omitted; but "Being satisfied that the the court held: words 'by the General Assembly of Maryland' are not of the essence and substance of a law, but their use directory only to the Legislature, we cannot, because of their omission from the enactment, declare the law in question unconstitutional and void." Judges Bartol, Brent, Robinson, Stewart, and Miller sat in that case, and the two last named dissented. The only expression we find in our later decisions which can be said to at all weaken the effect of the deliberate judgment of a majority of the judges who sat is that used by Judge Miller in Archer v. State, 74 Md. 449, 22 Atl. 9, 28 Am. St. Rep. 261. In discussing a wholly different provision of the Constitution (article 6, § 5, which declares that the treasurer shall qualify within one month after his appointment by the Legislature) Judge Miller said: "We cannot regard the case of McPherson v. Leonard, 29 Md. 377, as a controlling authority the other way. Two of the five judges by whom that case was decided dissented, and it has not been followed in any subsequent decision." But it had not been overruled, modified, or questioned, and Judge Stewart, who was the other dissenting judge in that case, said, in a dissenting opinion in Maxwell v. State, 40 Md. 802: "It is true there was a division of the court upon the subject; but the judgment of the court stands as the established law of the state, to govern in the construction of the laws."

The expression used by Judge Miller, in a case which in no wise involved the construction of this particular clause; cannot be held

Judge Brent, in delivering the opinion in that case, referred to the fact that a number of laws had been found upon the statute books of the state from 1777 to 1864 involving imi portant rights, and the brief of the counsel for McPherson cited a number from which the words "by the General Assembly of Mary's land" had been omitted, and during the 40 years since that decison there have doubti less been others. It might therefore do great injustice to those who relied on, and had the right to rely on, a decision of this court, to hold that it had been overruled by a case which in no manner involved the clause in question, and we cannot so hold. That being so, there can be no doubt that this enacting clause must be held to be sufficient. The people of the state of Maryland are represented in the General Assembly. "The Legislature shall consist of two distinct branches-a Senate and a House of Delegates-and shall be styled the General Assembly of Maryland" (article 3, § 1, Const.), and by article 7 of the Declaration of Rights it is declared: "That the right of the people to participate in the Legislature is the best security of liberty and the foundation of all free government; for this purpose elections ought to be free and frequent, and every male citizen having the qualifications prescribed by the Constitution ought to have the right of suffrage." without further discussion of that branch of the case, our conclusion is that the law is not invalid by reason of the enacting clause.

2. This brings us to the construction of the act, which is in these words:

"Section 1. Telegraph companies engaged in the business of transmitting communications by telegraph in the state of Maryland, and charging tolls therefor, shall show conspicuously on each and every telegram delivered the time it was filed for transmission and the time it was received at the office from which it is to be delivered.

"Sec. 2. The time of filing the telegram at place of origin and the time received at destination of each and every telegram transmitted, as provided in section 1, shall appear on each and every telegram under the captions 'Time filed' and 'Time received.'

"Sec. 3. Failure to comply with the provisions of sections one (1) and two (2) of this act shall be punishable by a fine of not less than ten dollars (\$10.00) nor more than two hundred dollars (\$200.00) for each and every telegram delivered in violation of said sections one (1) and two (2)."

We are of the opinion that the act is mandatory, and its provisions cannot be waived by the sender, so as to relieve the company from a prosecution by the state. The statute does not, as is sometimes done, impose a penalty to be recovered by the injured party; but it makes the violation of its provisions a criminal offense, punishable by a fine which is recoverable by the state. The sender of the message therefore has no more authority to have overruled McPherson v. Leonard. to relieve the company from such prosecution

than he would have to prevent, by his act, any other prosecution for the violation of a statute. The time a telegram is filed for transmission and the time it was received may be of much more importance to the person to whom it is addressed than to the sender. In W. U. Tel. Co. v. Lehman, 105 Md. 442, 66 Atl. 266, for example, Lehman & Bro., to whom the telegram was addressed, were the sufferers, and, if a statute such as this had been complied with, they would have had the company's own record in their possession to show negligence. Even a cursory reading of any law book on telegrams will suggest many instances of the importance, to the addressee, of such information. There may be cases in which the public at large is interested in having such facts, particularly in criminal cases where the precise time of sending or receiving telegrams sometimes becomes important. Such a record as is required by the statute would undoubtedly have a tendency to make the operators and messenger boys more prompt in sending and delivering messages, and the notations on the telegrams delivered would, in the event of alleged negligence on the part of the companies, oftentimes furnish those interested with information which it is not always easy to obtain. The date of mailing and the time of receipt of letters must be of some practical use, as otherwise the United States government would not have continued stamping them so long, and, if a penalty was imposed on a postmaster for not so stamping letters, it could hardly be said that he would be excused by proving that the sender of the letter had waived it. It might mitigate the punishment, but would not excuse the violation of the statute. So although this statute does not disclose the special reasons which influenced the Legislature to pass it, we can readily see that such regulations may be of great importance to those having occasion to send or receive telegrams, and certainly cannot be said to be so unreasonable that the courts would be justified for that reason in refusing to enforce it.

3. It is also clear that the Legislature did not intend that such notations should be at the expense of the sender of the message. Before the statute was passed, the sender could have included in the message the hour he delivered it for transmission, and, if there was any difficulty in his furnishing the addressee with the time of its receipt, that was some cause for the statute. A record of the time of transmission and the time of receipt need not be burdensome. "349A," or "349P," would be sufficient to enable one operator to inform the other, and the latter could note the time of its receipt in a few seconds. Telegraph companies usually charge as much for one word as for ten, and as much for a telegram addressed to or sent by a person who has a very short name, as if sent to or by one who has a very long name. They doubtless

to readily find the addressee, to those so indefinite as to make the delivery difficult. A telegram showing quick dispatch is a good advertisement for the company. It is well known that the long distance telephone is frequently resorted to because of delays in transmitting and delivering telegraph messages, and, as telephone companies are in competition with telegraph companies, it is not easy to see why the latter would object to such records as these, if they will make their service more prompt and efficient, unless it be that they are not willing to give their patrons information which will disclose negligence on their part, if there be any. If such be the object, then unquestionably the public interest is involved in such a requirement as this statute makes. Much of the recent legislation by Congress affecting railroad companies has added materially to the expense of conducting their business, without additional profit to the companies; but in so far as it is reasonable and proper for the protection of the public against discrimination or other injustice, or even for the public convenience, it has often been sustained. It is said in the brief of the appellant that the right of the company to charge for what is there called "the time filed" is not involved in this appeal; but the second plea expressly relied on the fact that the sender of the message refused to pay for the extra words, and that the company was not required to transmit the extra words without charge. think that the statute clearly contemplated that the information as to the time filed shall be transmitted without additional charge to the sender of the message, and that that is not an unreasonable regulation.

4. Nor do we find any difficulty in sustaining this judgment on account of the commerce clause in the federal Constitution. In the first place, the indictment in each count relates to a telegram sent from Annapolis to Baltimore-wholly within the state. There can no longer be any question about the right of a state to make reasonable regulations, to affect messages sent and delivered in the state, although the company may also be engaged in interstate business, and we are of the opinion that this statute must be construed to have been intended to apply only to intrastate messages. It requires the company to "show conspicuously on each and every telegram delivered the time it was filed for transmission and the time it was received." The state of Maryland could not impose a penalty on a telegraph company for delivering a telegram in New York which did not so show, and it could not impose a penalty for delivering a telegram, sent from New York, which did not disclose the time it was filed for transmission and the time it was received. If one state undertook to prohibit the delivery of a telegram sent from another state, unless it had such indorsement on it, that would clearly be an interference with prefer full addresses, which will enable them | interstate commerce. The state from which



it was sent might impose different regulations from the one to which it was sent, and might prescribe a wholly different form from that required by the statute at the place of destination. It might lead to great confusion if different states passed statutes on such subjects, which would materially interfere with interstate messages.

But this statute does not undertake to require telegraph companies to show on every telegram sent from within the state the time it was filed for transmission, but to show on "each and every telegram delivered"-meaning, of course, delivered in Maryland, as a telegram delivered in New York without these requirements could not be a violation of the statute, for the simple reason that it would be beyond the jurisdiction of Maryland. Whether or not a statute, requiring telegraph companies to keep or send a record of the time each telegram is received for transmission in this state, would be valid, as affecting interstate messages, is not involved in this case because this statute does not so require; but if the statute must be construed to mean that no telegram can be delivered in this state, which was sent from another state, without subjecting the company to a criminal prosecution for the absence of such notation, then we would hold it to be contrary to the commerce clause. One illustration of the effect of such construction is sufficient. Suppose a company received for transmission a message in California, and, without stating the time it was filed, sent it to B, Company in Missouri, to be forwarded by it to Maryland. If B. Company was required to wire back to A. Company in California to find out the time it was filed for transmission before it could transmit it to Maryland, the great delay thereby caused would be a manifest interference with interstate business. It might be possible that, after the Missouri agent had wired back to California to get the information, there was no such record there of the time as would be a compliance with

The Supreme Court of the United States, in Western Union Tel. Co. v. James, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105, held that a statute of Georgia, which imposed a penalty upon a telegraph company for failure to deliver impartially, in good faith, and with due diligence, a message sent from another state to a person in Georgia, was a valid exercise of the police power of the state, and not in violation of the commerce clause of the federal Constitution. "The statute in question is of court said: a nature that is in aid of the performance of a duty of the company that would exist in the absence of any such statute, and it is in no wise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing a general duty of the company." Again it was said: "Nor is

were regarded as fatal in Western Union Tel. Co. v. Pendleton, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187. No attempt is here made to enforce the provisions of the state statute beyond the limits of the state, and no other state could, by legislative enactment, affect in any degree the duty of the company in relation to the delivery of messages within the limits of the state of Georgia. No confusion therefore could be expected in carrying out within the limits of that state the provisions of the statute."

In Hart v. State, 100 Md. 595, 60 Atl. 457, we cited many, and quoted at length from some, of the decisions of the Supreme Court relating • to the attempted regulations by states of common carriers engaged in interstate business, and we need not prolong this opinion by again doing so to such an extent. Those decisions have recognized the right of states, in the exercise of their police power, to pass laws to protect the public health, the public morals, or the public safety, and "the power exists in each state by appropriate enactments not forbidden by its own or the federal Constitution to regulate the relative rights and duties of all persons and corporations within its jurisdiction, so as to provide for the public convenience and the public good," and "the power of the state by appropriate legislation to provide for the public convenience stands upon the same ground as its power by appropriate legislation to protect the public health, the public morals, or the public safety." Lake Shore, etc., Co. v. Ohio, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702. They also concede that "legislation which is a mere aid to commerce may be enacted by a state, although at the same time it may incidentally affect commerce itself." West. Union Tel. Co. v. James, supra.

But in none of those cases, or others that we are aware of, has the Supreme Court recognized the right of a state to make such legislation as that now before us, if applicable to interstate commerce. As is said in the note to Postal Telegraph Co. v. Umstadter, 103 Va. 742, 50 S. E. 259, 2 Am. & "Communication by Eng. Ann. Cas. 513: telegraph is commerce as well as in the nature of postal service, and is interstate commerce when carried on between different states; consequently it is directly within the power of regulation conferred upon Congress and free from the control of state regulations, except such as are strictly of a police character. Leloup v. Mobile, 127 U. S. 645, 8 Sup. Ct. 1383, 32 L. Ed. 311."

court said: "The statute in question is of a nature that is in aid of the performance of a duty of the company that would exist in no wise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing a general duty of the company." Again it was said: "Nor is plied to intrastate passengers. That could the statute open to the same objections that

included both classes of telegrams; but, for | ceny, and that the declaration was therefore dethe reasons stated, we are of opinion that the statute was only intended to be applicable to those sent from and delivered to points within the state, and such is our construction of it. It follows that the judgment will be affirmed, as this was an intrastate message.

Judgment affirmed; the appellant to pay the costs above and below.

BRISCOE, J., dissents as to what is said of case of McPherson v. Leonard.

(111 Md. 41)

CANTON NAT. BANK v. AMERICAN BONDING & TRUST CO.

(Court of Appeals of Maryland. June 29, 1909.)

1. LARCENY (§ 3*)-WHAT CONSTITUTES-LU-

CEI CAUSA. "Larceny" is the wrongful and fraudulent taking or carrying away of the personal goods of another with felonious intent to convert them to the taker's own use and make them his property without consent of the owner; but the felonious intent is not necessarily an intent to gain an advantage for the taker, it being sufficient that there be an intention to deprive the owner of his property; and, even in those juris-dictions where a lucri causa is required, it is not necessary that the benefit to the defendant be of a pecuniary nature.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 6; Dec. Dig. § 3.*

For other definitions, see Words and Phrases, vol. 5, pp. 3991-4003.]

2. LARCENY (\$ 27*)—PERSONS LIABLE—PRIN-CIPAL AND ACCESSORY.

Where accused procures another to commit a larceny, accused is guilty as a principal if present, and as an accessory before the fact if ab-

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 55-57; Dec. Dig. § 27.*]

3. Insurance (§ 629*)—Fidelity Insurance

—PLEADING.

Where, in an action on a policy insuring the fidelity of a bank cashier, agreeing to indemnify the bank against pecuniary loss, resulting from dishonest conduct of the cashier amounting to embezzlement or larceny, plaintiff, instead of charging in general terms the loss of money through the fraudulent and dishonest acts of the cashier, amounting to larceny, set out the par-ticular acts by which the losses were sustained, the declaration would be demurrable unless the allegations sufficiently charged larceny.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1575; Dec. Dig. § 629.*]

4. INSURANCE (§ 629*)—FIDELITY INSURANCE
—ACTIONS ON POLICY—PLEADING.
In a suit on a fidelity policy insuring a
bank against fraudulent acts of its cashier amounting to larceny, the declaration set out several alleged breaches consisting of money wrongfully paid by the teller of the bank at the instance of the cashler; but it was not charged that the teller of the same and the teller of the same and the teller of the bank at the instance of the cashler; but it was not charged murrable.

[Ed. Note.—For other cases, see I Cent. Dig. § 629.*] Insurance.

5. INSURANCE (§ 629*)—FIDELITY INSURANCE
—SEPARATE BREACHES.
While it is not necessary in a suit on a bank cashier's fidelity bond to set out in a separate count each breach of the bond, the assignment ment of each breach must be perfect in itself and cannot be assisted by reference to other breaches.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1575; Dec. Dig. § 629.*]

6. INSUBANCE (§ 629*)—FIDELITY INSUBANCE -DECLARATION.

Where a bank cashier's fidelity bond required defendant to pay such losses as plaintiff sustained by reason of the dishonest acts of the cashier amounting to larceny, committed during the term and discovered during the term or within three months thereafter, a declaration failing to charge when the alleged fraudulent acts of the cashier were discovered was fatally defeating. defective.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1575; Dec. Dig. § 629.*]

Appeal from Superior Court of Baltimore City; Henry D. Harlan, Judge.

Action by the Canton National Bank against the American Bonding & Trust Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTH-INGTON, and THOMAS, JJ.

Wm. S. Bryan, Jr., for appellant. Edward' Duffy, for appellee.

THOMAS, J. This suit was brought by the Canton National Bank against the American Bonding & Trust Company on a surety bond to recover losses suffered by the plaintiff through its cashier, John W. H. Geiger. By its bond, executed for the term beginning on the 26th day of September, 1896, and ending on the 26th day of September, 1897, and renewed from year to year so as to be in force down to and including the 26th day of September, 1907, the defendant covenanted and agreed, subject to the provisions and conditions therein contained, at the expiration of three months next after delivery to the company of proofs satisfactory to it of a loss within the term of the bond, to "make good and reimburse to the" plaintiff "to the extent of \$10,000, and no further, such pecuniary loss, if any, as may be sustained by the employer by reason of any fraudulent or dishonest conduct of the employed in connection with the duties of said position, amounting to embezzlement or larceny, which shall have been committed during said term. and discovered during said term or within that the teller was innocent of the larceny of which the cashier was claimed to have been guilty, or that the money taken and applied by the teller to the payment of the paper was taken in the presence of the cashier, nor, as to other breaches, was it charged that either the cashier or the teller took the money of the bank. Held, that neither of the breaches alleged charged lar-

eFor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

demurrer was sustained, plaintiff declined to and the prisoner Sellers was charged with peal was taken.

the defendant undertakes to make good are if she had sold it. The purpose for which limited to those occasioned by such acts of she took it is not material." The case of the cashier as amount to embezzlement or Reg. v. Privett, 2 C. & K. 144, goes to the larceny, and the contention of the appellee full extent of holding that it is not necessain this court is that the several acts of the ry that the prisoner should have intended to cashier set out in the declaration, and not derive some benefit or gain to himself. In claimed to be embezzlement, do not amount that case the jury found that the prisoners to larceny. The first inquiry therefore is: took the oats from their master with the in-What is "larceny"?

and research, larceny is defined at large to case for the 15 judges, who held the convicbe "the wrongful and fraudulent taking and tion of larceny right. In 25 Cyc. 52, it is carrying away by any person of the mere said that: "According to the weight of aupersonal goods of another, from any place, thority, the felonious intent required for with a felonious intent to convert them to his larceny is not necessarily an intent to gain (the taker's) own use, and make them his advantage for defendant. An intention to own property, without the consent of the deprive the owner of his property is enough." owner." In 1 Wharton's Crim. Law (8th While in 18 Am. & Eng. Ency. of Law (2d Baron Parke, Coke, Hawkins, and Black- said to be the other way, but that: "It is stone are criticised, "larceny" is said to be not necessary that the benefit should be of a "the taking and carrying away of a thing pecuniary nature. • • • unlawfully and without claim or right with that he intended to exercise proprietary the intention of converting it to a use other rights to the permanent deprivation of the than that of the owner." And in 2 Bishop's real owner, as where the purpose of the personal property which the trespasser make a gift to a third person." knows to belong either generally or specially. In every larceny there must also be a takof some advantage to the trespasser—a ques- not be by the hand of the accused. "If he tion on which the decisions are not har- procure a person innocent of any felonious monious." These learned authors agree that, intent to take the goods for him, his offense even where it is held that the taking must will be the same as if he had taken the be lucri causa, it is not necessary that the goods himself." 2 Russell on Crimes, 4; 1 motive should be one of pecuniary gain; any advantage to the prisoner is sufficient. And they cite authorities to the effect that to take to give away is larceny. 1 Wharton's heimer's Crimes & Pro. § 31; Com. v. Barry, Crim. Law, § 896; 1 Russell on Crimes, 125 Mass. 390. Where the person who actu-2; 2 Bishop's New Crim. Law, §§ 840-849. While it is intimated in State v. Hodges, 55 procured him to commit the larceny is, if and in the case of Worthington v. State, 58 "consist in the wrongful taking and carrying away the chattels of another with a felonious intent to convert them to the taker's own use," in the recent case of Williams v. U. S. Fidelity Co., 105 Md. 494, 66 Atl. 496, this court said that: "Larceny, at common law, was the felonious taking of the property of of November, 1906, the cashier, who was another against his will with the intent to then a member of the firm of German & Co., convert it to the use of the taker or, as some caused to be drawn a check on the plaintiff authorities hold, the use of the taker or a in the name of said company for the sum of third person." Mr. Bishop says (volume 2. § 846) that the English courts have at last Geiger, and delivered the check to him; that overthrown the old notion of lucri causa. In thereupon his brother presented the check to the case of Reg. v. White, 9 C. & P. 344, the the paying teller of the plaintiff; that the

amend, and judgment was entered for the receiving, etc., and Erskine, J., said: "If the defendant, and from that judgment this apprisoner Eliza White took the property and handed it to the other prisoner, as a gift, it By the terms of the bond the losses which was as much a felony as it would have been tent to give them to their master's horses, In 2 Russell on Crimes (6 Am. Ed.) 1. it is and without any intent to apply them to said that: "In a late work of great learning their private use, and Earle, J., reserved the Ed.) § 862, where the definitions given by Ed.) 504, the preponderance of authority is It is sufficient New Crim. Law. § 758, "larceny" is defined taking was to convert the thing taken to the as "the taking and removing by trespass, of use of a third person or merely in order to

to another, with the felonious intent to de- ing and a trespass; that is to say, there must prive the owner of his owership therein; be a taking from the possession of the owner and, perhaps it should be added, for the sake against his will. The taking, however, need Bishop's New Orim. Law, \$\$ 631, 651; 1 Wharton's Crim. Law, \$ 207; 25 Cyc. 58; 18 Am. & Eng. Ency. Law (2d Ed.) 468; Hockally takes the property is also guilty, he who Md. 127, that the taking must be lucri causa, present, guilty as principal, and, if absent, is guilty as an accessory before the fact. Hock-Md. 403, 42 Am. Rep. 338, larceny is said to heimer's Crimes & Pro. §§ 26-38; 25 Cyc. 58; 1 Bishop's New Crim. Law, § 651; 1 Wharton's Crim. Law, § 207.

> In the light of these principles, we will now consider the several acts or breaches charged in the declaration:

The first charge is: That on the 22d day \$2,500, in favor of his brother, George H. prisoner White was charged with larceny, paying teller, acting under the orders and directions of John W. H. Geiger, who was then and there the cashier of the plaintiff, paid the said George H. Geiger, in currency, \$2.500, the amount of said check: that at the time the check was cashed "there were no sufficient funds to the credit of German & Co. to satisfy and pay said check"; that the check was not charged against their account, but by the direction of the cashier was "held in the cash of the paying teller of the plaintiff"; that said sum of \$2,500, received by George H Geiger, was, by the direction of the cashier, applied to purposes foreign to the interests of the plaintiff; and that, when the cashier ordered the paying teller of the plaintiff to turn over the \$2.500 to George H. Geiger, he acted with the felonious intention of causing the said sum of \$2,-500 to be wrongfully taken and carried away from the possession of the plaintiff and of causing the plaintiff to be deprived of the

(2) The second charge is: That on the 5th of October, 1906, there was deposited with the plaintiff by the United Surety Company the sum of \$4,500; the understanding between the plaintiff (acting solely through the cashier and without the knowledge of the other officers of the plaintiff) and the United Surety Company being that said deposit of \$4,500 should be subject to the check of German & Co. only when said check was countersigned by Charles B. Brown, on behalf of the surety company. That German & Co. assented to the arrangement, and a separate account, representing this deposit, was opened with the bank by German & Co., designated as "German & Co. No. 2." That on the 7th of December, 1906, a check for \$4,500 was drawn through the procurement and direction of the cashier by German & Co. against this account, but was not countersigned by Charles B. Brown. check for \$4,500 was, by the direction of the cashier, charged to the account of German & Co. No. 2, and was then substituted in the cash of the paying teller of the plaintiff for the check of \$2,500, cashed for George H. Geiger, and a memorandum of \$2,000 credited to German & Co. And that the memorandum was then taken from the cash of the paying teller by the cashier.

(3) The third charge is: That on November 12, 1906, there stood to the credit of German & Co. in their account with the plaintiff \$241.29; that on that day a check drawn on that account for \$500 was paid out of the plaintiff's funds by the direction of the cashier; that from that time until and including the 24th of November, 1906, the account of German & Co. was continuously overdrawn, although divers and sundry deposits during that period were made by the said German & Co.; that, notwithstanding the fact that the account of German & Co. was continuously overdrawn during the abovementioned period, divers and sundry checks,

the aggregate to \$10,733.63, were paid out of the funds of the plaintiff by the direction and order of the cashier; that on the 24th of November, 1906, the account of German & Co. was balanced by crediting \$800 deposited that day, and the said memorandum of \$2,-000; and that, when the cashier ordered the paying teller to make payment of each of the above-mentioned checks of German & Co., the payments of which were not warranted by cash standing to their credit, he, the said cashier, acted with the felonious intent of causing the sums of money called for by said checks to be wrongfully taken and carried away from the possession of the plaintiff, and of causing the plaintiff to be deprived of said sums of money.

(4) The fourth charge is: That on August 3, 1906, there stood to the credit of the Maryland Plumbing & Tinning Company, in which the cashier had a large pecuniary interest, the sum of \$22.33; that on that day a check was drawn on said account by said company for the sum of \$290.08, and another check for \$27.54; that both of said checks were paid out of the plaintiff's funds by the order and directions of the cashier: that from that time until and including the 4th day of January, 1907, the account of said company was continuously overdrawn, although divers and sundry deposits were made during that period by said company; that, notwithstanding the account of the company was continuously overdrawn during the above-mentioned period, divers and sundry checks, including the above-mentioned checks, amounting in the aggregate to \$22,937.29, were paid out of the funds of the plaintiff by the direction and order of the cashier: that on the 4th of January, 1907, the amount of the overdraft of the account of said company was \$778.71, which is still due the plaintiff; and that, when the cashier ordered the paying teller to make payment of each of the abovementioned checks of said company, the payment of which was not warranted by the cash standing to the credit of said company, he, said cashler, acted with the felonious intent of causing the sums of money called for by said checks to be wrongfully taken and carried away from the possession of the plaintiff, and of causing the plaintiff to be deprived of the same.

(5) The fifth charge is: That from the 15th of December, 1905, to the 26th of November, 1906, divers and sundry checks of the Maryland Plumbing & Tinning Company, in addition to the checks above mentioned, and divers and sundry promissory notes of said company, amounting in the aggregate to \$7,-307.02, were paid by the paying teller of the plaintiff by the order and direction of the cashier and (also by his direction and order) held in the cash of the paying teller until December 5, 1906, at which time the cashier deposited in said cash his own check for \$3,323.50, and three checks of a certain including the check of \$500, amounting in John Schlee, one for \$1,148.10, one for \$1,-

000, and one for \$1,880.14, and withdrew from said cash the checks and notes of said company; that said checks of John Schlee were obtained by the cashier for the purpose of paying certain promissory notes of said Schlee which fell due to the plaintiff; that, instead of using the checks for such purpose, the cashier fraudulently used the same for the purpose above stated; and that, when the cashier ordered the paying teller to make payment of the above-mentioned checks and notes of said company, the payments of which were not warranted by the cash standing to the credit of the company, he acted with the felonious intention of causing the sums of money called for by said notes and checks to be wrongfully taken and carried away from the possession of the plaintiff, and of causing the plaintiff to be deprived of the same.

(6) The sixth charge is: That on the 31st of December, 1906, there appeared on the books of the plaintiff a balance to the credit of German & Co. of \$103.49; that on January 2, 1907, one check for \$50, and three checks, each for \$300, were drawn against their account; that on January 4, 1907, a check for \$1,025 was drawn against said account; that on January 8, 1907, a check for \$105 and another check for \$400 were drawn against said account, and on January 9th a check for \$400 was drawn against said account, making in all checks for \$2,940.75, each one of which was paid by the paying teller of the plaintiff by the order and direction of the cashier, and in the aggregate the payment of said checks made an overdraft of \$2,837.26; that, when the cashier ordered the paying teller of the plaintiff to pay each of last-mentioned checks, the payment of which was not warranted by the cash standing to the credit of German & Co., he (the cashier) acted with the felonious intention of causing the sums of money called for by said checks to be wrongfully taken and carried away from the possession of the plaintiff, and of causing the plaintiff to be deprived of the same.

(7) And the seventh and last charge is: That, as appears from the statement filed with the declaration as a part thereof, marked plaintiff's "Exhibit No. 4," George H. Geiger was, by the order and direction of the cashier, permitted to have divers and sundry checks paid by the paying teller of the plaintiff which caused the account of the said George H. Geiger to be overdrawn to the amount of \$115.84, which sum is still due and unpald; and that when the cashier ordered the paying teller to make payment of the checks to his brother, not warranted by the cash standing to the credit of his brother, he (the cashier) acted with the felonious intention of causing the sums of money called for by said checks to be wrongfully taken and carried away from the possession of the plaintiff, and of causing the plaintiff to be deprived of said sums of money.

The declaration further charges that the cashier, in ordering the payment of the above-mentioned checks and notes, acted without the assent or authority of the board of directors of the plaintiff "and without warrant or authority from any by-laws or regulations of the plaintiff," and that the plaintiff "has done all things required to be done by it by said bond."

Now the plaintiff, instead of charging in more general terms the loss of the money through the fraudulent and dishonest acts of the cashier amounting to larceny, as was done in the case of Am. Bonding & Trust Co. v. Milwaukee Co., 91 Md. 733, 48 Atl. 72, has elected to set out the particular acts by which it sustained the losses it seeks to recover, and which, it claims, amount to larceny, and, unless these allegations sufficiently charge the larceny, the declaration is bad. In the first, third, fourth, fifth, sixth, and seventh breaches it is alleged that the cashier, without any authority to do so, and with the intention of feloniously taking and carrying away from the possession of the plaintiff the several sums of money for which the checks and notes were drawn, caused the teller of the plaintiff to pay said checks and notes when there was not sufficient money to the credit of the drawers of the checks to justify their payment. If these sums of money were paid out of the funds of the plaintiff under such circumstances, and the teller was innocent of any felonious intent, or if he participated in the felonious intent, and the money was taken and paid in the presence, actual or constructive, of the cashier, then the cashier, under the authorities we have cited, was guilty of larceny; but if the teller was guilty, and the several sums of money charged to have been taken and paid by him were not taken and paid in the presence of the cashier, the cashier was only guilty as an accessory before the fact. While at common law, and in this state, the penalty is the same, "the offenses of principal and accessory before the fact" in larceny are distinct, and there cannot be a "conviction of one charge upon an allegation of the other, and an acquittal upon one charge is no bar to a trial upon the other." Hockheimer's Crimes & Crim. Proc. §§ 37, 38; 1 Wharton's Crim. Law, § 238; 1 Bishop's New Crim. Law, \$ 663; Code Pub. Gen. Laws 1904, art. 27, § 261.

In the first, fifth, sixth, and seventh breaches charged in the declaration the pleader does not say that the money paid on the checks therein mentioned was paid out of the funds of the plaintiff, and, while it may be inferred from other facts charged, it is not distinctly alleged. In the third, fourth, fifth, sixth, and seventh breaches it is not alleged that the teller of the bank was innocent of the larceny of which the cashier is charged to have been guilty, or that the money taken and applied by the teller to the pay-

ment of the checks and notes was taken in the presence of the cashier. It does not therefore appear from the charges made in these breaches that the cashier was guilty of the larceny of the money taken and applied by the teller to the payment of the checks and notes referred to. In the second breach · there is no charge that either the cashier or the teller took the money of the bank. As the facts set out in the declaration are not sufficient to show that the losses suffered by the plaintiff were sustained by reason of such fraudulent and dishonest conduct of the cashier as amounted to larceny or embezzlement, they are not sufficient to entitle the plaintiff to recover under the terms of the bond sued on.

While it does not appear to be necessary to set out in a separate count each breach of a bond of the kind sued on in this case (Evans' Harris, vol. 2, 188, cited in 1 Poe's P. & P. p. 798; Bullen & Leake, Precedents & Plea. [3d Ed.] 114-118; 3 Ency. Plea. & Prac. 659, 660; 3 Ency. of Forms, 730, 731; People v. Brush, 6 Wend. [N. Y.] 454), it is said in 3 Ency. Plea. & Prac. 661 that: "The assignment of each breach of a bond must be perfect in itself, and cannot be made by a reference to other breaches. The breach must show with certainty and precision that the plaintiff has a cause of action." But there is another reason why the demurrer to the declaration was properly sustained. By the express terms of the bond, the undertaking of the defendant was to pay such losses as the plaintiff sustained by reason of the fraudulent and dishonest conduct of the cashier, amounting to larceny, etc., "which shall have been committed during said term, and discovered during said term or within three months after the expiration thereof," and it is nowhere alleged in the declaration when the alleged fraudulent acts of the cashier were discovered. Fidelity & Casualty Co. v. Consolidated Nat. Bank, 71 Fed. 116, 17 C. C. A. 641; Am. Surety Co. v. Pauly, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977.

As all the breaches set out in the declaration are bad, it is not necessary to decide the further question discussed by counsel in the case, viz., whether when some of the breaches are bad, and the others are good, a demurrer to the whole declaration can be sustained. It is said, however, in note 2 to 8 Ency. of Plea. & Prac. p. 659, where a number of cases are cited, that "the several assignments of breach are analagous to several counts in a declaration," and that a general demurrer to the whole declaration will not be sustained if one of the several breaches assigned is sufficient.

For the reasons assigned, we must affirm the judgment below; but we shall remand the case under section 22, of article 5 of the Code (rule 8, respecting appeals), to the end

that, by proper amendment, the case may be tried upon its merits.

Judgment affirmed, and case remanded.

(111 Md. 69)

GREEN v. T. A. SHOEMAKER & CO.

(Court of Appeals of Maryland. June 28, 1909.) 1. LANDLORD AND TENANT (§ 18*)-NATURE OF

TENANCY.

Evidence held to show that a person was not a mere lodger in a house with the legal possession remaining in a landlady, but was a tenant, entitled to exclusive possession and control of rooms occupied.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 18.*]

2. Nuisance (§ 3°)—Blasting of Rocks.
Blasting of rocks with explosives in the vicinity of another's dwelling house is a nuisance; and the person doing the act or causing it to be done is liable for all resulting injuries.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 15; Dec. Dig. § 3.*]

Parties (§ 1*)—Person Entitled to Sur-Rule at Common Law.

The general rule at common law is that ev ery action must be brought in the name of the person whose legal right has been invaded.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 1; Dec. Dig. § 1.*]

4. NUISANCE (§ 44*)—PRIVATE NUISANCE—PERSONS ENTITLED TO SUE.

A tenant in possession of rooms in a house near where blasting was done could sue as for a private nuisance for injuries sustained by her therefrom.

[Ed. Note.—For other cases, see Nui Cent. Dig. §§ 107-100; Dec. Dig. § 44.*]

5. Explosives (§ 12*)—Injury from Blast-ing — Question for Jury — Proximate CAUSE.

In an action for physical injuries alleged to resulted from fright from blasting near plaintiff's residence, where plaintiff was 30 years old, in sound health, and free from any nervous disorder or tendency before the blasting began, which shattered the roof, walls, and windows of the house by night and day, and caused her constant fright and she afterwards was afflicted with nervous prostration, in the absence of evidence of any other cause therefor, the question whether the fright was the proximate cause of the nervous condition was for the jury.

[Ed. Note.—For other cases, see Explosives, Dec. Dig. § 12.*]

6. DAMAGES (§ 52*)-GROUNDS-PHYSICAL IN-

JURY RESULTING FROM FRIGHT.

If fright was a reasonable and natural consequence of blasting operations near a person's dwelling, and the person was actually put in fright thereby, and injury to her health was a reasonable and natural consequence of the fright, and was actually and proximately occa-sioned thereby, she could recover for the injury. Note.--For other cases.

see Damages, [Ed. Cent. Dig. § 100; Dec. Dig. § 52.*]

Appeal from Circuit Court, Baltimore County; Frank I. Duncan, Judge.

Action by Rebecca A. Green against T. A. Shoemaker & Co. Judgment for defendant, and plaintiff appeals. Reversed, and new trial awarded.

Argued before BOYD, C. J., and PEARCE. BRISCOE, SCHMUCKER, BURKE, THOM-AS, and WORTHINGTON, JJ.

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 2507 to date, & Reporter Indexes

Edward M. Hammond and Z. Howard as her abode, and was frequently compelled, Isaac, for appellant. Wm. H. Harlan and John L. G. Lee, for appellee.

PEARCE, J. This is an action by the appellant, a married woman, to recover damages for alleged injuries to her property and person, caused by the blasting of rocks by the defendants in the vicinity of her dwelling. She lived at Alberton, in Howard county, about 200 yards from the line of the Baltimore & Ohio Railroad, and the defendants were contractors, who were engaged in extensive work upon the line of said railroad during the year 1906, which required the blasting of large quantities of rock by ex-The declaration contained Your counts, and the first and second are substantially the same. They allege that at the time of the grievance complained of the plaintiff, as tenant, was in possession of three certain rooms in a house belonging to Mrs. Annie McIlvaney, in which said three rooms the plaintiff resided, and to the exclusive possession of which she was entitled; that the defendants from about April 14, 1906, to December, 1906, were engaged in blasting large quantities of rock near her said residence, and by means thereof caused large rocks and stones to be cast on the house in which she resided, and the lot of land appurtenant thereto, destroying doors, windows, sashes, and glass therein, breaking the roof and porches, and cracking the walls and ceilings of said house, and particularly of the three rooms occupied by the plaintiff, breaking the glass and china of the plaintiff and otherwise injuring her property, and wrongfully depriving her thus of the quiet and peaceable possession of said rooms as her dwelling. These two counts further alleged that, in consequence of said blasting, the plaintiff was struck and wounded by falling plaster and débris, "and was caused immediately by said blasting to be violently shaken and jarred, whereby she was greatly injured physically * * * and her health has been greatly damaged and shattered, and her nervous system disordered, and she has suffered great physical pain in consequence, and has sustained severe and permanent physical injuries." The third and fourth counts are substantially the same. These counts, after alleging the plaintiff's title to, and occupation of, said three rooms, and the blasting operations of the defendants, with the resulting damage to said dwelling and rooms, as set forth in the first and second counts, further alleged that "Immediately, and in consequence thereof, all persons on or about said premises, and those living in said rooms, including the plaintiff, were kept in continual fear and jeopardy of their lives, rendering a proper attention by the plaintiff to her duties full of fear and danger, and, as a further consequence, the plaintiff was wrongfully deprived of the quiet and peaceable possession of said rooms this nervousness, and he came every day

by day and by night, to seek shelter in the cellar, and that as a further consequence the said dwelling and the said plaintiff's rooms therein were subjected to incessant and violent vibrations. * * * and the plaintiff and all other persons in said rooms were subjected to frequent and violent physical jars, and that plaintiff's health has been thereby greatly damaged and shattered, and her nervous system disordered, and she has by reason suffered great physical pain, and has sustained severe and permanent physical injuries."

The defendants filed the general issue The plaintiff testified that previous to 1901 she rented and occupied the same rooms as tenant of Mrs. McIlvaney, paying as rent \$3 a month; that in 1901 Mrs. Mc-Ilvaney's husband died, and she then went to work in a mill nearby: that plaintiff then agreed with Mrs. McIlvaney to take care of her children and do her housework while she was at the mill, and that her rent for the same rooms at the same rate should be paid for by said services instead of in money as theretofore; that there was no community of interest or occupation of said house between Mrs. McIlvaney and the plaintiff: that she had exclusive possession and control of her three rooms, and Mrs. Mc-Ilvaney of the residue of said dwelling; that Mrs. McIlvaney furnished the meals, prepared the same, and they were eaten in her part of the house, and the plaintiff's arrangement for her family was the same; and that all their household arrangements were separate and distinct. She testified that the first blast was on April 14, 1906; that it knocked nearly half the plastering from the wall of the room she was in, and part of the ceiling. None of it then fell on her, though some fell on Mrs. McIlvaney's child. It seemed to lift the house up, and then let it fall. It broke every glass in the window except one. It threw the table upside down. It broke two dozen jars belonging to the plaintiff in the cellar of the house. On April 24th a stone burst through the roof and ceiling and came down through plaintiff's bed, mattress, and spring, and broke the slats and rollers. It weighed 22 pounds. That blast tore the window sash out, broke some in two, and threw them across the room. They did not sleep in that bed for six weeks after that. This blasting kept up till the fall of 1906. They often had to leave their meals and run to the cellar, and were' in terror all night of being killed. She had to sit up in a chair at night the best part of six weeks while they were blasting across the river. She said: "My nerves were completely broken down through fright, and I was not able to do my work. Before that time, I was in ordinary health, and never was nervous. Since then I have had no health at all. Dr. Miller attended me for

that every week or so until fall." Dr. Miller testified that he was her family physician before and after this blasting; that after April 14th plaintiff developed nervous prostration which he attributed to the shock of the blasting. George Green, plaintiff's husband, testified that he worked for defendants at that time; that there was constant blasting going on, and that in consequence his wife had become a nervous wreck; that she was 30 years of age, and before this blasting had always attended to all her household duties, but since then has been unable to do so. On cross-examination he said: "As far as the renting of the house was concerned, I did not think the house belonged to me. I did not have any jurisdiction over it. I bought the set of furniture to which the bed belonged 16 years ago. My two sisters lived with me and I collected \$8 a month rent from them." It is quite plain, as the whole rent paid Mrs. McIlvaney was \$3 a month, that the \$8 per month paid George Green by his sisters, and which he called rent, must have been for their board which was supplied by him. Mrs. Harris, the former Mrs. McIlvaney, who had since married, testified that she was a sister-in-law of Mrs. Green, and that the agreement in regard to the rent of her rooms was that "she was to take care of my children and do the work while I worked in the mill." She was then asked what Mrs. Green was to get for that, and she replied: "The use of the rooms she rented." Mrs. Davis, Walter Oldfield, and Hamilton Oldfield testified to the terrific blasting and the damage of the property. Upon the close of the plaintiff's testimony, the defendants moved to strike out all the evidence of the plaintiff's witnesses "bearing on the nervous condition and nervous shock to the plaintiff, and any physical injury resulting from such nervous shock, such testimony having been admitted subject to exception, because there is no evidence of any physical impact or corporal injury to the plaintiff." This motion was granted, and the first exception was taken to that ruling.

The defendants then prayed an instruction "that, under the pleadings and evidence in the case, there is no evidence legally sufficient to entitle the plaintiff to recover, and their verdict must be for the defendants"; and the second exception was taken to the granting of that instruction. The defendants having filed only the general issue plea to all the counts of the amended declaration, there is no question arising as to the form of the pleadings, and there are only two questions which it is necessary to consider: (1) Can the plaintiff upon the evideuce which was admitted recover damages for the interference with her quiet possession and enjoyment of the rooms occupied and rented by her? (2) Does a cause of ac-damage were shown than the breaking of

during the latter part of April, and after tion lie for physical injury resulting from that every week or so until fall." Dr. Mil-fright and nervousness caused by the wrong-ler testified that he was her family physi-ful acts of the defendants?

The evidence is undisputed that the rent for these rooms was always paid by the plaintiff, and not by her husband, and that the agreement of renting was made by Mrs. McIlvaney with the plaintiff alone. We are of opinion that under the evidence the plaintiff was not a mere lodger, the landlady retaining the legal possession of the whole house, but that she was a tenant entitled to the exclusive possession and control of the rooms she occupied. Blasting of rocks by the use of gunpowder or other explosives in the vicinity of another's dwelling house is a nuisance, and the person doing the act, or causing it to be done, is liable for all injuries that result therefrom. Wood on Law of Nuisances, 153; 29 Cyc. 1167; Hay v. Cohoes, 2 N. Y. 159, 51 Am. Dec. 279; 2 Greenleaf on Evidence, § 254. Each count in this declaration charges acts which constitute a public or common nuisance, and also discloses special injuries sustained by the plaintiff recoverable in a private action. Among these special injuries were that "all persons living in said rooms, including the plaintiff, were kept in continual fear and jeopardy of their lives, rendering a proper attention by the plaintiff to her duties full of fear and danger." This is the same allegation made in the narr. in Scott v. Bay, 3 Md. 431, which was a case of blasting, and in which the court said damages for such injuries were recoverable in case. In Webb's Pollock on Torts, the author says: "The conception of private nuisance was formerly limited to injuries done to a man's freehold by a neighbor's acts, of which stopping or narrowing rights of way and flooding land by the diversion of water courses appear to have been the chief species. In the modern authorities it includes all injuries to an owner or occupier in the enjoyment of the property of which he is in possession without regard to the quality of the tenure." The same author, on page 494. "The kind of nuisance which is says: most commonly spoken of by the technical name is the continuous doing of something which interferes with another's health or comfort in the occupation of his property, such as carrying on a noisy or offensive trade." The general rule of the common law is that every action must be brought in the name of the party whose legal right has been invaded or infringed. 15th Enc. Pl. & Pr. 484. For the immediate wrong and damage the person injured is the only one who can maintain the action. Id. 578. "The person who sustains an injury is the person to bring an action for the injury against the wrongdoer." Dicey on Parties, 347. We think this action was properly brought by the plaintiff. Even if no other

the two dozen jars which were her personal | property, she would be entitled to at least nominal damages which would carry costs. In Hazard Powder Co. v. Volger, 58 Fed. 152, 7 C. C. A. 130, a husband, Schultze Volger, sued the Hazard Powder Company, alleging that it maintained a powder magazine in violation of a city ordinance, and that its explosion wrecked his house and injured his wife. His house was erected on the land of another under a license. He gave up his position to nurse his wife, and it was held that peaceable possession was evidence of his right to maintain the action without regard to title. It was also held that he could recover for the loss of his wife's services, and the value of his own services as a nurse; that is, what would have been the reasonable cost for a hired nurse. The wife also brought a separate suit to recover for her own personal injuries, and did recover. It does not appear from the report of the case what was the character of her injuries, and these cases are only cited to show that separate recoveries were there allowed. It follows from what we have said that it was error to grant the defendant's prayer, which absolutely withdrew the case from the jury.

This brings us to the important question involved in the granting of the motion to strike out all the testimony bearing on the nervous shock to the plaintiff and physical injury resulting therefrom. There is a wide divergence of judicial opinion as to whether a cause of action will lie for actual physical injuries resulting from fright and nervous shock caused by the wrongful acts of another, and it may be considered as settled that mere fright, without any physical injury resulting therefrom, cannot form the basis of a cause of action. This is so, because mere fright is easily simulated, and because there is no practical standard for measuring the suffering occasioned thereby, or of testing the truth of the claims of the person as to the results of the fright. But when it is shown that a material physical injury has resulted from fright caused by a wrongful act, and especially, as in this case, from a constant repetition of wrongful acts, in their nature calculated to cause constant alarm and terror, it is difficult, if not im possible, to perceive any sound reason for denying a right of action in law for such physical injury. The grounds upon which those courts have proceeded which deny such right are twofold: "(1) That physical injury produced by mere fright caused by a wrongful act is not the proximate result of the act; and (2) that, upon the ground of expediency, the right should be denied because of the danger of opening the door to fictitious litigation, and the impossibility of estimating damages." Huston v. Freemansburg, 3 L. R. A. (N. S.) 50, Editor's note.

has laid down in clear language the true doctrine upon this question in Balt. City Passenger Railway Co. v. Kemp, 61 Md. 80. In that case the court, speaking through Judge Alvey, said: "It is not simply because the relation of cause and effect may be somewhat involved in obscurity, and therefore difficult to trace, that the principle obtains that only the natural and proximate results of a wrongful act are to be regarded. It is only where there may be a more direct and immediate sufficient cause of the effect complained of that the more remote cause will not be charged with the effect. If a given effect can be directly traced to a particular cause as the natural and proximate effect, why should not such effect be regarded by the law, even though such cause may not always, and under all conditions of things, produce like results? It is the common observation of all that the effects of personal physical injuries depend much upon the peculiar conditions and tendencies of the person injured, and what may produce but slight and comparatively uninjurious consequences in one case may produce consequences of the most serious and distressing character in another. * * * Hence the general rule is in actions of tort like the present that the wrongdoer is liable for all the direct injury resulting from his wrongful act, and that, too, although the extent or special nature of the resulting injury could not, with certainty, have been foreseen or contemplated as the probable result of the act done." In the case now before us the evidence does not suggest any other cause of the effect complained of. It is a matter of common knowledge or observation that loud explosions, even if unattended by any immediate special dangers. are very trying to the nerves of those subjected to them. This is especially so when such explosions are constantly repeated, as in blasting, and are accompanied by the hurling about of rocks and stones displaced by the blast, to the danger of property and It is equally a matter of common knowledge that as a general rule the nerves of women are more sensitive to injury than those of men, are more easily disturbed, and that, when so disturbed, the injurious consequences are more serious and lasting, Here is a young woman, 30 years of age, in sound health and free from any nervous disorder or tendency. She is subjected to a long continued series of terrific blastings near her dwelling, shattering the roof, walls, and windows by day and by night, and, in the language of the declaration, "putting her in continual fear and jeopardy of her life." In the absence of any evidence of any other cause, why, then, may not her nervous prostration be traced by the jury under the principles stated by Judge Alvey to the one cause shown to exist, viz., the As to the first of these grounds, this court alarm and terror under which she was

forced to live? In the case just cited there was a motion for a reargument based as the court stated upon authorities that were not brought to the attention of the court upon the former hearing, but the motion was overruled; the court saying: "Whether the direct causal connection exists is a question in all cases for the jury upon the facts in proof." In Sloane v. Southern Cal. R. R., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193, a case similar to the present, in that there was no physical impact, the court said: "The real question presented by the objections and exception of the appellant is whether the subsequent nervous disturbance of the plaintiff was a suffering of the body or of the mind. • • • The nerves and nerve centers of the body are a part of the physical system, and are not only susceptible of lesion from external causes, but are also liable to be weakened and destroyed from causes primarily acting upon the mind. If these nerves or the entire nervous system are thus affected, there is a physical injury thereby produced; and, if the primal cause of this injury is tortious, it is immaterial whether it is direct as by a blow or indirect through some action upon the mind." If, in the case before us, the plaintiff had received an actual blow, however slight, either from a rock hurled by the blast, from the falling of a wall or ceiling, or even by a fall of herself, caused by the alarm of the concussions, no one would question her right to maintain this action, nor the right of the jury to consider the nervous prostration from which she is suffering in ascertaining the damages to be awarded. If, therefore, the jury had believed from the evidence which was stricken out that the nervous prostration of the plaintiff was the natural and proximate consequence of the alarm and terror to which she was subjected by the constant blasting, it would properly have formed an element for their consideration in reaching their verdict. For these reasons we do not think the question of proximate cause in this case justified the striking out of the testimony bearing upon the nervous shock and the resulting physical injury, nor in the withdrawal of the case from the jury.

We now come to the question of expediency. It appears from an examination of the cases in which the right of recovery has been denied where there has been no physical impact that this doctrine has been the controlling one with the court. This is especially apparent in the Pennsylvania and Massachusetts decisions. In Huston v. Freemansburg, 212, Pa. 548, 61 Atl. 1022, 8 L. R. A. (N. S.) 49, the court dealt only with that question, and said: "If we opened the door to this new invention, the result would be great danger, if not disaster, to the cause of practical justice." In Homans v. Boston Elevated R. W. Co., 180 Mass, 456, 62 N. E. 737,

Justice Holmes said, referring to the rule established in that court: "As has been explained repeatedly, it is an arbitrary exception, based upon a motion of what is practicable, that prevents a recovery for visible illness resulting from nervous shock alone. * * We must recognize the logic in favor of the plaintiff when a remedy is denied because the only immediate wrong is a shock to the nerves." At the trial below the defendant by various requests tried to press the principle so far as to require the plaintiff to prove that the nervous shock was the immediate consequence of a slight blow received by being thrown forward against a seat, whereas the judge allowed her to recover for the nervous shock ending in paralysis, if it resulted from a jar to her nervous system which accompanied the slight blow to her person. In other words, the court held that it was not necessary to show that the shock was the consequence of the blow; and Judge Holmes said: "We are of opinion the judge was correct, and that further refining would be wrong." This case well illustrates the difficulty felt by the court in denying a recovery upon the ground of expediency without withholding from the plaintiff a legal right. The argument from mere expediency cannot commend itself to a court of justice resulting in the denial of a logical legal right and remedy in all cases because in some a fictitious injury may be urged as a real one. The apparent strength of the theory of expediency lies in the fact that nervous disturbances and injuries are sometimes more imaginary than real, and are sometimes feigned, but this reasoning loses sight of the equally obvious fact that a nervous injury arising from actual physical impact is as likely to be imagined as one resulting from fright without physical impact, and that the former is as capable of simulation as the latter. It must be conceded that the numerical weight of authority supports the general rule that there can be no recovery for nervous affections unaccompanied by contemporaneous physical injury, but the sounder view in our opinion is that there are exceptions to this rule, and that where the wrongful act complained of is the proximate cause of the injury within the principles announced in Kemp's Case, supra, and where the injury ought in the light of all the circumstances to have been contemplated as a natural and probable consequence thereof, the case falls within the exception and should be left to the jury. In England in Victorian Railway Commissioners v. Coultas, L. R. 18 App. Cases, 222, the court held that damages arising from mere terror unaccompanied at the time by any physical injury could not be considered as a consequence of the wrongful act there complained of, although the court refused to decide that in no case could recovery be had without proof of actual impact. In Bell v. 57 L. R. A. 291, 91 Am. St. Rep. 824, Chief Great Northern R. R. Co., 26 L. R. Irish,

mentioned, saying that where no intervening independent cause of the injury was suggested, and where the jury could find that the bodily injury complained of was a natural consequence of the fright, the chain of reasoning for recovery was complete. cases are reviewed in 1 Beven on Negligence (2d Ed.) pp. 76-83, and the doctrine of the former is criticised with much force and discrimination. In Watkins v. Kaolin Manufacturing Co., 131 N. C. 536, 42 S. E. 983, 60 L. R. A. 617, the action was brought to recover damages for injury to the nerves resulting from blasting near the plaintiff's dwelling, though there was no external physical impact. It was held that an allegation that plaintiff became so nervous and frightened from the negligent and reckless blasting by the defendant that she could not sleep at night, and was greatly disturbed in body and mind, stated a good cause of action for physical injury; and it was held that an action will lie for physical injury or disease resulting from fright or nervous shocks caused by negligent acts. In Denver R. R. v. Roller, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77, the jury was instructed as follows: "If great fright was a reasonable and natural consequence of the circumstances in which the collision aforesaid, with the ensuing wreckage, explosion, and conflagration, placed the plaintiff, and if she was actually put, in fright by those circumstances, and injury to her health was a reasonable and natural consequence of such fright, and was actually and proximately occasioned thereby, then said injury is one for which damages are recoverable." The reasoning upon which that conclusion was reached is in our opinion sound, and it is in accord with the views expressed in Sedgwick on Damages (8th Ed.) § 861; Addison on Torts, 5; 8 Sutherland on Damages, 714, 715. The same view was held in Tuttle v Atlantic City Railway Co., 66 N. J. Law, 327, 49 Atl. 450, 54 L. R. A. 582, 88 Am. St. Rep. 491, in Watson v. Dilts, 116 Iowa, 249, 89 N. W. 1068, 57 L. R. A. 559, 93 Am. St. Rep. 239, in Mack v. South Bound R. R., 52 S. C. 323, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913, in Purcell v. St. Paul City R. W. Co., 48 Minn.

428, the court refused to follow the case just | Col. & Santa Fé R. W. Co. v. Hayter, 93 Tex. 239, 54 S. W. 944, 47 L. R. A. 325, 77 Am. St. Rep. 856, and in Consolidated Traction Co. v. Lambertson, 59 N. J. Law, 297, 36 Atl. 100. It may be observed here that there is a class of cases in which courts which generally sustain the contrary rule seem not to require contemporaneous physical injury in order to sustain a recovery for fright and its consequences. In Spade v. Lynn R. R., 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. Rep. 393, where a recovery was denied, the court said: "We do not include cases of acts done with gross carelessness or recklessness showing utter indifference to such consequences when they must have been in the actor's mind." In Nelson v. Crawford, 122 Mich. 466, 81 N. W. 335, 80 Am. St. Rep. 577, it is intimated that the rule does not reach those cases where there is an intention to cause mental distress, and in Wilkinson v. Downton (1897) 2 Q. B. 57, it was expressly so held where a practical joke resulted in fright producing a miscarriage. In the case before us the evidence is that the defendants were notified of the injury to the house, and they made some repairs, but that the blasting continued thereafter and during all the summer with the same results. This would seem to come fairly within the description of gross recklessness as to consequences, and thus to bring the case within that exception.

> In view of all the circumstances of this case, we cannot apply to it the rigid rule applied in some courts, requiring actual contemporaneous physical impact producing physical injury, and we are of opinion that the case should have gone to the jury upon the principles announced in Denver R. R. v. Rolier, supra. It will be for the court in future cases of this character, as in all other cases where the questions of proximate cause and legally sufficient evidence arise, to permit no recovery except upon the application of the principles just mentioned, while denying none upon the ground of mere expediency, where these principles logically require the submission of the case to the jury.

Judgment reversed, with costs to the appellant above and below, and new trial 134, 50 N. W. 1034, 16 L. R. A. 203, in Gulf, awarded.

(111 Md. 104)

ABRAHAMS V. KING.

(Court of Appeals of Maryland. June 30, 1909.)

1. Specific Performance (§ 64*)—Conracts Enforceable—Sale of Land—Requisites

IN GENERAL.
Where a contract to convey land is in writing, is certain, fair in all its parts, on adequate consideration, and capable of being performed, it is as much a matter of course for equity to decree specific performance as for a court of law to give damages for its breach.

[Ed. Note.—For other cases, see Specific Performance. Cent. Dig. §§ 191-195, 198; Dec. Dig. § 64.*]

2. Vendor and Purchaser (§ 75*)—Time for PERFORMANCE.

Where a contract for the sale of land fixes no time for conveyance and payment, the law implies that payment and conveyance are to be made in a reasonable time.

[Ed. Note.-For other cases, see Vendor and Purchaser, Cent. Dig. § 118; Dec. Dig. § 75.*]

3. Specific Performance (§§ 8, 121*)—De-FENSES—FRAUD.

While specific performance is not a matter of right, but lies in the discretion of the court, yet where it is resisted on the ground of fraud in obtaining the contract, such fraud is not to be lightly assumed, but must be established as in other cases by satisfactory proof.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 17, 18; Dec. Dig. §§ 8, 121.*]

4. Fraud (§ 50*)—Burden of Proof.

Where fraud is charged in obtaining a contract fair upon its face, the burden of proving the fraud is upon the party charging it

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 46, 47; Dec. Dig. § 50.*]

5. Specific Performance (§ 121*)—Misrep-resentations—Fraud—Sufficiency of Ev-IDENCE.

In an action by vendee for specific per-formance of a contract for the sale of land, evi-dence held insufficient to show fraud on the part of plaintiff in omitting certain provisions from the contract.

[Ed. Note.—For other cases, see Specific Performace, Dec. Dig. § 121.*]

6. Specific Performance (§ 121*)—Evidence

—SUFFICIENCY.

In an action by a vendee to enforce specific performance of a land contract, evidence held to show that tender of performance was made by plaintiff in reasonable time.

[Fd. Note.—For other cases, see Specific Performance, Cent. Dig. § 395; Dec. Dig. § 121.*]

Appeal from Circuit Court, Baltimore County, in Equity; Frank I. Duncan, Judge. Action by Charles K. Abrahams against Rebecca L. King. From a decree for defendant, plaintiff appeals. Reversed and remanded.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, JJ.

Hyland P. Stewart, for appellant. Wm. E. Hoffman, for appellee.

PEARCE, J. This appeal is taken from a decree of the circuit court of Baltimore county refusing a decree for the specific performance of a written agreement for the sale of certain | terview the agreement herein transcribed was

lots of land. This agreement is as follows: "Rebecca L. King, Contract of Sale to Charles K. Abrahams. Baltimore, March 25, 07. Received of Charles K. Abrahams the sum of one hundred dollars on a/c of the purchase of all that portion of property lying north of Elderslie avenue running back to an alley, and lying between Pimlico avenue and Green Spring avenue in Baltimore Co., Md., to include property as it now stands, with house, store and trees (excepting one lot known as lot No. 95, situate on the S. W. corner of Green Spring avenue and Elderslie avenue) and further described and known as lots Nos. 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 96, & 97-13 lots, for the sum of eleven thousand seven hundred dollars. Rebecca L. King." At the foot of this paper was the following memorandum: "Received for record April 11, 1907, at 2 p. m. Same day recorded in Liber W. P. C. No. 311, folio 539, one of the Land Records of Baltimore County, and examined. Per William P. Cole, Clerk."

It appears from the evidence that Mrs. King is the owner of a large amount of real estate in Baltimore county, including the lots in question; that a considerable part of this property has been laid out into lots and plotted, a copy of said plot, showing the location and dimensions of the lots in question, and the streets, avenues, and alleys bounding on the same, being offered in evidence and admitted; and that Mrs. King caused a number of signboards to be put up on this property, notifying the public that it was for sale. and directing inquirers to apply to Mrs. King, or Mr. Wm. E. Hoffman, her attorney, giving the address of each. In February, 1907, the plaintiff, Mr. Abrahams, wrote Mrs. King. asking if she desired to sell lot 96, adjoining lot 95, then owned by him. She replied by letter February 21, 1907, that she did not care to name "the lowest cash price," unless he decided to take the lot, and that as soon as she could dispose of sufficient lots on the north side of Elderslie avenue to justify her in building a house elsewhere for her gardener, the farm house occupied by him would be removed. She also said she was going South the next day to be absent two weeks, and that he could see her on her return, adding: "My phone is Maryland 461 Garrison. You can ring me up to make sure I would be at home when you call." On March 18, 1907, she wrote and mailed to plaintiff a postal card, informing him of her return home, and that he could see her in regard to the lot at any time he could call, or he could see Mr. Hoffman at the Fidelity Building. A few days thereafter he did call upon her at her residence in reference to the lot No. 96. but there was then no reference to the purchase of other lots. A few days later he again called at her residence, and at that in-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

entered into and executed by her. The plaintiff's testimony is that Mrs. King furnished the paper upon which, and the pen and ink with which, the agreement was written, and that she exhibited to him a plat from which the description of the lots was taken. He also says that he thinks he read her the paper, and that she also read it over to herself. Concurrently with the execution of this paper the plaintiff gave Mrs. King a check on the Citizens' National Bank for \$100, the amount mentioned in the agreement as then received, and this check states on its face that it is on account of purchase price for lots 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 96, and 97 Elderslie.

Mrs. King testified that, when the agreement was made, plaintiff asked her if she wanted a mortgage or cash sale, and she said she was selling for cash; that he asked her if she had a check in the house, and she first said no, but then said she believed she had, and "she went up and brought down a check on the Old Fidelity, which he wrote on and gave her." This check was put in evidence by plaintiff, and it shows that the words "Fidelity and Deposit Company" were crossed out, and the words "Citizens' Nat. Bank of Baltimore" were written above them, and the check was filled in for \$100, to the order of Mrs. King, and was signed by the plaintiff, and delivered to Mrs. King, and the uncontradicted evidence is that the plaintiff has ever since had the money in that bank to meet it. The next morning, about 9:30 o'clock, plaintiff sent his clerk, Miss Parsons, with another certified check for \$100 to be substituted for the first check, and formal duplicate contracts of sale to be signed by Mrs. King, one to be retained by her, and one to be returned to him, but she refused to accept or sign any papers until she saw her lawyer, and these papers were returned by Miss Parsons to Mr. Abrahams. Later in the same day Mrs. King and Abrahams met at Mr. Hoffman's office, and Abrahams produced the duplicate contracts, and requested Mrs. King to sign them. Abrahams testified that she left the matter with Mr. Hoffman, and he told her not to sign it unless it contained a stipulation to use her sewerage plant, and that if she signed it without that provision, he would not put the matter through for her, and that she thereupon refused to sign it. Mr. Hoffman testified substantially to this effect, stating that he knew Mrs. King was building an expensive sewer. from which she expected to get \$150 for each lot she sold, and that this agreement contained no provision to that effect, and he charged Abrahams with endeavoring to take advantage of Mrs. King by negotiating with her, instead of him as her attorney. Abrahams denied any knowledge of any such condition of sale, or any mention of such condition. Mrs. King testified that she told

increased by the sewage system she had built. with which they could be connected when built on," but neither in her sworn answer, nor in her testimony, does she pretend to say that there was any mention of a charge therefor as a condition of the sale. She had sold lots on the south side of Elderslie avenue for a less price than that agreed upon with Abrahams, and she says she argued with him that, in view of the building of her sewage plant, and the improvements on the south side of the avenue, the lots on the north side were worth more than those on the south side. Another objection made by Mr. Hoffman was that the contract contained no provision for retaining the gardener's house for his use until Mrs. King could provide another, but as Abrahams acknowledged that Mrs. King mentioned that, after the agreement was signed, and he agreed to allow a reasonable time for that purpose, the only substantial question is as to a stipulation in the contract requiring Abrahams to connect with her sewer, and to pay for each connection \$150, and a further yearly charge of \$10. If Abrahams fraudulently omitted that stipulation from the contract, he is not entitled to the relief he now seeks. If Mrs. King, relying upon herself, chose to enter into the contract in this case, without inserting such a provision into the contract, or without plainly stating to Abrahams that such a stipulation was a part of the agreement and must be inserted in the deed, so as to fix upon him such a charge of bad faith as would justify the court in refusing specific performance, and leaving him to an action at law for damages, then she must abide the consequences of her agreement, unless there is some defect in the contract as it stands, which will warrant refusal of the decree sought. There is nothing in the contract itself which prevents such decree. It is in writing, is certain, fair in all its parts, for an adequate consideration, and capable of being performed. Taken in connection with the plat furnished by Mrs. King, the property can be accurately described in a conveyance, and in such case "it is as much a matter of course for a court of equity to decree specific performance as it is for a court of law to give damages for its breach." Popplein v. Foley, 61 Md. 385; O'Keefe v. Irvington, 87 Md. 200, 39 Atl. 428.

fused to sign it. Mr. Hoffman testified substantially to this effect, stating that he knew Mrs. King was building an expensive sewer. from which she expected to get \$150 for each lot she sold, and that this agreement contained no provision to that effect, and he charged Abrahams with endeavoring to take advantage of Mrs. King by negotiating with her, instead of him as her attorney. Abrahams denied any knowledge of any such condition. Mrs. King testified that she told Abrahams that "the value of these lots was that the contract fixes no time for the conveyance and payment, and it was held in Lawson v. Mullinix, 104 Md. 156, 64 Atl. 938, that the law implies that payment and conveyance is to be made in a reasonable time. A careful examination of the testimony has in obtaining this contract, and it must be remembered that, while specific performance is not a matter of right, and is in the discretion of the court, yet where it is resisted

on the ground of fraud in obtaining the contract, such fraud is not to be lightly assumed, but must be established as in other cases by satisfactory proof. Mrs. King's own testimony, if nothing else in the case were considered, fails to establish the charge of fraud. Mr. Abrahams says he read her the agreement before she signed it. She says she never read it, or heard it read, and she supposed it was a mere memorandum of the numbers of the lots, though she nowhere says that Abrahams misrepresented its character or contents. She says she did not receive the check as a check, and never looked at it or read it at all, and supposed it was a receipt, though she does not attempt to explain how it could be a receipt, and admits that when she brought him the check to fill and sign, she asked him if he had the money to meet it in the "Old Fidelity." When she returned this check on March 29th, after refusing to carry out the transaction, she did not then, nor at any time until her answer was filed, allege any of the matters she now alleges charging fraud. She simply refused to perform the contract, apparently, from the record, because her counsel thought she had been unfairly dealt with, and he refused to represent her in the matter. She testifies that she used the fact that she had established a sewerage system, and the opportunity to connect with it as the lots were built on, as an argument with Abrahams to prove the increased value of the lots. But this is inconsistent with the present claim that she thereby intended him to understand, and that he did understand, that the contract obliged him to connect with her sewer, and to pay, in addition to the contract price, a bonus of \$150 for each of the 13 lots, \$1,950, and a yearly tax of \$10 per lot besides. existence of the sewerage plant, coupled with such an obligation, would decrease, instead of increasing, the value of the lots, by depriving the owner of the adoption of such system of sewerage as might prove to his advantage. Unless Abrahams understood when the contract was signed that he was bound to use this sewer on the terms stated, and he fraudulently omitted that provision from the contract, Mrs. King cannot be permitted to avoid it. She had previously sold to a Mr. Walzl a number of lots, just across Elderslie avenue under certain conditions embodied in his deed, among which was one permitting, out not requiring, him to connect with her sewer upon certain terms to be agreed upon. Abrahams knew these conditions were intended to apply to all the lots, and all those conditions were inserted in the deed which she refused to execute. We do not think it necessary to review the testimony in further detail. It is clear that Mrs. King is an intelligent business woman, with considerable business experience. She invited personal communication in reference to the sale of these lots, generally by the signs displayed on the property, and specially in Mr. Abrahams' case

by letter and postal card, and as to that transaction took the matter into her own hands. Our conclusion upon the whole case is that Mrs. King was desirous of selling these lots, and when she dealt with Abrahams was willing to take the chances of his coming to terms with her for the use of the sewer when he should be ready to build upon the lots, but that after conference with her counsel she changed her mind, and desired to recede from the contract.

What was said by Judge Boyd in Smith v. Humphreys, 104 Md. 290, 65 Atl. 59, seems particularly applicable here. "Any person who comes into a court of equity admitting that he can read, and showing that he has average intelligence, but asking the aid of the court because he did not read a paper involved in the controversy, and was thereby imposed on, should be required to establish a very clear case before receiving the assistance of the court in getting rid of such document. It is getting to be too common to have parties ask courts to do what they could have done themselves, if they had exercised ordinary prudence, or, to state it in another way, to ask courts to undo what they have done by reason of their own negligence or carelessness." The burden of proof, where fraud is charged in obtaining a contract fair upon its face, is upon the party charging such fraud, and therefore what was said above is properly applicable in this case, although Mrs. King is not complainant in the case. She alleges fraud, and asks the court to ald her on that account in getting rid of a contract, valid unless fraudulently obtained. It was also contended that plaintiff was guilty of laches in asserting his right to sue, but this contention cannot be sustained. From March 25th to June 15th he was persistent, both in person and by letter, in demanding performance of the contract. That he employed Mr. Stewart to take up the matter, and negotiations between Mr. Stewart and Mr. Hoffman were continued until October 31, 1907, when Mrs. King abandoned the controversy, and consented to execute the deed without any stipulation requiring the use of her sewer or relating to the gardener's house, and naming the next day at noon for closing the transaction. Mr. Stewart immediately protested against the short notice given, less than 24 hours, the naming of an hour when a previous engagement would prevent his presence as Abrahams' attorney, and urged without avail the doubt of his being able to communicate with Abrahams in time. He was not able, after exhausting every effort, to reach Abrahams, and at noon next day Mrs. King refused to wait a moment and declared the whole matter off. This conduct is not suggestive of sincerity, but rather of a purpose to prevent Abrahams' tender of the purchase money, by affixing impossible conditions as to time. The tender was made, however, a few days later, on the 11th of November at Mr. Hoffman's office, but was refused. Under the circumstances of this case the tender was in reasonable time. No tender was required previous to October 31st, because Mrs. King had expressly declared she would not accept the money or execute the deed. In the view which we have taken of the case it is unnecessary to consider the exceptions to the testimony. Abrahams promptly consented, during the taking of the testimony, to correct the error of including the alley on the north of these lots in the deed, and it must be eliminated in any deed hereafter presented here for execution.

For the reasons given the decree must be reversed.

Decree reversed, and cause remanded that a decree may be passed in conformity with this opinion; costs above and below to be paid by the appellee.

(111 Md. 119)

BALTIMORE & O. R. CO. v. STRUBE. (Court of Appeals of Maryland. June 30, 1909.)

1. WITNESSES (§ 345*) - CREDIBILITY - EVI-DENCE.

Where, on an issue whether defendant's special policeman had made an unjustifiable assault on plaintiff, such policeman testified concerning the character of the assault, the court properly permitted him to be assed on cross-examination how many times he had been convicted of assault in Baltimore city or county, and whether he had not been convicted of the assault in question, as bearing on his credibility.

[Ed. Note—Enr. other cases assa Witnesses

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1126-1128; Dec. Dig. § 345.*]

2. MASTER AND SERVANT (§ 332*)—ASSAULT BY SERVANT—SPECIAL OFFICERS—SCOPE OF AUTHORITY.

Where C., who committed the assault for which plaintiff sued, testified that he was in defendant's employ at the time, that his duty was to look after defendant's property, with power to arrest trespassers, and arrested plaintiff for trespass on the property in the course of which he committed the assault in question, whether he acted within the scope of his employment or was then acting solely under his commission as an officer of the state was for

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1275; Dec. Dig. § 332.*]

8. ARREST (§ 68*)—WHAT CONSTITUTES.

An arrest is the seizing of a person and detaining him in the custody of the law; the officer being authorized to use such force as is necessary to accomplish the purpose.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. § 167; Dec. Dig. § 68.*

For other definitions, see Words and Phrases, vol. 1, pp. 501-503.]

4. RAILBOADS (§ 281*)—ARREST OF TRESPAS-SERS—EXCESSIVE FORCE—SPECIAL OFFICER

-MASTER'S LIABILITY.
Where C.; a special officer commissioned Where C.; a special officer commissioned by the Governor as authorized by Code Pub. Gen. Laws 1904, art. 23, \$ 403, was employed by defendant railroad company to look after its property and arrest trespassers, and at the time he arrested plaintiff for trespassing on the rail-road company's property he committed the as-sault sued for as a part of the same transaction, defendant was not relieved from lishility for defendant was not relieved from liability for

such assault because of C.'s official capacity, provided he was acting within the scope of his authority at the time be arrested plaintiff.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 902, 906-908; Dec. Dig. § 281.*]

5. RAILEOADS (§ 282*)—ARREST OF TRESPAS-BERS—USE OF EXCESSIVE FORCE—PUNITIVE DAMAGES.

Where plaintiff in the course of his arrest by a special officer of defendant railroad com-pany was severely beaten by him without justi-fication, plaintiff was entitled to recover punitive damages.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 916; Dec. Dig. § 282.*]

6. RAILROADS (§ 281*)—ABREST OF TRESPASSERS—EXCESSIVE FORCE—SPECIAL OFFICER.
In an action for excessive force used by -ARREST OF TRESPAS-

In an action for excessive force used by a special officer in the employ of defendant railroad company in arresting plaintiff for trespassing on the company's property, a request to charge that if such officer, while acting within the scope of his authority, arrested plaintiff while walking on defendant's tracks, and in doing so, and while plaintiff was under arrest, used unnecessary force and inflicted unnecessary indignities on plaintiff, he was then entitled to recover. was proper. titled to recover, was proper.

[Ed. Note.—For other cases, see Railroads. Cent. Dig. \$\$ 906-908; Dec. Dig. \$ 281.*]

7. MASTER AND SERVANT (§ 332*)—ASSAULT BY SERVANT—PUNITIVE DAMAGES—INSTRUC-TIONS.

In an action against a master for alleged excessive force used in arresting plaintiff, a prayer that if the jury believed from the evidence that plaintiff was injured by defendant's servant, and that the assault and battery was wanton, unprovoked, and excessive in its nature, then the jury could award punitive damages was objectionable in form.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1277; Dec. Dig. § 332.*]

Serial Se stituted one and the same transaction, occur-ring on defendant's premises within a short space of time, requests to charge attempting to separate the assault from the arrest were properly refused.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 921; Dec. Dig. § 282.*]

9. RAILROADS (\$ 282*)—ARREST OF TRESPAS-SERS—ASSAULT BY SERVANT—INSTRUCTIONS.

SERS—ASSAULT BY SERVANT—INSTRUCTIONS. In an action against a railroad company for excessive force used by its special officer in arresting plaintiff, a request to charge that if the officer was solely engaged in the performance of his duties as a police officer, and not as defendant's servant, or the assault occurred as the result of a personal argument or altercation between plaintiff and the officer, plaintiff could not recover, was properly refused as eliminating the question whether the altercation resulting in the assault arose out of the performance of the officer's duty as defendant's servance of the officer's duty as defendant's servance. ance of the officer's duty as defendant's serv-

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 921; Dec. Dig. § 282.*]

10. RAILBOADS (§ 282*)—ARREST OF TRESPAS-SERS—EXCESSIVE FORCE—PUNITIVE DAMAGES—MITIGATION.

Where plaintiff sued for excessive force used by defendant railroad company's special officer in the course of his employment in arresting plaintiff for trespassing on defendant's right of way, the fact that plaintiff brought

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes .

about his arrest by an altercation with the officer, and provoked the assault by resisting arrest, was effective merely in mitigation of punitive damages, and not in exoneration.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 916; Dec. Dig. § 282.*]

Appeal from Baltimore Court of Common Pleas; Thos. Ireland Elliott, Judge.

Action by George J. Strube against the Baltimore & Ohio Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed, and new trial granted.

Plaintiff's second prayer, which was granted, was as follows: "Plaintiff prays the court to instruct the jury that if they find from the evidence that the plaintiff was walking on the tracks of the defendant, a body corporate, on or about March 1, 1908, as testified to, and if they further find that William J. McCarron was in the employ of the said defendant as detective or special officer, that while the said McCarron was acting within the scope of his authority he arrested plaintiff, and in doing so, while plaintiff was under arrest, used an excessive and unnecessary amount of force and inflicted unnecessary indignities upon plaintiff, then the verdict of the jury must be for the plaintiff, even though the defendant's agent was justified in arresting plaintiff."

The plaintiff's third prayer, which was granted, recited: "The plaintiff prays the court to instruct the jury that if they believe from the evidence in the case that the plaintiff was injured by the agent and servant of the defendant, as alleged by the plaintiff, and that the assault and battery was wanton, unprovoked, and excessive in its nature, then they can inflict the vindictive and punitive damages upon the defendant."

Defendant's fifth prayer was: "The court instructs the jury that if they find from the evidence that McCarron, before any blow was struck, arrested plaintiff in the manner testified to, and if they further find that after the plaintiff was arrested, and while being taken to the station house, McCarron was only acting as a police officer of the state of Maryland, and not as an employé of the defendant, then their verdict must be for defendant, even though they find that McCarron did assault the plaintiff in the manner testified to."

Defendant's sixth prayer was: "The court instructs the jury that if they find that the assault occurred either while McCarron was solely engaged in the performance of his duties as a police officer, and not as an employé of defendant, if they so find, or that the assault occurred as the result of a personal argument or altercation between the plaintiff and the said McCarron, if they so find, then plaintiff is not entitled to recover, and the verdict must be for defendant."

Defendant's ninth prayer was: "The court | was employed by the Baltimore & Ohio Rail-instructs the jury that, if they find from the road as special officer; that he was assigned

evidence that the arrest was actually completed before any blow was struck, then the plaintiff is not entitled to recovery, and the verdict must be for defendant, even though they find that McCarron did in the manner testified to strike the plaintiff."

Argued before BOYD, C. J., and PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and THOMAS, JJ.

Carville D. Benson and Duncan K. Brent, for appellant. William H. Lawrence and David Ash, for appellee.

WORTHINGTON, J. The gravamen of the action in this case is the alleged use of excessive force and violence upon the appellee by William J. McCarron, a special officer of the appellant, in connection with the appellee's arrest for trespassing upon the appellant's property and right of way. The judgment below was for \$1,000 damages in favor of the plaintiff, and the defendant has appealed.

The substantial facts of the case as testifled to by the witnesses for the plaintiff are as follows: On March 1, 1908, plaintiff, with four companions, was returning along the tracks of the Baltimore & Ohio Railroad Company from a visit to a gypsy camp in Baltimore county. When plaintiff and his companions had crossed the Viaduct bridge which separates Baltimore county from Baltimore city, Mr. McCarron walked up behind the plaintiff, grabbed him back of the neck, and said: "You are under arrest. Didn't I tell you to stay off this railroad?" To which the plaintiff replied: "Yes; I suppose you did, but that has been six months or so ago. and it kind of left my memory." Plaintiff then desired to be taken to the Southwestern Police Station in Baltimore city, but McCarron said he should go to Mt. Winans Police Station in Baltimore county. McCarron then. still holding the plaintiff by the collar with one hand, and without plaintiff making any resistance, struck plaintiff several blows about the face with the other. Then dragged him across the track, knocked him down, and beat him while he was down. That as a result of the assault plaintiff was rendered unconscious, two of his front teeth were knocked out, his lips were cut and swollen to twice their normal size, his mouth was bleeding, his right ear was swollen, his hearing impaired, and his neck also was swollen and painful. After the assault plaintiff went with McCarron to the Mt. Winans Police Station, where the charge was preferred against him of trespassing on the property of the appellant, to which charge he pleaded guilty, and was fined \$2.20, which was paid, and plaintiff thereupon released.

The plaintiff also called McCarron as a witness, who testified that in March, 1908, he was employed by the Baltimore & Ohio Railroad as special officer; that he was assigned

eFor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to duty on the Baltimore Division; that his duties were to look after the company's property and also the care of records and car seals, to see that all the merchandise cars had their seals on arrival, and also that he had power to arrest people as trespassers; that on March 1, 1908, he arrested Strube, and charged him with trespassing on the property of the Baltimore & Ohio Railroad. On cross-examination McCarron stated that his power to arrest came from his commission as special officer. The commission was then offered in evidence, but does not appear in the record.

The testimony of the defendant's witnesses in so far as it conflicts with that introduced on behalf of the plaintiff was substantially as follows: That after Strube and his companions had passed over the Viaduct bridge, and had gone about 15 feet within the limits of Baltimore city, McCarron came behind and, calling to Strube, asked him if he had not warned him to stay off the railroad property, and further said: "If you come back here, I am going to take you to the station house." To which Strube replied: "You can lock me up now if you are able." Whereupon McCarrron took hold of Strube by the collar to arrest him. Strube made several passes at the officer in the effort to hit him, and then the officer, still holding to Strube with his right hand, struck him with his left hand. Strube "fell and kept his hands over his face like he was holding on to the crossties." That it was not true that McCarron struck the plaintiff more than once, or that the plaintiff became unconscious, or that plaintiff did nothing to resist arrest, or that McCarron cursed the plaintiff, or that he struck the plaintiff while he was down. On cross-examination by the plaintiff's attorneys McCarron testified as follows: "Q. When he said, 'You can't take me in now, if you wanted to,' that insulted you? A. Yes, sir. Q. You took him then? A. Yes, sir. Q. If he had not said that, you wouldn't have taken him in at all? A. No, sir. If he had gone on; no, sir. Q. You did it just to spite him? A. No, no. Q. Did you say anything to the other boys? A. He told me I might arrest him if I was able, and then I arrested him. Q. You arrested him to show you were able? A. It looks that way."

We have given the substance of the testimony on both sides, at some length, so that the questions of law presented by the prayers may be clearly understood.

During the progress of the trial the following questions were asked of McCarron on cross-examination, and allowed to be answered against the defendant's objection: "Q. How often have you been convicted of assault in Baltimore city or Baltimore county? A. I was arrested once when I was 16 years old at a dance in Cowen's Hall up here, and the men got fighting and I was arrested. Q. You were arrested and convicted at the

upon Strube, were you not? A. Yes, sir." Separate exceptions were taken to the rulings of the trial court as to both of these questions; but as they both involve, in part, the same principle of law, they will be considered together. The ground upon which this evidence is sought to be justified is that it "goes to the credibility of the witness." More properly speaking, it may be said to affect the weight of the witness' testimony in this case. Indeed, the first question seems to have been framed with a view to eliciting information concerning the witness' general disposition for fighting. But in either aspect we think the question was admissible under the circumstances. The issue was whether McCarron had made an unjustifiable assault upon the plaintiff. The plaintiff's testimony tended to prove that the assault was not justified. McCarron's tended to prove that it was. If the answer to the first question had shown that McCarron had been convicted of a number of assaults, it would have reflected upon the weight of his testimony as to the justification for the assault in this case. The answer, however, was of such a negative character as to be of little value either for or against the plaintiff, and, even if error, it would have been harmless

The second question objected to is admissible for the same reason as the first. The answer affects the weight of McCarron's testimony as to the character of the assault, and therefore in a sense his credibility as a witness. The case of Mattingly v. Montgomery, 106 Md. 461, 68 Atl. 205, is directly in point. The cases cited by appellant in support of its contention that such evidence is not admissible are not apposite. Such evidence would not be admissible in chief for the purpose of proving the fact of the assault, but the questions are proper upon cross-examination of the person charged with committing the assault.

The third exception found in the record relates to the prayers. The principal points of the defendant's contention in regard to these are (1) that in making the arrest Mc-Carron acted as a commissioned officer of the state of Maryland, and not as an employe of the defendant; but, if this first proposition be unsound, then (2), as soon as the arrest was completed, McCarron lost his dual capacity of officer and agent, ceased to be an employé of defendant, and became only an officer of the state of Maryland, and that, therefore, defendant is not liable for the assault. As to the first proposition, the commission spoken of is not in the record, and we are uninformed as to what authority it conferred upon McCarron, but assuming that it was a commission issued by the Governor under section 403, art. 23, Code Pub. Gen. Laws 1904, we yet cannot yield our assent to such a propositon. McCarron testified that he was in the employ of the de-Southwestern Police Station for this assault | fendant at the time of the arrest, that his

duties were to look after the company's property, and that he had power to arrest trespassers. We must assume that the plaintiff in walking along the right of way of the defendant company was violating the law, for, when taken before a justice of the peace, he pleaded guilty to the charge of "trespassing on the property of the Baltimore & Ohio Railroad." The court could not say as a matter of law that in making the arrest Mc-Carron was not acting within the scope of his employment as special officer of the defendant, or that he was then acting solely under his commission as an officer of the state of Maryland. Such a question was one proper to be submitted to the jury under all the evidence in the case. As was said by this court in Deck's Case, 102 Md. 669, 677, 62 Atl. 958, 961: "The question whether the special officer or detective was acting within the scope of his employment as an employé of the company at the time of the commission of the act complained of was a question for the jury to pass upon under all the facts and circumstances of the case." Neither could the court declare under the evidence in this case that, if the assault was made after "the arrest was actually completed," then the plaintiff was not entitled to recover. An arrest is the seizing of a person and detaining him in the custody of the law. 1 Bouvier, Law Dict. 166. An officer authorized to make an arrest may use necessary force. Id. In this case both the arrest and the assault occurred on the railroad tracks of the defendant as part of one and the same transaction apparently within the space of a very few moments of time, and it would not do under such circumstances for the court to say or submit to the jury to say that immediately after putting his hands on Strube, and saying, "I am going to put you under arrest," that thereafter McCarron ceased to be an employé of the defendant, and became merely an officer of the state. If McCarron was acting within the scope of his employment in making the arrest, the defendant would be responsible even if McCar ron acted maliciously or willfully in committing the assault, because the whole occurrence was but one transaction. If McCarron was not acting within the scope of his employment in making the arrest, then, of course, the defendant would not be liable. In this case the arrest and the assault must be treated as so merged together into one transaction as to be scarcely separable for practical purposes, even though theoretically they could possibly be regarded as distinct acts. The ground of the master's responsibility for the malicious torts of his servants or agents is this: That, where one of two innocent persons must suffer for the wrong of a third, the loss must fall upon him who has enabled the third person to do the wrong. McCarron was a special officer employed and paid by the appellant, and assigned to duty on the Baltimore Division of its right

of way. His selection was the appellant's, and the appellant must bear the responsibility of his acts if done within the scope of his employment. As stated by Judge Boyd in the case of Consolidated Ry. Co. v. Pierce, 89 Md. 503, 43 Atl. 940, if the servant was acting at the time in the course of his master's service, and for his benefit within the scope of his employment, the mere fact that he acted unlawfully, willfully, or wantonly does not necessarily show that he is no longer in his master's employ. We think there was evidence in the case proper to be submitted to the jury as to whether McCarron when he arrested the plaintiff was acting within the scope of his employment or not. We must hold, therefore, that defendant's first special exception was properly overruled, and the plaintiff's second prayer properly granted. The defendant's objection to this prayer, based on the instruction taken from Twilley's Case, 106 Md. 445, 67 Atl. 265, cannot be sustained, because that was a prayer offered by the defendant and presents a counter proposition to that contained in the plaintiff's second prayer. It would have been entirely proper for the court below to have granted a prayer concluding for the defendant modeled after the one referred to in Twilley's Case, supra, but no such prayer seems to have been offered, and, as we have said, we see no objection to the form of plaintiff's second prayer as granted: We think, however, that the form of the plaintiff's third prayer as to the measure of damages is objectionable.

In the case of Smith v. P. W. & B. R. R. Co., 87 Md. 52, 38 Atl. 1073, this court said, quoting from Quigley's Case, 21 How. 214, 16 L. Ed. 73, that: "Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief or of criminal indifference to civil obligations." And in B. & O. v. Barger, 80 Md. 34, 30 Atl. 562. 26 L. R. A. 220. 45 Am. St. Rep. 319, the court said: "Whilst the provocation of the plaintiff may not justify an assault, yet if it be of such character as would naturally arouse the anger and passion of men of ordinary temperament, and it is not too remote, it is admissitle in mitigation of damages." There is some evidence in this case to the effect that Strube provoked McCarron to arrest him by "bouncing out of the gang," and starting an altercation with the officer, and afterwards provoked the assault by resisting arrest, and while not meaning to say that the plaintiff is not entitled to something more than compensatory damages, if the jury find for plaintiff at all, yet we think the plaintiff's third

prayer was not drawn with sufficient accuracy to properly submit the question of punitive damages to the jury.

For the reasons we have already assigned, the defendant's first, second, third, and fourth prayers, which seek to withdraw the case from the jury, were properly refused.

We think the defendant's fifth and ninth prayers, which seek to separate the assault from the arrest, faulty, under the circumstances of this case, for the reason, as we have already said, that both the assault and the arrest constitute but one and the same transaction, occurring wholly on the premises and right of way of the defendant within a very short space of time, and under the circumstances it would have been improper to instruct the jury to attempt for the purpose of wholly exonerating the defendant to distinguish between them.

The defendant's sixth prayer is objectionable because it leaves out of consideration the question whether the altercation resulting in the assault did or did not arise out of the performance by McCarron of his duty as employé of the defendant. If Strube was at the time unlawfully trespassing on the premises of the defendant, and for so doing he rendered himself liable to arrest by the special officer acting within the scope of his employment, the fact that he brought about his arrest by an altercation with the officer, and then provoked the assault by resisting arrest, would not wholly exonerate the defendant from the consequences of the use of excessive force and violence by McCarron upon him, though such provocation might be considered in mitigation of punitive damages.

Defendant's seventh prayer, having been granted, is not before us for review.

Defendant's first and second special exceptions were properly overruled because there was evidence legally sufficient to warrant submitting the case to the jury.

But for error in granting plaintiff's prayer as to the measure of damages the judgment must be reversed.

Judgment reversed, with costs, and a new trial awarded.

(111 Md. 82)

WANNENWETSCH v. MAYOR, ETC., OF CITY OF BALTIMORE.

(Court of Appeals of Maryland. June 30, 1909.)

1. MUNICIPAL CORPORATIONS (\$ 284*) - STREETS-IMPROVEMENTS-ORDINANCE.

Baltimore City Ordinance No. 151, for the opening and improving of Millington avenue in Baltimore city annex, by the commissioners for opening streets, acting as the annex improvement commission, under authority conferred by Acts 1904, 1. 492, c. 247, was valid.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 284.*]

2. MUNICIPAL CORPORATIONS (§ 294*)—STREET IMPROVEMENTS — NOTICE — PUBLICATION—ENGLISH LANGUAGE.

ENGLISH LANGUAGE.

Under Baltimore City Ordinance No. 151, \$ 1, providing for the publication of notice of an application for street improvement, for 10 days, in at least two daily newspapers, published in Baltimore, publication of a notice in two newspapers, one of which was in the German language, was insufficient.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 787; Dec. Dig. § 294.*]

3. MUNICIPAL CORPORATIONS (§ 321*)—STREET IMPROVEMENTS — ASSESSMENTS — IRREGULARITY—PROPERTY OWNERS' REMEDIES.

Where certain street improvements were made under Baltimore City Ordinance No. 151, which was valid, and the acts of the commissioners were within their authority, the remedy of property owners for any errors or irregularities in the proceedings was by appeal to the Baltimore city court, as authorized by section 9 of the ordinance, and not by a suit to set aside an assessment levied to pay for the improvement.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. \$ 321.*]

Appeal from Circuit Court of Baltimore City; Chas. W. Heuisler, Judge.

Suit by John Wannenwetsch against the Mayor and City Council of Baltimore. From an order dismissing the bill, complainant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTH-INGTON, THOMAS, and HENRY, JJ.

James J. McNamara, for appellant. W. H. De C. Wright, for appellees.

BURKE, J. This is an appeal from an order of the circuit court for Baltimore city sustaining a demurrer to the bill of complaint and dismissing the bill. The commissioners for opening streets, acting as the annex improvement commission, under the provisions of Acts 1904, p. 492, c. 274, and by authority of an ordinance of the mayor and city council of Baltimore, approved June 15, 1906, made certain assessments against the property of the appellant, which abuts on Millington avenue in that part of Baltimore city known as the annex. The mayor and city council were demanding and attempting to collect these assessments, which, as alleged, are unauthorized, illegal, and void. The relief prayed for is: First, that the assessments against the appellant's property of his portion of costs for paving, grading, and curbing Millington avenue may be decreed to be ultra vires and void, and that the assessment and all proceedings against the plaintiff or his property may be enjoined. The ground upon which this relief is asked is twofold: First, that Ordinance No. 151, under which the proceedings were had and the assessment levied, is illegal and void; and, secondly, that if the ordinance be valid, the relief should be granted, because the commissioners for opening streets failed to

For other cases see same topic and section NUMBER in Dec. 4 Am. Digs. 1907 to date, & Reporter Indexes

publish the notices required by sections 2, 4, 6, and 7 of the ordinance in two newspapers published in the English language. We do not consider it necessary to discuss the first ground upon which the appellant relies, because, in our opinion, the two cases of Baltimore City v. Flack, 104 Md. 107, 64 Atl. 702, and Leon Lauer v. Mayor and City Council of Baltimore (decided March 24, 1909, and not yet officially reported) 73 Atl. 162, demonstrate the validity of that ordinance. The opinion in the Lauer Case sets forth clearly the sources of the power in the mayor and city council to pass the ordinance. We will therefore content ourselves by referring to that opinion and the reasons upon which it is based, in connection with the Flack Case, supra, as conclusive against the first objection made by the appellant to the validity of the assessment.

Section 1 of Ordinance No. 151 provides that, at the request of the owners of a majority of front feet of ground binding on the whole or any part of any street, lane, or alley, which is now open, or may hereafter be opened, in the annex portion of Baltimore city during the time of the exercise by the commissioners for opening streets of the powers and performance of duty conferred and imposed by chapter 274, p. 492, of the Acts of 1904 of the General Assembly of Maryland, or ordinances passed, or to be passed, in pursuance thereof, the said commissioners for opening streets, acting under the provisions of the aforesaid act and ordinances, may, if in their judgment the public interests will be served thereby, grade, pave, and curb such street, lane, or alley, or part thereof, at the expense pro rata of the owners of all the property binding thereon, wholly as to sidewalks (being one-fifth of the whole width on each side of said street), and elther wholly or in part as to the residue, in accordance with the following sections of the ordinance. Upon receipt of such application the commissioners are required to give 10 days' notice, in at least two of the daily newspapers published in the city of Baltimore, of the fact that the application has been filed, and of their intention to consider the same, and also of the time when, and the place where, objections to the application will be heard. The ordinance then declares who shall be deemed an owner for the purpose of making the application. It is then provided that after the contract for the work of grading, paving, or curbing has been awarded, in the manner provided by law, the commissioners shall impose the tax upon the property binding on the street. There is no question made as to the method pursued by the commissioners in this case in fixing the assessment. After the commissioners have completed their apportionment of costs and expenses to be assessed as aforesaid, and a statement thereof, it is their duty to "give notice by advertisement, inserted twice a the commissioners to proceed with the work

week for two (2) successive weeks, in two of the daily newspapers published in the city of Baltimore, that such apportionment has been made and that a statement thereof is on file in the office of the said commissioners for the inspection of all persons interested therein," etc. It is their duty to attend at the time and place appointed in the notice, and to consider all such representations and testimony, verbal or in writing, in relation to any matter in such statement which shall be offered to them, on behalf of any person claiming to be interested therein, and to make all such corrections and alterations in the said apportionment and statement as shall be necessary to make the same correct and just, and they may adjourn from time to time, if necessary, to give all persons claiming a review an opportunity to be heard; and, after closing such review, it is their duty to make all such corrections as shall be proper, and to make a correct list of the property and of the owners, or reputed owners thereof, liable to pay the assessments in the manner aforesaid, and the amount for which each piece of property or the owner thereof shall be liable, and to deliver to the city register a duplicate list thereof under their hands, together with such explanatory plat or plats, if any, as may be necessary to designate the property upon which said asassessments are levied, which assessments shall be liens on the several pieces of property on which the same shall be respectively assessed. When said duplicate list shall have been delivered to the said register or deposited in his office, it is his duty to notify all persons interested "by an advertisement to be inserted once a week for four successive weeks in two daily newspapers published in the city of Baltimore, that the said list of assessments or expenditures, plat or plats, if any have been so placed in his office, and that any parties affected thereby are entitled to appeal therefrom by petition in writing to the Baltimore city court." Section 9 is as follows: "That any person or persons who may be dissatisfied with any assessment or assessments in which he or they shall be in any manner interested, may within thirty days after the return of the above-mentioned proceedings to the city register, appeal therefrom by petition to the Baltimore city court, praying the said court to review the same, and thereupon the proceedings shall be similar to those in the trials of street appeals, and the same right shall be had to appeal to the Court of Appeals."

The record shows that the appellant, together with other property owners in the annex, and owning property fronting along Millington avenue, filed an application with the commissioners for opening streets to have that avenue graded, paved, and curbed. This application complied with section 1 of Ordinance No. 151, and the jurisdiction of



tract for tne work was awarded to the Maryland Pavement Company, which completed the work at a cost of \$10,365.41. The notices given by the commissioners of the application for the grading, paving, and curbing the street, the advertisement for bids for doing the work, and the notice required by section 6 of the ordinance were published in one English and one German newspaper. The notice given by the city register notifying all persons interested of their right of appeal was published in two newspapers printed in the English language, and complies fully with the requirements of section 7 of the ordinance. The objection to the first, second, and third notices is (and that is the only objection that can be urged) that they were not published in two newspapers printed and published in the English language. In this respect these notices, under the case of Bennett v. Baltimore City, 106 Md. 484, 68 Atl. 14, must be held to be insufficient. In that case Judge Schmucker, after citing a number of authorities in support of the general proposition that, in the absence of a direction to the contrary, the publication of a notice required by law to be made must be made in the English language, said: "These cases all treat the English language as the official or ordinary language of the country, and hold that a mere direction in the statute that an advertisement be made in a given number of newspapers must be so construed as to require the use for that purpose of newspapers published in the English language. This proposition applies with special force to a state like Maryland where from the earliest colonial times the English language has been employed in the official proceedings of all departments of the government." That was a case where a taxpayer sought to restrain the city from performing a contract, and in its essential facts was very different from those disclosed by this record. While the case settles the insufficiency of the notices to which we have referred, it does not determine the jurisdiction of a court of equity to entertain this bill, because in that case there was no tribunal other than a court of equity to which the taxpayer could appeal for

The appellant cited and relied upon the case of Baltimore v. Johnson, 62 Md. 226, where the court of equity restrained the collection of special taxes and assessments levied for grading and curbing Covington avenue, because of the failure of the city commissioners to give the proper notices prescribed by the ordinance. But this was done upon the ground that there was no appeal provided for the property owners from the proceedings of the commissioners. The ordinance under which the proceedings were taken directed the publication of the notices

attached under that application. The con- | disregarded by the commissioners. The court said: "Nothing can be plainer than that advertising in one newspaper only is not a substantial compliance with this requirement. It is also obvious that this is not a mere formal or immaterial provision, but a substantial and important one, and, in fact, one in which the property owners who are required to pay for the work are deeply interested. The contract to be thus awarded to the lowest bidder determines the cost of the work, and therefore the amount of the tax to be imposed, for it is only after the contract has been thus awarded, whereby the cost can be ascertained, that the commissioner is required by the eighth section of the same ordinance to impose a tax upon the owners of adjacent property 'equal in amount to the whole expense of the work.' The object of advertising for these proposals is to attract the bidders and induce competition, in order that the work may be done at the lowest obtainable price, and this is all in the interest and for the protection of the taxpayers. No appeal is allowed to the property owners from any of the proceedings of the commissioner under this ordinance, and his only redress against the imposition of an unlawful tax is by resort to a court of equity; and, while that court ought not to grant relief by declaring the tax illegal and void where there has been only slight or immaterial omissions or deviations from the requirements of the ordinance, it must so relieve where there has been, as in this cause, a substantial departure from a substantial provision introduced for his benefit and protection. Upon this ground alone the decree appealed from, which perpetuates the injunction, must be affirmed."

The cases of Holland v. Baltimore, 11 Md. 186, 69 Am. Dec. 195, and Baltimore v. Porter, 18 Md. 284, 79 Am. Dec. 686, which the appellant contended support his contention, rest upon the principle that the city commissioner in proceeding with the work acted without any legal authority, and hence all his proceedings in the premises were coram non judice and void. In Baltimore City v. Grand Lodge, 44 Md. 436, the assessments for benefits were made under a void ordinance. In this case, however, the ordinance is valid, and the commissioners acquired jurisdiction of the subject under the application, and in all they did in the premises have acted within the limits of their authority, and any errors, defects, or irregularities committed by them in the exercise of that authority could have been corrected by an appeal by any person interested to the Baltimore city court, as provided by section 9 of the ordinance.

Where a special and limited tribunal acts within its jurisdiction, and an appeal is provided by the statute to another tribunal in which their action may be reviewed, mere in three newspapers. This direction was errors, mistakes of judgment, or irregulari-

ties in their proceedings do not form a foundation for a bill in equity. Methodist Church v. Mayor and City Council, 6 Gill, 391, 48 Am. Dec. 540; Hazlehurst v. Baltimore, 37 Md. 220; Page v. Baltimore, 34 Md. 558. It is said in Page's Case, supra, that where there is an appeal given to the parties to be affected by proceedings of street commissioners, any irregularities in the proceedings, or in the disqualification of the commissioners, are open upon appeal, and the appellate tribunal is the proper one to review and correct them. In the case of the Methodist Protestant Church v. Mayor and City Council of Baltimore, 6 Gill, 402, 48 Am. Dec. 540, a bill for an injunction was filed, in which, among other things, it was charged that the commissioners for opening streets had not given the notice required by law, before proceeding to widen the street in question, and upon appeal Judge Dorsey, in delivering the opinion of this court, said: "To persons aggrieved by the proceedings of the commissioners in cases like the present, the legislative enactments upon the subject have provided the tribunal and the means of redress, and there only can it be successfully sought." "It is a salutary principle of law that every person is bound to take care of and protect his own rights and interests, and to vindicate them in due season, and in the proper place" (Gott & Wilson v. Carr, 6 Gill & J. 312), and "it is too well settled that a court of equity cannot undertake the decision of questions which

the law has confided to another tribunal specially designated to adjudicate them" (Friedenwald v. Shipley, 74 Md. 225, 21 Atl. 790, 24 Atl. 156). There is nothing in the decision in the Friedenwald Case in conflict with the principles we have stated. The broad language used in some portions of the opinion in that case must be read in connection with the precise questions which the court had under consideration. What was actually decided in that case is this: First, that the examiner had exceeded his authority in a most material respect, viz., in estimating for the cost of building two bridges across the tracks of the Philadelphia, Wilmington & Baltimore Railroad Company: and, secondly, that the statement of damages, benefits, and expenses filed by him was so framed as to mislead persons interested. The court found as a fact that: "Information was withheld from them which would probably have induced them to appeal, at all events which was essential to an intelligent determination of the question whether an appeal was necessary for their protection." In this case the commissioners confined themselves altogether within the limits of their jurisdiction, and the appellant was fully advised of his right of appeal.

We, therefore, decide that, having failed to avail himself of the appeal provided by law for the redress of the wrong of which he complains, he is without remedy in a court of equity.

Order affirmed, with costs.

(75 N. H. 208)

FINKELSTEIN v. KEENE ELEC-TRIC RY. CO.

(Supreme Court of New Hampshire. Cheshire. June 26, 1909.)

1. WITNESSES (§ 271*)—CROSS-EXAMINATION-EFFECT.

That plaintiff, suing a street railroad for personal injuries, cross-examined the conductor and showed that he had made a report of the accident, did not render the report competent as affirmative evidence for the railroad of the truth of the facts therein stated.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 961; Dec. Dig. § 271.*]

2 APPEAL AND ERROR (§ 1050*)-REVIEW

HARMLESS ERROR—EVIDENCE.

In an action for injuries to a street car passenger, error in admitting in evidence the report of the conductor, stating that the accident was wholly due to the nightiffs want of cars. was wholly due to the plaintiff's want of care, was prejudicial to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.*]

3. Trial (\$ 75*)—Exceptions to Evidence-

WAIVEB. A plaintiff, suing a street railroad for injuries, did not waive his exception to the admission of the conductor's report of the accident by cross-examination of the motorman, who testified that the report stated the truth, as to his recollection of the report; the cross-examination being proper to test the credibility of the motorman. the motorman.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 182; Dec. Dig. § 75.*]

Young, J., dissenting.

Transferred from Superior Court, Cheshire County; Stone, Judge.

Action by Hyman Finkelstein against the Keene Electric Railway Company. There was a verdict for defendant, and the cause was transferred from the superior court on exceptions. Sustained, and verdict set aside.

The plaintiff was injured while, or just after, alighting from the defendant's car. The conductor of the car was called by the defendant and testified in regard to what occurred at the time the plaintiff was injured. On cross-examination he testified that some days afterward he made a written report to the company at the request of the company's superintendent. On redirect examination, the report was ruled in, subject to the plaintiff's exception. Among other things, the report stated that the accident was due to want of care of the plaintiff alone.

Joseph Madden, for plaintiff. Charles H. Hersey and John E. Allen, for defendant.

WALKER, J. The report should have been excluded. The fact that upon the plaintiff's cross-examination of the defendant's conductor it appeared that he made a report of the accident to the defendant did not render the report competent as affirmative evidence for the defendant of the truth of the facts therein stated. Because one party proved the fact that a report was made did not authorize the other party to prove the 125.*]

contents of the report. The plaintiff did not offer any part of the report as evidence, and the question whether the defendant might then use other parts of it, or the whole of it, as explanatory evidence (Wentworth v. Mc-Duffle, 48 N. H. 402; Whitman v. Morey, 63 N. H. 448, 2 Atl. 899; Page v. Hazelton, 74 N. H. 252, 254, 66 Atl. 1049), did not arise.

Nor can it be said that the contents of the report were not prejudicial to the plaintiff. The statement that the accident was wholly due to the plaintiff's want of care is sufficient to show that the admission of the report furnished the jury with incompetent evidence of a most damaging character to the plaintiff.

The plaintiff's cross-examination of the defendant's motorman, who had testified that the report stated the truth, as to his recollertion of the report, did not amount to a waiver of the exception to its admission. The wilness' credibility was properly tested in this way after the report had been admitted as evidence before the jury. Clearly there was no waiver of the exception.

Exception sustained. Verdict set aside.

YOUNG, J., dissented. The others concurred.

(111 Md. 196)

MANUEL v. MAYOR, ETC., OF CITY OF . CUMBERLAND.

(Court of Appeals of Maryland. June 29, 1909.) 1. EVIDENCE (§ 83*) — PRESUMPTIONS — PEB-FORMANCE OF OFFICIAL DUTY.

The court will presume that an ordinance, requiring a city to keep a map showing street lines, location of sewers, gas mains, etc., has been observed, and the city is chargeable with knowledge of the location of a gas main in a street.

[Ed. Note.—For other cases, see Cent. Dig. § 105; Dec. Dig. § 83.*] see Evidence,

2. MASTER AND SERVANT (§ 296*)—INJURY T SERVANT — OBVIOUS DANGERS — EVIDENCE -INJURY TO Instructions.

Where, in an action for injuries to a servant, there was evidence that the danger was open and obvious, the master was entitled to an instruction authorizing a verdict in his favor, on the jury finding that the danger was open and obvious to any one.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 296.*]

3. MASTER AND SERVANT (§ 125*)—OBLIGATION OF MASTER.

A city employing men to dig a sewer trench under the supervision of the foreman of the city sewer works, under the superintendent and city engineer, must so locate the whole course of the trench that it will not be unsafe by reason of its method of construction, or its proximity to any object which may reasonably be expected to create darger in the performance of the work, otherwise safe; and the city, chargeable with knowledge of the location of a gas main close to the trench as located, must inform the foreman thereof, so that he may take the necessary steps to protect the men from danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243-251; Dec. Dig. §

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes 73 A.-45

4. MASTER AND SERVANT (§ 286*)—INJURY TO SERVANT — NEGLIGENCE — QUESTION FOR -INJURY TO Jury.

Whether a sewer trench was rendered unsafe to the men working in it by reason of its proximity to a gas main held for the jury.

[Ed. Note.-For other cases, see Master and

Servant, Dec. Dig. \$ 286.*]

5. Master and Servant (§ 155*) — Obligation of Master—Hidden Dangers.

Where a master knew of a secret and hid-den risk of danger, and his foreman and his en were ignorant thereof, the master must notify the men of it.

[Ed. Note.-For other cases, see Master and Servant, Cent. Dig. § 310; Dec. Dig. § 155.*]

6. MASTER AND SERVANT (§ 190*)—OBLIGA-TION OF MASTER—SAFE PLACE TO WORK. Where, in the digging of a sewer trench for

a city under the direction of the foreman of the a city under the direction of the foreman of the city sewer works under the street superintendent and engineer, it becomes necessary to dig through ground which, by reason of its condition, a competent foreman would see should be braced to secure the safety of the men, the city cannot escape liability for injury to the men by the caving of the ground because not braced by proving that it used due care in the selection of proving that it used due care in the selection of a competent foreman.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 190.*]

7. MASTER AND SERVANT (§ 189*) — OBLIGATION OF MASTER.

A master must take reasonable precautions to insure the safety of the place of the work and the machinery used, and the servant may look to the master for the discharge of the duty, and a master employing one to attend to the duty is liable for nonperformance, especial-ly where a probable source of danger was unknown to, and undiscoverable by, the foreman or the servants, but known to the master.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 189.*]

8. MASTER AND SERVANT (\$\\$ 285, 286*)—IN-JURY TO SERVANT—QUESTION FOR JURY.

In an action for injuries to a servant while digging a sewer trench from the caving of the earth, evidence held to require submission to the jury of the issue whether the fall of the earth was due to the proximity of a gas main in the street, and whether the fall would have been prevented by shoring the trench.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1002-1053; Dec. Dig. §§ 285, 286.*]

9. MASTER AND SERVANT (\$ 291*)-INSTRUC-TIONS-MISLEADING INSTRUCTION.

An instruction, in an action for injuries to a servant, which is calculated to lead the jury to believe that the whole question involved the negligence of a fellow servant, while the ques-tion involved the omission of a positive nondelegable duty of the master, is erroneous.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 291.*]

Appeal from Circuit Court, Garrett County; M. L. Keedy, and Robert R. Henderson, Judges.

Action by James W. Manuel against the Mayor and City Council of Cumberland. From a judgment for defendant, plaintiff appeals. Reversed, and new trial awarded.

The plaintiff's rejected prayers are as follows:

find from the evidence that at the time of his injury, if they so find, James W. Manuel was in the employ of the defendant, and engaged in making an excavation for a sewer on Maryland avenue, one of the streets of Cumberland, Md., under the order and direction of the superintendent of the defendant, and that while engaged in such work, on or about the 8th day of April, 1907, he was injured by the crumbling or slide of a bank of said excavation, which was due to the location of a gas main or pipe in proximity to said excavation, if they so find, and that the location of said gas main or pipe was unknown to the plaintiff, but was put down under the franchise granted by the defendant to the Cumberland Gaslight Company, and under the direction of the defendant's city engineer, and that the defendant was negligent in not having the bank or side of said excavation shored or braced, and that the shoring or bracing of said bank or side of the excavation would have prevented the injury complained of, then they shall find their verdict for the plaintiff; provided the said plaintiff was using due care and caution

on his part.

"(2) The jury is instructed that, if they find from the evidence that the defendant is a corporation having control of the streets, lanes, alleys, and avenues of the city of Oumberland, and that the plaintiff, while engaged in making an excavation along Maryland avenue, one of the streets or avenues of the said city, for a sewer for the defendant, on or about the 8th day of April, 1907, under its order and direction, was injured by the slide or caving in of said bank or side of said excavation, and that the slide or caving in of said bank or side of the excavation was due or caused by the location of a gas main or pipe put down or laid under or along said Maryland avenue, under a franchise granted by the defendant to the Cumberland Gaslight Company, in proximity to said excavation, and that the location of said gas main or pipe was unknown to the plaintiff, if they so find, and that the plaintiff was using due care and caution on his part and was in a place where he had been placed or directed by the defendant to work, and that the detendant was negligent in not shoring or bracing the bank or side of said excavation, and that such shoring or bracing of said bank or side of the excavation would have prevented the injury complained of, then their verdict shall be for the plaintiff.

"(3) The jury is further instructed that, if they find from the evidence that shortly prior to the injury complained of, William Brant, the companion of the plaintiff, suggested to the defendant's superintendent, in the hearing of the plaintiff, that the bank or side of the excavation would be safer if braced or shored, and that the defendant's superintendent "(1) The jury is instructed that, if they replied to the said Brant, in the hearing of

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the plaintiff, that the bank was safe, and ordered the said Brant and the plaintiff to go down to work in said excavation, then such statement and order was an assurance that the plaintiff had a right to rely upon; and, if he was injured by the slide or caving in of such bank on going into the excavation to work after such assurance of its safety and order to go down to work in said excavation by the defendant's superintendent, if they so find, then their verdict shall be for the plaintiff, unless the risk of going down to work in said excavation was obvious to the sense of any man, and that the plaintiff did not exercise ordinary care in going into said excavation under such circumstances."

The defendant's granted prayers are as follows:

"(2) The defendant by its attorneys prays the court to instruct the jury that, if they shall find from the evidence in this cause that the plaintiff was, on the 8th day of April, 1907, employed by the defendant as a laborer, and engaged with other servants of the defendant in digging, excavating, or constructing a ditch or trench on Maryland avenue, a street in the city of Cumberland, and that whilst so employed he received the injury complained of by reason of the giving away or falling in of said embankment of said ditch or trench, and if they shall further find that such giving away or falling in of said embankment was caused by its careless or faulty construction, and such faulty and careless construction of said embankment was due and owing to the negligence of other servants of the defendant, whose duty it was to see that such ditch or trench should be excavated, and such embankment be constructed, in a skillful and safe manner, yet the plaintiff cannot recover, unless he shall satisfy the jury that in selecting the employés or servants through whose negligence the accident occurred the defendant did not use reasonable care in procuring for said work or operation faithful and competent employés; and, further, that in this case the plaintiff has offered no evidence from which the jury may find that the defendant did not use such care in the selection of its said employés.

"(3) And further prays the court to instruct the jury that, if they shall find from the evidence in this cause that the plaintiff, before entering the ditch or trench, at the time he received the injury complained of in this cause (if they shall find he was so injured), knew, or by the exercise of a reasonable degree of prudence could have known, of the dangerous and unsafe condition of the embankment of said ditch or trench, then he cannot recover in this cause, and their verdict must be for the defendant.

"(4) The defendant further prays the court to instruct the jury that, if the dangerous character of the embankment of the ditch spoken of in the evidence in this cause was have known of the existence of the same, or by the exercise of a reasonable degree of prudence could have known of such dangerous character of said embankment, then in undertaking the performance of such hazardous duties as necessitated his entering said ditch the plaintiff assumed all such risk as was incident to his employment, and their verdict must be in favor of the defendant.

"(5) And further prays the court to instruct the jury that the burden of proof is upon the plaintiff in this cause to make out his case by a preponderance of testimony."

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTH-INGTON, and THOMAS, JJ.

P. C. Barnes, for appellant, Joseph Sprigg, R. W. McMichael, and Gilmor S. Hamill, for appellee.

PEARCE, J. The appellant, James W. Manuel, on the 8th day of April, 1907, was an employé of the appellee, the Mayor and City Council of Cumberland, and was engaged, with other workmen, in digging a trench in which a sewer pipe was to be laid; the work being done under the immediate supervision of Lem. Brant, who testified that he was "foreman of all the city's sewer works, under the street superintendent and city engineer." This sewer trench was about 5½ feet deep. Parallel to this trench in the same street, Maryland avenue, was a gas main, which at a certain point on this avenue was about 16 or 18 inches from the sewer trench, and was about 21/2 feet below the surface of the street. When the work for the day began on April 8th, the plaintiff with Wm. C. Brant and J. W. Clark were about to get into the trench, when Wm. C. Brant said to the foreman, "Wouldn't it be better to brace the sides of this ditch?" Wm. C. Brant testified that there had been a little rain and snow the night before; and, while he did not think the trench looked dangerous, he thought it would be better The foreman replied: "It is all right, and will soon dry off. Go down in the ditch and get to work." The plaintiff and Clark corroborated Wm. C. Brant as to his suggestion of bracing the sides of the trench, and as to the foreman's reply, but he denied both the suggestion and his reply. The men got into the ditch, and between 11 and 12 o'clock the side of the ditch between it and the gas main fell into the sewer trench for a distance of 8 or 10 feet. It slid in almost in a slab, and pinned Manuel against the other side of the trench up to his waist. His left arm was buried under the earth, and his wrist was badly injured. The bones of the wrist were dislocated, and there was a split fracture of the outer bone of the forearm, which Dr. Smith, the only physician and surgeon sworn, testified was a serious and permanent injury. Section 27 so open and obvious that the plaintiff must of the city ordinances was read in evidence,

which requires the city to keep an under- | trench was due to its immediate proximity ground map of the city, showing all street lines, water courses, streams, bridges, and culverts; "the location of all sewers or drains; of all gas mains, service pipes and valves and their size; of all steam heating pipes; and any other data below the surface of the ground along, the streets or alleys that may be deemed of value for information as against underground improvements or repairs"—and there is a presumption in law that this requirement was duly observed. It was admitted that the gas maln in Maryland avenue in question in this case was put down under the authority of the franchise and ordinance of the city by the Cumberland Gaslight Company, under the direction and supervision of the city engineer. It, therefore, appears that the city is chargeable with full knowledge of the location of this gas main, and its depth below the surface of the street, while the undisputed evidence is that neither the plaintiff, nor any of the men, knew of the location of the gas main. It does not appear from the evidence that the foreman knew of its location; and, in the absence of positive evidence that he did, the presumption is he did not. Wm. C. Brant and Clark both quit that work next day. and got employment elsewhere. It also appears from the testimony of the foreman that the city engineer gave him the grade and location for the sewer trench, and that his directions were followed in its construction, but that he was not furnished with any map to show where gas or water mains were located.

At the close of the plaintiff's testimony the defendant offered a prayer to withdraw the case from the jury; but, as this prayer was renewed at the close of the defendant's testimony and of the whole case, the prayer first offered needs no consideration. The plaintiff offered six prayers of which the first, second, and third were rejected, and the fourth, fifth, and sixth were granted. The plaintiff's fourth prayer instructed the jury that the defendant, under the ordinance above mentioned, was charged with knowledge of the location, size, and depth of all pipes and mains put down under its streets under any franchise granted by it. plaintiff's sixth prayer instructed the jury that the defendant was bound to use reasonable care to provide a safe place for plaintiff to work in, and that if said place was unsafe for that purpose by reason of the want of such care, then the plaintiff was entitled to recover, unless the jury found he knew, or ought to have known by the exercise of reasonable care, that it was unsafe, or unless by his own negligence he directly contributed to the accident. The fourth prayer is the usual prayer on the measure of damages in event of recovery. The plaintiff's rejected prayers will be set out by the reporter. The substance of the first prayer

to the gas main, that the existence and location of the gas main was unknown to the plaintiff, but was known to the defendant, and that it was so located by its authority, that the defendant was negligent in not having the sewer trench braced at that point, and that such bracing would have prevented the accident, then the plaintiff could recover if the jury found he was himself in the exercise of due care. The second prayer presents the same legal propositions, with slight verbal changes. The third prayer instructs the jury that if they find Wm. C. Brant suggested the bracing of the sides of the trench before the accident, and the foreman replied that was not necessary, and ordered the plaintiff to proceed with the work, such reply and order was an assurance of safety upon which he had the right to rely; and, if he was subsequently injured as claimed in the evidence, he was entitled to recover, unless the danger was obvious to the sense of any man, and unless he failed to exercise ordinary care in going into the trench under the circumstances.

The defendant offered seven prayers. The first and seventh, which sought to take the case from the jury, were rejected, and this ruling was so obviously correct that we shall not pause to consider it. The sixth, which was conceded, instructed the jury that the burden of proof was upon the plaintiff to establish his case by a preponderance of testimony. The defendant's second, third, fourth, and fifth prayers were granted. These will also be set out by the reporter. The second prayer asserts that the mere falling in of the side of the trench is not sufficient evidence of negligence on the defendant's part entitling plaintiff to recover. The fourth and fifth prayers relate to the question whether the dangerous condition of the character of the trench was open and obvious, and these prayers both present the same proposition as the qualification contained in the closing paragraph of the plaintiff's rejected third prayer, and in the body of his first and second rejected prayers. If there was any evidence requiring the plaintiff so to qualify his prayers, the defendant was entitled to an instruction, couched in appropriate language, expressly denying the right of recovery, if the jury found the danger was open and obvious to any one, and we do not think those instructions are open to any objection.

The important questions in the case arise upon the plaintiff's three rejected prayers, and the defendant's third rejected prayer. The specific negligence charged in the declaration is the failure of the defendant to provide a safe place in which to do the work in which the plaintiff was employed. The place may be unsafe, either because of some defect in its construction, or its own arrangement, or because, though properly conis that, if the falling of the side of the sewer structed and arranged, of its location with

reference to something else which may create | danger in the proper performance of the duty of the plaintiff. An illustration of the negligence first mentioned is found in Elmer v. Locke, 135 Mass. 575, where a brakeman was injured by the fall of a defective trestle, and in which it was held that the master could not escape liability by proving that he delegated to a proper agent the construction of the trestle, Similar illustrations may be found in Flike v. Boston & Albany R. R., 53 N. Y. 549, 13 Am. Rep. 545, and Paulmier v. Erie R. R., 34 N. J. Law, 451. Illustrations of negligence of the latter character are found in American Tobacco Co. v. Strickling, 88 Md. 500, 41 Atl. 1083, 69 L. R. A. 909, where the defendant was held liable for requiring the plaintiff to sweep the floor of a room in which an unguarded and rapidly revolving vertical shaft was in use, without informing her of the risk it created, and also in Pikesville R. R. Co. v. Russell, 88 Md. 503, 42 Atl. 214, where a conductor of a trolley car, while in the performance of his duty in collecting fares from the running board, came in contact with a trolley pole, which was set 7 inches within the line of poles, and the conductor was thereby killed. The setting of this pole within the proper safety line was the negligence of a servant of the defendant, but, because the result of that negligence was that the place provided for the work of the deceased was thereby rendered unsafe, the master could not escape liability.

In the case before us the master's duty was so to locate the whole course of this trench that it should not be unsafe by reason of its method of construction, or its proximity to any object, which might reasonably be expected to create danger in the performance of work otherwise safe. The defendant knew, or ought to have known, of the location of this gas main throughout its whole course, including the point of near approach to this sewer trench; and, if its proximity at that point rendered the place of work at that point unsafe, it was the defendant's duty to inform the foreman in charge of the work of such proximity, in order that he might take the necessary steps to protect the workmen from such danger. The material inquiry in this case, therefore, is whether the place where the plaintiff was working when the side of the trench gave way was rendered unsafe by the proximity of this gas main, and that was a question for the jury. It was a secret and hidden risk of danger, if any, both to the plaintiff and the foreman in charge of the work, but to the defendant it was well known; and, in such case, the master is bound to notify the plaintiff of it. There was evidence, adduced upon cross-examination of William C. Brant, who had 18 years of experience in digging sewer ditches and other sewer work, that a trench 18 inches from a gas main 31/2 feet below the surface

is dangerously close, and is not a safe place to work in. There was evidence also from the superintendent of the Gaslight Company that the outside diameter of this gas main was 5¼ inches. It is common knowledge that earth will not adhere to a smooth hard surface such as a tile or an iron pipe, as earth adheres to earth, and it is perfectly obvious that in making such excavations the nearer the approach to a main or pipe the greater is the danger of a fall of earth in the trench when the lateral support of the adjacent main or pipe is weakened by the removal of earth from the trench. If in the prosecution of this work it had become necessary to dig this trench through ground which. by reason of its condition, a competent and prudent foreman of the work sees, or should see, should be braced to secure the safety of the workmen, the defendant could not escape liability by showing that he had used due care in the selection of a competent foreman.

In B. & O. R. R. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 87 L. Ed. 772, quoted from with approval in Strickling's Case, supra, the Supreme Court said: "Of course, some places of work, and some kinds of machinery, are more dangerous than others, but that is something which inheres in the thing itself. which is a matter of necessity, and cannot be obviated. But within such limits, the master who provides the place, the tools, and the machinery owes a positive duty to his employé in respect thereto. That positive duty does not go to the extent of a guaranty of safety, but it does require that reasonable precautions be taken to ensure safety, and it matters not to the employé by whom that safety is secured, or the reasonable precautions taken. He has a right to look to the master for the discharge of that duty: and. if the master, instead of discharging that duty himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employe, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects." Where, as in this case, there was a probable source of danger unknown to, and undiscoverable by, either the plaintiff or the foreman, but known to the defendant, or which must have been known upon comparing the location of the sewer with that of the gas main, there is the strongest reason for the application of the rule above stated. If the foreman had been furnished with a drawing of the location of this gas main wherever it was in close proximity with this trench, it is reasonable to presume that he would have taken such precautions as he deemed reasonable to secure safety at the place of this accident, either by shoring up the side of the trench, or some other appropriate means, and that he would not have peremptorily ordered the men to go into the trench if he had had reason to believe it was unsafe. mony shows that the line of cleavage, in the

whole section of 10 feet, was along the line | not contain an abstract of the act, nor give in of the gas main. Manuel says, "The side of the ditch slid or fell right away from the gas main, so that you could see ten feet of the main exposed." Wm. C. Brant says, "It slid in clear to the bottom of the gas main." J. W. Clark says, "It fell right away from the main in one large lump, and left it bare." The superintendent says, "We braced the bank in several places, but not there," thus showing that where it could be seen, or otherwise known, that bracing was required as a proper precaution, he was prepared for it, and fortifying the presumption that if he had known of the proximity of this gas main, he would have braced the trench at that point. The specific question whether the fall of earth was due to the proximity of this gas main, and whether it would have been prevented by shoring or bracing the trench, should have been submitted to the jury, and the plaintiff's rejected prayers properly submitted those questions.

The defendant's third prayer was misleading because it was calculated, and indeed intended, to lead the jury to believe that the whole question was one of the negligence of a fellow servant, whereas, as we have seen, the vital question is one of the omission of a positive duty of the master, which cannot be delegated so as to avoid liability for neglect.

For the reasons stated, the judgment must

Judgment reversed, with costs to the appellant above and below, and new trial awarded.

(110 Md. 667)

NUTWELL V. ANNE ARUNDEL COUNTY COM'RS.

(Court of Appeals of Maryland. June 30, 1909.) 1. CRIMINAL LAW (§ 1022*)-SUMMARY CON-VICTION-APPEAL.

In the absence of a statute authorizing it, no appeal or writ of error lies from a judgment of the circuit court, in a criminal case rendered on appeal from justice's court.

[Ed. Note.—For other cases, see Crimi Law, Cent. Dig. § 2582; Dec. Dig. § 1022.*]

2. JUDGMENT (§ 648*) — CONCLUSIVENESS CRIMINAL JUDGMENT IN CIVIL CASE.

The decision of the circuit court, dismissing a motion to quash the writ in a criminal case begun in justice's court for invalidity of the statute creating the offense, does not deprive the Court of Appeals of jurisdiction to decide on the constitutionality of the statute, in a civil case properly brought before the court in which other parties beside the defendant in the criminal case are also concerned.

Note.—For other cases, see Judgment, [Ed. Dec. Dig. § 648.

3. STATUTES (§ 105°)—TITLE—SUFFICIENCY—CONSTITUTIONAL PROVISIONS.

The objects of Const. art. 3, § 29, providing that every law shall embrace but one subject, which shall be described in the title, etc., is to prevent the combination in one act of distinct and incongruous subjects, and to fairly advise the Legislature and the people of the real nature of pending legislation, and the title need

detail the provisions thereof, but it must not be misleading by limiting the enactment to a narrower scope than the body of the act is made to compass.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 117; Dec. Dig. § 105.*]

4. STATUTES (§ 121*)—TITLE—SUFFICIENCY.
Under Const. art. 3, § 29, providing that every law shall embrace but one subject, which shall be expressed in the title, the title of Acts 1908, p. 364, c. 672, entitled "An act to add two sections to article two of the Code of Public Local Laws, title 'Anne Arundel County,' subtitle 'Roads,' so as to require all owners of vehicles using public streets * * in Anne Arundel county to have a license therefor," is not sufficient to include provisions for licensing vehicles, provisions exempting enumerated vevehicles, provisions exempting enumerated vehicles and provisions for expending licenses and fines collected on the public roads, etc., and the act is invalid.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 121.*]

5. STATUTES (§ 64*)—VALIDITY—PARTIAL IN-VALIDITY—EFFECT.

It is not necessary to declare an entire act unconstitutional because one provision thereof is void, unless the provisions are so connected in subject-matter, meaning, or purpose that it cannot be presumed that the Legislature would have passed one without the other.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.*]

6. STATUTES (§ 64*)—VALIDITY—PARTIAL IN-VALIDITY—EFFECT.

The provisions of Acts 1908, p. 364, c. 672, imposing a license tax on vehicles, but exempting enumerated vehicles from such tax, are so inseparably connected with each other that the invalidity of the exemption provision renders the entire act invalid.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.*]

Appeal from Circuit Court, Anne Arundel County; Wm. H. Thomas, James R. Brashears, and Wm. Henry Forsythe, Jr., Judges.

Mandamus by Isaac S. Nutwell against the County Commissioners of Anne Arundel County, to compel defendants to restore to the assessment books of taxpayers property which had been stricken therefrom. From an order for defendants, plaintiff appeals. Reversed and remanded.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTH-INGTON, and HENRY, JJ.

Robert Moss, for appellant. James W. Owens, for appellees.

PER CURIAM. We are of opinion that Acts 1908, p. 364, c. 672, is unconstitutional, and therefore the order appealed from in this case must be reversed, and the case remanded for further proceedings.

An opinion will be hereafter filed giving the reasons upon which this conclusion is

Order reversed with costs and case remånded.

BURKE, J. The county commissioners of nature of pending legislation, and the title need Anne Arundel county, under the authority

eFor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

supposed to have been conferred upon them by Acts 1908, p. 364, c. 672, struck from the tax books of that county certain vehicles the owners of which had taken out a license as provided by that act. The appellant, a resident and taxpayer of Anne Arundel county, filed a petition for a mandamus in the circuit court for that county, in which he alleged that the striking of this large amount of personal property from the tax books of the county would materially lessen the taxable basis, and greatly increase the amount of taxes to be paid by the petitioner and other taxpayers of the county, as the fund arising from the licenses issued to owners of vehicles is to be applied under the act exclusively to the road tax, and the vehicles so licensed are exempt by the act from taxation for county, state, and school purposes. The petition prayed that a writ of mandamus might be issued, directed to the county commissioners, directing them to restore to the assessment books of the taxpayers named in the petition the specific property which they had stricken therefrom. The ground upon which the petitioner rests his right to mandamus is that the act of assembly is unconstitutional. The defendants answered the petition, and admitted that they had stricken from the tax books the property specified, and asserted the validity of Acts 1908, p. 364, c. 672, under which they acted. They further averred in their answer that the appellant refused to take out the license required by the act, and was arrested; that he prayed a jury trial, and that thereafter he made a motion in the circuit court for Anne Arundel county to quash the writ; that the court held the act valid, and dismissed the motion to quash. It is contended that as no appeal was taken by the appellant from the decision dismissing the motion to quash, which was based upon the alleged unconstitutionality of the act, the question as to the validity of the act, so far as the petitioner is concerned, is res adjudicata. It is maintained that it was the duty of the petitioner, if he decided to have the constitutionality of the act passed upon by this court, to have presented the question here by an appeal from the refusal of the court to grant the motion to quash, and, inasmuch as he failed to appeal within the time allowed by law, he is now concluded by the judgment of the lower court. But this court would have had no jurisdiction to determine the constitutionality of the act on an appeal from that judgment. Rayner v. State, 52 Md. 368; Judefind v. State, 78 Md. 510, 28 Atl. 405, 22 L. R. A. 721; Roth v. State, 89 Md. 524, 43 Atl. 769.

In Judefind's Case, supra, the plaintiff in error had been tried, convicted, and fined by a justice of the peace for violating the provisions of the law prohibiting working on Sunday. He appealed to the circuit court for Kent county, and was convicted and fined \$5 and costs by that court. From that judgment

he appealed to this court, upon the ground that the law under which he was convicted was unconstitutional. A motion was made by the Attorney General to dismiss the appeal, because no writ of error lies to this court from the decision of the circuit court, on an appeal to it from a judgment of a justice of the peace. The court, speaking through Judge Boyd, said: "That motion must prevail. It is well settled in this state that, when the circuit court has jurisdiction to hear and decide an appeal from a justice of the peace, its decision is final, and an appeal or a writ of error to this court will not lie, unless, of course, the statute authorizes such an appeal or writ of error to this court. If the traverser desired to contest the constitutionality of the law under which he was arrested, and have that question properly presented for the consideration of this court, he could have applied for the writ of certiorari. upon the specific ground of the unconstitutionality of the law, and the consequent want of power and jurisdiction of the justice of the peace to proceed under it. This court could. then have reviewed the judgment of the circuit court on an appeal or writ of error. Nor, can we review the decision of the circuit court on the question of the alleged defects on the face of the warrant and bond." While the decision of the circuit court upon the motion to quash is final and conclusive upon the appellant so far as the proceedings in that matter are concerned, because that court had jurisdiction to hear and determine the questions raised by the motion, and, whether it decided rightly or wrongly, its judgment could not be reviewed by this court upon appeal, any decision as to the validity of the act cannot deprive this court of the jurisdiction to decide upon the constitutionality of the act, in a civil case properly before us in which other parties are concerned.

We will now consider the main question in. the case, which is this: Does the title of the act of 1908 (page 364, c. 672), sufficiently describe its subject-matter as required by section 29, art. 3, of the Constitution of the state? The title of the act is: "An act to add two new sections to article two of the Code of Public Local Laws, title 'Anne Arundel County,' subtitle 'Roads,' so as to require all owners of vehicles using public streets and roads in Anne Arundel county to have a license therefor." Section 1 adds two new sections to article 2 of the Code of Public Local Laws, title "Anne Arundel County," to follow immediately after section 203x to be known as sections 203y and 203z. Section 203y declares that it shall not be lawful to run, or suffer to be run, upon any of the streets and roads in Anne Arundel county a vehicle of any description whatsoever, except ox carts, horse carts, farm wagons, and milk wagons, without first having obtained from the clerk of the county commissioners of Anne Arundel county a license at the rates fixed.

It then provides that the money collected from such licenses, and from fines paid for violation of the act, shall be expended upon the public roads and streets in the district in which the owner of the vehicle resides. Section 203z, after making certain provisions requiring the license to be attached to the vehicle, and conferring the power to transfer the license, exempts the owner of the vehicle so licensed from the payment of any other tax upon the same. It makes the violation of the act a misdemeanor, and upon a conviction therefor directs that a fine not exceeding \$5 and costs of prosecution shall be imposed.

The object of the constitutional provision, to which we have referred, has been frequently considered by this court.

Cases are so numerous, and a number of them so recent, that it is unnecessary to discuss them in this opinion. We will rest our decision in this case upon the cases of Kafka v. Wilkinson, 99 Md. 238, 57 Atl. 617, and Baltimore City v. Flack, 104 Md. 107, 64 Atl. 702. In Kafka's Case, supra, Judge Jones said of this provision of the Constitution: "It has received a liberal construction, and the courts have been reluctant in any case to give it an operation that would defeat the legislative intent. Yet they have not hesitated to strike down legislative acts that were clear infractions of its purpose and object. These have been declared to be twofold: 'The first is to prevent the combination in one act of several distinct and incongruous subjects; and the second is that the Legislature and the people of the state may be fairly advised of the real nature of pending legislation.' State v. Norris et al., 70 Md. 91, 95, 96, 16 Atl. 445, 446. In agreement with this object it has been held that, 'though the title need not contain an abstract of the bill, nor give in detail the provisions of the act, it must not be misleading by apparently limiting the enactment to a much narrower scope than the body of the act is made to compass." (Luman v. Hitchens Bros. Co., 90 Md. 14-23, 44 Atl. 1051, 1052, 46 L. R. A. 393), and that it ought not to be such as to divert attention from the matter contained in the body of the act (State v. Schultz Co., 83 Md. 58-62, 34 Atl. 243). It would seem that, if the object of the constitutional provision in question is to be respected, and it is to have meaning and effect in controlling legislation, the considerations which have just been mentioned must have been a controlling effect in applying it."

The mere statement of the substantial provision of the act demonstrates its validity under the rules stated. Under a title to require all owners of vehicles using the streets and roads of Anne Arundel county there is contained in one section an exemption of a large class of vehicles, and in the other an exemption from all other taxation upon the vehicles licensed. There is not the faintest

suggestion in the title of the act to lead any one to suspect that such exemptions were, or might be, introduced in the law. In these respects the title is not only too narrow, but it is clearly misleading. Besides this, one of the provisions of the act—that which exempts certain property from taxation-is wholly foreign to the subject-matter described in the title. It was urged that the court might strike down this exemption, if it found it was not fairly comprehended in the title. and hold the balance of the act valid. Chief Judge Boyd, in Somerset County Com'rs v. Pocomoke Bridge Co. (decided November 12, 1908) reported in 71 Atl. 462, stated the circumstances under which it is proper to apply the rule suggested: "It is well settled that it is not necessary or proper to strike down an entire act because one provision is void, 'unless the provisions are so connected together in subject-matter, meaning, or purpose that it cannot be presumed the Legislature would have passed the one without the other.' 26 Am. & Eng. Ency. of Law, 570. That principle has been announced by this court over and over again, and it has been applied to cases in which the valid and void provisions were in the same section of the act. Mayor, etc., of Hagerstown v. Dechert, 32 Md. 369; Steenken v. State, 88 Md. 708, 42 Atl. 212." The tax exemption feature of this act is one of its essential parts, and was no doubt inserted to secure its passage. is inseparably connected with the whole scheme of the act. It is so important that it cannot be presumed that the act would have passed without it. Under such circumstances the rule suggested by the appellee cannot be applied.

For the reasons assigned, we reversed the order appealed from, and remanded the case for further proceedings in the per curiam petition filed May 20, 1909.

(110 Md. 673)

ÆTNA INDEMNITY CO. v. WATERS. (Court of Appeals of Maryland. June 28, 1909.)

1. Contracts (§ 284*)—Infringement of Personal Rights.

The right to resort to the courts for the determination of the rights of the parties, or the settlement of disputes between them, will not be taken away by inference or anything short of a distinct agreement to waive it.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 284.*]

2. Contracts (§ 284*)—Infringement of Personal Rights.

A stipulation in a building contract that the architect's decision as to the construction of the drawings and specifications shall be final does not submit to his decision the contract rights of the parties to the exclusion of the courts.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1326; Dec. Dig. § 284.*]

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

8. CONTRACTS (§ 176*)—CONSTRUCTION—QUES-TION FOR JURY.

The construction of written documents is The construction of written occuments is ordinarily for the court, and, where their terms are not technical, ambiguous, or obscure, parol evidence cannot be resorted to, to aid in the construction, but where technical terms are used, parol testimony is admissible, and the question of the construction of the contract is for the jury.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 767-770; Dec. Dig. § 176.*]

4. CONTRACTS (§ 147*) — CONSTRUCTION — IN-TENTION OF PARTIES.

The courts in construing contracts will look to the language employed, the subject-matter, and the surrounding circumstances of the parties, so as to carry out their true intent.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 730, 743; Dec. Dig. § 147.*]

5. Evidence (§ 457*)—Parol Evidence—Application of Language — Technical TERMS.

Parol evidence is admissible to show that the expressions "floor slab" and "roof slab," in a written contract for the construction of the an a written contract for the construction of the reinforced concrete portion of a building, "columns, beams, floor, and roof slabs," etc., were used in a technical sense, designating not merely the floor or roof, but also the ceiling below it, as the roof or floor is constructed at the same time as the ceiling, together forming one integral portion of the building.

[Ed. Note.—For other cases, see Evidenc Cent. Dig. §§ 2104-2108; Dec. Dig. § 437.*] see Evidence,

6. Contracts (§ 199*)—Building Contracts CONSTRUCTION.

A contractor, who agreed to construct a building according to the specifications, containing the statement "the floors and beams and ing the statement "the floors and beams and columns supporting the same, ceilings, roof and stairways * * * to be of reinforced concrete," employed a subcontractor to construct the reinforced concrete; that is, columns, beams, floor and roof slabs, etc., as shown in the specifications made a part of the contract. Parol evidence showed that the phrases "floor slab" and "roof slab" designated, not merely the floor or roof, but also the ceiling below it. Hild, that the subcontractor was bound to erect a ceiling dependent on a roof as called for in the specifications. in the specifications.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 199.*]

7. CONTRACTS (§ 199*)—BUILDING CONTRACTS
—CONSTRUCTION—INTENTION OF PARTIES.
The intention of the parties to a building contract containing general words of description of the work followed by a mention of its several items, and incorporating the specifications by special reference, must be gathered from a consideration of the contract and specifications, taken together in the light of the purpose which their contents show they were intended to serve.

[Ed. Note.-For other cases, see Contracts, Dec. Dig. § 199.*]

8. PRINCIPAL AND SURETY (\$ 59°)-OBLIGA-TION OF SUBERY.

A contract of suretyship must, like

other contracts, receive a rational construction, which will accomplish the purpose of the parties in making it, and its meaning must be ascertained by the rules controlling the construction of other agreements.

[Ed. Note.-For other cases, see Principal and Surety, Cent. Dig. §§ 103, 1031/4; Dec.Dig. § 59.*]

9. PRINCIPAL AND SURETY (§ 123*) - DIS-CHARGE OF SURETY—NOTICE OF DEFAULT.

A surety in a bond of a building of

tractor, requiring the obligee to give immediate

notice of acts of the contractor likely to result in loss for which the surety will be responsible, is not discharged from liability because of the obligee's failure to notify it of delays in the progress of the work and slight failures to comply with the specifications.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 304-311; Dec. Dig. § 123.*]

10. Principal and Surety (§ 123*) — Discharge of Surety—Notice of Default.

CHARGE OF SURETY—NOTICE OF DEFAULT.

A building contractor's bond required the obligee to give the surety immediate notice of acts of the contractor likely to result in loss than the surety would be responsible. The acts of the contractor likely to result in loss for which the surety would be responsible. The contractor ceased work on a designated date, and the obligee about that date, stopped the contractor's employés from doing some work, because of the manner in which it was being done, but allowed them the privilege of correcting the erroneous method. After that date the work was delayed because other portions of the work on the building were not sufficiently advanced, and when the building was ready for further work, the obligee notified the contractor, and promptly informed the surety that he had done so. A dispute then arose as to whether certain work was called for by the contract. Held, that the failure to notify the surety of the cessation of the work on the designated date did not release him from liability. did not release him from liability.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 304-311; Dec. Dig. § 123.*]

11. PRINCIPAL AND SURETY (§ 100°) — DISCHARGE OF SURETY—BUILDING CONTRACT—CHANGE IN SPECIFICATIONS.

A surety in a building contractor's bond, stipulating that alterations in the specifications calling for a \$13.000 building must be consented to by the surety, is not discharged by reason of an alteration involving \$30 made without his

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 163; Dec. Dig. § 100.*]

12. Principal and Surety (§ 100*) — Discharge of Surety—Building Contracts—Change in Specifications.

A surety of a building contractor, who seeks to escape liability by a strict adherence to the letter of its bond, based on alterations in the specifications made without its consent, cannot complain of the application by the court of a similar strictness to the construction of the contract, prescribing the method which must be adopted to make a valid alteration.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. § 100.*]

13. Principal and Surety (§ 129*) - Dis-CHARGE OF SURETY.

Where the drawings and specifications rewhere the drawings and specifications re-ferred to in a building contract, making them a part thereof, were identified and adopted by the parties as controlling the performance of the work, the failure of the parties to sign the drawings and specifications as required by the contract was waived, and the contractor's sure-ty was not discharged from liability on that

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. § 129.*]

14. PRINCIPAL AND SURETY (§ 83*)-ESTOPPEL OF SURETY TO DENY LIABILITY.

Under the rule that a surety is estopped to deny the facts recited in his obligation, a surety of a building contractor, who relies on drawings and specifications as forming a part of the contract, cannot question the identity of the drawings and specifications on the ground

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that they were not signed by the parties, as required by the contract.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. § 83.*]

Appeal from Baltimore City Court; Alfred S. Niles, Judge.

Action by John Waters against the Ætna Indemnity Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The prayers of plaintiff are as follows: "The plaintiff prays the court to rule that, if the court sitting as a jury finds from the evidence that the defendant executed the bond on which this suit is brought, and that the Clarion Concrete Construction Company and John Waters entered into the contract offered in evidence, and mentioned in said bond, and that the roof slabs mentioned in said contract, as shown in the specifications and drawings therein mentioned, had connected therewith as a part thereof a suspended concrete ceiling, the two forming a so-called monolithic construction—that is to say, being so built as to form together one solid piece of concrete—then, by the true construction of the said contract, the Clarion Concrete Construction Company was bound to erect the ceiling mentioned in the evidence; and, if the court, sitting as a jury, finds that said Clarion Concrete Construction Company without just cause refused to erect said ceiling, and that the plaintiff thereby sustained loss and injury, and that the plaintiff further complied with all the conditions contained in the bond on which this suit is brought, that then the verdict must be for the plaintiff.

"The plaintiff prays the court to rule that, if the court sitting as a jury finds in favor of the plaintiff, then in estimating the damages the court shall allow the plaintiff the cost or expense to which the plaintiff was put in completing that portion of the work called for in the contract between the plaintiff and the Clarion Concrete Construction Company, which portion was not performed by said company provided said cost and expense was only the reasonable cost and expense thereof, less such sums as were due, or would have become due, to said company under the terms of said contract in the event that it had completed the same."

The prayers of defendant are as follows:

"(1) There is no evidence legally sufficient, under the pleadings in this case, to entitle the plaintiff to recover, and therefore the verdict of the court sitting as a jury must be for the defendant.

. "(2) There is no evidence legally sufficient under the pleadings in this case to entitle the plaintiff to recover more than nominal damages.

"(3) The defendant prays the court to instruct itself, sitting as a jury, that if it finds from the evidence in this case that, imme-

diately after the defendant was notified of the alleged failure and default of the said Clarion Concrete Construction Company to complete the work under its said contract with the plaintiff, the defendant offered to sublet or complete the same so far as to fully perform and complete all the work specified in the clause of the said contract, which reads as follows: 'Columns, beams, floor and roof slabs, stairs, skylight sides. concrete foundations, concrete underfloors, top finish, asphalt under cells, cement floor finish at stair corridor, safety treads on stairs, all in the new female dormitory of the Maryland Penitentiary as shown on the drawings and described on the specifications prepared by Charles M. Anderson, architect.' -but the said plaintiff refused to accept such performance on the part of the defendant unless the defendant would also agree to construct a certain concrete ceiling in the said female dormitory, then under the pleadings in this case the verdict must be for the defendant.

"(4) The defendant prays the court to instruct itself, sitting as a jury, that if it finds from the evidence in this case that the said Clarion Concrete Construction Company, or its receiver, offered to complete and perform all work specified in the building contract offered in evidence by the plaintiff in the clause of said contract, reading as follows: 'Columns, beams, floor and roof slabs, stairs. skylight sides, concrete foundations, concrete underfloors, top finish, asphalt under cells, cement floor finish at stair corridor, safety treads on stairs, all in the new female dormitory of the Maryland Penitentiary' * * *—and the said plaintiff did refuse to accept performance of the said work unless the said construction company, or its receiver should likewise agree to construct and complete a certain ceiling, or any other work not mentioned in the above-recited clause of said contract, then, under the pleadings in this case, the verdict must be for the defendant.

"(5) If the court shall find that the plaintiff refused to permit the Clarion Concrete Construction Company or the defendant to complete the work called for in the contract between said construction company and the plaintiff, referred to in the bond sued upon in this case, unless the said construction company or the defendant would construct a concrete celling for the new female dormitory of the Maryland Penitentiary, then under the pleadings in this case the verdict must be for the defendant.

"(6) If the court shall find that the contract between the plaintiff and the Clarion Concrete Construction Company of Baltimore city, dated September 18, 1906, which is in evidence, was the contract referred to in the bond sued upon in this case, then, by the true construction of said contract, the

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said construction company was under no obligation to construct a ceiling for the new female dormitory of the Maryland Penitentiary mentioned in said contract.

"(7) There is no evidence legally sufficient to sustain a verdict for the plaintiff upon the issue joined upon the surrejoinder to the third rejoinder to the first replication to the eighth plea, and therefore the verdict upon that issue must be for the defendant.

"(8) There is no evidence legally sufficient to sustain a verdict for the plaintiff upon the issue joined upon the surrejoinder to the fourth rejoinder to the first replication to the eighth plea, and therefore the verdict upon that issue must be for the defendant.

"(9) There is no evidence legally sufficient to sustain a verdict for the plaintiff upon the issue joined upon the surrejoinder to the third rejoinder to the first replication to the ninth plea, and therefore the verdict upon that issue must be for the defendant.

"(10) There is no evidence legally sufficient to sustain a verdict for the plaintiff upon the issue joined upon the surrejoinder to the fourth rejoinder to the first replication to the ninth plea, and therefore the verdict upon that issue must be for the defendant.

"(11) If the court, sitting as a jury, shall find from the evidence that the third payment mentioned in the contract, dated September 18, 1906, between the plaintiff and the Clarion Concrete Construction Company, which is in evidence, was made on the 28th day of November, 1906, and that the third reinforced floor mentioned in said contract was not put in place by said Clarion Concrete Construction Company until the 21st day of January, 1907; and that no claim for any allowance for such delay was presented in writing to Charles M. Anderson, architect, by said Clarion Concrete Construction Company on the ground that the same was due to the act, neglect, or default of the plaintiff or of said architect or of any other contractor employed by the plaintiff upon the work at the Maryland Penitentiary, or by any damage caused by fire or other casualty for which said concrete company was not responsible under said contract (and there is no evidence legally sufficient to prove any such presentation of written claim to said architect); and that such delay as it occurred came to the knowledge of the plaintiff or of his foreman authorized to oversee the said work; and if the court shall further find from the evidence that prior to the 5th day of January, 1907, the said Clarion Concrete Construction Company failed to have a competent man in charge of the work under its said contract with the plaintiff, and put concrete into the molds before the molds were plumbed and lined up, and before they were sufficiently propped up to prevent the mold from swagging, and that putting the concrete into molds in such a manner was improper construction; and that such failure of said

Clarion Concrete Construction Company to have a competent man in charge of said work, and the other acts on the part of the Clarion Concrete Construction Company. hereinabove mentioned, came to the knowledge of the plaintiff on or before the 5th day of January, 1907; and if the court shall further find from the evidence that prior to the 9th day of January, 1907, a partition at the east end of the chapel wing of the addition to the Maryland Penitentiary mentioned in said contract, part of the work called for by said contract, bulged out of plumb, so that the same would have to be trimmed to make a plumb and parallel wall in thickness, according to the plans and specifications prepared by said architect, and referred to in said contract, and that such bulging was caused by the spreading of the mold because the mold was not properly stayed by said Clarion Concrete Construction Company, and that all of said facts came to the knowledge of the plaintiff on or before the 9th day of January, 1907; and that prior to said 9th day of January, 1907, the plaintiff by his agents called the attention of the representatives of the Clarion Concrete Construction Company to the said bulging of said partition; and that the said Clarion Concrete Construction Company had promised to attend to the same, but had not, up to said 9th day of January, 1907, remedied said defect: and that the plaintiff prior to said 9th day of January knew of said facts; and if the court shall further find from the evidence that on or before the 9th day of January, 1907, the other defects in the work of said Clarion Concrete Construction Company, under its said contract with the plaintiff complained of in the letter from the plaintiff to said company dated January 9, 1907, which is in evidence, came to the knowledge of the plaintiff; and if the court shall further find from the evidence that on or before the 11th day of January, 1907, the rods, in respect to the columns from 9 to 16 on the north wing of said addition to said penitentiary, were run up too high, so that they would have to be cut off in order to make connections in the proper height according to the said plans and specifications of said architect; and that on or before the 11th day of January, 1907, the Clarion Concrete Construction Company had been ordered by said architect to make said change, but had neglected or refused so to do, and had in consequence been obliged by him to stop work on that part of this work until such correction should be made; and that all of said facts came to the knowledge of the plaintiff on or before January 11, 1907, and if no notice in writing of any of said facts was given to the defendant or its president at its New York City office until the plaintiff's letter dated February 4, 1904, which is in evidence-then, under the pleadings in this case, the verdict must be for the defendant.

"(12) If the court shall find from the evi-

dence that acts on the part of the Clarion crete Construction Company on account of Concrete Construction Company or its agents, which might involve a loss for which the defendant might be liable under the terms of the bond sued upon in this case, came to the knowledge of the plaintiff on or before the 5th day of January, 1907, and that the defendant was not notified in writing of said acts, or any of them, until the 4th day of February, 1907, then under the pleadings in this case the verdict must be for the defendant.

"(13) If the court shall find from the evidence that acts on the part of the Clarion Concrete Construction Company or its agents, which might involve a loss for which the defendant might be liable under the terms of the bond sued upon in this case, came to the knowledge of the plaintiff on or before the 9th day of January, 1907, and that the defendant was not notified in writing of said acts, or any of them, until the 4th day of February, 1907, then, under the pleadings in this case, the verdict must be for the de-

"(14) If the court shall find from the evidence that acts on the part of the Clarion Concrete Construction Company or its agents, which might involve a loss for which the defendant might be liable under the terms of the bond sued upon in this case, came to the knowledge of the plaintiff on or before the 11th day of January, 1907, and that the defendant was not notified in writing of said acts, or any of them, until the 4th day of February, 1907, then, under the pleadings in this case, the verdict must be for the defendant.

"(15) If the court shall find from the evidence that part of the work which by the contract between the Clarion Concrete Construction Company and the plaintiff referred to in the bond which is sued upon in this case, the said Clarion Concrete Construction Company was bound to perform, the construction of a certain table screen or screen partition, and that said table screen or screen partition was shown on the original plans and specifications referred to in said bond and contract, and that after the execution and delivery of said bond, and before the said construction company had failed and refused to continue and complete said work, said company wrote to the plaintiff the letter dated January 12, 1907, which is in evidence, and that the plaintiff replied thereto by the letter dated January 14th, which is in evidence, and that the defendant was not notified of the agreement contained in said letters, and did not consent thereto, then, under the pleadings in this case, the verdict must be for the defendant, even though the court may further find that said table screen or screen partition was omitted in accordance with the written order of Charles M. Anderson, architect, and that said order specified the amount to be allowed by the Clarion Con-

the omission of said table screen.

"(16) The defendant prays the court to instruct itself, sitting as a jury, that if it find from the evidence in this case that the Clarion Concrete Construction Company agreed with the plaintiff that a sum of money, to wit, the sum of \$30, should be deducted from the last installment of the contract price on account of the omission of a certain table screen appearing on the plans, and alleged or claimed by the plaintiff to form a part of the work, which the said construction company was bound to perform under said contract, and if the court shall further find that said deduction from said contract price was made without the written consent of the surety, the defendant in this case, then, under the pleadings in this case, the verdict must be for the defendant.

"(17) If the court shall find from the evidence that on the 14th day of January, 1908, the Clarion Concrete Construction Company and the plaintiff agreed together as follows, namely: That the construction of a certain reinforced concrete structure known as a table screen or screen partition in the second story of the new addition to the Maryland Penitentiary should be omitted by the said Clarion Company, although the same was shown on and by the original plans and specifications of Charles M. Anderson, architect, referred to in the bond sued upon in this case, and that the sum of \$30 should, in consideration thereof, be deducted from the last payment to be made to the said company under its contract with the plaintiff referred to in said bond, then, under the pleadings in this case, the verdict must be for the defendant, even though the court may further find that said agreement was made upon the letter of said architect to the plaintiff, dated January 13, 1907, which is in evidence.

"(18) If the court shall find that on the 14th day of January, 1907, the plaintiff agreed with the Clarion Concrete Construction Company that a certain reinforced concrete structure known as a table screen or screen partition should not be constructed. and that the sum of \$30 should be deducted from the amount to be paid by the plaintiff to said company under said contract, and if the court shall further find that the construction of said table screen or screen partition was shown on and by the original drawings and specifications of Charles M. Anderson, architect, referred to in said bond and in said contract, and that the defendant was not notified in writing of the omission of said table screen or screen partition, and did not consent thereto, then, under the pleadings in this case, the verdict must be for the defendant.

"(19) If the court shall find that after the execution and delivery of the bond sued upon in this case, and before any refusal or neglect of the Clarion Concrete Construction Company to continue and complete the work

called for in its contract with the plaintiff | mentioned in said bond, a dispute arose between the plaintiff and said company as to whether said company under its said contract with the plaintiff was bound to construct a certain concrete ceiling, and that the said company wrote to the plaintiff the letter dated February 6, 1907, which is in evidence, proposing to submit said dispute to arbitration, and that the plaintiff upon receipt of said letter thereupon, in reply thereto, stated to representatives of said company that he would submit said dispute to arbitration accordingly as proposed, then, under the pleadings in this case, the verdict must be for the defendant, even though the court may further find that the said Clarion Concrete Construction Company thereafter withdrew its said offer to arbitrate, and even though such withdrawal was acquiesced in by the plaintiff.

"(20) If the court, sitting as a jury, shall find that on or before January 5, 1907, the Clarion Concrete Construction Company, in and about work at the new female dormitory of the Maryland Penitentiary, under the contract between said company and the plaintiff, which is in evidence, committed acts which were likely to result in loss for which the defendant would be liable under the bond which is sued upon in this case, and that on or before the 5th day of January, 1907, the occurrence of said acts came to the knowledge of the plaintiff, and that the defendant was not notified of said acts before the receipt in New York of a letter, addressed by the plaintiff to the defendant's New York office, and posted by the plaintiff, in Baltimore, on the 4th day of February, 1907, then, under the pleadings in this case, the verdict must be for the defendant."

Argued before BOYD, C. J., and BRISCOE, SCHMUCKER, WORTHINGTON, THOMAS. and HENRY, JJ.

Horace S. Whitman and Arthur W. Machen, Jr., for appellant. J. Morfit Mullen and Vernon Cook, for appellee.

SCHMUCKER, J. The appeal in this case was taken from a judgment, in favor of the appellee, in a suit on a bond given by the appellant as surety for the Clarion Concrete Construction Company. That company, in September, 1906, made a contract with John Waters, a well-known builder in Baltimore city, to furnish the material and do the work for the reinforced concrete construction required in the erection of a dormitory at the penitentiary, which he had undertaken to build for the state of Maryland. The bond sued on was given by the appellant to secure the performance of that contract. In July, 1907, Waters instituted the present suit, in the superior court of Baltimore city, on the bond for an alleged failure of the concrete company to fully perform its contract with him. The case, having been tried before the for the plaintiff for \$1,655.67, from which the appeal was taken.

The pleadings in the case are voluminous and intricate, covering more than 20 pages of the record, and 19 issues were joined during their progress; but, as the case was finally tried on its merits, we can dispose of it here by a consideration of the questions raised by the bills of exception without reviewing the pleadings. The record contains 23 bills of exceptions, of which the last relates to the court's action on the prayers and instructions to the jury, and all of the others refer to rulings on evidence. At the close of the case the plaintiff offered 2 prayers, and the defendant offered 20. They will be set out in the report of the case by the reporter. The court refused the plaintiff's first prayer and granted his second one, and refused all of the defendant's prayers in the form in which they were offered, but granted the third, eleventh, and twentieth, after modifying them. The court also gave two instructions on the law at its own instance. An examination of the exceptious makes it apparent that the questions raised by them may be conveniently disposed of in classes or groups, in the order adopted on the appellant's brief in presenting the several propositions upon which it relied to defeat the action in the court below, and on which it now insists as grounds of reversal. Those defenses relate: (1) To the construction of the contract secured by the bond sued on; (2) failure of plaintiff to notify defendant of acts of the contractor likely to result in loss; (3) effect of alleged alterations in contract without defendant's consent; (4) to various other questions raised by the first, fifth, twelfth, thirteenth, and fifteenth bills of exceptions, and the plaintiff's second prayer.

The appellant's main contention on the construction of the contract is that it did not require the concrete company to erect the ceiling on the upper story of the building. As against this view the appellee insists that the expression "roof slabs" found in the contract was intended to include the ceiling under the roof and fastened to it. He further insists that, upon a fair interpretation of the entire contract, and the architect's drawings and specifications therein referred to, it is plain that the reinforced concrete work contracted for by the concrete company was intended to include the ceiling in question. The first article of the contract is as follows: "Article 1. The contractor shall and will provide all the materials and perform all the work for the reinforced concrete construction. i. e., columns, beams, floor and roof slabs, skylight sides, concrete foundations, concrete under floors, top finish, asphalt under cells, cement floor finish at stair corridor, safety treads on stairs, all in the new female dormitory of the Maryland Penitentiary, as shown on the drawings and described in the specifications prepared by Charles M. Anderson, arcourt without a jury, resulted in a judgment | chitect, which drawings and specifications are

identified by the signature of the parties hereto, and become hereby a part of this con-The architect's specifications referred to in article 1 provide, under the head of "Reinforced Concrete," that "the floors, beams, and columns supporting same, ceilings, roofs and stairways and interior partitions throughout, as shown on plans, to be of reinforced concrete." They also require that the work should be of "monolithic construction." It is further provided in the contract that the work is to be done under the direction of said architect, and that his decision as to the meaning of the drawings and specifications shall be final; also that no alterations shall be made except upon his written order, the amount to be paid by the owner. or allowed by the contractor, by virtue of such alteration to be stated in such order. There is also a provision that, if the contractor should not at any time furnish a sufficiency of skilled workmen or materials of proper quality, or should fail to diligently prosecute the work, or to perform any of the stipulations of the contract, then, upon the certification by the architect of such neglect or failure, the owner may, after 8 days' written notice to the contractor, provide any such labor or materials, and deduct the cost thereof from any money then due, or thereafter to become due, and may also, with the approval of the architect, terminate the employment of the contractor, and take possession of the premises with the material, tools, and appliances thereon, and finish the work at the expense of the contractor. If, in such event, the expense of the completion as audited and certified by the architect shall exceed the unpaid balance of the contract price. the contractor shall pay the difference to the owner, and such certificate of the architect shall be conclusive upon the parties. bond of the appellant, on which the suit was brought, is conditioned on the faithful performance of the contract. It also provides that the surety shall be notified in writing of any act on the part of the principal or its agents or employés which may involve a loss, immediately after its occurrence, and must be similarly notified of, and its written consent secured to, any change or alteration made in the original plans or specifications by the obligee.

The contract and bond having been executed, the concrete company began the execution of the work contracted for, and had completed the greater portion of it by February 4, 1907, when it took the position, in a letter to the appellee, that it was not compelled under its contract to construct the celling over the upper floor of the building. The appellee stoutly insisting that the contract did call for the construction of that ceiling, the two parties expressed a willingness to have the dispute between them settled by arbitration, but as only one of them selected an arbitrator, and neither of them took further steps in that direction, no settlement by that means occurred. On March 28, 1907, the ap-

pellee formally notified the concrete company to proceed with the work under the contract, which it failed to do. It was on the same day put into the hands of Horace S. Whitman as receiver, on a suit of one of its creditors, by a decree of circuit court No. 2 of Baltimore city. On April 2, 1907, the appellee notified the appellant that the concrete company was not proceeding with its work, and that it denied its obligation to construct the ceiling. In response to this notice the receiver, Mr. Whitman, who was also counsel for the appellant, offered to complete the work without the ceiling, for which he refused to accept any responsibility. The appellee thereupon, having first notified Mr. Whitman of his purpose, proceeded to have the work completed himself through the agency of other subcontractors. After the work had been finished, the architect certified that the cost of its completion by the appellee was \$7,995.67, which exceeded the balance of the money not paid to the concrete company under its contract by \$1,655.67, for which amount the judgment was obtained.

Mention will be made hereafter of certain acts of the concrete company likely to result in loss, of which the appellant insists that it did not receive prompt notice, and also of an alleged alteration of the contract without the appellant's consent, which it contends discharged the bond.

We will now consider whether, under a proper construction of the contract, the concrete company was bound to construct the disputed ceiling. We agree with the appellant that the provision in the contract that the architect's decision as to the true construction and meaning of the drawings and specifications shall be final does not take from the court, and confer upon the architect, the power to construe the contract itself. The law is clear that the common right of resort to the courts for the determination of the rights of parties, or the settlement of disputes between them, will not be taken away by inference or implication, or anything short of a distinct agreement to waive it. No such agreement is found in the contract before us which in terms limits the architect's authority to determining the meaning and construction of the drawings and specifications prepared by him, but does not submit to his decision the contract rights of the parties. Smith & Sons v. Jewell, 104 Md. 279, 65 Atl. 6 et seq.; Isaacs v. Dawson, 70 App. Div. 232, 75 N. Y. Supp. 837, affirmed in 174 N. Y. 537, 66 N. E. 1110; Baltimore v. Schaub Bros., 96 Md. 554, 54 Atl. 106; Lauman v. Young, 31 Pa. 306; Gubbins v. Lautenschlager (C. C.) 74 Fed. 167.

call for the construction of that ceiling, the two parties expressed a willingness to have the dispute between them settled by arbitration, but as only one of them selected an arbitrator, and neither of them took further steps in that direction, no settlement by that means occurred. On March 28, 1907, the ap-

whether, under its provisions, the concrete ings" is used, as well as "floors" and "roofs," company was under any obligation at all to construct the disputed ceiling. It is familiar law that the construction of written documents is ordinarily one of law for the court; and, if their terms are not technical, ambiguous, or obscure, parol evidence cannot be resorted to to aid in the construction. Roberts v. Bonaparte, 73 Md. 199, 20 Atl. 918, 10 L. R. A. 689; Williams v. Woods, 16 Md. 251; Cecil Bank v. Farmers' Bank, 22 Md. 155; Needy v. Middlekauff, 102 Md. 183, 62 Atl. 159. But where technical terms are used in a written contract, parol testimony may be introduced to explain their meaning, which will then become a question for the jury, to whom "the court will give conditional instructions as to the effect of the contract, according as they may find the meaning of such terms to be." Roberts v. Bonaparte, supra; Leftwich v. Royal Ins. Co., 91 Md. 612, 46 Atl. 1010; Badart v. Foulon, 80 Md. 589, 31 Atl. 513. In the last-mentioned case this court in its opinion quoted with approval from the opinion of Baron Parke in Share v. Wilson, 9 Clark & Finnelly, 355, the following statement: "In the first place there is no doubt that, not only where the language of the instrument is such as the court does not understand, it is competent to receive evidence of the proper meaning of that language as when it was written in a foreign tongue, but it is also competent where technical words or peculiar terms, or indeed any expressions, are used which at the time the instrument was written had acquired an appropriate meaning, either generally or by iocal usage or amongst particular classes." It is equally familiar law, recognized by the cases already cited, that in the construction of contracts courts look to the language employed, the subject-matter, and the surrounding circumstances of the parties who made them so as to carry out their true intent.

Applying these principles to the present case, we have, first, in point of time, a contract between Mr. Waters and the state for the erection of a penitentiary dormitory according to the drawings and specifications of a designated architect. Those specifications are found to contain the distinct statement: "The floors and beams and columns supporting the same, ceilings, roofs and stairways, and interior partitions throughout to be of reinforced concrete." We next have the subcontract, now under consideration, between Mr. Waters and the concrete company, by which the latter undertakes to "provide all of the materials and perform all of the work for the reinforced concrete construction" in the dormitory as shown on the drawings and described on the specifications already mentioned. The items constituting the concrete construction contracted for are not enumerated in precisely the same language in the subcontract as in the specifications. In the enu-

while in that contained in the contract we find no mention of ceilings, nor any separate mention of roofs, but two expressions, "floor slabs" and "roof slabs" appear there that are not found in the enumeration contained in the specifications. If from that state of facts it is to be inferred that the concrete company was not bound to construct the ceiling on the fourth floor, it would equally follow that it was not bound to construct ceilings on the first, second, or third floors, unless some of the expressions, descriptive of the work to be done, employed in the contract be held to include the ceilings on those three floors. In view of the violence of the assumption that the contract did not intend to provide for the construction of any ceilings at all, and also in view of the subject-matter of the contract and the surrounding circumstances, we think that the learned judge below correctly permitted the appellee to introduce evidence to show that in concrete construction the expression "floor slab" and "roof slab" are, respectively, used in a technical or peculiar sense to designate, not merely the floor or roof, but also the ceiling below it, as the roof or floor is constructed at the same time as the ceiling under it, and they together form one integral portion of the entire building. We are convinced that those expressions were used in a technical or peculiar sense in the present case from the testimony of Mr. Waters, the builder, Mr. Anderson, the architect, and Mr. Barre, the manager of the Armored Concrete Company, all of whom, from the nature of their occupations, were familiar with architectural drawings and specifications. The appellant did not deny that the expression "floor slab" in the contract was intended to describe the concrete structure which formed at once the floor to one story and the ceiling to the story below it, but he contended that the expression "roof slab" should not be held to describe both the roof and the ceiling below it, because the two, although rigidly connected with each other, were in fact separated by an air space of several feet, and could be separately constructed. That contention presented a question of the meaning of the technical expression "roof slab" as used in the contract, and was one for the jury, or for the court sitting as a jury.

The court's first instruction which covered this branch of the case was as follows: "The court finds as matter of law that the words 'roof slabs' * * as shown on the drawings and described in the specifications referred to compose a technical term. The court further rules as a matter of law that if it sitting as a jury shall find from the evidence that said technical term, when used in a contract for the erection of a building where the specifications referred to require that the roof and ceiling should be conmeration in the specifications the word "ceil-structed of reinforced concrete by 'monolithic construction,' the ceiling being attached ply with specifications and the cessation of to and dependent from the roof, means to persons skilled in the trade in which said technical term is used 'the roof together with the ceiling so attached and dependent,' then by the true construction of the contract offered in evidence between the Clarion Concrete Company and the plaintiff, the said Clarion Concrete Company was bound thereunder to erect the ceiling so attached to, and dependent upon, the roof as called for in the specifications referred to in said contract." We find no error in the granting of that instruction. The contention of the appellant is that the contract in this case fails within the principle that, where general words are followed by a special clause, the latter will limit and restrain their operation, which is asserted in Needy v. Middlekauff. supra, and Mims v. Armstrong, 31 Md. 87. 1 Am. Rep. 22. In the present case we not only have general words of description of the work covered by the contract, followed by a brief mention of its several items, but have also incorporated into the contract, by special reference thereto, a set of drawings and specifications which more fully show the purpose and particulars of the work. The intention of the parties to the contract must be gathered from a consideration of the contract and the drawings and specifications, taken together in the light of the purpose which their contents show they were intended to serve.

What we have said in reference to the court's first instruction also disposes of questions raised by the defendant's first, second, third, fourth, and fifth prayers, and its second, third, fourth, eighth, ninth, tenth, fourteenth and sixteenth to twenty-second exceptions to rulings on evidence.

The second defense relied on by the appellant is an alleged violation of one of the provisions of the bond sued on, consisting of a failure of the appellee to give it notice of acts of the concrete company likely to result in loss for which the surety would be responsible. Matters connected with this defense are presented by the eleventh bill of exceptions, and the defendant's first, eleventh, twelfth, thirteenth, fourteenth, and twentieth prayers, as well as by the court's own instructions and its modification of the eleventh and twentieth prayers and the overruling of the defendant's special exceptions.

It is not disputed that the appellee gave immediate written notice to the appellant of the concrete company's refusal, on February 4. 1907, to construct the disputed ceiling, and of the appointment of the receiver for that company on March 28, 1907, and also of the attachment laid in his hands to affect any money payable to the company under its contract. The other acts of the company, likely to involve loss, of which the appellant complains that it did not receive due notice, consist of delays in the progress of the work,

the work on or about January 11, 1907. Although a surety is not liable beyond the strict terms of its contract, that contract, like all others, must receive a rational construction which will accomplish the real purpose which its authors had in view in making it. Its "language has the same significance, and its meaning must be ascertained by the same rules of law, when it is found in the contract of a surety as when it appears in other agreements." Am. Bonding Co. v. Pueblo Investing Co., 150 Fed. 17, 80 C. C. A. 97, 9 L. R. A. (N. S.) 557; National Surety Co. v. U. S., 129 Fed. 70, 63 C. C. A. 512; U. S. Fidelity Co. v. Woodson Co., 145 Fed. 144, 76 C. C. A. 114.

It may safely be said to be a matter of common knowledge, certainly one which a company like the appellant, which makes a business of guaranteeing the performance of contracts of builders and others, ought to have known, that in the execution of every building contract of any magnitude or importance some delays, cessations of work, and slight deviations from the plans and specifications are bound to occur. In a sense it is true that every such occurrence may result in loss to the surety, but it is irrational to suppose that the parties to the contract of suretyship contemplated a destruction of the contract, and the consequent loss of the protection it was intended to afford, upon the happening of any such occurrence of a slight and immaterial character. Without noticing in detail all of the acts disclosed by this record which might have resulted in loss to the surety, but did not do so, we may say that in our view they are not such as to call for or justify an application to them with strict severity of the provision of the bond relating to notice to the surety. That clause is in effect a forfeiture clause, and therefore belongs to a class of provisions of which the courts are not disposed to make a rigid application to circumstances not of the essence of the transaction. Monahan v. Mut. Ins. Co., 103 Md. 158, 159, 63 Atl. 211, 5 L. R. A. (N. S.) 759, and cases there cited.

The contention of appeilant's counsel that the failure to promptly notify the surety of the cessation of work under the contract about January 11, 1907, deserves especial notice. Treating that as having been a final abandonment of the work by the company, he insists that the failure to promptly notify the surety of the fact prevented it from taking possession of the work, as it had a right to do under the terms of the bond, and receiving all subsequent payments under the contract including the sum of \$2,000, afterwards paid to the company or for its account. That contention involves a distinct issue of fact; i. e., whether the plaintiff had any reason to believe that the work was finally abandoned on January 11th. There is evidence in the record tending to show improper workmanship, and failure to com- that, although Mr. Waters on or about that

date stopped the employes of the company from doing some work because of the manner in which it was being done, he allowed them the privilege of correcting their erroneous method; also that after that date the completion of the concrete work was delayed because the other portions of the work on the building were not sufficiently advanced to permit the resumption of the concrete construction, and that when the building was ready for the concrete construction of the roof, Mr. Waters notified the company of that fact, and promptly informed the appellant that he had done so, and that the receiver of the company replied that he was prepared to complete the contract by constructing the roof, but refused to construct the disputed ceiling, and that it was the controversy over the obligation to construct the ceiling, and the state of the other work on the building, rather than an abandonment of the contract by the company which delayed the completion of the work. A letter appears in the record written by the concrete company to Mr. Waters on February 4th, informing him that they were forced to suspend work on the building because the stone walls had not reached a sufficient height to enable them to proceed with the only concrete work which then remained to be done.

In the recent case of United Surety Co. v. Summers, 72 Atl. 775, we had occasion to pass upon a state of facts involving the same principle as that now under consideration. That was a suit on a bond for the faithful performance of a building contract, and the bond contained the identical provision found in the present one, requiring prompt notice to be given to the surety of any act on the part of the principal likely to result in loss to the surety. In that case the builder omitted to construct a stairway, called for by the contract, between two floors of the building, although he was paid for it. No notice was given to the surety of the omission or the payment, and it relied upon the failure to give the notice as one of its defenses to a suit on the bond. We there held that the surety was not released by the failure of the obligee to give it the notice to which it claimed that it was entitled.

The third defense set up by the appellant is based upon an alleged alteration of the contract without its consent. The clause in the bond on that subject is: "The said surety must be notified in writing and its written consent secured to any change or alterations made in the original plans or speci-fications made by the obligee." The alleged alteration relied on in support of this defense was that, during the progess of the reinforced concrete work, a screen partition in the dining room, called for in the specifications, was omitted under a verbal agreement, in consideration of which the concrete

, of \$30 on the contract price. It is difficult to see how the appellant as surety was injured by that transaction; and, in view of the proportion which the sum of \$30, which it involved, bears to whole contract price of \$13,-506, it might well be regarded as falling within the operation of the principle, recognized by many authorities, that slight and immaterial changes in a contract which do not change its legal import will not release a surety. 27 A. & E. Encyc. 495, 496; Anderson v. Bellenger, 87 Ala. 334, 6 South. 82, 4 L. R. A. 680, 13 Am. St. Rep. 46; American Bonding Co. v. Pueblo Investing Co., supra; 2 Cyc. 217, 218; Leppert v. U. S. Fidelity Company et al., 101 Md. 75, 60 Atl. 450. The learned judge below in rejecting this defense relied especially upon the fact that the alleged change in the contract never was made in a valid or legally effectual manner, and consequently there was no alteration in the plans or specifications within the meaning of the bond. By the terms of the contract itself no such alteration could be made, "except upon the written order of the architect," who was to fix the sum to be paid to or allowed by the contractor therefor, subject to the right of the parties to resort to arbitration if dissatisfied with his decision. alleged alteration was not so made. appellant, in seeking to escape liability by a strict adhesion to the letter of its bond, could not complain of the application by the court of a similar strictness to the construction of the clause of the contract prescribing the method which must be adopted in order to make a valid change or alteration in its terms. We find no error in the action of the court below upon the portions of the record applicable to that defense, which are the sixth and seventh bills of exception, and the defendant's first, seventh, eighth, ninth, tenth, fifteenth, sixteenth, seventeenth, eighteenth, and nineteenth prayers, and the court's second instruction.

The appellant also relied by way of defense on the fact that the drawings and specifications prepared by Mr. Anderson, the architect, and referred to in the contract, were not signed by the contracting parties. We are unable to recognize any merit in that defense. The contract itself was signed by the parties, and there is no question as to the identity of the drawings and specifications to which it refers. They were recognized and adopted by all parties to the transaction as controlling the performance of the work contracted for, and their conduct in that respect amounted to a waiver of the formality of signing. Furthermore, the drawings and specifications were relied on, as forming part of the contract, by the appellant in its main defense to the present action, which was that they did not require the concrete company to construct the ceiling to the upper story to the dormitory. Under these circumstances it cannot now be heard company agreed to allow Mr. Waters a credit to call in question their identity, or complain of their admission in evidence. The features of this case to which we have adverted call with especial force for the application to it of the familiar doctrine that a surety is estopped to deny the facts recited.

3. MUNICIPAL CORPORATIONS (§ 751*)—GRADING ALLEY—INDEPENDENT CONTRACTOR.

A city is liable for damage to property due to the negligent manner in which an alley was filled and repaved, though it employed an independent contractor to do the work, where it retained control thereof in his obligation which is well supported by the decisions in this state and elsewhere. 27 A. & E. Encyc. 447, 466, 467; 16 Cyc. 702; State v. Horner, 34 Md. 573; Hamilton v. State, 32 Md. 352; Billingsley v. State, 14

Without referring in detail to the other questions relied on by the appellant as grounds for reversal, all of which are more or less technical in their nature, we deem it sufficient to say that the record discloses no reversible error in the disposition of those questions made by the learned judge before whom the case was tried below.

In dealing with the construction of the bond in this case, and of the contract, the faithful performance of which it was intended to secure, we have kept in view the attitude assumed by us in several recent cases of a similar character, especially the case of State, Use of Smith, v. Turner, 101 Md. 584, 61 Atl. 334, where we said: "While the liability of the surety is not to be enlarged by mere implication, yet in the effort to ascertain what these duties are, a reasonable construction is to be given to the language of the statutes dealing with these duties, and the construction is not to be strained in order to effect a release of a surety, whose obligation is deliberately entered into, as a commercial transaction, and with the exclusive view to the pecuniary profit resulting from it."

As a result of the conclusions which we have reached from a careful examination of the issues presented by the record, we will affirm the judgment appealed from.

Judgment affirmed, with costs.

(111 Md. 121)

THILLMAN v. MAYOR, ETC., OF CITY OF BALTIMORE et al.

(Court of Appeals of Maryland. June 30, 1909.)

1. APPEAL AND ERROR (§ 837*)-REVIEW-IN-STRUCTIONS.

The correctness of prayers for instructions which do not refer to the pleadings must be determined entirely by a consideration of the evi-

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3264; Dec. Dig. § 837.*]

2. MUNICIPAL CORPORATIONS (§ 751*)-GRAD-ING ALLEY-INDEPENDENT CONTRACTOR.

Even if a city could escape liability for damage to property, due to the negligent manner in which an alley was filled and repaved while the work was still in the hands of the contractor, it cannot do so for damage sustained after it has taken control of the alley.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1579; Dec. Dig. § 751.*]

tained control thereof.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1580-1582; Dec. Dig. § 751.*]

4. APPEAL AND ERROR (§ 927*)—REVIEW—DIRECTED VERDICT—EVIDENCE TAKEN AS COR-

The Supreme Court, in considering a prayer for a directed verdict, must take the evidence of the adverse party as correct.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 4024; Dec. Dig. § 927.*]

CORPORATIONS

5. MUNICIPAL CORPOBATIONS (§ 733*) — STREETS—LIABILITY FOR DAMAGES.

Though the powers granted a municipality to open, grade, and pave streets, and to construct such gutters and sewers as in its judgstruct such gutters and sewers as in its judg-ment the public convenience may require, are discretionary, any particular plan that may be adopted must be reasonable, and the manner of its execution is, with respect to the right of the citizen, a mere ministerial duty, and for any negligence in the execution of the work the municipality will be held responsible.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1547; Dec. Dig. § 733.*1

6. MUNICIPAL CORPORATIONS (§ 821*)—GRAD-ING ALLEY—ACTION FOR DAMAGES—SUFFI-CIENCY OF EVIDENCE.

Evidence, in an action for damage to property due to the negligent manner in which an alley was filled and repaved, held sufficient to require a submission of the case to the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.*]

7. JUDGMENT (§ 240°) — JOINT OB SEVERAL JUDGMENT.

In an action against a city and a contractor for damage to property, due to the negligent manner in which an alley was filled and re-paved, only such damages as they are jointly liable for can be recovered.

[Ed. Note.—For other cases, see Cent. Dig. § 423; Dec. Dig. § 240.*] see Judgment,

Appeal from Court of Common Pleas of Baltimore City; Thos. Ireland Elliott, Judge.

Action by Bernard Thillman against the Mayor and City Council of Baltimore and another. Judgment for defendants, and plaintiff appeals. Reversed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTH-INGTON, THOMAS, and HENRY, JJ.

J. Marsh Matthews and Hyland P. Stewart, for appellant. W. H. De Wright and Howard Bryant, for appellees.

BOYD, O. J. The appellant sued the appellees and Isaac S. Filbert for injuries alleged to have been sustained to his properties on the southwest corner of Broadway and Hoffman streets in the city of Baltimore, numbered 1328-1336 North Broadway. The case has some peculiar features. Although the Filbert Paving & Construction Company was made a party by amendment, the dec-

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

laration alleges that the mayor and city council of Baltimore, being the owner of the beds and alleys in the city and particularly of the beds of Broadway and Hoffman streets and the "10-foot" alley in the rear of the plaintiff's premises, undertook, with the assistance of the defendant, Isaac S. Filbert, "to change the grade of Hoffman street at said point, and to repave the street; the said work being done in such a careless and negligent manner as to seriously damage the said properties of the plaintiff, and the water which had hitherto for years been accustomed to pass out of said alley in the rear of said properties, and out Hoffman street, was diverted from its usual course, and dammed up in such a careless and negligent manner by said defendants as to cause the same to overflow and flood the properties above mentioned of the plaintiff, whereby the same were greatly damaged," etc. It will be observed that the Filbert Paving & Construction Company is not alleged to have been connected with the work, and during the trial the case against Isaac S. Filbert was dismissed. There is no reference to the company in the narr. excepting in the beginning, where it is mentioned as one of the defendants. Then in the evidence, as will be seen later, the cause of the injury was claimed to be the alleged negligent filling and repaving of the alley near Hoffman street. At the conclusion of the plaintiff's testimony the mayor and city council of Baltimore and the Filbert Paving & Construction Company each offered a prayer that there was no evidence legally sufficient to entitle the plaintiff to recover against it and the verdict must therefore be for it. Both of the prayers were granted, a verdict was rendered for the defendants, and from the judgment entered on that verdict this appeal was taken. The prayers do not refer to the pleadings, and hence their correctness must be determined entirely by a consideration of the evidence. 2 Poe, § 302; Con. Ry. Co. v. Pierce, 89 Md. 495, 43 Atl. 940; West Va. Cent. Ry. Co. v. Fuller, 96 Md. 652, 54 Atl. 669, 61 L. R. A. 574, and many other So, although nothing was alleged against the Filbert Company, and the evidence does not sustain the allegations in the narr. against the city, we are not permitted to consider the pleadings in passing on the prayers, but must assume that they were granted with reference to the evidence alone.

It is not denied that there was evidence of injury to the plaintiff's property, and hence we need only determine whether there was legally sufficient evidence that such injury was caused by the defendants, or either of them, in a way which made them liable. It is contended on the part of the city that it is relieved from liability because the work was done by an independent contractor. general principles applicable where work is to be done by a contractor, upon his own responsibility, who is not subject to the control of the employer as to the manner in Rep. 395, the city was held liable for an acci-

which it is to be performed, have been well established in this state since they were so clearly announced by Judge Alvey in De Ford v. State, 30 Md. 179. In that case the court quoted at length from the opinions of Pollock, C. B., and Baron Wilde in Hole v. S. & S. Ry. Co., 6 Hurls & Norm. 488. The former said: "I suggested, in the course of the argument, that where a man employs a contractor to build a house, who builds it so as to darken another person's window, the remedy is not against the builder, but the owner of the house. It may be that the same principle applies to cases where a man is employed by another to do an act which it is the duty of the latter to do. In such cases it is the duty of the owner of the soil to inquire what is in the course of being done -to know what is the plan-to see that materials are good, and to take care that no mischief ensues." Baron Wilde thus stated the principle: "The distinction appears to me to be that when work is being done under a contract, if an accident happens, and an injury is caused by negligence in a matter entirely collateral to the contract, the liability turns on the question whether the relation of master and servant exists. But when the thing contracted to be done causes the mischief, and the injury can only be said to arise from the authority of the employer, because the thing contracted to be done is imperfectly performed, there the employer must be taken to have authorized the act, and is responsible for it." That distinction has been consistently recognized in our decisions since De Ford's Case was determined, and may be illustrated by citing some of them.

In Moores' Case, 80 Md. 348, 30 Au. 643, 45 Am. St. Rep. 345, the company was relieved because the negligence which caused the accident was wholly collateral to the contract. An employe of the contractor was guilty of negligence in not stopping an engine, and in blowing the whistle as Mrs. Moores was driving along the turnpike. The engine was being used by the contractor for hauling ballast to be placed on the tracks of the railway company. But in that case it was said: "Even if the relation of principal and agent, or master and servant, do not, strictly speaking, exist, yet the person for whom the work is done may still be liable if the injury is such as might have been anticipated by him as a probable consequence of the work let out to the contractor, or if it be of such character as must result in creating a nuisance, or if he owes a duty to third persons or the public in the execution of the work." So in Syrnons v. Road Directors, 105 Md. 254, 65 Atl. 1067, the injury was for blasting, done some distance from the public road by the servants of an independent contractor, with which the agents of the defendants were in no wise connected.

In O'Donnell's Case, 53 Md. 110, 36 Am.

into a rope, which the agent of the contractor had stretched across a street, but upon which there was at the time no lighted lantern. The rule contended for by Mr. Cowen, counsel for plaintiff, was approved as follows: "Where the person for whom the work to be done is under a pre-existing obligation to have the work done in a particular way, or to have certain precautions against accident observed, he cannot be discharged by creating the relation between bimself and another of employer and contractor." And in Moores' Case, supra, it will be seen from the above quotation that the contractor is not relieved "if he owes a duty to third persons or the public in the execution of the work." Bonaparte v. Wiseman, 89 Md. 12, 42 Atl. 918, 44 L. R. A. 482, one who contracted with an independent contractor to make an excavation on his own lot was held liable for injury thereby caused to the house of an adjoining owner when such injury might reasonably have been anticipated as the probable consequence of the excavation, and no notice had been given to the adjoining lot owner. In P. B. & W. R. Co. v. Mitchell, 107 Md. 600, 69 Atl. 422, 17 L. R. A. (N. S.) 974, it was held that: "When work is being done by an independent contractor, the employer is not liable for an injury caused by the contractor's negligence in a collateral matter, but he is liable if the injury is caused by the thing contracted to be done, or if it be such as might have been anticipated as a probable consequence of the work let out to the contractor, and no precaution is taken to prevent the injury. The duty to refrain from interfering with the right of the public to the safe and unimpeded use of highways is one of which an employer cannot divest himself by committing the work to a contractor."

In Bernheimer Bros. v. Bager, 108 Md. 551. 70 Atl. 91, we quoted with approval from 16 Am. & Eng. Ency. of L. 197, that: "A person or corporation on whom positive duties are imposed by law cannot avoid liability for injuries resulting from failure to perform such duties, by employing a contractor for the purpose; nor in such a case is the fact that the injuries resulted from the contractor's negligence a defense." That article goes on to say: "The most important application of this principle that one who is under a positive duty cannot relieve himself therefrom by delegating it to an independent contractor occurs in the case of a municipal corporation, which, by the decided weight of authority, is liable for injuries caused by defects in its streets or highways, though these are the direct result of the negligence of a contractor employed by it, since it is under the positive duty of keeping its streets in a safe condition; and the municipality cannot protect itself in this regard by stipulations requiring the contractor to take proper precautions.

dent caused by the plaintiff driving at night; conditions resulting from the negligence of a contractor if these conditions did not involve any neglect of municipal duty."

It cannot be denied that it was the duty of the city to have this work so done that it would not cause unnecessary injury to the public, or to the owners of adjoining properties, and it could not relieve itself of all liability by having the work done by an independent contractor. There was evidence tending to show that the cause of the trouble was that at the end of the alley, next to Hoffman street, there was a pond of water, resulting from it being dammed up after the street was finished, and a drain which had conducted the water from the alley to a sewer on Broadway had been taken up; that dirt was then hauled to the alley, and "dumped into this slushy part until it was filled up." The plaintiff told the superintendent, "That isn't going to be a job," but they paved the alley, which was then slushy ground, according to the plaintiff's testimony. There was a fill on the east side of the alley of 3 feet, and one on the west side of 3 feet 7 inches-making a slope of seven inches towards Broadway. In paving, by reason of the slope, they deflected the gutter stones from the center of the alley to the curbstone at the corner of the building line of Hoffman street and the northeastern end of the alley. The theory of the plaintiff was that, by reason of paving the alley in the condition it was in, owing to the dirt being dumped in the water and causing slush, the stones sank and let the water from the alley go down under the stones and run under the sidewalk on Hoffman street to Broadway, and then, by reason of the solid foundation under the pavements on Hoffman street and on Broadway, the water was backed up until, the foundation of his house being weaker, it found its way into his cellar. There is ample evidence to sustain that theory, and it also shows that there was a crevice between the gutter stones about half an inch wide and 8 to 12 inches long, through which some of the water passing down the alley went, and eventually got into the plaintiff's cellar.

The plaintiff's testimony also tended to show that the conditions complained of existed from time to time from October 10, 1903, until some time in 1905, when he finally ascertained what the cause was, and corrected the trouble. He testified that the floodings of his cellar occurred on over 20 different occasions he had made note of-including from October 10, 1903, to February 13, 1905; that before the improvements were made he had never had any trouble with water in his cellar, and that since he had some concreting done in the alley. In October, 1905, no water had gone in, "and it is as dry as a bone, as it used to be before." He complained to the city authorities at least as soon as the early part of 1904, and about the 23d of Feb-But a city is not liable for injuries caused by ruary of that year the city sent a man to fix

He caulked the gutter stones, the allev. which stopped the water for a little while, but it did not last. As early as March 8, 1904, there was some correspondence between

the plaintiff and the city engineer.

We have thus referred at some length to the evidence in reference to the conditions existing, to show that for a long time after the work was done by the contractor the plaintiff suffered injury by reason of its faulty construction. Even if the city could have escaped liability from injuries sustained by the plaintiff while the work was still in the hands of the contractor, it could not have done so for those sustained after it had taken control of the street and alley. Sipe v. P. R. R. Co. (Pa.) 71 Atl. 847, 26 Cyc. 1566, where many cases are cited. But the evidence also shows that the assistant city engineer "saw the work being done every day while it was in progress, and mostly under his inspection." The contract pro-"All material furnished and vided that: work done, not in accordance with these specifications, shall be removed within twenty-four (24) hours after written notice from the city engineer, by and at the expense of the contractor; or in case of failure to do so, it shall be removed by the city and the cost charged to the contractor and deducted from the amount due him." There is a provision that: "All soft and spongy material below the subgrade shall be removed and filled with clean, sharp sand or gravel, or other material satisfactory to the city engineer, and thoroughly rammed and rolled"and another that: "Wherever the city englneer is mentioned in these specifications, it is understood to be the city engineer in person, assistant city engineer, or the assistant engineer in charge of the work." There are a number of other provisions giving the city engineer more or less control over the work. Under such circumstances we can have no doubt of the liability of the city for defects in the work, causing injury to the plaintiff. It is not only its duty to have such work done, but to have it properly done, so that others will not suffer from it being improperly performed. Our own cases recognize the rule that an employer is not relieved by having a contractor, when he retains control of the work himself. In Bonaparte v. Wiseman, supra, "a party who employs an independent contractor to do certain work, without reserving any control over it, is not liable," etc. In the Symons Case the fact was noted that the road engineer of Allegany county had no control over the work. See, also, Stork v. Philadelphia, 199 Pa. 462, 49 Atl. 236, 16 Am. & Eng. Ency. of Law, 187; 26 Cyc. 1565. In this contract there was more than a mere reservation by the city to supervise the work, for the purpose of determining whether it was being done in conformity to the contract. It rather indicates that the city officers realized that they owed a duty to the public, and to open, grade, and pave streets, and to con-

those who might be specially interested, to see that the work was properly done. are, then, of the opinion that the city could not be relieved from this action by reason of the contract made with the Filbert Paving & Construction Company.

The remaining question to be determined whether there was any legally sufficient evidence to entitle the plaintiff to recover. The assistant city engineer testified that the paving, grading, and curbing of Hoffman street, from the west side of Broadway to the east side of Bond street, was done by the city of Baltimore, "by and through the Filbert Paving & Construction Company," and the evidence tended to show that what was done in the alley was done by that company in connection with the work on Hoffman street. It was suggested at the argument that this was a private alley, but, however that may be, the work was undertaken by the city in connection with the grading and paving of Hoffman street, and there was unquestionably some evidence tending to show that the work was defectively done, and that by reason of the negligent construction the plaintiff suffered loss. The testimony does not show that it was merely an incidental or consequential injury such as may result from the change of a grade of a street, done under legislative authority, and for which the municipality is not liable. "In such cases, if the work be done with care so as to avoid unnecessary injury to adjacent property, and there be no invasion of such property, its owners must suffer the injury resulting from the work thus done to promote the public welfare." Guest v. Church Hill, 90 Md. 698, 45 Ati. 882. But in this case there was evidence that the work was not done with care, and that the injury to the plaintiff's property was the direct, result of such want of care. If the work had been properly done, the change in the grade and paving of Hoffman street would not have caused the injury complained of, for the alley was filled sufficiently high where it joined Hoffman street to let the water run from it. The gutter stones were deflected to the northeast because the grade of Hoffman street was lower on that side, but there was sufficient fall to let the surface water empty into Hoffman street. The difficulty was that by reason of the faulty construction in filling and paving the alley the water did not run off, but got under the pavement, and finally into the plaintiff's ceilar. Of course we are assuming the testimony offered by the plaintiff to be correct, as we must in considering these prayers, and with that assumption there was undoubtedly evidence of negligence. The city authorities apparently discovered where the water came from, and corrected the defect temporarily, but it was only temporary.

It is well settled that, although the powers granted a municipality by its charter to

struct such gutters and sewers as in its judg- | 5. Trial (§ 260*)—Instruction Covered by ment the public convenience may require, are discretionary, "any particular plan that may be adopted must be a reasonable one, and the manner of its execution thence becomes, with respect to the right of the citizen, a mere ministerial duty; and for any negligence or unskillfulness in the execution or construction of the work, whereby injury is inflicted upon private right, the municipality will be held responsible." Hitchins v. Frostburg, 68 Md. 100, 11 Atl. 826, 6 Am. St. Rep. 422.

So, without deeming it necessary to discuss other grounds of recovery, as claimed by the appellant, we are of the opinion that there was sufficient evidence in the case to require the court to submit it to the jury. Of course a further question may arise as to what damages, if any, can be recovered against the defendants jointly, as only such as they are jointly liable for can be recovered in an action against the two defendants. 1 Poe, \$ 492. But we are of the opinion the prayers ought not to have been granted, and hence the judgment must be reversed.

Judgment reversed, and new trial awarded: the appellees to pay the costs above and below.

(111 Md. 227)

PETERS et al. v. TILGHMAN & PURNELL et al.

(Court of Appeals of Maryland. June 1, 1909.) APPEAL AND ERBOR (§ 1057*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

There was no reversible error in sustaining an objection to a question, where from the other evidence the jury was in full possession of all the information which could have been given it had witness been permitted to answer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4194; Dec. Dig. § 1057.*]

2. EVIDENCE (§ 274*)—DECLARATIONS OF PERSON INTERESTED IN BOUNDARY.

The guardian of children in charge of a

tract of land belonging to them is interested in the subject of the boundary, and his declarations are not receivable.

[Ed. Note.—For other cases, see Cent. Dig. § 1123; Dec. Dig. § 274.*] see Evidence,

52*) — CUTTING TIMBER — 3. Thespass (§ 52*) — Measure of Damages.

The measure of damages for cutting and carrying away timber is such sum as the timber was worth when first cut without deducting the expense of severing the same from the land. [Ed. Note.—For other cases, see Cent. Dig. § 137; Dec. Dig. § 52.*]

4. TRESPASS (§ 68*)-Instructions

A prayer, requested by plaintiff in trespass quare clausum, that as defendants had in evidence no paper title or color of title, if the jury found that the place of trespass was within the lines of the deed under which plaintiff claimed, then the verdict must be for plaintiff, unless defendants had held the lands by adverse possession for at least 20 years, was properly granted.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 151; Dec. Dig. § 68.*]

Instruction Given.

A requested prayer covered by another prayer given is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.*]

6. TRESPASS (§ 43*)—ISSUES AND PROOF—POS-SESSION OF PART OF TRACT.

The rule that, where a trespass is charged to have been committed, title is not necessarily asserted to or possession claimed of the entire tract, and therefore proving possession of a part thereof and a trespass on it is all that is requir-ed, does not apply where a case is tried with a plat or location and a trespass accurately located.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 107; Dec. Dig. § 43.*]

7. TRESPASS (§ 68*)—TRIAL—INSTRUCTIONS.

A prayer, offered by defendant in trespass quare clausum, that, if a road as iaid down on the plat was the road intended by the deed under which plaintiffs claimed, then plaintiffs could not recover, was not objectionable because segregating a part of the evidence and asking a verdict upon that alone, where, if the road was also the road mentioned in the deed, then it was also plaintiff's boundary at the alleged place of also plaintiff's boundary at the alleged place of trespass, and no other fact in the case could under the locations and pleadings establish any trespass by defendants upon plaintiffs.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 151; Dec. Dig. § 68.*]

8. Boundaries (§ 35*)-Evidence-General REPUTATION.

General understanding and reputation among the owners, neighbors, and others who have been tenants or employes on the respective lands, as to the line between them, is admissible.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 155; Dec. Dig. § 35.*]

9. TRESPASS (§ 68*)—TRIAL—INSTRUCTIONS.

A prayer, offered by defendant in trespass quare clausum, that if a line ended at the north side of a lot, and did not cross over to the south side thereof, then the location of a road made by plaintiffs was not its true location, should not have been granted, where, though the proposition might have been tenable had the line callsition might have been tenable had the line called for a distance marked by a well-established visible object, and if that distance, when it reached the object, located it upon the line of the road as located by defendants, the line in fact had no given distance, and its only call was for the main road, the location of which was the very thing in controversy.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 151; Dec. Dig. § 68.*]

10. TRESPASS (§ 68*)—TRIAL—INSTRUCTIONS. A prayer offered by defendant in trespass quare clausum that if a line ended at the north side of a road, and did not extend to the south side thereof, then the location of a road made by plaintiffs was not its true location, ought not to have been granted, where the lot was nowhere located and it was impossible for the jury to know or even conjecture where its north

jury to know or even conjecture where its north or south line were to be found.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 151; Dec. Dig. § 68.*]

Adverse Possession (§ 43*)—Wrongful Possession-Tacking.

Tort-feasors cannot tack their wrongful possessions so as to constitute adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 213; Dec. Dig. § 43.*]

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Adverse Possession (\$ 23*)—Evidence— CUTTING TIMBER.

The cutting and selling of timber from time to time is not evidence of adverse possession, but a mere succession of acts of trespass.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 113; Dec. Dig. § 23.*]

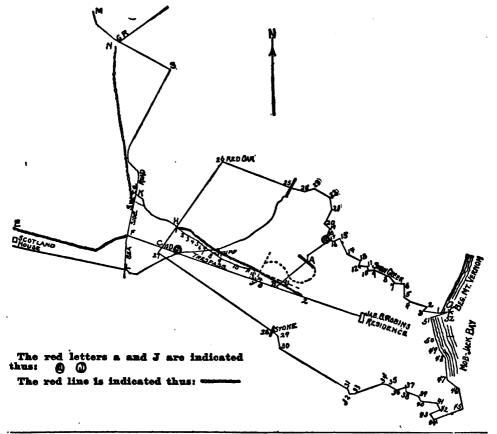
Appeal from Circuit Court, Worcester County; Charles F. Holland, Judge.

Action by Caroline P. Peters against Tilghman & Purnell and others. Upon the death of plaintiff, Charles M. Peters and Reese C. Peters, administrators, were made parties plaintiff in her place, and from a judgment for defendants, they appeal. Reversed.

Defendants' fourth prayer: "The defendants pray the court to instruct the jury that if they find from the evidence that the parcel of land, laid down on the plat, made under the warrant of survey in this case, as the 'trespass,' and lying between the Tull road and the road leading from the Fairfield House to the twenty-seventh line of Mt. Vernon, near the sawdust heap, had been in the undisputed and peaceable possession of the defendants Ellen A. Robins and William L. Robins, and those under whom they claim title, for more than 20 years before the deed to Caroline M. Peters from Joseph Godfrey and before the bringing of this suit, and that said Ellen A. Robins and William L. Robins. and those under whom they claim, claimed to dict must be for the defendants."

be the owners of said parcel of land, and publicly and notoriously held exclusive possession thereof as such against all other persons, and exercised acts of user and ownership over the same, in selling and cutting timber therefrom, and by renting said land to tenants, then, notwithstanding the jury may find that the road leading from said Fairfield House towards said sawdust heap laid down on said plat is the road described in the deed from James B. Robins to Littleton Robins, their verdict must be for the defendants."

Defendants' sixth prayer: "The defendants pray the court to instruct the jury that if they believe from the evidence that the east line of the plaintiffs' lands, as described in the deed of James B. Robins to Littleton Robins running from Hosher's dam to the road named in said deed as the main horse road ended at the north side of the Porter's Lodge lot, or at or near the road lying parallel to said lot on the north, if they find there was a road there, now disused, and did not cross over said Porter's Lodge lot, and extend to the south side thereof, then the location of the road made and claimed as the main horse road by the plaintiffs as the road mentioned in the deed from James B. Robins to Littleton Robins is not the true location of the same, and their ver-



For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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Argued before BOYD, C. J., and BRIS-OCE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, THOMAS, and HEN-RY. JJ. over of the said branch by an old dam; thence with a line drawn southwest to the main horse road that leads out from the said James Robins' dwelling house to Snow

E. Stanley Toadvin and George M. Upshur, for appellants. Wm. F. Johnson and John H. Handy, for appellees.

PEARCE, J. This is an action of trespass quare clausum fregit, brought by Caroline P. Peters in her life against the appellees. and upon her death the appellants were made parties plaintiff in her place. plaintiffs close is described in the declaration as "certain lands of the plaintiff, the said Caroline P. Peters, situated in Worcester county in the state of Maryland, which were conveyed to her by Joseph Godfrey by deed dated December 1, 1883, recorded among the land records of Worcester county in Liber I. T. M. No. 10 folio 87." The defendants pleaded not guilty, and took defense on warrant; but that warrant was countermanded, and later a warrant of resurvey was granted to the plaintiffs, and a survey and plat was filed by the county surveyor to whom the warrant was issued, a copy of which plat will be inserted by the reporter. Locations for the respective parties were made upon the plat, and an agreement of counsel was filed in the case, admitting for the purposes of that action only: "(1) That the location of the certificate and patent of Mt. Vernon patented to James B. Robins, December 19, 1793, is correctly located by actual survey and protraction on the plat; (2) that the twenty-seventh line of Mt. Vernon is correctly located on the plat; (3) that Hosher's branch called for in the deed from James B. Robins to Littleton Robins, dated February 15, 1793, from its entrance into Swan creek to the going over way and dam therein mentioned, are correctly located on the plat." This agreement, together with the plat and the plaintiffs' certificate and list of title papers, and the deed of February 15, 1793, from James B. Robins to Littleton Robins, mentioned in the agreement, were offered in evidence by the plaintiffs. That deed recites that John Purnell Robins, the father of Littleton and James B. Robins, was seised in fee tail of a tract of land in Worcester county, called "Mt. Vernon," containing 723 acres of land, which he could not devise, and which descended to James B. Robins as issue in tail, whereby he became entitled to the greater part of his father's estate; but that James desired to make a more equal distribution of his father's estate, and he therefore by that deed conveyed to his brother Littleton 400 acres, part of Mt. Vernon, included within the following metes and bounds, viz.: "Beginning at the mouth of a gut that leads out of a branch called Hosher's branch, and falls into a creek called Robins, or Swan creek; thence up and with the said gut to the said branch called Hosher's branch, to a going

thence with a line drawn southwest to the main horse road that leads out from the said James Robins' dwelling house to Snow Hill, by the way of the cross-roads or shop; thence with the said road to the outlines of Mt. Vernon; thence with the said outlines northerly and easterly to a marked red oak. a corner tree of the said tract standing at the head of the creek called Robins creek or Swan creek; thence binding on the said creek to the first beginning-containing 400 acres of land more or less, as also all that tract of land called Robins addition, lying adjoining the lands that were devised to said Littleton by his father, called Ennis addition, Canarnec," etc.

The plaintiffs also offered in evidence all their other title papers mentioned in their list and certificate filed in the case. It will be seen by reference to the agreement above mentioned and to the surveyor's plat that the whole tract patented as Mt. Vernon to James B. Robins is conceded for the purposees of this suit to be correctly located on said plat; the twenty-seventh line of Mi. Vernon being particularly mentioned as correctly located. It will also be seen from said agreement and plat and the surveyor's certificate that the beginning point of the tract conveyed by James B. Robins to Littleton Robins is correctly located on the plat at red letter "a," at the end of the seventeenth line of Mt. Vernon,¹ where Hosher's brauch enters Swan creek, and that the course of this branch from red letter "a" to the going over way and dam and the going over way and dam itself are correctly located on the plat, the way and the dam being designated by black letter "A": and that the course of the southwest line from letter "A" to the main horse road called for in the deed to Littleton Robins is correctly located on the plat; but the length of this southwest line is in dispute, the contention being as to the location of the main horse road. The plaintiffs contend that this southwest line strikes the main horse road at the letter "U" on the plat, while the defendants claim it does not strike the main horse road until it is continued to letter "B" on the plat. There is no dispute as to the location of James B. Robins' dwelling as designated on the plat. But the defendants claim that the main horse road runs from this dwelling in a straight line till it intersects the twenty-seventh line of Mt. Vernon, at the letter "C" as shown by the black line on the plat; while the plaintiffs claim that the main horse road diverges from said black line at or near the letter "Q" designated on the plat, and runs thence north of said black line, and in a straight line until it intersects the twenty-seventh line of Mt. Vernon at the letter "H," as shown by the red line2 on

^{*} The red line is indicated on the plat thus:



 $^{^1\,\}mathrm{The}$ red letter "a" is indicated on the plat thus:

dispute is the wedge-shaped piece between the conflicting locations of the main horse road, marked "Trespass" on the plat, from which parcel the defendants Tilghman & Purnell have cut the timber purchased by them from their codefendants Ellen A. Robins and William L. Robins, who claim title under Littleton Robins' deed above mentioned. The sole question therefore is the true location of the main horse road. Both parties offered evidence in respect to the location of this road, tending to prove the issues on their respective parts, and the defendants filed in the case before the trial a list of title papers and a certificate of the several lines run and locations made for them by the surveyor, but did not offer in evidence at the trial any title papers whatever. Two exceptions to the rulings upon the evidence were taken by the plaintiffs, and one to the ruling upon the prayers, and, the verdict and judgment being against them, they have appealed.

During the examination of Mr. Schoolfield. the surveyor who executed the warrant, and while he was testifying as to the plaintiffs' location of the main horse road on the plat. he was asked by the plaintiffs' counsel to state what was the condition of that road between the point where it crossed the twenty-seventh line of Mt. Vernon at the letter "C" on the plat and the continuation of the course of the road to the Seaside road at the point indicated by the letter "F"; the purpose being to show that this main horse road as located by the plaintiffs originally ran to the letter "C." The witness replied that this road was in existence up to Pennewell's field, and within about 30 rods of the Seaside road, and that the red part of the line between "C" and "F" indicated the part of the road now covered by Pennewell's cultivated field. He was then asked, "Did any one point out that old road there as a continuation of the road you have testified about?" and, the defendant objecting to the question, the court sustained the objection. This is the first exception. It will be seen that, in the certificate which had been admitted in evidence, the surveyor certified that he located "the main horse road continued, that leads from James B. Robins' dwelling to Snow Hill, beginning at the letter 'O' and running to the County road and crossing the same into an old road towards Snow Hill, the route of which was pointed out by William Guthrie, Jesse W. Messick, John Tull, and John E. Holstein." Moreover, before the question excepted to had been put to him, he had testified without objection that this road "was then in existence up to Pennewell's field, where it was cultivated, and, in reply to a question how he knew there was a road there, he said, "My recollection is that old road was pointed out there," and that "they pointed out a lot of cinders there

the plat. Thus it appears that the land in | Besides this, George Smack, who was on the survey, testified at the trial that there were signs of a straight road from the Robins dwelling until it reached the Seaside road near Pennewell's house, and Charles H. Smack, also on the survey, testified at the trial to the same exact effect. Jesse Messick, John Hickman, and John E. Holstein, all of whom were on the survey, also testified at the trial to the same effect. The lastnamed testified that he had heard his father say that in Judge Robins' day there was a straight road from the Seaside road down to Fairfield (the James B. Robins dwelling), and you could see a light when you left the Seaside road at Judge Robins' house. It is therefore clear that the jury was in full possession, from all the sources above mentioned. of all the information which could have been given it, if the witness had been permitted to answer the question, and the plaintiffs suffered no injury by the exclusion of the answer. There was no reversible error in this ruling.

> During the examination of defendants' witnesses, one of them, Joshua Morris, testified that in 1872 he ran a sawmill for Collins & Vincent near this land and sawed timber which Collins & Vincent had purchased from the Robins and Peters land at the place of the trespass claimed in this case. He was asked whether any lines between these tracts were pointed out to him, and, if so, by whom, and he said there had been by John R. Purnell, who was dead at the time of that trial. He was then asked what road Mr. Purnell pointed out as the line, and this question was objected to; but the court overruled the objection and permitted the witness to answer. It appears from the evidence in the record that Mr. Purnell was then the guardian of Mrs. Robins' children and was in charge of the Fairfield tract belonging to them. He was therefore interested in the subject of the boundary, and the declarations of a party interested in any manner are not receivable in such cases. 1 Greenleaf on Evidence. \$ 145; Jarrett's Lessee v. West, 1 Har. & J. 501; Martin v. Gunby, 2 Har. & J. 248. There was error therefore in the admission of this evidence, and there is nothing in the record which would enable us to say that the plaintiffs were not injured thereby.

The third exception brings up the ruling on the prayers. The court granted the plaintiffs' first, second, third, and sixth prayers and refused its fourth and fifth prayers. The first pfayer instructed the jury that, if it found from the evidence that the defendants broke and entered the lands of Caroline P. Peters, at the place located on the plat marked "Trespass," prior to the institution of the suit, and that Caroline P. Peters had died since the institution of the suit, and that letters of administration were granted to the plaintiffs on her personal estate by the orphans' court of Worcester county, and where there had been a blacksmith shop." that Caroline P. Peters resided in Worcester at the time of her death, and that the defendants cut down and carried away timber trees and other trees from said land, then the plaintiffs were entitled to recover the value of such timber trees and other trees as the jury should find the defendants cut down and carried away. The second prayer related to the measure of damages for cutting and carrying away timber trees and other trees, and asserted this measure of damages to be "such sum as the jury may find the said timber trees and other trees were worth when first severed from the land, without deducting the expense of severing the same from said land, and the jury is at liberty to allow such interest thereon as they may deem right and proper." The third prayer instructed the jury that if it found the preliminary facts set out in the first prayer, and also found that the defendants trampled down and cut up the land at the place located on the plat and marked "Trespass," then the plaintiffs were entitled to recover such sum as would compensate for the injury occasioned thereby. The appellees made no criticism of these prayers, and we discover no error in them. The rule of damages given in the second prayer is that given in Barton Coal Co. v. Cox, 89 Md. 1, 17 Am. Rep. 525, for trespass q. c. f. and mining and carrying away coal, and approved in Blaen Avon Coal Co. v. McCulloh, 59 Md. 403, 43 Am. Rep. 560. The principle there applied was that where the article or thing taken away had not then been changed by the taker into some new form, as, for instance, timber into boards, but was carried away in the form in which it first became a chattel, its value in that form represents the owner's loss, and that, as its taking was wrongful, the wrongdoer can be allowed no deduction on account of his labor bestowed in converting it into a chattel. The rule is properly applicable in the present case.

The sixth prayer instructed the jury that, as the defendants had in evidence no title paper or color of title to the place of trespass designated on the plat, then if the jury found that the place of trespass was within the lines of the deed from Godfrey to Caroline Peters under which she claimed, then the verdict must be for the plaintiffs, unless the jury found that the defendants had held the lands located as the trespass by adverse, undisputed, exclusive, and unmixed possession for at least 20 years before suit brought. This prayer was properly granted, and, as the fifth prayer was fully covered by the sixth, the fifth was properly refused.

The fourth prayer, which was rejected, asked an instruction that: "If the jury finds that the place located on the plat as the place of trespass is included in the limits of the deed of Littleton Robins from James B. Robins dated February 15, 1793, came into the ownership and possession of Caroline P. Peters by mesne conveyances and descent as produced in evidence by the plaintiffs, and

the defendants broke and entered upon the lands of the plaintiffs as located on the plat, then their verdict must be for the plaintiffs, even though the jury may believe that the plaintiffs are not entitled to some other part or parts of the land included in the boundaries of said deed." To maintain this prayer the plaintiffs rely upon the case of Tyson v. Shueey, 5 Md. 540, in which the court held that where the narr. charged a trespass as having been committed on the plaintiffs' close, called "Greyhound Forest," it does not necessarily assert title to, or claim possession of, the entire tract, and therefore proving possession of part thereof and a trespass on such part is all that is required; but that was said in a case which was tried without plats or locations, and we do not think what was there said applies to this case. the trespass was accurately located as beginning at "C"; thence running to "H"; thence by the Tull road 13 courses to the letter "Y"; and thence to the beginning, "C." The Porter's Lodge lot does lie between the two disputed locations of the main horse road, and adjoins the trespass as located, but does not lie, even in part, within the trespass as located. The defendants did offer some evidence tending to show title by actual inclosure to Porter's Lodge lot, or a part thereof; but no question of title or possession of Porter's Lodge lot could arise in action of trespass q. c. f. confined to another part of the land between the disputed roads, but no part of the place of trespass, and the granting of that prayer would have confused and misled the jury and permitted them to consider an issue not involved in that suit.

There can be no objection to defendants' second prayer, which is really their first, as it merely requires the plaintiffs to establish their claim by preponderance of proof. The plaintiffs' objection to the defendants' third prayer is that it segregates a part of the evidence, and asks a verdict upon that alone; but we do not think the objection is tenable in this case. The prayer asserts that, if the Tull road as laid down on the plat is the road intended by the deed from James B. Robins to Littleton Robins under which the plaintiffs claim, then the plaintiffs cannot recover. Now it will be seen from the plat that the Tull road is the northerly line of the trespass as there located, and, if the Tull road is also the main horse road mentioned in the deed from James B. Robins to Littleton Robins, then it is also the southerly boundary of the plaintiffs at the alleged place of trespass, and no other fact or facts in the case could under the locations and pleadings establish any trespass by the defendants upon the plaintiffs. Segregation in such case constitutes no error.

Robins dated February 15, 1793, came into the ownership and possession of Caroline P. Teters by mesne conveyances and descent as produced in evidence by the plaintiffs, and neighbors, and others who have been tenants

or employes on the said respective lands as to i which is the line between the plaintiffs' and defendants' lands"; and we think there was no error in the legal proposition asserted. Such evidence was allowed in Redding v. Mc-Cubbin, 1 Har. & McH. 368, and in Howell v. Tilden, 1 Har. & McH. 84. It was not admitted in Medley v. Williams, 7 Gill & J. 67. though the court said it should be received "where more certain and positive evidence is not likely to exist." In Tyson v. Shueey, supra, it was objected that the lines, boundaries, and location of Greyhound Forest could not be established by general reputation; but the court overruled the objection, saying that the decisions cited to sustain the objection were prior to Acts 1852, c. 177 (now section 22, art. 75, Code Pub. Gen. Laws 1904), providing that lands may be described in declarations of ejectment or trespass by any name acquired by reputation, and the court added: "If a party may declare upon the name which the land has acquired by reputation, by what possible means, or by what species of evidence, can he sustain the allegation except by resorting to proof of that very reputation which established the name?" The weight of authority in this country, both in the state and federal courts, is strong to the same effect. 5 Cyc. 957, 958; Boardman v. Reed. 6 Pet. 328, 8 L. Ed. 415; Clement v. Packer. 125 U. S. 321, 8 Sup. Ct. 907, 31 L. Ed. 721; Ayers v. Watson, 137 U. S. 596, 11 Sup. Ct. 201, 34 L. Ed. 803. And the reasons given in Tyson v. Shueey, and elsewhere, for the rules, are sound and satisfactory.

We think defendants' sixth prayer ough not to have been granted. Its theory is that if the east line of plaintiffs' land, being the southwest line from "A" to the main horse road, ended at the north side of the Porter's Lodge lot, and did not cross over and extend to the south side thereof, then the location of the main horse road made by the plaintiffs is not the true location of that road; but the vice of that prayer is that Porter's Lodge lot is nowhere located on the plat, and there is nowhere in the record any evidence of its outlines or dimensions. The evident purpose of the prayer is that, if the jury find this southwest line stops at "U" on the plat, and does not extend to "B," then the plaintiffs' location of the main horse road is not the true location; but this is merely saying, if the southwest line only runs to the defendants' location of the main road, then the plaintiffs' location cannot be the correct one. That proposition might be tenable, if this southwest line called for a distance marked by a well-defined and well-established visible object such as a marked stone, or notable tree, and if that distance, when it reached that object, should locate the object upon the line of the main road as lo-

line has no given distance, and its only call is for the main horse road, the location of which is the very thing here in controversy, and the reasoning of the prayer goes in a circle. Moreover, the reference to the Porter's Lodge lot as a terminus of the southwest line is a sufficient reason for refusing the prayer, since that lot is nowhere located, and it is impossible for the jury to know or even to conjecture where its north or south line is to be found.

There was error also in granting the defendants' fourth prayer. There was no paper title or color of title shown by the defendants in the place of trespass; but the plaintiffs did produce an unbroken paper title to the place of trespass if it lies within the lines of Godfrey's deed to Mrs. Peters. Hence the possession of the place of trespass by the defendants or their predecessors in title must have originated in tort, and this prayer permits tort-feasors to tack their wrongful possessions so as to constitute adverse possession, and it is settled that this cannot be done. This prayer also permits the jury to find adversary possession of the place of trespass by the defendants from "acts of user and ownership over the same in selling and cutting timber therefrom"; but this is not evidence of adversary possession. Waterman on Trespass, vol. 2, p. 9 (1st Ed.). note on cutting timber. Gent v. Lynch, 23 Md. 65, 87 Am. Dec. 538. In that case Judge Bartol said: Cutting and selling wood from time to time "are mere successive acts of trespass, nothing more." And so in Parker v. Wallis, 60 Md. 19, 45 Am. Rep. 703, where the acts relied on were to dig and sell sand from time to time, the court said: "The entries thereon for that purpose were but successive acts of trespass against the true owner if he was not owner himself."

We shall request the reporter to set out the defendants' fourth and sixth prayers in full, that their discussion may be more readily understood.

For the errors indicated, the judgment must be reversed.

Judgment reversed, with costs to the appellants above and below, and new trial awarded.

(111 Md. 158)

McGAW ▼. ACKER, MERRALL & CONDIT CO.

(Court of Appeals of Maryland. June 30, 1909.)

1. TRIAL (§ 252*) — INSTRUCTIONS—EVIDENCE

TO SUPPORT.

A prayer for instructions not supported by the evidence is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \$\\$ 596-612; Dec. Dig. \$\ 252.*]

2. Damages (§ 73*)—Costs and Attorney's Fees.

ject upon the line of the main road as lo-The general rule is that costs and expenses cated by the defendant; but that southwest of litigation, other than the usual and ordinary

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

court costs, are not recoverable in an action for out the written consent of the lessors, and damages, nor are such costs even recoverable in a subsequent action; but, where the wrongful acts of defendant have involved plaintiff in litigation with others, or placed him in such relations with others as made it necessary to incur expense to protect his interest, such costs and expense should be treated as legal consequences of the original act.

[Ed. Note.—For other cases, see Cent. Dig. § 152; Dec. Dig. § 73.*] see Damages,

3. Damages (\$ 73*)—Attorney's Fees-Ex-

PENSES.

Where plaintiff was about to lose possession of certain premises by the wrongful act of defendant, and was obliged to employ professional aid, and incur expense, to retain possession of the premises to which, as between itself and defendant, it was entitled, the necessary expenses it incurred to regain possession were elements of the injury.

[Ed. Note—For other cases, see Demography.]

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 152; Dec. Dig. § 73.*]

APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTIONS.

Error in an instruction is harmless, where the adverse party is not injured thereby.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221–4224; Dec. Dig. § 1064.*]

Appeal from Superior Court of Baltimore City; Alfred S. Niles, Judge.

Action by the Acker, Merrall & Condit Company against George K. McGaw. Judgment for plaintiff, and defendant appeals Affirmed.

Plaintiff's granted prayers, referred to in the opinion, are as follows:

Plaintiff's first prayer: "The plaintiff prays the court to instruct the court sitting as a jury that, if it find that the defendant was, during the month of October, 1905, in the employ of the plaintiff as the general manager of its Baltimore branch, and was a director of the plaintiff corporation; and that the plaintiff corporation occupied the premises known as Nos. 220-222 North Charles street under the terms of a lease which expired on the 31st day of January, 1906, and the jury further find that on or about the 24th day of October, 1905, a notice was sent to the plaintiff to the effect that said lease would expire at the time aforesaid; and that thereupon the plaintiff corporation called upon the defendant to take up the matter of procuring a new lease; and it further find that the defendant took no notice of said communication, but had prior to the said 24th day of October, 1905, negotiated in his own name a lease for the premises aforesaid, which lease was in fac: executed on the 26th day of October, 1905, to take effect as of February 1, 1906; and the jury further find that the defendant, when requested to assign the said lease, at first refused to do so, but under advice of counsel, on or about the 6th day of December, 1905, assigned the said lease; and the jury further find that the said lease contained a provision that the assignment of the

the jury further find that the lessors declined to give their consent to said assignment, and required the plaintiff to pay a higher rent, which rent if the jury find the plaintiff was obliged to pay in order to retain possession of the said premises—then in that event the plaintiff is entitled to recover, provided the jury further find that the defendant could have procured the said lease in the name of the plaintiff at the time when he procured the same in his own name as aforesaid."

Plaintiff's second prayer: "If the jury find under the first prayer that the plaintiff is entitled to recover, then the measure of damages is the amount of increased rent, together with such costs as the plaintiff was put to in procuring the said new lease as aforesaid, provided said costs were reasonable and necessary.

Plaintiff's third prayer: "The plaintiff prays the court to instruct the court sitting as a jury that, if it find that the defendant, George K. McGaw, occupied the position of director and local manager in the city of Baltimore of the plaintiff; and it further find that the plaintiff occupied the premises Nos. 220-222 North Charles street under lease to the said McGaw which terminated on the 1st day of January, 1906; and that on or about the 24th day of October, 1905, the plaintiff received notice that the said term would terminate as aforesaid; and that thereupon it notified said McGaw; and that the said McGaw, without notice to the plaintiff, and without applying to the said trustees for renewal of the said lease, or a new lease in the name of the plaintiff, applied to the trustees for a new lease for three years from the termination of the old lease in his own name, and obtained the lease dated October 26, 1905, offered in evidence, at the yearly rental of \$8,000; and that when requested to assign the same, he at first declined, and subsequently, when advised by counsel, assigned the same to the plaintiff; that subsequently the plaintiff notified said McGaw that the trustees had refused to consent to said assignment, and had made a demand for a greater rent; and that the plaintiff notified the said McGaw of said demand, and requested the said McGaw to aid it in procuring the consent of the trustees to the assignment of the lease made by McGaw to it; that the said McGaw declined to do so, and made no effort; and the court acting as a jury further find that if said McGaw had made such effort, he could have procured the consent of the said trustees to said assignment; and that the plaintiff in good faith, and in order to save itself from the danger of an ejectment from said property, agreed to pay an additional sum of \$1,000 per annum in excess of the rent demanded in the lease to McGaw-then and in that same by the lessee would not be valid with levent the plaintiff is entitled to recover from

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the said McGaw said excess of rent so agreed ! to be paid, together with such reasonable costs and expenses as the jury may find the plaintiff incurred in procuring a new lease of the said premises."

Plaintiff's fourth prayer: "The plaintiff prays the court to instruct the court sitting as a jury that, if it find that the defendant, George K. McGaw, occupied the position of local manager in the city of Baltimore of the plaintiff, and was a director of the company at the time he procured the lease in his own name on the 25th day of October, 1905, as set forth in the first prayer, if it so find, and it further find that under the facts as recited in said prayer said McGaw assigned the lease to the plaintiff, and after the said assignment the said McGaw failed to make any effort whatever to secure or procure the consent of the lessors to said assignment, but on the contrary, authorized Messrs. Warden and Hopper to use his name as a guarantor of an offer of a higher rent made by the said Warden and Hopper to the said trustees, if the jury so find, and that by reason of the said action on the part of the said McGaw, the trustees having the said higher offer, guaranteed as aforesaid, declined to assent to the said assignment, but required the plaintiff to pay a higher rent, then in that event the plaintiff is entitled to recover.'

And the defendant's twelfth prayer, as referred to in the opinion, was as follows:

Defendant's twelfth prayer: "That unless the court sitting as a jury shall find from the evidence that damage was caused the plaintiff corporation by the defendant's taking the lease of the premises known as No. 220-222 North Charles street in his own name, or by his failure to promptly assign said lease (if the court sitting as a jury shall find such failure), the verdict of the court sitting as a jury should be for the defendant."

Argued before BOYD, C. J., and BRIS-OOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, THOMAS, and HEN-RY, JJ.

George Weems Williams and Frank Gosnell, for appellant. John E. Semmes, for appellee.

BURKE, J. By this appeal the pending case is brought before us for the second time. The first case is reported in 106 Md. 536, 68 Atl. 17. The declaration in that suit contained two causes of action incorporated in one count. It was alleged that the defendant had committed two breaches of duty which he owed to the plaintiff, whereby in each instance it suffered loss. This defect in the declaration was noticed in the opinion of this court; and, as the judgment was reversed and the case remanded, it was said that the declaration could be amended before the retrial of the case. It was accordingly amended. The narr. in the present case contains three counts. The first and second counts declare upon the two cember, 1905, the defendant was not liable

causes of action contained in the declaration in the former case, and the third count assigns a new ground of action. Briefly stated, the causes of action relied upon in the respective counts of the narr. in this case are: First, that the defendant committed an actionable wrong in taking the lease in his own name, when he could and should have taken it in the name of the plaintiff; secondly, that he refused to make any effort to procure the consent of the trustees to the assignment of the lease to the plaintiff, but permitted himself to be used as a guarantor for an increased offer of rent for the premises made by Hopper and Warden; thirdly, that it was the duty of the defendant to aid. the plaintiff in procuring the assent of the trustees to the assignment of the lease, and that he refused to aid them, whereby loss accrued to the plaintiff. The first and second counts set out causes of action identical with those contained in the declaration which appeared in the record on the former appeal. In the trial of that case the lower court directed a verdict for the defendant. upon the ground that there had been no evidence offered legally sufficient to entitle the plaintiff to recover. We held that there was legally sufficient evidence to support both causes of action upon which the plaintiff relied in that case, which, as we have stated, are set out in the first and second counts in the declaration appearing in this record. Upon the new trial the plaintiff recovered a judgment, and the defendant has brought this appeal. The record contains no exceptions to the ruling of the court upon questions of evidence. At the close of the whole case the plaintiff offered 7 prayers, and the defendant 14, for instructions. The defendant filed special exceptions to the plaintiff's first, third, and fourth prayers. The court overruled the special exceptions, and granted the plaintiff's first, second, third, and fourth prayers, and rejected its fifth, sixth, and seventh. The defendant's twelfth prayer was conceded, and all its other prayers were refused. He excepted to the ruling of the court upon his prayers and special exceptions, and this constitutes the only exception before us.

The reporter will set out the plaintiff's granted prayers, and also the defendant's twelfth prayer. The defendant's first, sectwelfth prayer. ond, third, fourth, sixth, eighth, thirteenth, and fourteenth prayers concluded in some instances against the right of the plaintiff to recover, and in others denies his right to recover upon certain counts of the declaration. They raised practically the same questions presented by the special exceptions to the plaintiff's prayers.

The court was asked by the defendant's fifth prayer to tell the jury that, inasmuch as the uncontradicted evidence showed that all relationship between the plaintiff and the defendant terminated on the 8th of Defor anything he did, or omitted to do, after that date. This prayer was not supported by the evidence, and was properly refused. Mr. McGaw did not sever his relation as a director of the plaintiff corporation until January 13, 1906, and for any actionable breach of duty committed by him as such director he was liable. The defendant by his seventh prayer asked the court to rule, as a matter of law, that there was no evidence legally sufficient to show that when the defendant secured the lease in his own name, he could have secured a similar lease for the plaintiff corporation at the same rental. This prayer was properly rejected for reasons which will be presently stated. His eleventh prayer asserts, but states no legal conclusion, that the uncontradicted evidence shows that the defendant was at no time authorized to take the lease of the premises in the name of the plaintiff corporation. While it is true the defendant was not expressly told to rent the premises and take the lease in the plaintiff's name, there is ample evidence from which a jury might have found that he had authority to do so. The prayer was not only indefinite and inconclusive, but was misleading, and it tended to divert attention from the real issues made by the pleadings. The evidence produced in support of the plaintiff's case is substantially the same as that contained in the record on the former appeal. It is in no essential particular different. Assuming that the court was right in rejecting the defendant's ninth and tenth prayers, a reference to the statement of facts contained in the opinion in the former case, and to the conclusion reached by the court, is sufficient to show that the trial judge committed no error in granting the plaintiff's first and fourth prayers. Those prayers are based upon the first and second counts of the amended declaration, which set up the precise causes of action alleged in the narr. in the former case, and we there said that the evidence was legally sufficient to be submitted to a jury in support of both causes of action. We, therefore, hold that the decision in the former case is conclusive of all questions raised by the special exceptions and prayers of the defendant to take the case from the jury for lack of legally sufficient evidence to support either of these counts.

The evidence produced on behalf of the defendant on the retrial of the case consisted of that of Mr. McGaw, Frank W. Hopper, and certain extracts from the minute book of the plaintiff corporation. We find nothing in this evidence to induce us to hold that the principles announced in the former case should not be applied to this. It is fair to say that Mr. McGaw was not conscious of any intentional wrongdoing, and that he believed he had a perfect right to do what he did do; but, if the facts stated either in law of the case (Gans Salvage Co. v. Byrnes,

true, he must be held liable for such loss as the plaintiff thereby incurred.

The plaintiff's second prayer is said to be objectionable because it allows the recovery of such reasonable and necessary costs as the plaintiff was put to in procuring the new These costs consisted of a counsel fee of \$250 paid Mr. Steele, and certain expenses incurred by officials of the plaintiff company in procuring the leasehold title to the premises. The counsel fee and costs which the court allowed the plaintiff to recover are not the counsel fees and costs involved in this litigation, but such only as were incurred in securing the new lease in its name after the defendant had, as alleged, wrongfully secured in his own name a lease of the property. These expenses were paid by the plaintiff and proven at the trial, and it is not denied that they were reasonable, and there seems to be no doubt that they were necessarily incurred. The general rule is that costs and expenses of litigation, other than the usual and ordinary court costs, are not recoverable in an action for damages, nor are such costs even recoverable in a subsequent action; but, where the wrongful acts of the defendant have involved the plaintiff in litigation with others, or placed him in such relations with others as make it necessary to incur expense to protect his interest, such costs and expense should be treated as the legal consequences of the original wrongful act. If the plaintiff's evidence be true, it was about to lose possession of the premises by the wrongful act of the defendant, and it was obliged to employ professional aid and incur expense to retain possession of the premises to which, as between itself and the defendant, it was entitled, and the necessary expenses it incurred to regain the possession is an element of the injury. Hadley v. Baxendale, 9 Exch. 341; Furstenburg v. Fawsett, 61 Md. 191, 192; City Passenger Railway Co. v. Kemp, 61 Md. 75; Webster v. Woolford, 81 Md. 329, 32 Atl. 734; 1 Sutherland on Damages (2d Ed.) § 58. The other objection to this prayer is disposed of by what we have said in passing on the first prayer of the plaintiff.

It clearly appears that the defendant was not injured by the granting of the plaintiff's third prayer. That prayer is based upon the third count of the declaration, and it is shown that the verdict and judgment were entered under the first count, and that the court would not have found for the plaintiff under either of the other counts. If, therefore, there were error in granting that prayer, and we are not to be understood as so deciding, it was not reversible error, as no harm whatever was done to the defendant, and this is likewise true of the asserted inconsistency between the defendant's twelfth prayer, which, being conceded, became the the first or fourth prayers of the plaintiff be 102 Md. 245, 62 Atl. 155, 1 L. R. A. [N. S.]

272), and the third and fourth granted prayers of the plaintiff.

The defendant's ninth prayer asked the court to declare that upon the uncontradicted evidence in the case the trustees of the estate of John and James Gregg participated in the defendant's wrongful act in securing the lease in his own name. It is argued that, as the trustees, with full knowledge, participated in the defendant's violation of duty, a resulting trust was thereby created in favor of the plaintiff, which it could have enforced against the trustees and Mr. McGaw, and therefore there was no necessity for the payment of the increased rent. The defendant's tenth prayer rests upon the same proposition. It may well be conceded that Mr. McGaw held the lease of October 26, 1905, as trustee for the plaintiff, and that it could have compelled him to assign it; but the uncontradicted evidence does not show that the trustees knew that the defendant was violating his duty to the plaintiff at the time they executed the lease, or that they participated in any breach of duty which may have been committed by the defendant. On the contrary, it tends to show that their conduct was in all respects fair and proper. There is certainly nothing in the conduct of the trustees that would authorize the court to hold, as a matter of law, that the defendant was thereby relieved of liability in this snit.

We find no reversible error in any of the rulings of the trial court, and the judgment appealed from will be affirmed.

Judgment affirmed, with costs.

(111 Md. 96)

DAGUE V. GRAND LODGE BROTHER-HOOD OF RAILROAD TRAINMEN.

(Court of Appeals of Maryland. June 29, 1909.)

Insubance (§ 754*)—Mutual Benefits-Forfeiture—Payment of Dues.

Plaintiff's dues for January were sent by mail, as was the custom of absent members, and the letter was taken to the house of the financier of the subordinate lodge. The house was found and the letter was taken back to the ost office, and notice sent to the financier, who post office, and notice sent to the mancier, who did not call for it until January 15th. In the preceding month of December plaintiff had been transferred to another lodge, which thereafter refused his dues because it had not accepted the transfer, and the transferring lodge thereafter refused his dues because of his alleged delinquency. Held, that the default was due to the negligence of the local officer, and the company could not avail itself thereof to evade payment under the certificate.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 754.*]

2. Insurance (§ 747*) - Expulsion-Waiver

-ILLEGALITY.

Plaintiff sent his dues by mail to the C. lodge, of which he had been a member, but they were not received because of the absence of the local officer. In the preceding month plaintiff, without his knowledge or consent, had been transferred to the M. lodge. The C. lodge re-

cy, and the M. lodge refused them because it had not accepted the transfer. The officer of the C. lodge told him that a mistake had been the C. lodge told him that a mistake had been made in suspending him, and that he thought the lodge would readmit him, and he filled out and returned a blank given him for readmission. He was notified to attend the C. lodge on a certain date, but the reason therefor was not stated, and his work carried him to a distant city on the date mantioned. tant city on the date mentioned. Afterwards he attempted to join another lodge, but was repeter for physical disqualification, and he wrote a letter requesting that the dues which had been received after his expulsion be refunded. Held that, as plaintiff did not know what his rights were, and was pursuing such course as he was advised was proper for the restoration of his rights, he had not waived the illegality of his expulsion.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. # 747.*]

3. INSURANCE (§ 825*)—EXPULSION—WAIVER—QUESTION FOR JURY.
Where the question whether a member of an insurance order had waived the illegality of his expulsion, depended on parol evidence of facts and circumstances it should be determined by the interval of the control of the mined by the jury.

[Ed. Note.-For other cases, see Insurance, Dec. Dig. § 825.*]

4. INSURANCE (\$ 805*)—MUTUAL BENEFIT—RIGHT OF ACTION—CONDITIONS PRECEDENT.

Where defendant in a mutual benefit insurance society denied its liability, disallowed the claim, and refused appeal to the beneficiary board, insured had a right to bring suit, and defendant was estopped to rely on the provisions of the constitution relating to appeal, or to proofs of loss proofs of loss.

[Ed. Note.-For other cases, see Insurance. Dec. Dig. \$ 805.*]

Appeal from Circuit Court, Allegany County; M. L. Keedy, Judge.

Action by Harry D. Dague against the Grand Lodge Brotherhood of Railroad Trainmen. From a judgment for defendant, plaintiff appeals. Reversed.

Argued before BOYD, C. J., and PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and THOMAS, JJ.

Walter C. Capper, for appellant, Austin A. Wilson, for appellee.

BURKE, J. The appellee is a voluntary incorporated organization doing business in this state. It consists of a grand lodge, with headquarters located at Cleveland, Ohio, and subordinate lodges holding charters granted by the Grand Lodge. The object of the organization is to unite the railroad trainmen, and to promote their general welfare. It issues three classes of beneficiary certificates known as Classes A, B, and C. The constitution provides that each class shall be evidenced by a beneficiary certificate, to be issued under the hands of the grand master and grand secretary and treasurer, and in the name and under the seal of the Grand Lodge. Each certificate shows the class in which it is issued, and provides for the payment, in accordance with the constitution of the order, of the full amount of fused his dues because of his alleged delinquen- such class upon the death of the insured

therein named, or upon his becoming totally | constitution provided that a member holding and permanently disabled. A person who suffers the loss of a hand at or above the wrist, or the loss of a foot at or above the ankle joint, or the loss of the sight of both eyes, is totally and permanently disabled within the meaning of the certificate. When a member is thus disabled, he is entitled to on sufficient and satisfactory proof thereof, the full amount of his beneficiary certificate, but not otherwise. When a member suffers such disability, it is the duty of the lodge of which he is a member to furnish proofs of the same to the Grand Lodge. In the event of the disability of a member while out of the jurisdiction of his lodge, it is the duty of the lodge within the jurisdiction in which the disability occurs to furnish these proofs to the Grand Lodge. Every claim for total and permanent disability, after disallowance, shall be referred to the beneficiary board of the order, and if rejected by that board, the claimant shall have the right to appeal to the Grand Lodge at its next succeeding session, but not afterwards. provided by the constitution that no suit or action at law or in equity shall ever be commenced upon any beneficiary certificate, until after such appeal has been taken, within the time directed, and decided by the Grand Section 64 of the constitution declares that all right of action upon beneficiary certificates shall be absolutely barred unless proofs of death or total and permanent disability shall be forwarded to the grand secretary and treasurer, as hereinafter required, within six months after such death or disability occurs, and it shall be likewise barred unless such action shall be commenced in some court of competent jurisdiction within six months after the final rejection of the claim by the Grand Lodge. Section 129 of the constitution of subordinate lodges provides that the dues of members of this lodge shall be paid monthly in advance, before the first day of each month, to the financier, or collector (when such office exists), and shall be conditioned upon the class of certificate held in the beneficiary department. Section 141 declares that "if any member of this lodge failing or refusing to pay his dues and assessments, as required by section 129, becomes expelled without any notice or further action whatsoever, and at that instant his beneficiary certificate shall be void, and all rights and benefits of beneficiary membership shall cease and be determined." The appellant in this case held a beneficiary certificate in Class C of the defendant, issued by the Grand Lodge on the 6th of May, 1900, through the agency of Subordinate Lodge No. 115. He was transferred to the Cumberland Lodge No. 440 in 1903, and it is admitted that he paid his dues and assessments promptly up to the 1st of January, 1907. He suffered a total and permanent disability, the loss of a leg in the railroad

a certificate in Class C should receive, upon incurring such disability, the sum of \$1,350. The certificate was issued upon the express conditions "that the said Harry D. Dague shall comply with the constitution, by-laws, rules and regulations now in force or which may hereafter be adopted by the within named brotherhood, which as printed and published by the Grand Lodge of the said brotherhood, are made a part thereof, and that he pay all dues and assessments imposed upon him within the time specified by the constitution and by-laws and any failure to make such payment of either grand or subordinate lodge dues, or any general or special assessment levied, shall at once forfeit any and all rights hereunder, and this certificate shall become null and void without notice to the assured, nor shall any payment by or for the assured of either dues or assessments, after such forfeiture revive this certificate or confer any rights thereunder." The defendant refused to pay the amount claimed to be due under the certificate, upon the ground that the appellant was not a member of the organization when he was injured, and this suit was brought to recover the amount payable under the certificate. The trial of the case in the circuit court for Allegany county resulted in a verdict for the defendant under an instruction granted by the court, at the close of the plaintiff's case, that under the pleadings there was no legally sufficient evidence to entitle him to recover, and from the judgment thereon entered this appeal was taken.

The defendant claims that the appellant was not a member of the organization, because he failed to pay his monthly dues for January, 1907, and that, under the constitution of the organization and the terms of the certificate, that failure operated to expel him from membership, and to forfeit all his rights under the certificate. The court below found that this contention of the appellee was not sustained by the evidence, and that the failure of Lodge No. 440 to receive the dues for January, 1907, and the ensuing months was not due to any default on the part of the plaintiff. The evidence is clear that his dues for January, 1907, and for the intervening months preceding the accident, were not paid to, or received by, the Cumberland Lodge, because of the default of the officers of that lodge. E. M. Pettle was the financier of that lodge, and it was his duty to receive the dues of members, and to give receipts therefor. These dues were obliged to be paid monthly in advance before the first day of each month. It was the duty of Mr. Pettie to provide some place where the members could pay their dues to him in person, or to some person authorized to receive them. The testimony shows that the dues of the plaintiff for January, 1907, were taken to the home of Mr. Pettle on the service, on the 21st of July, 1907. The 29th of December, 1906, by J. B. Wahl, a



mail carrier of the Cumberland post office. I notified on February 21, 1907, to be in Cum-The house was locked, and that Mr. Pettie was away from home, and he had no office at which the money could be paid. The money was sent by the plaintiff in a registered letter from Glassport, Pa., and that it was the custom of members who were absent, as the plaintiff was, to send their dues by mail. A notice was left under the door at Mr. Pettie's home, notifying him that the letter was at the post office. It was his custom to call at the office about the last of each month and receive registered letters and money orders, but in December, 1906, he did not do this, and allowed his mail to accumulate, and this letter was not delivered until about the 15th of January, 1907. The evidence also shows that on December 26, 1906, the

plaintiff, transferred him to Glassport Lodge, but he never was accepted by that lodge; and, under section 155 of the constitution of subordinate lodges, he retained his membership in the Cumberland Lodge, and it was his duty to pay his dues and assessments to it. The plaintiff was at all times ready, able, and willing to pay his monthly dues as they

Cumberland Lodge, without notice to the

became payable subsequent to January 1, 1907; but the Cumberland Lodge declared it could not receive them because his failure to pay the January dues had forfeited his membership in the order and the McKees.

membership in the order, and the McKeesport Lodge to which he had been transferred would not receive them, because he had not been accepted by that lodge.

It is, we think, entirely clear that the situation in which the plaintiff was placed was due to the default and negligence of E. M. Pettie, the financier of the Cumberland Lodge, and that under the rule laid down in Schlosser v. Grand Lodge, 94 Md. 362, 50 Atl. 1048, the defendant cannot avail itself of that negligence to evade the payment of the sum claimed to be due under the certificate. The appellee contends that, if it be conceded that the plaintiff was illegally suspended, he has waived the illegality of the expulsion, and therefore cannot recover. The court below adopted this view, and withdrew the case from the jury upon that ground alone, but stated that the case was a close one. The propriety of this ruling involves an examination of the facts appearing in the record upon which it was based. There was no express waiver of any of his rights of membership, and it is evident that the plaintiff did not intend willingly to surrender any of his rights, but that he wished to retain the benefits to which he was entitled under his certificate. The Cumberland Lodge told him that a mistake had been made in suspending him, and he was told by Mr. Pettie that he thought the lodge would readmit him without cost, and shortly after that Mr. Little, the secretary, sent him a blank form of readmission, which he filled out and returned to the Cumberland Lodge. He was

berland on the 27th of that month, but was not told for what purpose. He was then 143 miles from Cumberland at work, and he could not come. He heard nothing further from the Cumberland Lodge. He then tried to join the McKeesport Lodge, but was rejected because of some physical disqualifications. On April 4, 1907, he wrote the following letter to A. E. King, grand secretary and treasurer of the defendant: "As I have been dropped out of the B. of R. T. and refused readmission again as a beneficiary member, I thought I would write and let you know under what circumstances I was expelled on December 28th. L sent a registered letter to Bro. Pettie of 440 at Cumberland at No. 18 Davison street, with my dues, \$2.75, and I went to Philadelphia; did not get back until January 14th, '07, and Brother Pettie claimed he did not get my dues in time, but he ought to have gotten them on the morning of the 29th, not later than 9:30 o'clock, as they have a mail delivery in the morning and one in the afternoon. Now, I have got the registered receipt from him dated Jan. 10th, '07. Now, I cannot understand why he did not get it sooner. Then Bro. C. H. Little sent me a form to fill out for reinstatement, stating that through an error of Bro. Pettie the lodge would reinstate me and stand all expenses. Now, I filled the form out, but I had only to the 27th of February to get there, and I could not go on account of my being away the month before and it would cost me nine dollars and I would have to lose about three days, as it is about 143 miles from here to Cumberland. Now Mr. King, I think that 440 ought to refund that \$2.75, as I never got my receipt. If I had gotten my receipt I would not have been expelled the day I sent my dues to Cumberland. They sent a transfer card the next day, and I did not know that 518 of Mc-Keesport had asked for it, as I did not intend to stay at this place, as I was working out a notice at the time, and then I recalled it and stayed here on the P. and L. E. Now I have belonged to the B. of R. T. for nearly 8 years, and I have never asked any lodge to carry me over from one month to another, but I have voted for more than one member to be carried over when they were in hard luck, and I never got but three dollars out of 440, and that was one time I had my ankle hurt, and I never got anything out of lodge 113 at Philadelphia, as I always have had good health. Now, I am not writing this to try to get back in the B. of R. R. T., but I am just stating plain facts, as I have paid about \$250 in the B. of R. R. T. already. I think lodge 440 ought to refund my last \$2.75 that I sent to Cumberland. I do not know what I was turned down for, but I think when you pass one doctor for work you ought to be able to pass another one for the B. of R. R. T. as I am more stouter now than when I first joined the B. of R. R. T., as I am about 20 pounds heavier, and I never felt better in my life. Now Mr. King, see what you can do about having 440 refund that \$2.75 to me. This is all I ask, as I do not feel like going in the B. of R. R. T. as an honorary member. Hoping you will look the matter up with 440. I remain," etc.

After the appellant was injured he went to see some of the members of the Cumberland Lodge to see what they were going to do about it. It is apparent from the whole conduct of the plaintiff that he did not know what his rights were in the matter, and that he was pursuing such course as he was advised was proper for the restoration of rights which he supposed he had lost through a mistake of the Cumberland Lodge. It is not conceivable that he would have done what he did do if he had known that his expulsion from membership in the order was illegal, and that in point of fact and law his rights under his certificate were still intact. Misapprehension or ignorance of his rights furnishes the only reasonable explanation of his conduct. Waiver or acquiescence (which is a species of waiver by tacit assent) "implies the abandonment of some right which can be exercised, or the renouncement of some benefit or advantage which but for such waiver the party relinquishing would have enjoyed. The general rule is that there can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights, and of facts which will enable him to take effectual action for the enforcement of such rights. No one can acquiesce in a wrong while ignorant that it has been committed, and that the effect of his action will be to confirm it." 29 Am. & Eng. Ency. of Law, 1093. In this case the court ruled, as a matter of law, that the plaintiff had waived or acquiesced in the wrongful acts of the de-In thus holding we think the court fell into an error. There is a class of cases, of which the case of Spring Garden Mut. Ins. Co. v. Evans, 9 Md. 1, 66 Am. Dec. 80, is an example, in which the court ought to determine as a matter of law the question of waiver vel non; but, where the question depends upon parol evidence of facts and circumstances, it should be determined by the jury under the instructions of the court. Caledonian Ins. Co. v. Traub, 80 Md. 214. 30 Atl. 904. The defendant denied its liability, disallowed the plaintiff's claim, and refused his appeal to the beneficiary board. Under these circumstances the plaintiff had a right to bring the suit, and the defendant is estopped to rely upon the provisions of the constitution we have quoted relating to the appeal to the beneficiary board, or to the proofs of loss, if it be assumed that it was the plaintiff's duty to furnish those proofs.

The judgment will be reversed, and the case remanded for a new trial.

Judgment reversed, and case remanded for a new trial with costs to the appellant above and below.

(111 Md. 321)

ÆTNA INDEMNITY CO. OF HARTFORD, CONN., et al. v. GEORGE A. FULLER CO.

(Court of Appeals of Maryland. June 30, 1909.)

 EVIDENCE (§ 20°)—JUDICIAL NOTICE—COM-MON KNOWLEDGE—TIME OF MAILS.

MON KNOWLEDGE—TIME OF MAILS.

In the absence of evidence of actual delay, it is common knowledge that a letter, written during business hours in Baltimore on any day except Saturday, would be delivered in New York in the early morning delivery of the next day, and if written on Saturday afternoon would be delivered on Monday morning.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 20.*]

 Insurance (§ 124*) — Indemnity Insurance.

A bond of a subcontractor to construct the reinforced concrete and cement work of a building, conditioned on the subcontractor conforming to the contract, and stipulating that the bond is executed by the surety and received by the contractor on conditions stated, is a contract of insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 172; Dec. Dig. § 124.*]

3. Corporations (§ 672*)—Actions—Pleas.

A motion to strike a plea, in an action by a foreign corporation, alleging that plaintiff is not a corporation, is properly overruled.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2646; Dec. Dig. § 672.*]

4. Pleading (\$ 352*)—Striking Plea.

A motion to strike the plea of non est factum as to the bond sued on, in an action on a subcontractor's bond conditioned on his conforming to the contract, is properly overruled.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1078; Dec. Dig. § 352.*]

5. PLEADING (§ 8*)—LEGAL CONCLUSIONS.

A plea, in an action by a foreign corporation on a subcontractor's bond conditioned for his conformity to the contract, which avers that plaintiff is not a corporation legally entitled to sue, and that all liability of the surety on the bond has been released, is demurrable, because stating conclusions of law, and not the facts, as required by Code Pub. Gen. Laws 1904, art. 75, § 2.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 12; Dec. Dig. § 8.*]

6. CONTRACTS (§ 306*)—BUILDING CONTRACTS
—CERTIFICATE OF ARCHITECT—CONCLUSIVENESS.

The architect's certificate, showing on its face that the auditing was made on the checks and vouchers of expenses produced by the contractor, and not on a personal inspection of the work, is not a certificate, within a contract stipulating that the expense incurred by the contractor, on the subcontractor failing to comply with the contract, shall be audited and certified by the architect.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 306.*]

7. CONTRACTS (§ 332*)—ACTIONS—DEFENSES—PLEADING.

PLEADING.

When a right of action on contract is once vested, any circumstance the omission of which

goes to defeat it, whether called a proviso by way of defeasance or a condition subsequent, is a matter of defense, and need not be stated in the declaration.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1634; Dec. Dig. § 332.*]

8. Contracts (§ 328*)—Building Contracts
—Breach—Defenses.

—BEEACH—DEFENSES.

Where a subcontractor gave a bond conditioned for his conforming to the contract for the construction of a part of a building, and stipulating that the surety, on notice, might complete the contract abandoned by the subcontractor, and abandoned the contract, a right of action at once vested in the contractor, and the deprivation of the right of the surety to complete the contract was available only in reduction of demages, and was a matter of defense. tion of damages, and was a matter of defense only.

[Ed. Note.—For other cases, see Cent. Dig. § 1571; Dec. Dig. § 328.*]

9. Pleading (§ 8*)—Legal Conclusions.

A plea, in an action on a subcontractor's bond conditioned for his conforming to his contract, which merely charges that the contractor violated the contract, without stating any facts, is demurrable, because stating a legal conclusion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 12; Dec. Dig. § 8.*]

10. Appeal and Error (§ 1040*)—Harmless Error—Erroneous Rulings on Demur-

It is not reversible error to sustain a demurrer to a plea, where the party complaining had the benefit of the plea by issue joined on another plea.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1040.*]

11. CONTRACTS (§ 256*)—BUILDING CONTRACTS

-ABANDONMENT.

A subcontractor, who totally suspended work under his contract and who consented to the appointment of a receiver of his property, thus voluntarily putting it out of its power to continue the work, in law and fact abandoned the contract the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1151; Dec. Dig. § 256.*]

12. Damages (§ 175*)—Breach of Building Contract—Evidence.

Where a subcontractor abandoned the contract, the contractor, suing for the breach, could show the damages sustained by showing that the work done by him in completing the contract was necessary, and that the prices paid for labor and materials were the prevailing market prices.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 469; Dec. Dig. § 175.*]

13. Damages (§ 175*) — Building Contracts
—Breaches—Evidence.

Where a contractor, employing a subcontractor, atipulated that the expense incurred by the contractor on the subcontractor failing to perform the contract should be audited and cerperform the contract should be addited and certified by the architect, and the architect, though requested, refused to give a certificate, based on the contractor's checks and vouchers of expense, the contractor, when suing the subcontractor and surety for the damages sustained, could show the expense incurred in completing the work, for the act of the architect amounted to an absolute refusal in bad faith to give a certificate.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 469; Dec. Dig. § 175.*]

14. EVIDENCE (§ 441*) — PAROL EVIDENCE — VARYING WRITTEN CONTRACTS. Evidence of an alleged verbal agreement, antecedent to the written agreement between

the parties, and differing from it, is inadmissi-

[Ed. Note.—For other cases, see Cent. Dig. § 2030; Dec. Dig. § 441.*]

15. PRINCIPAL AND SUBETY (§ 160*)—ACTIONS ON BONDS—EVIDENCE—ADMISSIBILITY.

In an action on a subcontractor's bond, conditioned for his conforming to the contract, evidence of the contract was a subcontractor's manager. dence of statements by the contractor's manager to the agent of the surety as to the responsibil-ity of other bidders for the contract, offered to show that the representations influenced the surety in executing the bond, was properly excluded.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 436; Dec. Dig. § 160.*]

16. EVIDENCE (§ 471*)—OPINIONS.

In an action on a subcontractor's bond, conditioned on his conforming to his contract, it was proper to refuse to permit a witness to say why the contractor did not pay the subcontractor's pay roll, presented after the work had been stopped; for the question called for the opinion of the witness, and not a statement of the contractor against his interest.

[Ed. Note.—For other cuses, see E Cent. Dig. § 2150; Dec. Dig. § 471.*]

17. PRINCIPAL AND SUBETY (§ 142*)-ACTIONS

on Bonds-Defenses.

ON BONDS—DEFENSES.

Where, in an action on a subcontractor's bond, conditioned for his conforming to the contract to construct a part of a building, it appeared that the contractor had paid to the subcontractor nearly \$60,000 on the contract of \$68,000, while only about 60 per cent. of the work had been done, proof that the contractor, required to retain 5 per cent. of the total amount of the contract until time for final payment, had written letters to creditors of the subcontractor stating that the contractor could only pay a certain percentage of the amount of only pay a certain percentage of the amount of the contract price, and that he would not guar-antee payment for labor and materials, did not defeat a recovery on the bond, on the ground that the letters made it impossible for the subcontractor to purchase materials.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 390; Dec. Dig. § 142.*]

18. Damages (§ 120*)—Breach of Building CONTRACTS.

A contractor, suing on the subcontractor's bond, conditioned on his conforming to the contract, for the damages sustained because of the subcontractor abandoning the work, is entitled to recover the reasonable cost incurred by him in completing the work, less the balance of the contract price remaining in his hands.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 293; Dec. Dig. § 120.*]

19. TRIAL (\$ 170*)—DIRECTION OF VERDICT.

Where there was no evidence in support of a plea, it was proper for the court to instruct the jury that on that issue the verdict must be against defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 390; Dec. Dig. § 170.*]

20. Principal and Surety (\$ 76*)-Liabili-

TIES-BREACH BY PRINCIPAL.

A contractor, employing a subcontractor for reinforced concrete and cement work of a the reinforced concrete and cement work of a building, stipulating that any material purchased by the contractor for the subcontractor, or any money advanced by the contractor to the subcontractor for pay rolls, shall be charged to the account of the subcontractor, and shall be considered as a part payment on the contract, and that payments to the subcontractor may be made within 5 per cent. of the total amount of the price, the balance to be held until time for final payment, obligates such contractor to make payments to the subcontractor in

•For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

installments as the work progresses to within [5 per cent. of the total amount of the contract, the balance to be held until time for final payment; but a failure of the contractor to make such payments does not prevent a recovery on the subcontractor's bond, based on the subcontractor abandoning the work.

[Ed. Note.—For other cases, see Principal and Suvety, Cent. Dig. § 122; Dec. Dig. § 76.*]

21. EVIDENCE (§ 84*)—PRESUMPTIONS.

The law presumes that a representation is true, and the presumption must be overcome by positive evidence of falsity, or by suspicious circumstances so strong as to warrant a reasonable mind to believe that there was falsity.

[Ed. Note.-For other cases, see Evidence, Dec. Dig. § 84.*]

22. Contracts (§ 212*)—Construction—Rea-SONABLE TIME

Where no time is mentioned in the contract within which the surety of a subcontractor may elect to complete the contract on the subconreasonable time, which is a question of law for the court on the facts; and where the surety was notified of the default of the subcontractor on the day it occurred, and failed for nearly two weeks to take any stong the surety was given weeks to take any steps, the surety was given reasonable time, and the contractor might then complete the work.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 948; Dec. Dig. § 212.*]

23. TRIAL (§ 262*) — INSTRUCTIONS — INCONSISTENT INSTRUCTIONS.

It is not error to reject a requested instruction, which is in conflict with another requested instruction, which has been granted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 661; Dec. Dig. § 262.*]

Appeal from Superior Court of Baltimore City; Thos. Ireland Elliott, Judge.

Action by the George A. Fuller Company against the Ætna Indemnity Company of Hartford, Connecticut and others. From a judgment for plaintiff, defendants appeal. Affirmed.

The court amended and granted plaintiff's prayers as follows:

"(1) The court instructs the jury that if they believe from the evidence that the plaintiff is a corporation, and that the plaintiff and the defendant the Southern Construction Company entered into the contract, dated the 26th day of May, 1906, offered in evidence, relating to concrete work at the Friedenwald Building, and that said company commenced the said work comprehended under said contract, and continued to prosecute the same until the 23d day of August, 1906, and that on said date the said defendant the Southern Construction Company abandoned said work without first completing the same, and shall further find that the plaintiff took charge of the said unfinished work and completed the same, and if they shall further find that the plaintiff had up to the time of said abandonment of the work fully performed its part of said contract, and if they shall further find that said Southern Construction Company and the defendant the Ætna Indemnity Company executed and delivered to the plaintiff the bond sued on in this case and offered in evidence, then, unless

the jury further find that the defendant the Ætna Indemnity Company has shown by a preponderance of the evidence in this case that the bond sued on was obtained from it by the fraud or misrepresentations of the plaintiff, the verdict of the jury upon the whole case be for the plaintiff.

. "(2) The court instructs the jury that, if they find in favor of the plaintiff, then in estimating the damages they shall allow the plaintiff such reasonable cost or expense as the plaintiff should have incurred in completing that portion of the work called for in the contract between the plaintiff and the defendant the Southern Construction Company, which they shall find was not performed by said latter company, less, however, the balance of the contract price remaining in the hands of the plaintiff, which amounts to the sum of \$10.138.48. The said balance has been arrived at upon the following calculation:

Original contract price Extras	\$66.067 1,860	00 00
Total contract price and extras Less payments on account aggregat- ing	\$67,927	00
	59,788	52
Balance	\$ 8,138	48
agreement of the parties at the sum of	2,000	00

Making the total balance in the hands of the plaintiff the sum of .. \$10,138 48

as above stated. The jury may allow interest, if in their discretion they deem it proper to do so."

"(6) The court instructs the jury that there is no evidence in this case legally sufficient to support the allegations of the thirteenth plea of the defendant the Southern Construction Company, and their verdict upon the issues raised in that plea should therefore be for the plaintiff as against the Southern Construction Company."

"(8) The court instructs the jury that the representations said by the witness Hunter to have been made to him by the witness Witherspoon respecting the agreement of the George A. Fuller Company to finance the work comprehended in its contract with the Southern Construction Company, and respecting the alleged absence of financial risk to be assumed by the Ætna Indemnity Company. as surety, by reason of the financing by the Fuller Company aforesaid, are not such representations, even if made, as constitute a defense to this action."

The court modified and granted the prayers of defendant the Ætna Indemnity Company of Hartford, Conn., as follows:

"(2) The court instructs the jury that according to the true legal interpretation of the thirteenth clause of the written contract, dated May 26, 1906, offered in evidence, the

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plaintiff was obligated to make payments to the Southern Construction Company on account of the total contract price of \$66,067 in installments, as the work mentioned in said contract progressed, to within 5 per cent. of the total amount of the contract, the remaining 5 per cent. to be held back until time for the final payment arrived; but a failure on the part of said plaintiff to make such payments, if found by the jury, would not prevent a recovery in this case by the plaintiff."

"(16) The court instructs the jury that if they find that Leslie Witherspoon, the manager of the plaintiff, represented to Archibald J. Hunter, agent of the Ætna Indemnity Company, on or about May 26, 1908, and prior to the execution and delivery of the bond in suit, that the plaintiff had received other bids for the work covered by the contract guaranteed by said bond at or within \$4,000 of the contract price of \$66,067, and that the Ætna Indemnity Company, in reliance on such representation, executed and delivered the said bond, and if they shall further find from the evidence that such representation was material to the assumption by the Ætna Indemnity Company of liability thereon, and that the said representation was untrue, then the verdict of the jury may be for the said defendant the Ætna Indemnity Company, although the jury may also find the other facts offered in evidence by the plaintiff."

The court granted the following prayers of defendant the Ætna Indemnity Company of Hartford, Conn.:

"(12) The court instructs the jury that it was the duty of the plaintiff to complete the contract mentioned in the bond in this case at the lowest reasonable cost, and if they find for the plaintiff they should not allow to the plaintiff damages in excess of such lowest reasonable cost, with interest thereon in their discretion.

"(13) The court instructs the jury that there is no legally sufficient evidence in this case to entitle the plaintiff to recover the penalty of \$50 per day under the fourteenth clause of the contract between the plaintiff and the defendant the Southern Construction Company, offered in evidence.

"(14) The court instructs the jury that by the undisputed evidence in this case the defendant the Ætna Indemnity Company is entitled to a credit of \$8,138.48, being the unexpended balance of the contract price, and a further credit of \$2,000, being the sum of various allowances conceded by the plaintiff, in reduction of the amount which the jury may find to be the lowest reasonable cost of completing the work covered by the contract between the plaintiff and the defendant the Southern Construction Company."

Argued before BOYD, C. J., and PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and THOMAS, JJ.

W. Thomas Kemp and George Whitelock, for appellants. Clarence A. Tucker and Joseph N. Ulman, for appellee.

PEARCE, J. This action was brought by the George A. Fuller Company, a foreign corporation, upon a bond executed by the Southern Construction Company of Baltimore, Md., as principal, and by the Ætna Indemnity Company of Hartford, Conn., as surety, in the penalty of \$50,000. These parties will be hereinafter designated briefly as the "Fuller Company," the "Southern Company," and the "Ætna Company." The Fuller Company had entered into a contract for the erection complete of a certain building in Baltimore city, known as the "Friedenwald Building," and had sublet all the reinforced concrete and cement work thereof to the Southern Company, under a written agreement between them dated May 26, 1906. Under this agreement the Southern Company was required to furnish "a surety bond" in the amount of \$50,000 for the faithful performance of the contract. The contract price to be paid the Southern Company for work and materials thereunder was \$66,067; and \$6.50 per cubic yard for all additional concrete work, and such sum was "to be paid by the contractor [the Fuller Company] to the subcontractor [the Southern Company] in installments as the work progresses." The fifth and thirfeenth clauses of this agreement are the important clauses in this case, and the essential parts thereof are therefore transcribed as follows:

"Fifth. Should the subcontractor at any time refuse or neglect to supply a sufficient. number of properly skilled workmen, or sufficient materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, the contractor shall be at liberty, after three days' written notice to the subcontractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due, or thereafter to become due, to the subcontractor under this contract; and the contractor shall also be at liberty to terminate the employment of the subcontractor for the said work, and to enter upon the premises and take possession, for the purpose of completing the work comprehended under this contract, of all materials, tools, and appliances thereon, and to employ any other person or persons to finish the work and to provide the materials therefor, and in case of such discontinuance of the employment the subcontractor shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance to be paid under this contract shall exceed the expense incurred by the contractor in finishing the work, such excess shall be paid to the subcontractor, but if such expense shall exceed such unpaid balance the subcontractor shall pay the difference to the contractor. The expense incurred by the contractor as herein provided, either for furnishing the materials or for

finishing the work, and any damage incurred through such defau't, shall be audited and certified by the architect, whose certificate thereof shall be conclusive upon the parties."

"Thirteenth. Any material purchased by the contractor for the subcontractor, or any money advanced by the contractor to the subcontractor for pay rolls, etc., shall be charged to the account of the subcontractor, and shall be considered as part payment on this contract. Payments to the subcontractor may be thus made to within 5 per cent. of the total amount of this contract, the remaining 5 per cent. to be held back until time for the final payment, arrives."

The contract required the entire work, except the tooling of the exterior walls, to be completed September 1, 1906. In compliance with this agreement the Southern Company furnished the bond sued on and hereinbefore mentioned, which was signed and sealed by the Southern Company and by the Ætna Company May 26, 1906. The condition of that bond is as follows: "The condition of the foregoing obligation is such that if the said principal shall conform to and comply with all the terms and covenants of a certain contract between said principal and said contractor, dated May 26, 1906, relating to concrete work on Freidenwald Building as per contract, on the part of said principal to be performed and complied with, according to the tenor of said contract, then this obligation to be null and void; otherwise, to be and remain in full force and effect." Ιt was further provided in said bond as follows: "This bond is executed by the surety and received by the contractor upon the follówing express conditions." Here follow eight separate conditions, of which it is only necessary to set out parts of the third and seventh.

"Third. If the said principal abandon said contract, or fail to comply with any or all of the conditions of said contract to such an extent that the same shall be forfeited, then said surety, upon the notice above stated [prompt notice after default by personal delivery or registered mail], shall have the right and privilege to sublet or complete said contract, whichever said surety may elect to do, provided it be done in accordance with said contract. * * *"

"Seventh. If, after default and notice of such default to the surety, the principal shall continue to proceed with the performance of the contract, the contractor may pay the principal for work done and material supplied without affecting the liability of the surety hereunder, unless the surety shall serve a notice upon the contractor directing it to withhold such payments, in which event the contractor may only pay for the work and labor performed subsequent to the decontract, and must withhold the balance of they again wrote the Ætna Company, call-

the payments to secure the performance of the contract.'

There seems to be no question, upon the evidence, that the bond was executed on the day it bears date, May 26, 1906. Witherspoon, plaintiff's manager, was not able to say whether either the bond or contract was executed May 26th or June 5th; but Hunter, the Baltimore agent of the Atna Company, said he had seen no written contract when the bond was executed, and Purnell, secretary of the Southern Company, who signed the bond, swore positively that the contract was not executed and was not in existence on May 26th, and that he knew it was executed on June 5th. Witherspoon testified positively that he showed Hunter either the contract or an exact copy before delivery of the bond, though he could not fix the exact date of delivery, and Hunter admitted that he was "furnished a precise copy of the written agreement offered in evidence on June 5, 1906, and that on July 26, 1906, his company accepted payment of the premium on this bond from the Fuller Company, through the office of the Southern Company." Work under the contract was begun, as nearly as appears from the evidence, about June 7, 1906, before the delivery of the bond, according to Witherspoon's recollection of the fact. The Southern Company stopped work August 23, 1906, and never resumed it. On August 23, 1906, the Fuller Company wrote the Ætna Company that a bill for a receiver had been filed against the Southern Company, alleging its insolvency, and that, while work had not then actually stopped, they were advised the Southern would probably consent to the appointment of a receiver, and they asked the advice of the Ætna Company for the protection of their mutual interests. On August 24th they again wrote, stating that the Southern had actually stopped work, and that, while a receiver had not then been appointed, they were advised the Southern would consent, and they should therefore look to the Ætna's bond. They also inclosed a carbon copy of their letter of same date to the Southern that unless work was resumed at once its employment would be terminated, and the Fuller Company would look to the On August 29th the plaintiff again bond. wrote the Ætna Company, stating that a receiver had been appointed on the 28th; the Southern consenting thereto, and admitting its insolvency. They also stated they had terminated the employment, and had entered upon the premises and taken possession "for the purpose of completing or having completed the work comprehended under the contract," and they inclosed carbon copy of letter of same date to the Southern Company, and also to Mr. Geo. R. Willis, its receiver, conveying the same notice as that given the Ætna Company. The receipt of all these fault, less the reserve provided for in the letters was admitted. On September 1st,

and saying: "Not having heard from you, we assume that you do not deem it to your advantage to go ahead and sublet or com-.plete said contract, and accordingly this company will on next Tuesday, September 4, 1906, in order to keep the damages down to as low a figure as possible, make a start for the completion of the work comprehended under the contract, holding your bond responsible for any loss we sustain in the premises."

On September 4th the Ætna Company briefly acknowledged the letter of August 29th, stating that they had been waiting for a communication from their indemnitors, and on the same day also acknowledged their letter of September 1st, stating their surprise that the plaintiff should have chosen to go ahead with the contract on the 4th, when they knew their letter of 1st inst. could not possibly reach the Ætna Company in New York before the 4th inst., and saying: "You seem to overlook the fact we have indemnitors from any loss on account of the insurance of the above bond, and that it is quite necessary for us to obtain their acquiescence in whatever action this company might take as surety." It may be observed here that no testimony was offered to show the time required for transmission and delivery of a letter from Baltimore to New York; but, in the absence of some evidence of actual delay, it is common knowledge that a letter written during business hours in Baltimore on any day except Saturday would be delivered in New York in the early morning delivery of the next day, and, if written on Saturday afternoon, would be delivered on Monday morning. It is quite impossible to conceive that a letter mailed in Baltimore on Saturday, September 1st, could not be delivered in New York until Tuesday, the 4th. It is also to be observed that the Ætna Company in this letter characterizes the bond every properly as a contract of insurance. It appears from the testimony of both sides that, when the work was stopped on August 23d, from 50 per cent. to 60 per cent. of the work on this contract had been done, while the plaintiff had paid the Southern Company, before its actual failure on the 28th of August, about \$60,000 on their \$68.000 contract.

The declaration contains three counts of a simple character. The first count sets out the condition of the bond, and charges as a breach the abandonment of the contract long before its completion, alleging that the plaintiff was damaged by being compelled to complete the unfinished work and to pay out large sums of money in doing so. The second count sets out the condition of the bond. and the insolvency of the Southern Company, and charges as a breach the stopping of the work long before its completion. It alleges the giving of due notice and termination of the contract, the completion of the work by

ing their attention to their previous letters, the plaintiff, the provision for auditing the cost of completion by the architect and damage sustained by the default, the certificate of such audit and the plaintiff's demand for the amount thereof, and the defendants' refusal to pay the same. The third count set out the condition of the bond and the entire fifth clause of the contract, and alleged as a breach that before completing the contract the Southern became insolvent, consented to the appointment of a receiver, and stopped work, and further alleged in like manner the termination of the employment, the completion of the work by the plaintiff, the certificate and award of the architects, the demand of the plaintiff for the amount of the award, and the defendants' refusal to pay the same.

> The subsequent pleadings are voluminous. The Ætna Company first filed 14 pleas to the whole declaration; the thirteenth and fourteenth being the same as the eighth and ninth, but filed on equitable grounds. The substance of these pleas may be condensed as follows: (1) That the plaintiff is not a corporation. (2) Plaintiff not a corporation legally entitled to sue. (3) Non est factum as to the bond sued on. (4) That the paper filed with the declaration, purporting to be a certificate of the architects, was not a certificate. (5) That said alleged certificate was obtained by the plaintiff by fraud. (6) That the contract was, before the time for its fulfillment, without defendant's consent, so materially altered as to release defendant from all liability on the bond. (7) That all liability, if any, of defendant on the bond, had been released. (8) That plaintiff, before May 26th, agreed with the Southern Company to supply it with all necessary money to complete said contract, and to finance all its requirements thereunder; that plaintiff failed and refused to comply with this agreement, with the fraudulent purpose of causing the Southern Company to make default, and thereby to enable the architects to assess damages against that company; and the plea further alleged that said architects were the creatures and tools of the plaintiff, absolutely dependent upon it for employment, and that they could not, and did not, fairly assess any damages that might have accrued in the matter. (9) That the alleged architects' certificate was not their bona fide finding, but was the result of a fraudulent design to mulct the two defendant companies in damages. (10) That under the contract the plaintiff was indebted to the Southern Company in an amount equal to, and greater than, the damages claimed by plaintiff. (11) That the bond sued on was obtained by the fraud and misrepresentation of the plaintiff. (12) That the alleged architects' certificate was obtained by fraud. The thirteenth and fourteenth, as we have said, are the same as the eighth and ninth, except that they were filed on equitable grounds.

The plaintiff moved to strike out the first

and third pleas, and this motion was correctly overruled. The plaintiff then joined issue on the first and third pleas, demurred to the second, fourth, fifth, sixth, seventh, eighth, ninth, twelfth, thirteenth, and fourteenth pleas, and demanded a bill of particulars as to the tenth plea, and replied to the eleventh plea that the bond was not obtained by fraud. The demurrer was sustained as to the second, fourth, fifth, seventh, ninth, twelfth, thirteenth, and fourteenth pleas, and was overruled as to the sixth and eighth. The defendant failed to furnish a bill of particulars as to the tenth plea, and It was thus eliminated, and the defendant did not plead over as to any pleas to which the demurrer was sustained. The plaintiff replied to the sixth plea that the contract was not materially altered so as to release the defendant from liability on the bond, and replied to the eighth plea that it did not agree to supply the Southern Company with money to perform the contract, nor to finance any of its requirements, and denied all the other allegations of that plea relating to said architects. Subsequently, by leave of court, the Ætna Company filed two additional pleas. The substance of the first was that the Southern Company did abandon the contract, by reason of which the Ætna Company acquired the right to sublet or complete the contract, and the plaintiff wrongfully entered upon and completed the contract, and thereby deprived the Ætna Company of said right and privilege. The second additional plea set up the same defense as the first, but set out in full conditions 2 and 3 recited in the bond, under which said right and privilege was claimed, and then alleged, as in the first additional plea, the facts which it claimed operated to defeat its right and privilege. The plaintiff demurred to these two additional pleas, and the demurrers were sustained. The case thus went to the jury, as to the Ætna Company, upon the issues raised by the first, third, sixth, eighth, and eleventh pleas, viz., nul tiel corporation, non est factum as to the bond sued on, material alteration of the contract, releasing the Ætna Company from liability on the bond, the question of agreement by plaintiff to finance all requirements of the Southern Company under the contract, and the fraudulent breach of such agreement, and the obtaining of the bond by fraud.

The second and seventh pleas of the Ætna Company were clearly demurrable, because they both stated merely conclusions or matter of law. Code Pub. Gen. Laws, art. 75, § 2; Gent v. Cole, 38 Md. 110. For the same reason it is at least open to question whether the sixth plea was not also demurrable. though the trial court held otherwise, and that question is not before us. The other original pleas of the Ætna Company were founded upon the architects' certificate; but, as this certificate was excluded by the court,

cedes that any error in ruling upon those pleas would not constitute reversible error. The record does not disclose the ground upon which this certificate was excluded; but there is an intimation in one of the briefs that it was because the certificate showed upon its face that the auditing was made merely upon the checks and vouchers of expense produced by the plaintiff, and not upon a personal examination and inspection of the work done in the completion of the contract. We think that is the inference which must be drawn from the language of the certificate, and as it is clearly the professional skill and personal judgment of the architects as to the character and quality of the work done by the plaintiff, to which the parties are entitled under the contract, we are of opinion the certificate was correctly excluded.

The Ætna Company earnestly contends, however, that the declaration is defective in failing to allege specifically that the notice of default required by condition 2 of the bond was given, and that a proper opportunity thereafter was given the Ætna Company to sublet or complete the contract. It contends that these were conditions precedent, which must be alleged in the declaration, as well as proved, in order to maintain the action. Whether the conditions or covenants of a contract are precedent or independent, has been a fruitful subject of discussion; but we think Mr. Poe has succinctly stated the principle applicable to this case, in section 565 (3d Ed.) of his work on Pleading, in which he says: "When a right of action is once vested, any circumstance the omission of which goes to defeat it, whether called by the name of a proviso, by way of defeasance, or a condition subsequent, must in its nature be a matter of defense, and need not be stated in the declaration." For reasons which will be hereafter stated, we think it will appear that the Southern Company abandoned the contract, whereby a right of action was at once vested in the plaintiff. Damage in greater or less degree, even if only nominal damage, was the natural and necessary consequence of such abandonment, and this damage would not be satisfied by the mere subletting or completion of the contract by the Ætna Company. Hence the deprivation of the right to sublet or complete the contract, even if established, would go only in reduction of damages to such extent as the proof would warrant, and must necessarily be a matter of defense only. The demurrer to the two additional pleas was, therefore, properly overruled.

The Southern Company filed 12 pleas, misnumbering the last three as the eleventh, twelfth, and thirteenth. Issue was joined on the fourth plea, which was non est factum, and all the others were demurred to. The demurrer was overruled as to the sixth, seventh, and thirteenth, and sustained as to this appellant in its brief very properly con- all the others. The sixth plea set up an agreement to finance the contract for the to the appointment of a receiver, thus vol-Southern; the seventh charged that the plaintiff failed to pay the Southern Company certain sums as stipulated in the contract; and the thirteenth, as a plea on equitable grounds, charged that the plaintiff, with the fraudulent and malicious purpose of ruining the Southern Company financially and making it impossible to comply with said contract, wrote and sent to certain creditors of the Southern Company a letter, set out in said plea. The plaintiff then traversed the sixth, seventh, and thirteenth pleas, and issue was joined thereon. The first, second, third, ninth, and twelfth pleas all related to the architects' certificate, and, as this was not admitted when offered in evidence, no injury could result from sustaining the demurrer to these pleas. The fifth plea merely charged that the plaintiff violated the terms of the contract, without stating any fact "to inform the court, whose duty it is to declare the law arising upon the facts, and to apprise the opposite party of what is meant to be proved, in order to give him an opportunity to answer or traverse it." Gent v. Cole, supra. The eighth plea is identical in substance with the thirteenth, which was filed on equitable grounds, and the full benefit of that plea was obtained in the issue joined on the thir-The eleventh plea is the same as the Ætna Company's thirteenth plea, on equitable grounds, and what we have said as to the Ætna's thirteenth plea applies to the Southern's eleventh plea.

We are thus brought to the end of these voluminous pleadings.

Twenty exceptions were taken to rulings upon the evidence, and one to the ruling on the prayers. The first and second exceptions raise the most important question in the case. The architects' certificate having been excluded, the court permitted the plaintiff, in the first exception, to show by the witness Beaumont, who was plaintiff's superintendent in Baltimore at the time this work was being done, that all the work done in completing this contract was necessary for the purpose, and that the prices paid for labor and material were the prevailing market prices; and in the second exception the plaintiff was permitted to show by the witness Simonson, an architect of conceded experience and qualification as an expert, what was the reasonable cost of completing this contract after suspension by the Southern Company. The objection to this evidence was that, in the absence of the architects' certificate, recovery must be limited to nominal damages. But we think this evidence was properly admitted. We have already said that we are of opinion the evidence shows that the Southern Company abandoned the contract, thus bringing this case within the decision in Smith v. Jewell, 104 Md. 269, 65 Atl. 6: The total suspension of work under this contract, and the consent

untarily putting it out of its power to continue, is, in law and in fact, an abandonment of the contract, carrying with it all the legal consequences of abandonment, chief among which is the opening of the door to the ordinary rules of evidence in estimating the damages for breach of the contract.

But there is another and equally satisfactory reason for the admission of such testimony in this case. All the cases agree that where the failure to produce an architect's certificate is due to fraud or bad faith on the part of the architect, the rule requiring such certificate must give way. The evidence is undisputed in the present case that the architects, though requested and urged to give a certificate prepared by the plaintiff's counsel, refused to give any other form than that which the court properly excluded. are not to be understood as charging these architects with actual fraud, or with any fraudulent purpose; but it was their duty to make such a personal examination of the work done in completing the contract as would have enabled them to give a proper certificate, such as would have been admitted in evidence, and when they neglected that duty it operated as injuriously upon the rights of the plaintiff as an absolute refusal in bad faith to give any certificate whatever. Both defendants in this case had allegedthe Ætna by its eighth plea, and the Southern by its sixth plea-that the architects were incapable of fairly and justly estimating these damages, and they ought not to be allowed, while seeking to exclude such estimate, to exclude, also, any other mode of proof.

The third, seventh, eighth, ninth, tenth, eleventh, twelfth, sixteenth, seventeenth, eighteenth, nineteenth, and twentieth exceptions were all taken to rulings which excluded parol testimony offered to vary the written agreement between the parties, and we car discover no error in any of these rulings. In each of these instances the effort of the defendants was to introduce evidence as to an alleged verbal agreement, antecedent to the written agreement, but differing from it.

The fourth, fifth, and sixth exceptions may be considered together. These all sought to introduce alleged statements made by Witherspoon, plaintiff's manager, as to the responsibility of other bidders for this contract, with a view to show that these alleged representations influenced the Ætna Company in executing the bond. If this were an action of deceit by the Ætna Company against the plaintiff, proof that such statements were made, followed by proof of the faisity of those statements, and that the Ætna Company had a right to rely upon them, a different situation would be presented. But in this case the matter inquired into was wholly irrelevant.

The thirteenth exception was taken to the

refusal to allow the witness Purnell to say why the plaintiff did not pay the Southern's pay roll of August 25th, presented after the work had been stopped. The question was not whether any reason for not paying this pay roll had been given by plaintiff, but simply why it had not paid it. If the object had been to elicit a statement of plaintiff against its interest, or to lay before the jury any reason put forward by the plaintiff, it would have been a proper question; but to have allowed the question as framed would bave been to permit the witness to give his mere opinion of the reason which governed the plaintiff in refusing to make that payment.

The fourteenth and fifteenth exceptions relate to the letter written by the plaintiff on August 18th, and mailed to a number of the .creditors of the Southern Company, informing them that under the contract they could only pay a certain percentage of the total amount of the contract price, and that they therefore would not guarantee payment for labor or material after that date. That letter was set out in the thirteenth plea of the Southern Company, and the plea alleged that it was written and sent with the malicious and fraudulent purpose to make it impossible for that defendant to comply with the contract, and issue was joined upon that plea. The evidence shows that at that time the plaintiff had advanced and paid nearly \$60,-000 on the contract of \$68,000, while only about 55 to 60 per cent. of the work had been done. Unless the plaintiff was bound by the terms of its contract to furnish the Southern Company with all the money necessary to complete the contract at such times as it should demand, it had the right to protect itself by such a notice to the creditors of the Southern. Because it had seen fit to make advances not required by the contract, so long as it felt safe in doing so, is no reason why it should continue to do so, when it was clear to any prudent person that the danger point had been reached. If they had not ceased those payments, they would in a few days have trenched upon the reserve which under the contract they were bound to maintain for the protection of the Ætna Company, in which event that company would have had a good cause of complaint and defense in this action to that extent. In the fourteenth and fifteenth exceptions the defendants sought to show as a matter of de-·fense that they were unable after these letters were sent out to purchase materials from the parties to whom they were sent; but, if the plaintiff had complied with the terms of its contract as to payments, it was wholly immaterial to any issue in this case what effect their refusal to do more than their contract required had upon the ability of the Southern Company to perform its part of the contract. There was no error in these crulings.

The court granted four prayers of the plaintiff, viz., the first, second, sixth. and eighth, amending the first, second, and eighth before granting, and we shall request the reporter to set these out in full. We approve the propositions of law embraced in these instructions, as in conformity with the views we have expressed herein in dealing with the questions of pleading and the exceptions to the rulings upon the evidence. The plaintiff's first prayer requires the jury to find that the plaintiff had fully performed its part of the contract up to the time work was stopped, that the Southern Company abandoned the contract, and the plaintiff thereupon completed the same, and instructed the jury that upon such finding their verdict must be for the plaintiff, unless they should also find that the execution of the bond was procured by the fraud or misrepresentations of the plaintiff. The plaintiff's second prayer as to the measure of damages correctly states the law, and is practically in accord with the defendant's contention as set forth in its fourteenth granted prayer, dealing with the measure of damages in event of recovery. There was not a particle of evidence of any malicious or fraudulent purpose to destroy the credit of the Southern Company, or to prevent its execution of the contract, either in writing and sending the letter of August 18th, set out in the Southern's 13th plea, or in any other act or word of the plaintiff; and it was therefore proper to instruct the jury on the plaintiff's sixth prayer that upon that issue their verdict must be for the plaintiff as against the Southern Company. What we have said as to the alleged representations of Witherspoon to Hunter, in referring to the fourteenth and fifteenth exceptions, is applicable to the plaintiff's eighth prayer, which was properly granted.

The Southern Company offered three prayers, all of which were refused. They were all predicated upon the exclusion of the architects' certificate, and the contention that there could be no recovery upon any other evidence. It follows, from what we have already said, that these prayers were properly refused.

The Ætna Company offered 18 prayers, of which the court granted the twelfth, thirteenth, and fourteenth as offered, and modified the second and sixteenth, and granted them as modified. We shall request the reporter to set out the defendant's granted prayers also. The second prayer, as amended by the court, correctly interpreted the thirteenth clause of the contract as to the obligation to make payments in installments as the work progressed, and was correctly modified by adding that such failure, even if found by the jury, would not prevent a recovery by the plaintiff. The twelfth prayer limited the recovery in any event to the "lowest reasonable cost of completing the contract." This prayer would not have been

objectionable if it had omitted the word | This was nearly two weeks, an amply rea-"lowest," and had declared "the reasonable cost" to be the standard for the jury. The thirteenth prayer was liberal to the defendants in refusing to allow the recovery of any penalty for delay under the fourteenth clause of the contract. The fourteenth prayer, as we have said, in referring to the plaintiff's second prayer, correctly states the credit to be allowed on any damages awarded by the jury. The sixteenth prayer of the Ætna Company was correctly amended by the court, so as to permit, instead of requiring, the verdict to be for the defendant, but was liberal in the extreme to the Ætna Company in leaving to the jury to find that the alleged representations of Witherspoon to Hunter as to the receipt of other bids, within \$2,000 of the Southern's bid, were untrue. That was the pith of the prayer. There is a presumption of truth always, which should be overcome, either by positive evidence of falsity or by suspicious circumstances so strong as to warrant a reasonable mind in believing that there was falsity, and we have not discovered any evidence of that character in the

It is not necessary to prolong this opinion by any detailed examination of the Ætna's rejected prayers. The first, third, fourth, fifth, and eighth prayers are based on the absence of the architects' certificate and the contention that no other character of evidence was admissible to prove the damages. The sixth, seventh, ninth, and fifteenth attempt to procure instructions based upon the excluded evidence, offered to prove a verbal contract antecedent to and contradictory of the written agreement. These prayers were skillfully drawn, so as to confuse the payments stipulated for in the written agreement with the alleged verbal undertaking to finance the contract by making advances at the demand of the Southern. The defendants received all to which they were entitled upon that score in the proviso of the plaintiff's first prayer, which instructed the jury they could not find for the plaintiff, if they found the bond was procured by the fraud or misrepresentations of the plaintiff. The tenth prayer submits to the jury to find whether the plaintiff afforded the Ætua Company a reasonable time to elect whether it would sublet or complete the contract, and was defective for that reason. No time being mentioned in the contract for that purpose, the question of reasonable time is one of law for the court upon the facts, and the evidence does not show there was a denial of reasonable time. Wheeler v. Harrison, 94 Md. 147, 50 Atl. 523. The Ætna was notified of the default on the very day it occurred, August 23d, by registered mail, and by repeated subsequent letters, and was finally, on September 1st, given till September 4th "to go ahead or sublet the contract."

sonable time in our opinion, to make its election. The eleventh prayer is apparently in conflict with the Ætna's fourteenth granted prayer, and was properly rejected for that reason, if no other. The seventeenth and eighteenth prayers were properly rejected as in conflict with plaintiff's eighth prayer, by which the jury were instructed that the representations mentioned in that prayer, being the same mentioned in the Ætna's seventeenth and eighteenth prayers, were not such representations, even if made, as constitute a defense to this action.

Being of opinion that the whole case was fairly presented upon the granted prayers, the judgment will be affirmed.

Judgment affirmed, with costs to the appellee above and below.

(82 Conn. 271)

GIRARD v. GROSVENORDALE CO. (Supreme Court of Errors of Connecticut. July 20, 1909.)

1. Master and Servant (§ 295*)—Injuries

TO SERVANT—INSTRUCTIONS—ASSUMED RISK.
Where plaintiff was injured by the fall of a shaft in defendant's mill, an instruction that plaintiff could not recover if he assumed the risk of defendant's negligence in continuing to operate the shaft, nor unless the jury found that deate the shaft, nor unless the jury found that defendant's negligence, subsequently arising after the pulley broke, in failing to use reasonable care to have the power shut off. etc., caused the accident and injury to plaintiff, was erroneous, since the risk of injury from the master's negligence in failing to promptly shut off the power and stop the machinery after knowledge of the defect was one which plaintiff could assume by unnecessarily remaining in the danger zone by unnecessarily remaining in the danger zone with knowledge thereof.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 295.*]

2. MASTER AND SERVANT (§ 217*)—INJURIES TO SERVANT—ACTS IN EMERGENCY—CONTRIBUTORY NEGLIGENCE—ASSUMED RISK.

That plaintiff acted in an emergency in remaining in a room in defendant's mill after knowing of danger from a broken pulley, to save defendent's employee from injury pulley. To save defendent's employee from injury pulley. defendant's employés from injury, while relevant to the question of his contributory negligence, would not entitle him to recover for injuries sustained by the fall of the shaft, if he assumed the risk by remaining in the danger zone with knowledge thereof.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 217.*]

3. MASTER AND SERVANT (§ 205*)—INJURIES TO SERVANT—ASSUMED RISK—PROMISE TO OBVIATE DANGER.

Mere assumption on the part of an injured servant that the master would stop the machinery on a pulley breaking, without any promise by the master to the servant, did not relieve the latter from the assumption of risk incident to his unnecessarily remaining in a place of dan-ger with knowledge thereof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 547-549; Dec. Dig. § 205.*]

4. MASTER AND SERVANT (§ 190*)—INJURIES TO SERVANT—NONDELEGABLE DUTY—"FELLOW SERVANTS"—"VICE PRINCIPALS." Servants to whom a master delegates the duty to use reasonable care to furnish other

eFor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

servants with a safe place to work, and to see [that rules and regulations regarding the care and condition of appliances are complied with, are "vice principals," and not "fellow servants" of other employes.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 449-474; Dec. Dig. § 190.*

For other definitions, see Words and Phrases, vol. 3, pp. 2716-2730; vol. 8, pp. 7662, 7313-7316, 7827.]

APPEAL AND EBROR (\$ 1050*)-RULINGS ON EVIDENCE-PREJUDICE.

Rulings admitting evidence applicable only to an issue withdrawn from the jury were harm-

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.*]

6. MASTER AND SERVANT (§ 270*)—INJURIES TO SERVANT—EVIDENCE.

In an action for injuries to a servant by alleged negligence in failing to promptly shut off the power on a breakage occurring in the machinery, evidence as to the time ordinarily required to stop the machinery was not objectionable be-cause it did not show the time required in an emergency such as that existing at the time of plaintiff's injury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 270.*]

7. Juby (§ 88*) — Examination — Interest

INDEMNITY

Where plaintiff's counsel, in the absence of the jurors, and in the presence of counsel for defendant, informed the court that defendant was insured against liability for damage to plaintiff, and that the insurance company was conducting the defense, it was not an improper exercise of discretion to permit plaintiff in good faith to inquire of the jurors whether any of them were stockholders, officers, agents, or em-ployés of the insurance company, as affecting their qualification.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 410; Dec. Dig. § 88.*]

Appeal from Superior Court, Windham County; George W. Wheeler, Judge.

Action by Ferdinand Girard against the Grosvenordale Company. From a judgment for plaintiff for \$5,000 damages, defendant appeals. Reversed and remanded.

Charles E. Searls, for appellant. Donald G. Perkins, for appellee.

THAYER, J. The plaintiff was employed as a scourer in the defendant's cotton mill in a room known as the new spinning room, and also in a smaller adjoining room. There was no dispute between the parties that, while he was in the small room on the day named in the complaint, he was struck by a falling counter shaft, and thereby injured as alleged in the complaint. The question upon the trial was whether the injury was caused by the negligence of the defendant, set up in the first count of the complaint, so as to give him a right of action against it. The negligence alleged is that the defendant, in operating the spinning frames in that room by power conveyed to them through belts connecting the same to sundry pulleys upon counter shafts attached to the ceiling of the room, which shafts received their that it was pulling on the hangers which fas-

power through belts from a main shaft, also attached to the ceiling of the room, which was driven by power from an engine, for a long time previous to the injury had been negligently running and operating those shafts at an excessive and high rate of speed, and had negligently failed to strongly and securely adjust and fasten the main shaft and its connections so as to withstand such excessive speed, and had failed to provide a suitable system for the examination and inspection of such shafting, pulleys, and other connections, and to examine and inspect the same; that through the negligence of the defendant one of the large pulleys on the main shaft was weak, defective, and cracked, which was known to the defendant, and on the day of the injury, while that shaft and pulley were being operated at a high and excessive speed, a large portion of the face of the pulley broke out and was separated from the pulley, which was seen and known by the defendant through its servants, yet it negligently suffered and allowed the shafting and pulley to continue to revolve at a high and excessive speed, and failed to shut off the power driving the shaft, although the pulley and shaft were, through the loss of the portion of the face of the pulley, out of balance, and pounding badly, whereby the main shaft became loosened and fell from its fastenings, and, revolving as it fell, tore down the counter shafting, which struck the plaintiff and caused his injuries. After the evidence was closed, the court instructed the jury that there was no evidence to support the second count, which charged negligent treatment of the plaintiff by a doctor employed by the defendant, and no evidence to support the allegations of negligence in the first count prior and up to the breaking of the large pulley, and that the only question of negligence arising in the case for their determination rested upon what took place after the breaking of the pulley, not what took place before, and that the plaintiff did not rely upon a violation of the duty of the defendant in failing to use reasonable care to furnish competent fellow servants or reasonably safe appliances and instrumentalities, but upon the violation of its duty to use reasonable care to furnish him a reasonably safe place in which to work.

The plaintiff claimed that just prior to the accident he had been cleaning a spinning frame in the new spinning room, and, having finished it, went in search of his overseer to obtain instructions. He first went to the overseer's office downstairs, and, not finding him there, went to the small spinning room, where the accident happened, to look for him. As he entered the room, he saw that the pulley was broken; that the belt was off; that the pulley was running unevenly, and with a beat or hammer, and

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tened the shafting to the ceiling, and that the whole floor was shaking, and that if it continued any portion or all was liable to come down at any time. He passed into the room, and by voice and motions directed the help employed at the spinning frames to get away. He remained in the room for 10 or 12 minutes when the shafting fell.

The defendant, among other things, claimed that the plaintiff assumed the risk of his injury. The court, having properly instructed the jury as to what was essential to a finding that the plaintiff had assumed the risk, instructed them as follows: "If you find that this risk was assumed in the manner I have suggested, and as I have said, there can be no recovery, unless you find further that the defendant's negligence, subsequently arising after the broken pulley, caused the accident and injury to the plaintiff-of course the plaintiff's negligence did not contribute—and, second, unless you find that the plaintiff was there as he claims in the course of his duty, and while there, seeing the broken pulley, and anticipating danger to the girls at the frames, remained to get them away from danger, and while so engaged was injured through the defendant's negligence in not having used reasonable care to have the power shut off." The defendant assigns error upon this part of the charge. It is true, as the jury were told, that risks arising out of the master's negligence are not risks which are ordinarily incident to the servant's employment, and are not ordinarily assumed by him as a part of his contract of employment. But there are extraordinary risks from unsafe instrumentalities, or unsafe places to work, which may arise after the employment, through the master's neglect to properly operate, repair, or care for such instrumentalities or places, and these, when they and the danger arising from them are known to and appreciated by the servant, may be assumed by him. 1 Labatt on Master and Servant, p. 638, 274; Carrigan v. Washburn & Moen Mfg. Co., 170 Mass. 80, 81, 48 N. E. 1079; Murphy v. Grand Trunk Ry. Co., 73 N. H. 18, 20, 58 Atl. 835; Conley v. Express Co., 87 Me. 852, 356, 32 Atl. 965; Hayden v. Smithville Mfg. Co., 29 Conn. 548, 559. Such assumption of the risk prevents a recovery by him from the master. The instruction complained of was tantamount to telling the jury that if the plaintiff's injury was due to the defendant's negligence in continuing to operate the shaft and pulley after the latter was broken, the plaintiff could recover, although he had assumed the risk of injury from such negligence. This was the only negligence alleged in the complaint, which, under the previous instructions of the court, was then before the jury. It was the risk arising from remaining in the room, rendered unsafe by this negligence of the defendant subsequent to the breaking of the pulley, which it claimed

assumed it, he could not recover, not because the defendant was not negligent, but because he had assumed the risk. The instruction permitted him to recover, if the jury found the defendant negligent, although he had assumed the risk. In this there was error.

Nor would the fact that the plaintiff was injured while engaged in the work of the defendant while acting in an emergency to save defendant's employés from injury, and as the necessities of the case fairly and reasonably called for his doing, as he claimed, warrant the plaintiff's recovery if he had assumed the risk. If the plaintiff acted in such an emergency as he claimed, that fact would have a bearing upon the question of his contributory negligence, and perhaps also upon the question whether he in fact assumed the risk. But if he assumed the risk, the master was not responsible to him for his injuries. as the court in another part of the charge instructed the jury he would be.

The plaintiff urges that, if the law is so that, when a servant, knowing of the existence of a defect due to the master's neglect, and appreciating the danger of it, voluntarily chooses to continue in the service, he assumes the risk, it is presupposed in such a case that the master intends to have the work go on with the defect, and that there is always an exception where the master induces the servant to remain by promises to remedy the defect. And he says that the defendant was not harmed by the instruction first considered, because in the present case the entire question of assumed risk might properly have been withdrawn from the jury, for the reason that the master did not intend to have the work go on with the broken pulley, and had taken steps, as the plaintiff knew, to shut down and thereby remove the defect. The defendant had, as appears, taken steps to shut down, but it does not appear that the plaintiff had knowledge of that fact, and in reply to a question testified merely that he believed that they would shut down. There must be the promise of the master, or its equivalent, inducing the servant to remain in the employment, to relieve him from the assumption of the risk and throw it upon the master. That was not the case here. No promises were made, and no inducements held out to the plaintiff. His act was purely voluntary so far as appears. The court could not properly have taken the question of assumed risk from the jury, and the charge as given was harmful to the defendant.

plaintiff could recover, although he had assumed the risk of injury from such negligence. This was the only negligence alleged in the complaint, which, under the previous instructions of the court, was then before the jury. It was the risk arising from remaining in the room, rendered unsafe by this negligence of the defendant subsequent to the plaintiff could assume a risk of injury resulting from the defendant's negligence. That he could do this is unquestion-

able; whether he did it or not was, upon the evidence and claims of the parties, a question of fact for the jury, and could not properly be taken from them by the court, as it was requested to do by the defendant.

The defendant claimed that the plaintiff's injuries were caused by the negligence of a fellow servant, and made several requests to charge in support of the claim. The court refused to give the requests, saying to the jury: "The fellow-servant defense is not in the case. It is no part of the pleadings in the case, not a special defense here, and so I shall not refer to it." This is assigned for error. It was the duty of the defendant to use reasonable care to furnish the plaintiff with a safe place to work, and to have rules and regulations regarding the care and condition of the shafting and other instrumentalities and their operation which would keep the place in such condition, and to use reasonable care to see that these rules and regulations were enforced. If these duties were delegated by it to its officers, agents, or servants, they became vice principals, and stood in place of the defendant in that respect. The court had so instructed the jury. All the evidence in the case bearing upon this subject shows that it was the agent to whom these duties were intrusted who permitted the shafts to revolve after the pulley was broken until the plaintiff was injured. The court was correct, therefore, in saying that the fellow-servant defense was not in the case, not because it was not pleaded, but because, upon the evidence, if there was negligence, it was that of the defendant, and not that of the plaintiff's fellow servant.

The court's direction to the jury that they must not predicate a verdict upon the alleged negligence of the defendant prior to the breaking of the pulley removed from their consideration all of the evidence to which exception was taken at the trial, except that of Arnold and Tourtellotte. The defendant's assignments of error, so far as based upon the admission of the evidence thus withdrawn, need not be considered. The rulings, if erroneous, were harmless. Arnold and Tourtellotte testified as to the time required to shut off power in the engine room and stop the operation of the mill. This was objected to as immaterial, because this evidence did not show the time required to shut off the power under the circumstances of emergency existing at the time of the plaintiff's injury. The evidence informed the jury of the time ordinarily required to stop the mill, and would aid them in determining whether, under the circumstances and emergency existing at the time of the accident, it could have been stopped in time to prevent the plaintiff's injury. Its weight was for the jury. But it was material as bearing upon the question of the defendant's negligence, and properly admitted.

Before the jury was impaneled counsel for the plaintiff, in the absence of the jurors,

and in the presence of counsel for the defendant, informed the court that the defendant was insured against liability for damage to the plaintiff through negligence by an insurance company, and that the insurance company was interested and conducting the de fense. Counsel for the defendant admitted the fact of the insurance. The plaintiff's counsel claimed the right to inquire of the jurors whether any of them were stockholders, officers, agents, or employés of the insurance company as affecting the qualification of the jurors. The defendant objected to this, but the court permitted it to be done, and in impaneling the jury such questions were asked of them by the plaintiff's counsel. Exception was taken to this, and it is assigned as error. So far as appears, the inquiries were made in good faith, for the genuine purpose of learning whether any of the jurors were disqualified by interest, and not for the purpose of getting before the jurors a fact not in issue in the case for the purpose of prejudicing them. The facts were not called to the juror's attention until permission had first been obtained from the court in their absence. It was within the discretion of the court to grant this permission if. upon the statements of counsel, there was any reason to believe that any of the jurors would be interested, as stockholders or otherwise in the insurance company, in the result of the action. Ordinarily such interest on the part of jurors in this state in a foreign insurance company would hardly be presumed. But it is possible that the agent of the company who placed the insurance, or claim agent or adjuster who had been employed in attempting to settle the claim, might be among the jurors summoned. It cannot therefore be said that in all cases it is improper to permit counsel to ask such questions as were permitted in this case to determine whether jurors are disqualified. Cases are cited from other states holding that it is error to permit the fact of the insurance to be brought to the jury's attention by questions asked in the examination of witnesses, by remarks of counsel in argument, or by questions asked of jurors while they are being impaneled. For the reason stated, we think there are cases when the questions may properly be permitted in determining the qualifications of the jurors, and that in the present case it does not appear that the court's discretion was improperly exercised. The court was requested to direct a verdict for the defendant, and after the verdict was rendered, motions were made to set it aside as being against the evidence, and because the damages awarded were excessive.

As a new trial must be granted upon the grounds already stated, it is unnecessary to consider the other questions raised by the appeal.

There was error in the charge, and a new trial is ordered. The other Judges concurred. (82 Conn. 392)

STATE v. ANDERSON.

(Supreme Court of Errors of Connecticut. July 20, 1909.)

1. Costs (§ 284*)—RIGHT TO COSTS—STATUTES.

Costs are not taxable, unless given by statute.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 1082; Dec. Dig. § 284.*]

2. Costs (§ 317*)—CRIMINAL PROSECUTIONS. Under Gen. St. 1902, § 811, providing for the taxation of costs in the Supreme Court of Errors in favor of the successful appellant, and section 1521, giving to defendant in a criminal case the right to appeal with the same effect as in civil actions, and Court Rules, § 62, providing for the payment of costs in favor of the prevailing party, a defendant, successful on appeal from a conviction of crime, is not entitled to costs, for payment cannot be enforced against the state without its consent, which is not given by its consent to be made a defendant on appeal.

[Ed. Note.—For other cases, see Costs, Cent. Dig. \$\$ 1192, 1193; Dec. Dig. \$ 317.*]

3. STATES (§ 191*)—ACTIONS AGAINST STATE.

The state cannot be sued without its consent.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 179-184; Dec. Dig. § 191.*]

Appeal from Criminal Court of Common Pleas, New Haven County.

Tillie Anderson successfully prosecuted an appeal from a conviction of crime, and appeals from the refusal of the clerk to tax costs in her favor. Affirmed.

See 72 Atl. 648.

Ernest L. Averill, for appellant. Robert J. Woodruff, Pros. Atty., for the State.

BALDWIN, C. J. Costs are never taxable, unless given by statute. Studwell v. Cooke, 38 Conn. 549. Gen. St. 1902, \$ 1521, grants a right to the defendant in a criminal prosecution before the criminal court of common pleas to an appeal to this court "in the same manner and with the same effect as in civil actions." The defendant was successful (82 Conn. 111, 72 Atl. 648) in procuring on appeal a reversal of a judgment of conviction rendered in the criminal court of common pleas. Gen. St. 1902, § 811, provides that, when a judgment shall be reversed by this court. "It may render judgment in favor of the plaintiff in error, or appellant, to recover of the defendant the damages he has sustained by such erroneous judgment, together with his costs on the writ of error or appeal, or may remand the cause to the court below to be proceeded with by said court to final judgment, in which case the whole costs, except the costs on the writ of error, or appeal, shall be taxed in favor of the prevailing party: and the costs in the Supreme Court of Errors shall be taxed in favor of the plaintiff in error, or appellant." The rules of this court, under this statute (Practice Book, p. 284, \$ 62), provide that "in all cases on ap-

when 'error' is found, whether a new trial be awarded or not, the costs of this court (including the expense allowable for printing evidence or evidence and rulings made a part of the record), in the absence of special order to the contrary, will be taxed in the judgment of this court in favor of the prevailing party in this court."

The words of Gen. St. 1902, §§ 811, 1521, and of our rules (section 62), if taken literally, would support the defendant's claim. But it is a general principle that what courts cannot enforce they cannot decree. Clarke's Appeal, 70 Conn. 195, 209, 39 Atl. 155. The state, by which the prosecution was brought, cannot be sued without its consent. It holds the immunities from legal process, mesne or final, belonging by the English common law to the king. State v. Kilbourn, 81 Conn. 9, 11, 69 Atl. 1028. Among these were that he is not included under general words in a statute, and that he pays no costs. State v. Shelton, 47 Conn. 400, 405; 1 Blackstone, Com. 262; 8 Blackstone, Com. 400. The consent of the state in this cause to be made a defendant on appeal did not imply a consent to pay costs, should the appeal be successful.

The ruling of the clerk is affirmed. The other Judges concurred.

(5º Conn. 291)

KNIGHT V. CONTINENTAL AUTOMO-BILE MFG. CO.

(Supreme Court of Errors of Connecticut. July 20, 1900.)

1. DAMAGES (§ 208*) — PERSONAL INJURY — POWER OF JURY.

The assessment of damages for personal in-

The assessment of damages for personal injuries negligently inflicted is peculiarly within the province of the jury.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 208.*]

2. New Trial (§ 76*)—Grounds—Excessive Damages.

The court may grant a new trial on the ground that the damages awarded for personal injuries are plainly excessive.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. \$\$ 153-156; Dec. Dig. \$ 76.*]

Appeal from Superior Court, New Haven County; William S. Case, Judge.

Action by John H. Knight against the Continental Automobile Manufacturing Company to recover for injuries caused by the negligence of defendant's servants in the operation of an automobile. From a judgment for plaintiff, and from the denial of a motion to set aside the verdict, defendant appeals. Affirmed.

C. S. Hamilton, for appellant. David E. Fitzgerald and Walter J. Walsh, for appellee.

tiff in error, or appellant." The rules of this court, under this statute (Practice Book, p. 284, \$ 62), provide that "in all cases on appeal, whether for legal or equitable relief, he was the conductor of an open trolley

car that ran between Savin Rock and Mt. | 2. Frauds, Statute of (§ 71*)—Contracts
Carmel. While he was on the running board
of the car, and engaged in issuing transfers
to the passengers of the car, he was sudden. to the passengers of the car, he was suddenly struck by a part of an automobile driven in the opposite direction to that in which the car was proceeding. The automobile was operated by the defendant's servant, while acting within the actual course of his employment. The trolley car was well lighted, and the chauffeur saw it when he was some distance away. There was ample room on both sides of the approaching car in which the driver of the automobile could have turned and avoided striking the plaintiff. On the outside of the body of the automobile was an iron hook used for the purpose of holding the top of the automobile up in position. This hook struck the plaintiff as the two vehicles passed, tearing his coat, trousers, and his underclothing, and causing a deep gash or wound in his leg, throwing him to the ground, and rendering him unconacions

The duty and power of a trial judge in respect to a verdict rendered by a jury having been so fully explained by several recent decisions of this court, we are not disposed to make any extended review of the law applicable in the present case. evidence reported is sufficient to sustain the verdict for the plaintiff upon the question of negligence; the defendant's main contention being that the verdict was excessive. this class of cases the damages cannot be computed by mathematical calculation, and the law furnishes no precise or definite rule for their assessment, which is peculiarly within the province of the jury. Clark v. Pendleton, 20 Conn. 495, 509; Shaw v. Pope, 80 Conn. 206, 211, 67 Atl. 495.

It would be competent for the court to grant a new trial if it appeared that the damages awarded were plainly excessive and exorbitant. Noxon v. Remington, 78 Conn. 296, 299, 61 Atl. 963. A careful examination of all the evidence contained in the record convinces us that there was no abuse of discretion in holding that there were no satisfactory reasons for interference with the action of the jury.

There is no error. The other Judges concurred.

(82 Conn. 293)

MALKEN et al. v. HEMMING BROS.

(Supreme Court of Errors of Connecticut. July 20, 1909.)

1. CONTRACTS (§ 245*) - MODIFICATION MERGER.

Where a contract is modified by a subsequent agreement, the contract as thus modified is a new agreement.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 245.*]

able unless it, or some memorandum thereof, is in writing, signed by the parties.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 113-139; Dec. Dig. § 71.*]

3. FRAUDS, STATUTE OF (§ 181*)—CONTRACTS
FOR SALE OF REAL ESTATE—MODIFICATION.
A modification of a contract for the sale of A modification of a contract for the saie or real estate, whereby the purchaser, instead of giving a note secured by mortgage for the balance of the price, as required by the contract, shall convey to the vendor a tract of land, is within the statute of frauds, and provable only by written contract, or memorandum thereof. [Ed. Note.—For other cases, see Frauds, Stat-ate of, Cent. Dig. §§ 283, 284; Dec. Dig. § 131.*]

4. SPECIFIC PERFORMANCE (\$ 123*) — CONTRACTS FOR SALE OF REAL ESTATE — EVI-DENCE.

In a suit for the specific performance of a contract for the sale of real estate, the issue whether the contract was made held, under the evidence, for the jury.

[Ed. Note.-For other cases, see Specific Performance, Dec. Dig. 123.*]

5. Specific Performance (§ 123*) — Contracts for Sale of Real Estate—Evi-DENCE.

In a suit to enforce a contract for the sale of real estate, the question whether the defendant, who signed the memorandum, did so as agent for the codefendants, held, under the evidence of the codefendants and the several sections and the several sections are the several sections and the several sections are the several sections and the several sections are the several sections and the section sections are the section sections and the section sections are the section sections and the section section section section sections are the section section section section sections and the section idence, for the jury.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 123.*]

6. Vendor and Purchaser (§ 152*) — Contracts—Performance—Variance.

A deed conveying real estate subject to three mortgages, amounting to a specified sum, assumed by the purchaser, is in substance the deed called for by the contract of sale, stipulating that the purchaser shall assume a first mortgage of the specified sum; and the purchaser, not refusing to accept the deed on the ground of variance, cannot rely thereon as a ground to invalidate the vendor's tender of performance.

[Ed. Note.-For other cases, see Vendor and Purchaser, Dec. Dig. § 152.*]

Appeal from Superior Court, New Haven County; William S. Case, Judge.

Action by Jacob Malken and others against Hemming Bros. for the specific performance of a contract for the sale of real estate or for damages. From a judgment of nonsuit, plaintiffs appeal. Reversed, and new trial ordered.

Richard H. Tyner, for appellants. Charles S. Hamilton, for appeliees.

THAYER, J. The complaint as amended sets up a contract, evidenced by a writing under seal, entered into by the plaintiffs and defendants for the sale by the former to the latter of certain real estate situated in New Haven, to be paid for partly in cash, partly by the assumption by the defendants of a first mortgage of \$13,000 then existing upon the premises, and the balance by a note to be secured by a mortgage upon the purchased premises. The conveyance was to be made and the transaction completed at a future

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

day. Prior to that date the complaint alleges there was a modification of the contract by parol, whereby the defendants, instead of giving the note secured by mortgage for the balance of the purchase price, were to convey to the plaintiffs a parcel of land on Butler street then standing in the name of Benjamin Hemming. The complaint alleges the tender by the plaintiffs of the deed called for by the contract as originally made and as modified, and their continued readiness to perform their part of it, and the neglect of the defendants to perform their part of either contract, and asks for the specific performance of the contract as modified, or other equitable relief, and, if that is refused, for \$10,000 damages. The answer denies substantially all the allegations of the complaint, and alleges that the original contract was obtained by fraud, which latter allegation is denied in the reply.

Just what issues were on trial to the jury is not clear from the record. It appears there that the plaintiffs filed a notice that they desired some (indicating them), but not all, of the issues in the case tried to the jury. This is an equitable action, and is not brought to recover damages and also for equitable relief, and so does not fall within the provisions of section 722 of the General Statutes of 1902, as amended by section 3, c. 56, p. 284, of the Public Acts of 1905. Being an equitable action solely, the plaintiffs were not entitled, as a matter of right, to a jury trial of any of the issues joined. Savings Bank v. McCormack, 79 Conn. 260, 263, 64 Atl. 338. Under chapter 236, p. 441, of the Public Acts of 1905 the court might, upon the application of either of the parties to the action, order any of the issues of fact which had been joined in the case to be tried to the jury. No such order appears in the record. But as the issues indicated by the plaintiffs for trial by the jury included all the issues raised by the pleadings except three, which related to the plaintiffs' readiness to carry out their part of the contract, the defendants' refusal to carry out theirs. and the plaintiffs' loss by depreciation in the value of their property, we may assume that the case proceeded as though all the issues were to be determined by the jury. The court, in nonsuiting the plaintiffs, seems to have so treated it, and upon the argument it has been so treated by counsel for both par-

If the original contract was modified and changed by subsequent agreement, the contract as changed became a new contract. Teal v. Bilby, 123 U. S. 572, 578, 8 Sup. Ct. 239, 31 L. Ed. 263; Rollins v. Marsh, 128 Mass. 116, 120; Rogers v. Rogers, 139 Mass. 440, 444, 1 N. E. 122. The original contract. being for the sale of real estate, was within the statute of frauds; and no action could be maintained upon it, unless it, or some memorandum thereof, was made in writing,

tract, as alleged and attempted to be proved. was equally within the statute. Swain v. Seamens, 76 U.S. 254, 271, 19 L. Ed. 554; Hill v. Blake, 97 N. Y. 216, 222. The alleged modification provided for the conveyance of the Benjamin Hemming land by the defendants to the plaintiffs. This could only be proved by a written contract, or memorandum thereof. No such evidence was offered, and, although parol evidence of it was offered and received against the objection of the defendants, there was no legitimate evidence of the modified contract to go to the jury. The nonsuit was, therefore, properly granted, unless the plaintiffs were entitled to have a finding of the jury upon the issues joined as to the original contract.

The defendants denied the making of either of the contracts by them. As tending to prove the original contract, a written memorandum under seal and other evidence was introduced. There was evidence sufficient to go to the jury upon the question whether this contract was made. If it was proven, and the modification claimed was not proven, the plaintiffs were entitled to judgment under that contract; for the defendants admitted that they had not performed their part of it. The complaint sufficiently presents a case for such a judgment upon the original contract. In fact, as originally drawn, it counted only upon that contract. The issues presented relating to the first count were improperly taken from the jury.

The nonsuit is attempted to be sustained by the appellees upon the ground that the written memorandum of contract was not signed by the three defendants individually, but only by G. F. Hemming, one of them, and that there was no evidence of his agency to act for the others. But there was evidence tending to show that the defendants were machinists doing business as Hemming Bros., that two of the brothers took part in the negotiations and went to view the plaintiffs' land, that the name of Hemming Bros. was signed to the memorandum by G. F. Hemming, and that he also signed their name to a check; and this, in connection with a statement in the answer that the defendants claimed the right to rescind and did rescind the contract, was sufficient evidence to go to the jury upon the question of the agency.

It is also claimed that the nonsuit can be sustained upon the ground that the deed which was tendered to the defendants by the plaintiffs did not comply with the requirements of the written contract. memorandum provides that the Hemming Bros, shall assume a first mortgage of \$13,000 on the premises which were to be conveyed to them. There were, in fact, three mortgages, amounting in all to \$13,000, instead of a single mortgage for that amount, upon the property. The deed tendered provided that the defendants assume these three signed by the parties. The modified con-|mortgages, instead of one mortgage. It is

said that this is a fatal variance. The defendants did not base their refusal to accept the deed upon this ground. Had they done so, the plaintiffs could doubtless have had the mortgages consolidated into one. The deed in substance and effect was that which was called for by the contract, and as it was not refused upon the ground now urged to invalidate the tender, the variance, if it were such, affords no ground to invalidate the tender.

COURTS (§ 489*)—EXCLUSIVE JURISDICTION —UNITED STATES COURTS—COMMERCE.

In view of the laws of the states regulating the relations of master and servant and actions for injuries to or the death of servants, and in view of the provisions of Act Cong. April 22. 1908, c. 149. 35 Stat. 65, making every railroad while engaged in interstate commerce liable for injuries to employes while employed in such commerce, which conflict with the laws of the states regulating the relations of master and servant and actions for injuries to or the death of servants, and in view of the provisions of Act Cong. April 22. 1908, c. 149. 35 Stat. 65, making every railroad while engaged in interstate commerce liable for injuries to employes while employed in such commerce, which conflict with the laws of the states regulating the relations of master and servant and actions for injuries to or the death of servants, and in view of the provisions of Act Cong. April 22. 1908, c. 149. 35 Stat. 65, making every railroad while engaged in interstate commerce liable for injuries to employes while employed in such commerce, which conflict with the laws of the states regulating the relations of master and servant and actions for injuries to or the death of servants, and in view of the laws of the states regulating the relations of master and servant and actions for injuries to or the death of servants, and in view of the laws of the states regulating the relations of master and servant and actions for injuries to or the death of servants, and in view of the laws of the states regulations.

There is error, and a new trial is ordered. The other Judges concurred.

(82 Conn. 352)

HOXIE v. NEW YORK, N. H. & H. R. CO. (Supreme Court of Errors of Connecticut. July 20, 1909.)

1. EVIDENCE (§ 80*)—PRESUMPTIONS—LAWS OF OTHER STATES.

In the absence of evidence to the contrary, it is presumed that the law of a sister state is the same as the common law of Connecticut.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80; Common Law, Cent. Dig. §§ 14–16.]

2. TORTS (§ 2*)—WHAT LAW GOVERNS.

The law of the place where a tort is committed governs at least when a wrong is actionable under the law of the place of its commission, and there is nothing in the public policy obtaining at the forum standing in the way of granting a remedy.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 2; Dec. Dig. § 2.*]

3. COMMERCE (§ 3*)—INTERSTATE COMMERCE—POWER OF CONGRESS.

The plenary power conferred on Congress by Const. U. S. art. 1, § 8, to regulate interstate and foreign commerce, is subject to limitations of the commerce of the constitution of the constitutions. tions specifically prescribed in the Constitu-tion, and others may exist by virtue of the necessary implication from the dual system of political government.

[Ed. Note.—For other cases, see Commerce. Cent. Dig. § 3; Dec. Dig. § 3.*]

4. STATES (§ 4*)—RELATIONS TO FEDERAL GOV-

ERNMENT.

Congress cannot impair the right in any state to maintain its own executive, legislative, and judicial magistracies so long as it preserves a republican form of government, and the power of a state to maintain a judicial department is incident to the inherent sovereignty of the state.

[Ed. Note.—For other cases, see States, Cent. Dig. § 2; Dec. Dig. § 4.*]

5. COURTS (\$ 289*)—UNITED STATES COURTS— JURISDICTION—COMMERCE. Act Cong. April 22, 1908, c. 149, 35 Stat. 65, making every realroad while engaged in in-terstate commerce liable for injuries to employes while employed in such commerce, creates a statutory right of action not existing at common law or in chancery, and gives an action where the common law denies it and the action is one which, if warranted by the federal Constitution, may, under the general laws of the United States, be made subject to judicial proceedings in the federal courts as a suit of a civil nature arising under the laws of the United States.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 289.*]

courts only.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 489.*]

7. MASTER AND SERVANT (§ 159*) — FELLOW SERVANT DOCTRINE.

The common-law rule that a servant cannot recover from his master for injuries received from the negligence of a fellow servant acting in the same line of employment is a part of the general American common law, which rests on considerations of right and justice.

[Ed. Note.—For other cases, see Master and ervant, Cent. Dig. §§ 318-325; Dec. Dig. § 159.*7

COMMERCE (§ 3*)—INTERSTATE COMMERCE-

Power of Congress.

Congress may prescribe a new rule of right as to transactions occurring in the course of interstate commerce to control the disposition of causes in all courts, state and federal, for such a rule is a change in substantive law.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 3; Dec. Dig. § 3.*]

9. STATES (§ 4*)—RELATION TO UNITED STATES. While the courts of the states and of the United States together constitute one judicial system for the enforcement of legal rights, it will not be presumed that Congress will require the courts of a state to enforce rights created by the laws of the United States which can only be enforced by following modes of procedure not permitted by the state law and opposed to the public policy which that law declares, and nothing short of express provisions or necessary implications in an act of Congress suffices to force on a state court the exercise of such jurisdiction. such jurisdiction.

[Ed. Note.—For other cases, see States, Dec. Dig. § 4.*]

10. CONSTITUTIONAL LAW (§ 207*) — PRIVI-LEGES OF CITIZENS OF THE SEVERAL STATES

—INTERSTATE COMMERCE.

The right to engage in interstate commerce is not created by the federal Constitution, but the right is impliedly guaranteed by article 4, § 2, thereof, as a privilege inherent in American citizenship.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 207.*]

11. STATES (§ 4*)—RESERVED POWERS.

The reserved powers of the states leave them charged with the sole duty and power of preserving order and the security of persons and property within their territorial limits, except so far as the federal Constitution otherwise provides, and a like duty and power exist as to the regulations of master and servant and to the duties of carriers.

[Ed. Note.—For other cases, see States, Dec. Dig. § 4.*]

12. MASTER AND SERVANT (§ 159*)—FELLOW SERVANTS—APPLICATION OF DOCTRINE.

The law that a servant cannot sue his master for injuries from the negligence of a fellow servant, nor for injuries from the negligence of the master combined with the negligence

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

13. STATES (§ 4*) — RELATION TO UNITED STATES—POWER OF CONGRESS.

Congress cannot require a state court to entertain an action authorized by Act Cong. April 22, 1908, c. 149, 35 Stat. 65, making every relired while consecutive intertains. railroad while engaged in interstate commerce liable for injuries to employes while engaged in such commerce, though it be assumed that Congress may create such statutory action.

[Ed. Note.—For other cases, see States, Dec. Dig. § 4.*]

14. COURTS (§ 489*) - FEDERAL COURTS - AC-

TIONS. Act Cong. April 22, 1908, c. 149, 35 Stat. 65, making every railroad while engaged in interstate commerce liable for injuries to employes while employed in such commerce if valid, by giving a new remedy by plenary action, which cannot be vested in a court not created by the United States.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 489.*]

15. STATES (§ 4*) — RELATIONS TO UNITED STATES—STATE COURTS — POWER OF CON-GRESS.

Though Congress may authorize a state court to entertain a plenary action created by a federal law, the jurisdiction need not be assumed by the state court, which performs its duty when it administers justice as the laws of the state require.

[Ed. Note.—For other cases, see States, Dec. Dig. § 4.*]

16. ABATEMENT AND REVIVAL (§ 8*)-JURIS-

DICTION—OBJECTIONS.

The objection to a state court entertaining a plenary action created by a federal law may be taken by demurrer.

[Ed. Note.-For other cases, see Abatement and Revival, Dec. Dig. § 3.*]

17. APPEAL AND EBROB (§ 1040*)—HABBLESS ERROB — PLEADINGS — IMMATRIAL QUES-TIONS.

Where a demurrer to a complaint was properly sustained, it was immaterial that a par-ticular objection, manifest on the face of the record, was not distinctly made.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1040.*]

18. COMMERCE (§ 7*)—INTERSTATE COMMERCE—REGULATIONS OF MASTER AND SERVANT.
Act Cong. April 22, 1908, c. 149, 35 Stat.
65, making railroads while engaged in interstate commerce liable for injuries to employed in the property of the service of injuries. while employed in such commerce, is invalid, except so far as it is a regulation of interstate commerce, and it is not sufficient that it remotely affects such commerce, if that result is only to be secured by invading the settled limits of the sovereignty of the states as to their own intermal police. internal police.

[Ed. Note.—I Dec. Dig. § 7.*] -For other cases, see Commerce,

19. STATUTES (\$ 225%*)—CONSTBUCTION—RE-ENACTMENT AFTER JUDICIAL INTERPRETA-TION.

A statute substantially re-enacting the particular words of a prior statute after they have received a judicial interpretation must be presumed to have been adopted with knowledge of the judicial construction.

[Ed. Note.—For other cases, see Seet. Dig. \$ 306; Dec. Dig. \$ 225%.*] Statutes,

gence of the injured servant, applies to the servant of a carrier.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 322, 324; Dec. Dig. §

[52. 1908, c. 149, 35 Stat. 66, that every contract between an interstate railroad and an employ corrections the scill of the servant of the servant of the servant. employé exempting the railroad from liability created by the act shall be void, violates the fifth amendment to the federal Constitution be-cause it deprives the parties to the contract of their liberty and property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. §§ 276, 278.*]

21. CONSTITUTIONAL LAW (§ 301*) — UNLAW-FUL DEPRIVATION OF PROPERTY.

The provisions of section 3, Act Cong. April 22, 1908, c. 149, 35 Stat. 68, which sanction a recovery where the injured employé of a railroad engaged in interstate commerce was guilty of gross negligence and the railroad of none, are not a legitimate regulation of inter-state commerce, but an arbitrary deprivation of property prohibited by the fifth amendment to the federal Constitution.

[Ed. Note.—For other cases, see Constitution-

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 857; Dec. Dig. § 301.*]

22. DEATH (§ 9*) - DEATH OF SERVANT - AC-

22. DEATH (§ 9*) — DEATH OF SEEVANT — ACTIONS—STATUTES—VALIDITY.

Act Cong. April 22, 1908, c. 149, 35 Stat. 65, giving a remedy for death of employes of railroads engaged in interstate commerce without limitation, the fund to be distributed in a manner inconsistent with the law of every state as to the devolution of the estate of a decedent, is invalid; for, if the damages recoverable are to be treated as representing an estate left by decedent, it is for the state of his domicile to regulate the distribution thereof, and, if the damages are treated as a fund created by the act, Congress may not bring into existence a new duty of executors or administrators to collect and a new duty of masters to pay what decedent never owned. decedent never owned.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 9.*]

23. STATUTES (§ 64*)—PARTIAL INVALIDITY—

23. STATUTES (§ 64*)—PARTIAL INVALIDITY—
EFFECT.

The invalidity of sections 3, 5, Act Cong.
April 22. 1908, c. 149, 35 Stat. 66, relating
to contributory negligence of the injured employé of a railroad engaged in interstate commerce, and prohibiting contracts exempting railroads from liabilities created by the act and
the invalidity of provisions authorizing damages
for the death of an employé, and providing for
the distribution of the damages, renders the
entire act void, so far as it applies to an action by a brakeman for injuries received while tion by a brakeman for injuries received while coupling an interstate train due to the negli-gence of a fellow servant in control of another train of the same railroad.

[Ed. Note.—For other cases, see S Cent. Dig. §§ 58-66; Dec. Dig. § 64.*]

24. CONSTITUTIONAL LAW (§ 48*)—STATUTES
—VALIDITY—PRESUMPTIONS.

A statute is prima facie presumed by the courts valid.

[Ed. Note.--For other cases, see Constitutional Law, Cent. Dig. \$ 46; Dec. Dig. \$ 48.*]

Appeal from Superior Court, New London County; Ralph Wheeler, Judge.

Action by William H. Hoxie against the New York, New Haven & Hartford Railroad Company. From a judgment for defendant rendered after sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Action by an inhabitant of Connecticut brought to the superior court for New London county against the New York, New

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1997 to date, & Reporter Indexes

Haven & Hartford Railroad Company, described as a corporation organized under the laws of Connecticut, for an injury received by him while acting as a train hand on its railroad at Auburn, in Massachusetts. The complaint alleged an injury received while the plaintiff was coupling cars in a train running from Norwich, Conn., to Worcester, Mass., and due to the negligence of a fellow servant in control of another train of the defendant running between Hartford, Conn., and Worcester; and claimed damages "under and by force of the act of Congress approved April 22, 1908 (35 Stat. 65, c. 149), relating to liability of common carriers by railroad engaged in commerce between the states." A demurrer to the complaint was sustained, and judgment rendered for the defendant.

Hadlai A. Hull and Frank L. McGuire, for appellant. Edward D. Robbins and Michael Kenealy, for appellee. E. O. Harrison and Philip Doherty, for the United States.

BALDWIN, C. J. (after stating the facts as above). The plaintiff bases his action solely on the act of Congress of April 22, 1908 (35 Stat. 65, c. 149). His injury having been due to the negligence of a fellow servant, could throw no liability on the defendant had it occurred in this state, and were the question of liability to be determined by the common law of Connecticut. It did occur in Massachusetts, and he does not allege what the law of Massachusetts in respect to that question is. It is therefore to be presumed to be the same as that of this state. Lockwood v. Crawford, 18 Conn. 870

If the plaintiff has a right of action, it must be based on the law affecting the relations of the parties at the time and place of the injury. As to the merits and rights involved in actions, the law of the place where they originated is to govern. v. Watkinson, 17 Conn. 500, 510, 44 Am. Dec. 562. This is true of tort actions, at least when a wrong having been done, actionable under the law of the place of its commission, there is nothing in the public policy obtaining at the forum to stand in the way of granting a remedy. 2 Wharton on Private International Law (3d Ed.) § 478b. law of Massachusetts in respect to any claims on the defendant growing out of the plaintiff's injury being presumably the same as that of Connecticut, there can be no recovery unless by virtue of the act of Congress which, if it affects proceedings in state courts, governs in each state alike. Congress has what may be described in general terms as plenary power (Const. art. 1, § 8) "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Elsewhere in the Constitution certain limitations are specifically prethe necessary implications from the dual system of political government-imperium in imperio-which that instrument created. By its provisions the sovereignty of each of the states is as carefully guarded as that of the United States. Each was to remain free to maintain its own executive, legislative, and judicial magistracies. Nothing could be done by Congress to impair this right in any state so long as it preserved a republican form of government. The power to maintain a judicial department is one, incident to the inherent sovereignty of each state, "in respect to which the state is as independent of the general government as that government is independent of the states." As to that power, "the two governments are upon an equality." The Collector v. Day, 11 Wall. 113, 126, 20 L. Ed. 122. The judicial power of the United States is by the first section of their Constitution (article 8) "vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish," and by the second section extends, among other things, "to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority." "The better opinion is that the second section was intended as a constitutional definition of the judicial power which the Constitution intended to confine to courts created by Congress; in other words, that such power extends only to the trial and determination of 'cases' in courts of record, and that Congress is still at liberty to authorize the judicial officers of the several states to exercise such power as is ordinarily given to officers of courts not of record; such, for instance, as the power to take affidavits, to arrest and commit for trial offenders against the laws of the United States, to naturalize aliens, and to perform such other duties as may be regarded as incidental to the judicial power rather than a part of the judicial power itself." It was therefore held in the case from which this observation has been quoted that an act of Congress investing justices of the peace appointed under the laws of a state with authority to arrest and temporarily imprison deserters from a merchant vessel was not objectionable on the ground that it gave them a judicial power belonging to the United States. Robertson v. Baldwin, 165 U. S. 275, 279, 280, 17 Sup. Ct. 326, 41 L.

that of Connecticut, there can be no recovery unless by virtue of the act of Congress which, if it affects proceedings in state courts, governs in each state alike. Congress has what may be described in general terms as plenary power (Const. art. 1, § 8) "to regulate commerce with foreign nations, and that the judicial power shall extend to—that among the several states, and with the include—the several matters particularly mentioned, leaving unrestricted the general grant of the entire judicial power"; scribed, and others may exist by virtue of and that "all the judicial power which the

nation was capable of exercising" was vested in the tribunals described in the first section. Kansas v. Colorado, 206 U. S. 46, 82, 83, 27 Sup. Ct. 655, 51 L. Ed. 956. This power certainly included any authority which might be given them by Congress to take cognizance of judicial proceedings under statutes of the United States. "It is a sound principle that in every well-organized government the judicial power should be coextensive with the legislative, so far at least as private rights are to be enforced by judicial proceedings." Kendall v. United

States, 12 Pet. 524, 618, 9 L. Ed. 1181. We find, then, under our American system of government, each state possessing legislative power over most subjects, and having courts that may exercise a commensurate judicial power, and the United States possessing legislative power over a few subjects and having courts that may exercise a commensurate judicial power. The act of Congress now in question creates a statutory right of action. It is one not existing at common law, nor in chancery. It is one which, if warranted by the Constitution of the United States, may, under their general laws regulating the jurisdiction of the Cirsuit Courts of the United States (Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]), whenever damages exceeding \$2.000 are claimed, be made the subject of judicial proceedings in the courts of the United States as a suit of a civil nature arising under the laws of the United States without reference to the citizenship of the

In view of these circumstances and conditions, two questions present themselves at the threshold of the present case. The first is whether Congress intended by this act to authorize the institution of an action under it in the courts of the states. The second is whether, if such were its intention, it had power to make it incumbent on the state courts to assume jurisdiction.

The main provisions of the act are these: "Section 1. That every common carrier by railroad while engaging in commerce between any of the several states and territories, or between any of the states and territories, or between the district of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employé, to his or her personal representative for the benefit of the surviving widow or husband and children of such employé; and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employés of such carrier, or by reason of any defect or insufficiency due

ances, machinery, track, roadbed, works. boats, wharves, or other equipment.'

"Sec. 3. That in all actions bereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employé, or where such injuries have resulted in his death, the fact that the employé may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé: Provided, that no such employé who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employé.

"Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to or the death of any of its employes, such employe shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employé.

"Sec. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, that in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the insured employe or the person entitled thereto on account of the injury or death for which said action was brought.

"Sec. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued."

"Sec. 8. That nothing in this act shall be held to limit the duty or liability of common carriers or to impair the rights of their employés under any other act or acts of Congress."

Was it the intention of Congress to authorize the institution of the statutory form of action, thus created, in the courts of the states? At common law a servant cannot recover from his master for injuries received from the negligence of a fellow servant acting in the same line of employment. This is a part of that general American common law resting upon considerations of right and justice that have been generally accepted by the people of the United States, in administering which in any state the federal to its negligence, in its cars, engines, appli- courts have not deemed themselves bound by

the judicial decisions of that state as to | cedent. It would also remove any limitation what according to its common law are the limits of that doctrine there. The Supreme Court of the United States has treated it as a rule of general jurisprudence, especially when invoked in cases arising in the course of commerce between states, and as justly supported by the principle that negligence of a servant resulting in an injury to a fellow servant does not of itself prove any omission of care on the part of the master in his employment, and only such omission of care can justify holding the master responsible. Baltimore & Ohio R. R. Co. v. Baugh, 149 U. S. 368, 378, 386, 13 Sup. Ct. 914, 37 L. Ed. 772. The common law had established the fellow-servant doctrine upon two main considerations: One, that above mentioned, viewing it as a rule of justice; and the other, viewing it as a rule of policy, in that it tended to make each servant more watchful of his fellows, and thus to promote the safety of all, as well as the efficiency of their common work. Congress has now seen fit to give an action where the common law denied it. It makes a demand legal, which the common law deemed impolitic. It is not lightly to be presumed that these provisions were intended to found original proceedings in the courts of the states and to lay down for them new rules, not only of right and policy, but of procedure. Carpenter v. Snelling, 97 Mass. 452, 458. Sections 4 and 6 of the act of 1908 clearly indicate that the action is one to be brought under the statute. The methods of procedure which are prescribed can all be easily pursued in the federal courts. Some of them it might be difficult or even impossible to follow in the courts of a state. Others could only be observed there at the cost of setting up in the same tribunal conflicting standards of right and policy and practice.

This may be illustrated by a reference to the existing jurisprudence and legislation of They allow a recovery for an injury resulting in death, whether instantaneous or otherwise, in an action surviving to or brought by the executor or administrator, of not exceeding \$5,000, provided suit be instituted within one year, the damages to be distributed, after deducting the costs and expenses of suit, half to the husband or widow and half to the lineal descendants of the decedent, per stirpes; but, if there be no such descendants, the whole to go to the husband or widow, and, if there be no husband or widow, to the heirs, according to the law regulating the distribution of intestate personal estate. Gen. St. 1902, § 399; Pub. Acts 1903, p. 149, c. 193. If the act of Congress of April 22, 1908, applies to state courts, it would in an action under the act by virtue of section 1, cut off grandchildren of the decedent in favor of his parents; and, in the event of there being no surviving husband, widow, children, or parent, exclude the

of the damages recoverable in case of a fatal injury, and by the terms of section 6 double the time within which suit could be brought. By virtue of section 3 contributory negligence is to be no bar, but, if proved, "the damages shall be diminished by the jury," in a certain proportion. Under our practice, suits of such a nature have been often tried, or heard in damages, before the court, without a jury, In such case, unless the statute could be interpreted to require the court to allow such a diminution, the purpose of this section would be frustrated. Section 5 allows a setoff under certain circumstances. The action given is one founded on a tortious act or omission for which the defendant is made responsible. Set-off is purely a matter of statute. It was unknown to the common law. Our statutes allow it in certain causes sounding in contract, but not in any sounding in tort. Lovell v. Hammond, 66 Conn. 500, 508, 34 Atl. 511. If the act of Congress can support an action brought under its provisions in a state court, it would force upon this state an extension of the privilege of set-off which our statutes have not thought it wise to permit. It would also, by virtue of section 6, double the time within which a railroad company can be sued in our courts by one of its servants for personal injuries received while in its employment. Under Gen. St. 1902. \$ 1130. no action to recover damages for an injury to, or the death of, any person, caused by negligence, can be maintained against any railroad company, unless written notice, containing a general description of the injury and of the time, place, and cause of its occurrence, as nearly as the same can be ascertained, shall have been given to the defendant within four months after the neglect complained of, unless the action itself is commenced within that period. That such a notice has been given is a condition of recovery. Peck v. Fair Haven & Westville R. Co., 77 Conn. 161, 58 Atl. 757.

No similar provision is made in the act of Congress now in question, and, if it applies to proceedings in state courts, no such notice in cases brought under it would seem to be necessary. It is not alleged in the case at bar that one was given, though the action was not brought until more than four months after the alleged date of the plaintiff's injury. The question now under consideration is not whether Congress may not prescribe a new rule of right as to transactions occurring in the course of commerce between the states, to be recognized and to control the disposition of causes in all courts, state and federal. Undoubtedly it can. Schlemmer v. Buffalo Railway, 205 U.S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681. It would be a change in substantive law, and thus alter so far forth the law of the land. But the superior court was called upon to say next of kin who were not dependent on the de- whether the plaintiff could under the act of

an original action, which could only be brought, if at all, under that act, and which could only be sustained by disregarding many of the requirements of our own law with respect both to pleadings and evidence.

Another reason for considering this legislation as conversant only with proceedings in the federal courts is afforded by the provision (section 7) that the term "common carrier," as used in the act, "shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier." By this a direct action is unconditionally given on the statute against a receiver. Receivers stand for the court which appoints them. To sue them without leave of that court is contrary to the rules of chancery practice. By an act of Congress passed March 3, 1887 (24 Stat. 552, c. 373 [U. S. Comp. St. 1901, p. 508]), every receiver appointed by any court of the United States may be sued without its previous leave. The two acts of 1908 and 1887, so far as they apply to federal courts, are in this respect in entire harmony. But, if the act of 1908 were to be construed as warranting an action in a state court against a receiver appointed by a state court, it would set up a new rule of practice for that state, and attack the dignity of its judicial department.

We have then a statute plainly intended to give an action in the courts of the United States, and, assuming that it is not unconstitutional, well adapted to that purpose. It is a statute not expressly purporting to give an action in a court of a state, and which in this state at least is not in harmony with our system of administrative justice. If it gives such an action, it can only be on the ground that as its terms are general, and do not exclude state courts, a right to sue in them is implied. Undoubtedly the courts of every state and of the United States together constitute in a certain sense one judicial system for the enforcement of legal rights; but it is not to be presumed that Congress would (if it could) require those of a state to enforce rights newly created by the laws of the United States, which can only be enforced by following modes of procedure not permitted by the state law, and opposed to the public policy which that law declares. Houseman, 93 U.S. 130. 136, 23 L. Ed. 833. Nothing short of express provisions or necessary implications in the language of an act of Congress could suffice to force upon a state court the exercise of a jurisdiction so incompatible with the legislation and practice which constitute its ordinary and natural rules of action.

It is true that under the present statutes of the United States no action under the act of 1908 would lie in a court of the United States unless the damages claimed exceeded

Congress of 1908 insist on its entertaining | deemed to have had in mind the power of the plaintiff to claim what damages he pleases. and the rule that the sum named determines the jurisdiction. But, if Congress intended to give an action under the act of April 22, 1908, in the courts of the states, as well as in those of the United States, it is our opinion that the superior court was justifled in sustaining the demurrer. The right to engage in commerce between the states is not a right created by or under the Constitution of the United States. It existed long before that Constitution was adopted. It was expressly guaranteed to the free inhabitants of each state by the Articles of Confederation (article 4) and impliedly guaranteed by article 4, § 2, Const. U. S., as a privilege inherent in American citizenship. Slaughterhouse Cases, 18 Wall. 36, 75, 21 L. Ed. 394; Gibbons v. Ogden, 9 Wheat. 1, 211, 6 L. Ed. 23; Crandall v. Nevada, 6 Wall. 35, 18 L. Ed. 745; Lottery Case, 188 U. S. 321, 362, 23 Sup. Ct. 321, 47 L. Ed. 492; The Employers' Liability Cases, 207 U.S. 463, 502, 28 Sup. Ct. 141, 52 L. Ed. 297. The reserved powers of the states leave them charged with the sole duty and power of preserving public order and the security of persons and property within their territorial limits, except so far as, by or under the Constitution of the United States, it may be otherwise provided. A like duty and power exist with reference to the regulation of the private relations of employer and employe, and in general to the duties of common carriers. That a regulation so adopted by a state may incidentally affect commerce between the states does not render it invalid. Hennington v. Georgia, 163 U. S. 299, 317, 16 Sup. Ct. 1086, 41 L. Ed. 166; New York, New Haven & Hartford R. R. Co. v. New York, 165 U. S. 628, 681, 17 Sup. Ct. 418, 41 L. Ed. 853; Chicago Railway v. Solan, 169 U. S. 133, 137, 18 Sup. Ct. 289, 42 L. Ed. 688; Missouri Railway v. Haber, 169 U.S. 613, 635, 18 Sup. Ct. 488, 42 L. Ed. 878.

The state of Connecticut has under her laws, written and unwritten, so regulated the relations of employer and employé that no action can be maintained in her courts by a servant against his master for personal injuries sustained within her territorial limits through the negligence of one of his fellow servants, nor for such injuries sustained through the negligence of the master, combined with that of the plaintiff himself, when the latter's negligence essentially contributed to the result, whether it were or were not as great as the master's. The servant of a common carrier falls within these rules. This is not because of the nature of his master's business. They apply to every servant and every master. If it be assumed that Congress has power to prescribe a different rule for accidents occurring in or outside of Connecticut in the course of running a railroad Congress may, however, well be train between states, and to create a new ble by the courts of the United States, it cannot in our opinion require such an action to be entertained by the courts of this state. It would open a door to serious miscarriages of justice through confusing our juries if one rule of procedure were to be prescribed in one class of suits against an employer and another, diametrically opposed to it, in another class of them. The same jurors might be instructed in one case that negligence on the part of the plaintiff constituted no defense, but might be considered in mitigation of damages, and in the next that he could not recover at all unless he proved affirmatively that he met his injury when himself in the exercise of due care. They might be instructed in one case that a set-off was allowable, and in the next, under contractual conditions precisely similar, that a set-off was not allowable. It would also compel the courts established by a sovereign power, and maintained at its expense for the enforcement of what it deemed justice, to enforce what it deemed injustice. If Congress may thus change the common-law relations of master and servant by giving a new form and cause of action in the courts of the United States, it does not follow that they can give a servant a right to such a remedy in those of states where these relations remain unaltered.

The act of 1908 furthermore, if constitutional, enlarges the judicial power of the courts of the United States by giving in a certain class of causes a judicial remedy where none previously existed. This remedy is by a plenary action. If we understand correctly the position of the Supreme Court of the United States, no part of the judicial power of the United States, when it is to be exercised in the form of an original plenary action, can be vested in any court not created by the United States. In Martin v. Hunter's Lessee, 1 Wheat. 304, 330, 4 L. Ed. 97, it was stated that "Congress cannot vest any portion of the judicial power of the United States except in courts ordained and established by itself." Houston v. Moore, 5 Wheat. 1, 27, 5 L. Ed. 19, which reaffirmed this position, was the subject of consideration in Claffin v. Houseman, 93 U. S. 130, 141, 23 L. Ed. 833, where it was held to have decided "not that Congress could confer jurisdiction upon the state courts, but that these courts might exercise jurisdiction on cases authorized by the laws of the state, and not prohibited by the exclusive jurisdiction of the federal courts." Robertson v. Baldwin, 165 U. S. 275, 279, 17 Sup. Ct. 326, 41 L. Ed. 715, in words previously quoted, pronounces it as the better opinion that the Constitution was intended to confine to courts created by Congress the trial and determination of cases in courts of record falling within the grant of federal judicial power. This case does not present the question which might arise ulation of interstate commerce to hold the

statutory action for its enforcement cogniza- | If the state of Connecticut by appropriate legislation had accepted for its courts the jurisdiction which the plaintiff invokes. he could then maintain his suit, it would be because the state had in effect granted him the right to sue. Ex parte Knowles, 5 Cal. 300. But, if Congress may authorize a state court to entertain a plenary action created by a law of the United States, it would not follow that the jurisdiction must be assumed. The judicial duty of the courts of a state is fulfilled when they administer justice as its laws require. Stephens, Petitioner, 4 Gray (Mass.) 559, 562. If they may, when not prohibited by the statutes of their state, accept jurisdiction of statutory actions given by act of Congress, they are also free to decline it; and the objection may be taken by demurrer. Ely v. Peck, 7 Conn. 239.

> The grounds of the demurrer filed in the case at bar, while challenging the constitutionality of the act of 1908, do not specifically raise the point now under discussion. It was, however, manifest on the face of the record, and, the judgment that the complaint was insufficient being right, it is immaterial that this particular objection was not distinctly made. Thresher v. Stonington Savings Bank, 68 Conn. 201, 205, 36 Atl. 38; British-American Insurance Co. v. Wilson, 77 Conn. 559, 564, 60 Atl. 293.

> Thus far we have refrained from discussing the constitutionality of the act, except as to the single objection that, if it can be considered as intended to give an action in the courts of the states, it goes in that respect beyond the powers of Congress. In our opinion it also transcends them otherwise. By section 1 the rule of respondeat superior is extended so as to make the common carrier by railroad between states responsible for an injury received by one of its servants in the course of his employment in interstate commerce, due in whole or part to the negligence of any of its officers, agents, or employés, whether they are or are not at the time themselves employed in such commerce. An interstate carrier is generally also an intrastate carrier. It may have a considerable force of officers, agents, or employés engaged in business that is wholly local. Does the power to regulate commerce between the states go so far as to warrant imposing on a carrier responsibility to a servant engaged in that business for the consequences of the negligence of another of its servants, occurring when the latter was not engaged in it. or indeed in any business for the common employer? If a freight clerk whose duties are confined to keeping tally of goods consigned from one point to another in the same state in an office devoted to that purpose should carelessly discharge a rifle, a bullet from which should hit a brakeman on an interstate train a mile away, we are of opinion that it could not fairly be deemed a reg

common employer responsible for the injury. The Employer's Liability Cases, 207 U. S. 463, 496, 28 Sup. Ct. 141, 52 L. Ed. 297. Nor would it be such a regulation to make an interstate railroad company liable to a train hand who while going to work was accidentally struck by an automobile directed by one of its vice presidents or land agents while on a pleasure drive.

It is to be observed in this connection, also, that the act is not concerned solely with cases of injuries to train hands. It includes those to any person who is employed by the carrier in interstate commerce, and gives an action to his "or her" personal representative. A waitress employed by an interstate railroad in a railroad restaurant, where local custom does not exist or is not served, could recover on the statute for an injury received from the negligence of a man hired by the carrier for some purpose purely of a local character. Except so far as the act is a regulation of commerce between the states, its enactment was beyond the power of Congress. That it remotely affects such commerce is not sufficient, if that result is only to be secured by invading the settled limits of the sovereignty of the states with respect to their own internal police. Williams v. Fear, 179 U. S. 270, 278, 21 Sup. Ct. 128, 45 L. Ed. 186; Keller v. United States, 213 U. 8. 138, 29 Sup. Ct. 470, 53 L. Ed. --. The act cannot be interpreted as referring only to negligence of employes while engaged in interstate commerce. It substantially re-enacts in this particular the words of the previous Employer's Liability Act of June 11, 1906 (34 Stat. 232, c. 3073 [U. S. Comp. St. Supp. 1907, p. 891]), and must be presumed to have been drafted with knowledge of the judicial construction which those words had received. The Employer's Liability Cases, 207 U. S. 463, 500, 28 Sup. Ct. 141, 52 L. Ed.

The provision of section 5 that any contract between an interstate carrier and any of its employes in such business intended to enable it to exempt itself from any liability created by the act "shall to that extent be void" is in our opinion in violation of, the fifth amendment to the Constitution of the United States as tending to deprive the parties to such a contract of their liberty and property without due process of law. The contract may be one made on a full consideration by an employé, or one seeking to become such, who is fully capable of understanding its meaning and effect. He may be the general manager of a great railroad system, the damages resulting from the loss of whose life might justly be estimated at a vast sum. His salary may have been agreed on in view of this provision of exemption. To avoid that, and yet let the other provisions of the contract stand, would necessarily work rank injustice. It would virtually deprive the carrier of its property, and, under the construction of that phrase adopted stranger. There can be no contribution be-

by the courts of the United States, do so without due process of law. Adair v. United States, 208 U.S. 161, 172, 28 Sup. Ct. 277, 52 L. Ed. 436. The statute cannot be regarded in this respect as one made for the protection of an ignorant and improvident class, such as the acts regarding shipping articles. The employes of a railroad company are in general men of more than ordinary intelligence. The dangerous nature of the business requires and secures this. It cannot be regarded as one made for the protection of train hands, for it covers every kind of employes. It denies them one and all that liberty of contract which the Constitution of the United States secures to every person within their jurisdiction. The act, it is to be remembered, does not confine itself to avoiding a contractual provision for exemption from liability for the negligence of the carrier's servants while engaged in carrying on the work of transportation. avoids a provision for exemption from liability for the negligence of its servants while not engaged in carrying on the work of transportation, and even while not engaged in the line of their service, at all. The provisions of section 3 allow and apparently require the recovery of some damages, although the plaintiff's negligence was gross and that of his fellow employé slight. If, as aptly suggested by the defendant's counsel, an engineer, hearing, but negligently disregarding, an automatic warning bell, should derail his train at a switch negligently left open by the man in charge, and the latter be struck by an overturned car, each could recover from the common employer for any personal injury, although it came from a plain violation of known rules, and the employer's loss from the consequent destruction of life and property were enormous. The doctrine of comparative negligence, as it has been generally understood where it obtains, is that slight negligence shall not defeat an action against one guilty of gross negligence. In the form assumed by the act of 1908 it sanctions a recovery where the plaintiff has been guilty of gross negligence and the defendant of none at all. To hold the carrier liable in such case because of the imputed negligence of any officer, agent, or employé, whether the latter be at the time engaged in interstate commerce or not, seems to us not an appropriate or legitimate regulation of commerce between the states. but rather an arbitrary and unlawful deprivation of property within the meaning of the fifth amendment to the Constitution of the United States. It serves to confirm this conclusion that the liability thrown upon the carrier by section 1 is not confined to damages resulting solely from the negligence of its officers, agents, or employes. It is fixed and complete if such negligence contributes in any degree to the injury, although it be partly due to the act or omission of a mere in such a case could be held under the statute, his property would be taken to pay for a wrong mainly, perhaps, done by one with whom it stood in no contractual relations, and who, except for this particular act, had no connection with commerce between the states. The act gives a remedy for injuries causing death, without limitation of the damages recoverable, in favor of the executor or administrator, the fund to be distributed in a manner which is inconsistent with the law of every state with respect to the devolution of the estate of a deceased person. In our opinion, Congress cannot create such a right of action in favor of personal representatives of an inhabitant of a state. They are appointed or their appointment is approved, by authority of the state, exercised through some court to which they are accountable. If the damages recoverable are to be treated as representing estate left by the decedent, it is for the state of his domicile to regulate their distribution. If they are to be treated as a fund created by this act. which does not represent anything that ever belonged to the decedent, it was in our opinion not within the competency of Congress thus to bring into existence a new duty of executors or administrators to collect and a new duty of masters to pay what the decedent never owned. Such legislation falls solely within the sphere of the states. It does not appear that Congress would have enacted this measure without the provisions on which we have thus commented. parts of the statute cannot be severed from the rest, and their invalidity renders it wholly void, so far as it applies to the case before us. The Employer's Liability Act Cases, 207 U. S. 463, 501, 28 Sup. Ct. 141, 52 L. Ed. 436.

A statute enacted in a jurisdiction where a written constitution obtains is prima facie presumed by its courts if its validity be questioned before them to be in accord with that constitution. Whether such a presumption exists, either in a state court or in those of the United States, in favor of an act of Congress which, if valid, reduces the limits within which the sovereignty of the states has for more than a century been freely exercised, and especially of this act, which by its title does not purport to be a regulation of interstate or foreign commerce, but simply to relate "to the liability of common carriers by railroad to their employés in certain cases," we need not inquire. If the statute under review has the support of such a presumption, that support is overthrown by the considerations previously stated.

To sum up our conclusions, the judgment of the superior court was right on each of the following grounds: (1) Congress did not intend by the act of April 22, 1908, to authorize the institution of an action under it in the courts of the states. (2) It had no pow-

tween wrongdoers. If, therefore, the carrier in such a case could be held under the statute, his property would be taken to pay for a wrong mainly, perhaps, done by one with whom it stood in no contractual relations, and who, except for this particular act, had no connection with commerce between the states. The act gives a remedy for injuries causing death, without limitation of the sate incumbent on the state courts to assume jurisdiction of such an action. (3) The issues before the superior court involved the consideration of these points, which justified of themselves the dismissal of the plaintiff's action; but, further (4) the act, so far as it concerns this cause, is wholly void by reason of certain of its provisions which cannot be separated from the rest.

There is no error. The other Judges concur.

(82 Conn. 373)

MONDOU v. NEW YORK, N. H. & H. R. CO. (Supreme Court of Errors of Connecticut. July 20, 1909.)

1. MASTER AND SERVANT (§ 124*)—DUTY OF RAILROADS TO EMPLOYÉS.

A railroad owes to a fireman the duty of using reasonable care in inspecting the condition of all the rolling stock used, and is liable for negligently failing to inspect a defective foreign car placed in its train, causing injury to a fireman.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §\$ 235-242; Dec. Dig. § 124.*]

2. MASTER AND SERVANT (§ 258*)—DUTY OF RAILBOADS TO EMPLOYÉS — ACTIONS — COMPLAINT.

A complaint in an action for injuries to a railroad fireman brought within four months of the date of the injury, caused by a defective foreign car in a train, which charges the railroad directly with negligence as to the duty of inspecting the foreign car, and that the fireman exercised due care, states a prima facie case under the laws of Connecticut.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 258.*]

Appeal from Superior Court, New London County; Ralph Wheeler, Judge.

Action by Edgar G. Mondou against the New York, New Haven & Hartford Railroad Company. From a judgment for defendant on sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Action by an employé of the defendant under the act of Congress relating to the liability of common carriers by railroad to their employés, approved April 22, 1908 (chapter 149, 35 Stat. 65), to recover damages for personal injuries alleged to have been caused by the negligence of the plaintiff's fellow servant. A demurrer to the complaint upon the ground of the unconstitutionality of the act of Congress was sustained, and judgment rendered for the defendant. No error.

Donald G. Perkins and Thomas J. Kelly, for appellant. Edward D. Robbins and Michael Kenealy, for appellee. E. O. Harrison and Philip Doherty, for the United States.

BALDWIN, C. J. The complaint alleges that the plaintiff while employed by the defendant as a fireman on a railroad train running from Midway, Conn., to the Harlem river, in New York, was injured while in the exercise of due care by the negligence of the

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

receiving a foreign car, which was defective and in a dangerous condition, without inspecting it, and putting it into another train running in the opposite direction from the Harlem river to Midway, in consequence of which, as the trains met in Guilford in this state on August 5, 1908, the top of the car tilted over and struck the plaintiff. It concludes thus: "The plaintiff claims \$25,000 damages under and by force of the act of Congress entitled 'An act relating to the liability of common carriers by railroad to their employés in certain cases,' approved April 22, 1908 (chapter 149, 35 Stat. 65)." The suit was brought in October, 1908. A demurrer was filed attacking both the complaint and the claim for relief. Both parties have treated the action as one brought upon the act of Congress of April 22, 1908, and we shall therefore accept that view, as did the superior court.

Thus considered, the demurrer was properly sustained for reasons fully stated in the case of Hoxie v. New York, N. H. & H. R. Co. (Conn.) 73 Atl. 754. We think it proper, however, to observe, in order to avoid any misconception of our position in subsequent cases, that the complaint charges the defendant directly with negligence in respect to the duty of inspecting the foreign car. It owed an absolute duty to the plaintiff to use reasonable care in inspecting the condition of all the rolling stock used upon its railroad. The demurrer admitted that it failed to exercise such care and that the plaintiff exercised due care, and, as the suit was brought within four months from the date of the injury to the plaintiff, he would have made out a prima facie case, had he not chosen to claim his remedy under the act of Congress, instead of under the laws of Connecticut.

There is no error. The other Judges con-

(82 Conn. 308)

STATE ex rel. MORIARTY v. DONAHUE et al.

(Supreme Court of Errors of Connecticut. July 20, 1909.)

1. EXECUTORS AND ADMINISTRATORS (§ 392*)—DISTRIBUTION—BOND—BREACH.

Where the probate court had directed to whom the proceeds of a sale of real estate should be distributed, and the order was not appealed from, the refusal of the administratrix to distribute the share to which one of the distributese was entitled to his administratrix, because such distributee mortgaged his interest in the land in his lifetime, was a breach of the sale bond; the probate court having no jurisdiction in the administration proceedings to inquire into the equities existing between such distributees of the estate and the mortgagee, notwithstanding foreclosure.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 392.*]

defendant and its servants and agents in 2. Courts (\$ 2001/2*)—Probate Court—Juris-receiving a foreign car, which was defective Diction.

A court of probate cannot inquire as to rights acquired by third persons, since the death of the ancestor, in property descending to heirs. [Ed. Note.—For other cases, see Courts, Dec. Dig. § 200½.*]

3. EXECUTORS AND ADMINISTRATORS (§ 400*)—
REAL ESTATE—SALE—DISTRIBUTION OF PROCEEDS.

Under Gen. St. 1902, § 353, providing for a sale of intestate's real estate for the settlement of the estate in the probate court, the proceeds are to be distributed as real estate.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 400.*]

4. EXECUTORS AND ADMINISTRATORS (§ 392*)—
REAL ESTATE—SALE—PROCEEDS—DISTRIBUTION—BONDS.

Gen. St. 1902, § 353, authorizes the probate court in its discretion to order a sale of an intestnte's real estate in such manner and on such notice as it shall judge reasonable, and to require a sufficient additional sale bond. Held that, since it is no part of an administrator's duties to sell real estate under such section, and distribute the proceeds, where an administratrix applied to sell such real estate, and gave a new bond to obtain such authority, her failure to distribute the proceeds of the sale according to the direction of the probate court was a breach of the sale bond, but not of her general administration bond.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 392.*]

Appeal from Superior Court, New Haven County; William L. Bennett, Judge.

Action by the State, on relation of Nellie Donahue Moriarty, as administratrix, etc., against Mary Ann Donahue, as administratrix, and others, on probate bonds for failure of defendant administratrix to pay plaintiff a distributive share of the estate of Bridget Donahue. From an order sustaining a demurrer to defendants' answers and overruling others, and from a jud ment accordingly, all the parties, except defendant Seery, appeal. Affirmed.

John O'Neill and Finton J. Phelan, for plaintiff. Edward L. Seery, for defendants.

THAYER, J. On February 21, 1906, the defendant Mary A. Donahue was appointed administratrix de bonis non of the estate of her mother, Bridget Donahue, and gave a probate bond, with the defendant Seery as surety, for the faithful discharge of her du-On August 16, 1906, having been ordered by the court of probate to sell all the real estate of the deceased, she gave another bond, with the defendant Grelie as surety, "to secure the distribution of the assets of said sale according to law." On September 19. 1908, she settled her administration account, which showed that there was then in her hands in cash to be distributed the sum of \$23,171.80. Upon her application the court of probate found that the only persons entitled to the estate at the time of the death of Bridget were her five children and only heirs at law, and that each of these was entitled to, and that there should be distrib-

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

uted to them, respectively, one equal onefifth share of the estate remaining in the
hands of the defendant administratrix. One
of these children was Thomas Donahue, who
was living at the time of his mother's death,
but died shortly thereafter. The defendant
Mary A. Donahue neglected to pay over the
one-fifth of Bridget's estate to the estate
of Thomas. This action is brought for the
benefit of Nellie D. Moriarty, the administratrix of his estate. These facts are alleged in the complaint in one count, and the
defendant Mary A. Donahue, administratrix
of Bridget's estate, and her sureties on the
two bonds are made parties defendants.

The defendants filed separate answers. That of Mary A. Donahue alleges, in substance, the following facts: The entire personal estate received by her as administratrix of Bridget's estate amounted to \$2,-345.50, and was required for, and actually expended in, the payment of the debts and expenses of settlement of the estate. At the time of her death Bridget was possessed of an undivided one-half interest in five pieces of land in Waterbury, which she had inherited from her brother Patrick Coyle. After her death the court of probate distributed to her estate as her share of her brother's estate two of these pieces of land. Prior to such distribution, but after her death, her son Thomas, above mentioned, mortgaged his interest in the entire five pieces of land to one Downey, who later foreclosed the mortgage against the administratrix and heirs at law and representatives of Thomas; the judgment providing that, unless the defendant in that action should pay to Downey \$4,009.13 on or before the first Monday in July, 1908, they should be foreclosed of all interest in the mortgaged premises, and they have never paid the amount found due or appealed from the judgment. On February 1, 1907, pursuant to the order of the court of probate above mentioned, Mary A. Donahue as administratrix sold all the real estate which belonged to Bridget's estate for \$23,-The defendant Seery in his answer sets up substantially the same facts as the defendant Donahue, but in two defenses. The first repeats the allegations relating to the real estate. The second alleges, in substance, that the personal property amounted to only \$2,345.50, and has been fully accounted for by the administratrix to the acceptance of the court of probate. The answer of the defendant Grelle was substantially like that of the other two defendants relating to the real estate-omitted any reference to the personal property. The plaintiff demurred to each of these defenses. The questions raised by the demurrers are: (1) Whether the fact that Thomas Donahue mortgaged his interest in his mother's estate to Downey, and the latter's foreclosure of the mortgage, justified Bridget's administratrix in refusing to pay over to the estate of Thomas a

the court of probate; (2) whether, if she was not justified by those facts in refusing to pay it over, such refusal constituted a breach of the first or general administrator's bond on which Seery was surety. The latter question is raised by the plaintiff's appeal; the former by the defendants'.

The second bond, upon which Grelle was surety, was given at the time the sale of the real estate was ordered, and its purpose as stated in the condition was to secure the proper distribution of the proceeds of the sale. It appears that all the property for distribution was the proceeds of the sale. The court of probate has made an order directing to whom it shall be distributed, and the order has not been appealed from. That the refusal of the administratrix to distribute to the estate of Thomas a one-fifth share, as ordered, was a breach of the bond must be and is conceded, unless, as claimed by the obligees, the mortgage by Thomas to Downey, and the latter's foreclosure of the mortgage, render such distribution improper. But the court of probate had no power to inquire into the equities existing between Thomas and Downey. Hewitt's Appeal, 53 Conn. 24, 37, 1 Atl. 815; Hall v. Pierson, 63 Conn. 332, 338, 28 Atl. 544. That court cannot inquire as to what conveyances have been made, or attempted to be made, by distributees during the settlement of the estate. Had this real estate not been sold by the administratrix, one-fifth part of it must have been set to Thomas, regardless of the mortgage and foreclosure. The court of probate could not go into an inquiry as to what rights Downey or any third party had acquired in it since the death of Bridget. Holcomb v. Sherwood, 29 Conn. 418, 420; Homer's Appeal, 85 Conn. 113, 114. Such inquiries are for another court. Much less can the administratrix assume to decide between them. Her duty is to obey the order of the court of probate for a distribution passed upon her application. She was not a party to the foreclosure suit, and Downey is not a party to this proceeding. His rights are still for another court to determine. The proceeds of the real estate are to be distributed as the real estate would have been distributed had the sale not been made; that is, according to the rights of the parties at the death of Bridget. Gen. St. 1902, \$ 353; Hall v. Pierson, 63 Conn. 332, 28 Atl. 544. The court, therefore, was correct in holding that the answers of the administratrix and Grelle were insufficient and in sustaining the demurrer thereto.

personal property. The plaintiff demurred to each of these defenses. The questions raised by the demurrers are: (1) Whether the fact that Thomas Donahue mortgaged his interest in his mother's estate to Downey, and the latter's foreclosure of the mortgage, justified Bridget's administratrix in refusing to pay over to the estate of Thomas a one-fifth share in the estate as ordered by

quirement shall remove him from his office and trust. The bonds upon which Seery was surety recited the appointment of the principal, Mary A. Donahue, as administratrix of the estate of Bridget Donahue, and was conditioned upon the faithful discharge by her of the duties of that appointment. plaintiff claims that the sale of the real estate, and distribution of the proceeds to the persons to whom the real estate would have been distributed had it not been sold, was a part of the duties of administration, and therefore secured by this bond.

Anciently the administrator as such had nothing to do with the intestate's real estate, unless it was required to pay debts. In case it was required to pay debts he might, upon showing the necessity therefor, obtain an order for the sale of sufficient of the real estate to produce funds for their payment. Such sale was in such case a matter which pertained to the settlement of the estate. Pratt v. Stewart, 49 Conn. 339, 841, 342. The proceeds were to be used for the purpose of paying the debts of the estate, and their misappropriation would be a breach of the administrator's bond. But the real estate, except when required for the purpose indicated, belonged to the heir, and the court of probate had no power to order its sale. While the rights of the administrator with respect to the intestate's real estate have been extended by statute, and the court of probate has been given power in its discretion to order the sale of the whole, or any part of it, yet the title to the real estate of the intestate does not pass to the administrator upon his appointment, as does that of the personal property. It forms no part of the estate which he is appointed to administer. When a sale is ordered, as in this case, for purposes of partition or distribution, the proceeds constitute a special fund. And it is because this fund is not a part of the personal estate to be administered and distributed like the rest of the personal property, and therefore not covered by the original administrator's bond, that the statute requires as a condition, without the performance of which the sale would be void, that a sufficient bond shall be required by the court of probate on making the order of sale. State v. Thresher, 77 Conn. 70, 75, 58 Atl. 460. This positive requirement would be unnecessary if the statute contemplated that the sale and distribution of the proceeds are a part of the administration of the estate. The bond is required to be given although the original bond may be ample in amount to secure the sum to be realized from the sale. If an additional bond, supplementary to the original administrator's bond, should be necessary, the court of probate has power, under section 211 of the General Statutes, to require the

the neglect of the principal to obey the re- | bond. Thus no necessity existed for the enactment requiring a special bond to be given when real estate is ordered, if such sale and the distribution of the proceeds as directed by section 853 of the General Statutes is to be treated as a part of the duties of the administration of the estate. Our conclusion is that they are not a part of the duties the discharge of which is assumed by the administrator when he qualifies, and that a failure to perform them by neglecting to distribute to the persons entitled thereto the proceeds of the sale is not a breach of the original administrator's bond. The superior court, therefore, properly overruled the demurrer to Seery's second defense.

> In her administration account the administratrix charged berself with the proceeds of the real estate, and the order of the court of probate ordering its distribution in form treats it as personal estate. No question was made upon the trial as to the propriety of this action, or as to its affecting the rights of the parties. It was conceded that the property for distribution was all a part of the proceeds of the sale of the real estate, and to be distributed as the real estate would have been distributed if it had not been sold. As in this case the same heirs, in the same proportions, would be entitled to the property. whether real or personal estate, the action of the administratrix and the court in treating it as personal estate becomes unimportant in view of the conceded facts in the case.

> There is no error. The other Judges concurred.

> > (82 Conn. 383)

GILSON V. BOSTON REALTY CO. (Supreme Court of Errors of Connecticut. July 20, 1909.)

1. Money Received (§ 1*)-Implied Promise

TO REFAY.

The law creates an implied promise on the part of one to pay money in his possession which in equity and good conscience belongs to another, and an action for money had and received lies therefor.

[Ed. Note.—For other cases, see Monceived, Cent. Dig. § 1; Dec. Dig. § 1.*] see Money Re-

2. FRAUDS, STATUTE OF (§ 142*)-REMEDIES OF PURCHASER-RECOVERY OF PURCHASE MON-

EY. A contract for the sale of real estate re quired payments in installments, and provided that waiver of terms should be without effect unless in writing. The vendor orally agreed that the purchaser might pay at his convenience, unless he received notification to the contrary. The purchaser, relying thereon, falled to make payments, and the vendor, without any notice, sold the premises to another. Held, that the purchaser could recover the money paid, notwithstanding the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Dec. Dig. § 142.*]

8. EVIDENCE (§ 467*)—PAROL EVIDENCE—VA-BYING TERMS OF WRITTEN CONTRACT. Parol evidence that a purchaser, in a writ-

administrator to give such supplementary | ten contract for the sale and purchase of real

estate, stipulating for payment in weekly install-ments, was misled by declarations of the vendor as to the time in which she could make pay-ments is admissible.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 467.*]

Appeal from Court of Common Pleas, Fairfield County; Howard B. Scott, Judge.

Action for money had and received by Margaret Gilson against the Boston Realty Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Clitus H. King and John W. Banks, for appellant. Phelan & Phelan, for appellee.

RORABACK, J. This action grows out of a written contract under seal, dated August 1, 1906, by which the defendants (a copartnership composed of two members) agreed to sell and convey to the plaintiff certain real estate for \$294. Twenty-five dollars of the contract price was paid upon the execution of the written agreement, and the balance was to be paid in installments of \$5 per week. October 7, 1906, the plaintiff was further credited with \$16 of the contract price. The agreement provided that, if she failed to pay any of the stipulated installments for 30 days after it fell due, the agreement to sell should become void as the option of the defendant, who should be thereupon released from all obligations thereunder, but have the right to retain for their own use, as liquidated damages, all moneys previously paid by her. Upon several occasions before and after the payment of the \$16 the defendants told the plaintiff that she need not make the payments weekly, and that she might pay at her convenience, unless the defendants notified her that payment was required. The plaintiff at all times intended to pay for the real estate, and was able to do so, and would have carried out the agreement if she had not been misled by these statements of the defendants. The defendants did not notify her that they desired her to make payments, or that they exercised their option to be released from their obligations, but sold the land to another person. The plaintiff, hearing of the sale, tendered the defendants the balance due under the contract, and demanded a deed, or the return of the \$41. The tender was made in a short time after the plaintiff knew of the sale. The defendants refused to deed the land, or to return the money. The defendants admit receiving the money, but contend that the plaintiff had forfeited all rights under the contract by a failure to make payment of the installments when they became The agreement further provided that no modification or waiver of any term or condition thereof should be alleged or set up, or be of any force or effect, unless in writing

equity and good conscience belongs to another, the law will create an implied promise upon the part of such person to pay the same to him to whom it belongs, and that in such a case an action for money had and received may be maintained. In this case the defendants, by orally agreeing that they would notify the plaintiff when they required any money of her, and that she might pay for the real estate at her convenience, unless she received such notification, prevented the plaintiff from making the payments within the time limited in the written contract. The plaintiff intended to and would have paid according to the stipulations in the agreement if she had not been misled by the statements of the defendants. She was ready, and wanted, to make payment of the balance if given a fair opportunity to do so. The defendants, notwithstanding their statements, now set up the nonperformance by the plaintiff which their own acts brought about. The statute of frauds has no bearing in this case. The cause of action is not the refusal to perform a contract or keep a promise upon which another relied, but the unjust infliction of loss upon one party, with a consequent benefit to the other, from a violation of a confidence which should have been respected. Wainright v. Talcott, 60 Conn. 43, 52, 22 Atl. 484. Parol evidence by the plaintiff that she was misled by the declarations of the defendants as to the time that she could make payments of the weekly installments was properly admitted by the court below. Wainright v. Talcott, supra, 60 Conn. 53, 22 Atl, 484; Thomson v. Poor, 147 N. Y. 402, 42 N. E. 13.

No notice having been given to her of any exercise of the defendants' option to become released from their obligations, it is unnecessary to inquire whether, had such a notice been given, the provision as to liquidated damages would have affected her rights.

There is no error. The other Judges concurred.

(32 Conn. 290)

MAHONEY V. HARTFORD INV. CORPO-RATION.

(Supreme Court of Errors of Connecticut. July 20, 1909.)

1. CONTRACTS (§ 232*)-EXTRA WORK-PLUMB-ING SPECIFICATIONS.

Specifications for remodeling a building recited that the architects had been unable to locate the horizontal runs of soil pipe, and that the contractor should locate the old pines, and connect the new soil and rainwater pipes there-to, and that all drains, soil, and rainwater pipes condemned by the plumbing inspector rust be removed and replaced with new pipes. The contract price for the entire plumbing job was \$11,000, and it appeared that the replacing of a new sewer system was alone worth \$5,000. and signed by both parties.

It is a familiar principle that when one person has in his possession money which in

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

defendant ordered to install a new system. Plaintiff, the plumbing contractor, having refused to do this under his contract, defendant's general manager directed him to proceed, and he would be paid therefor. Held that, the general manager having authority to make such contract, plaintiff was entitled to charge for the installation of such sewer system as extra work.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \$ 4175; Dec. Dig. \$ 1052.*]

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 232.*]

2. Corporations (\$ 426*)-General Manager -AUTHORITY-RATIFICATION.

Where the general manager of a corpora-tion was the sole active head of its affairs, and the corporation's directors, knowing that he had ordered orally certain extra work on the cor-poration's building to be done on the corpora-tion's credit, did not dissent, the corporation was bound by the manager's agreement to pay plaintiff for such extra work.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. 4 426.*]

8. Corporations (\$ 451*) - Implied Con-TRACTS.

Where plaintiff expended money and furnished labor and materials for the benefit of a corporation, and the corporation accepted the benefits thereof, it was bound to pay plaintiff the reasonable value thereof to the same extent as an individual.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 451.*]

4. CONTRACTS (\$ 227*) - EXTRA WORK - OB-

Where the general manager of a corpora-tion orally ordered extra work to be performed by a contractor, there was a waiver of the re-quirement of the contract that such work should e undertaken only on written orders from the architects.

[Ed. Note.—For Dec. Dig. § 227.*] -For other cases, see Contracts,

5. Contracts (§ 199*)—Building Contracts -"ALTERATIONS."

Labor and material necessary to put in a new sewerage system in a remodeled building were not "alterations," within a provision of the contract declaring that no alterations should be made in the work done or described by the drawings and specifications except on the written order of the architects.

[Ed. Note. -For other cases, see Contracts. Dec. Dig. 199.*

For other definitions, see Words and Phrases, vol. 1, pp. 360-365.]

6. EVIDENCE (§ 354*)-BOOKS OF ACCOUNT SUBSEQUENT ENTRIES.

Where an account of work and labor was kept in plaintiff's books by entries from slips made by the foreman of the job, which slips were destroyed after the items had been entered, it was no objection to the introduction of the books that the entries were made at intervals after the transactions occurred.

[Ed. Note.—For other cases, see Evider Cent. Dig. §§ 1432-1483; Dec. Dig. § 354.*] see Evidence,

7. EVIDENCE (§ 354*)—ACCOUNT BOOKS-INAL ENTRIES.

That slips from which entries in a contractor's books of account were made were thereupon destroyed, under the belief that they were no longer necessary, was no objection to the admissibility of the books, though the slips were the original entries.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \$\$ 1432-1483; Dec. Dig. \$ 354.*]

mission of evidence relating to a claim for which

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4175; Dec. Dig. § 1052.*]

9. EVIDENCE (§ 471*)—Conclusions.

Plaintiff's evidence that he furnished extra work and material in controversy, under an agreement that he should receive pay therefor, was admissible.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 471.*]

10. TRIAL (4 63*)--RECEPTION OF EVIDENCE-ORDER OF PROOF.

The admission of evidence on rebuttal, in-

stead of in chief, is within the discretion of the trial court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 151-153; Dec. Dig. § 63.*]

Appeal from Superior Court, Hartford County; Milton A. Shumway, Judge.

Action by William E. Mahoney against the Hartford Investment Corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

R. C. Dickerson and W. Bro Smith, for appellant. J. H. Peck and N. E. Pierce, for appellee.

RORABACK, J. This action was brought on the common counts to recover for extra plumbing work and materials, alleged to have been furnished and rendered by the plaintiff to the defendant in connection with the reconstruction of a building, now known as the "Hotel Garde," in the city of Hartford. The appeal is largely based upon an attempt to retry before this court questions of fact settled in the court below, the defendant contending that many of the conclusions of the trial court are not warranted by the evidence, which is before us under the provisions of section 797 of the General Statutes of 1902, and we are asked to correct the finding, so that it will state facts contrary to those found. An examination of the entire record shows that the finding is justified by the evidence, and fairly states the rulings made during the trial. Therefore the case is considered upon the finding as made.

The trial court has found that this building was formerly owned by the estate of James G. Batterson. The defendant corporation was organized by the heirs of Mr. Batterson and by William H. Garde and his family for the purpose of transforming the building into a hotel, to be conducted by Mr. Garde, who was an experienced hotel manager. March 29, 1905, a contract was made between the plaintiff and the defendant, which, among other things, provided that: contractor, under the direction and to the satisfaction of Bayley & Goodrich, architects acting for the purposes of this contract as agents of the said owner, shall and will provide all the materials and perform all the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

work mentioned in the specifications and shown on the drawings prepared by the said architects for the plumbing for the alterations and repairs to the Batterson building situated at the corner of High and Asylum streets, Hartford, Conn. No alterations shall be made in the work shown or described by the drawings and specifications, except upon a written order of the architects, and when so made the value of the work added or omitted shall be computed by the architects and the amount so ascertained shall be added to or deducted from the contract price." The specifications upon this subject of sewers state: "The architects have been unable to locate the horizontal runs of soil pipe in the basement further than that the present main 5" soil pipe appears to come down near the old center stairway and runs ont to the sewer at the S. W. corner of the building. The rainwater pipes are supposed to connect to this old soil pipe before it leaves the building. This contractor must locate the old pipes and connect the new soil and rainwater pipes thereto by the most direct runs without interfering with the piers or wall foundations. All old drains, soil and rainwater pipes that may be condemned by the plumbing inspector must be removed and replaced with new pipes. The contractor for plumbing must do all excavation and filling necessary for his work."

The defendant contends that an itemized claim for "sewers" amounting to \$4,906 allowed by the trial court as extra work, is included in the contract and specifications. It appears that at the time the parties executed the contract the architects were unable to locate and describe the drainage pipes of the building about to be reconstructed. The expressions in the specifications as to the sewer are indefinite. The limit of the plaintiff's undertaking as to this subject cannot be fixed from the writing in question by any settled rule of legal construction. In the construction and interpretation of written instruments it is a familiar rule that the writing shall, if possible, be so constructed as to effectuate the intent of the parties. In arriving at the intent expressed or implied in the language used it is admissible to consider the situation of the parties, and the circumstances connected with the transaction, and the writing should be considered with the help of that evidence. Wilson v. Root, 80 Conn. 227, 231, 67 Atl. 482; Sweeney v. Landers, Frary & Clark, 80 Conn. 575, 578, 69 Atl. 566. When the contract was made the sewer work contemplated was an unknown quantity. From the specifications it appears that this item was not regarded as an important feature of the plaintiff's undertaking. The contract price for the entire plumbing work was but \$11,000. The work in replacing a new sewer of modern construction was worth about \$5,000. The defendant, several weeks after the contract was made,

foreign to the plaintiff's undertaking, by directing and paying him for an investigation of the old drainage system of the Batterson building. This investigation disclosed a large drainage system for the building in question, having numerous lateral connections, some of which came from the buildings in the neighborhood owned by parties other than the defendant. After the old system of drainage had been uncovered, it was condemned by the building inspector of the city of Hartford, and the defendant was ordered to replace it with a new system of modern construction. Had it been anticipated that this entire drainage system was defective, and that a new one would have to be substituted, it is fair to presume that the repair of it would have constituted a definite feature of the written agreement. It appears that when the old sewer was condemned, there was then a contention as to which party should perform the work. Mahoney refused to do it unless he received extra compensation. William H. Garde told Mahoney to go ahead and do the work, and the defendant would pay for it. The circumstances surrounding the transaction, and the acts of the parties subsequent to the written agreement, are all consistent with the theory that there was no intention to make Mahoney install a new system of sewerage as a part of his contract. If William H. Garde had authority to bind the corporation, the conclusion is inevitable that an obligation to pay Mahoney has arisen.

The defendant claimed that a large number of small items allowed by the court below as extras came within the provisions of the written contract. The finding upon this subject shows that, as the work of rebuilding progressed, it was ascertained that in some respects the plans were not adapted to the actual conditions existing and changes were made. The proposed changes were submitted to William H. Garde, and were approved by him, and the work and materials necessary, not included in the original contract, were by him ordered to be furnished. By reason of the changes in the plans William H. Garde orally ordered the plaintiff to make certain alterations in the work, which Mahoney had already fully completed. By reason of accidents, for which the plaintiff was in no way responsible, it became necessary to do certain repair work, which William H. Garde orally employed Mahoney to do. Mahoney did all this work in a skillful and workmanlike manner. The labor and materials used are correctly stated in the bill of particulars, and the prices charged therein are fair and reasonable. In this connection it is again important to consider whether this work was ordered by one authorized to bind the defendant.

plumbing work was but \$11,000. The work in replacing a new sewer of modern construction was worth about \$5,000. The defendant, several weeks after the contract was made, treated the subject of drainage as a matter items were extra and ordered by William H.

Garde. It appears that from the time the work was commenced until the building was opened as a hotel, Mr. Garde was the sole active manager of all the affairs of the defendant. He represented the company in all its dealings with the various contractors. No other officer or director of the defendant ever exercised any authority over the work on the building, except by way of making suggestions to Mr. Garde. The various directors, by reason of consultations with Garde, and of their observations, were well aware of his conduct in regard to the work as it progressed on the building, and of the apparent authority exercised by him, and they acquiesced therein. They were aware that he ordered orally certain work to be done which was not included in the original drawings and specifications, and did not dissent. Authority in the agent of a corporation máy be inferred from the conduct of its affairs, or from the knowledge of its directors and their neglect to make objection. Fitch v. Lewiston Steam Mach. Co., 80 Me. 34, 12 Atl. 732; Sherman v. Fitch, 98 Mass. 64. A corporation may be bound by an implied contract in the same manner as an individual. To render such party liable as a debtor under an implied promise it must be shown, not only that the services were valuable, but also that they were rendered under such circumstances as to raise the fair presumption that the parties intended and understood that they were to be paid for. Union Hardware Co. v. Plume & Atwood Mfg. Co., 58 Conn. 219, 221, 20 Atl. 455; Tryon v. White & Corbin Co., 62 Conn. 161, 25 Atl. 712, 20 L. R. A. 291; Fitzgerald & M. Constr. Co. v. Fitzgerald, 137 U. S. 98, 11 Sup. Ct. 36, 84 L. Ed. 618, 614; Pew v. First National Bank, 130 Mass. 391, 395. Mahoney expended his money and furnished labor and materials for the benefit of the corporation. The corporation has accepted it, and it is under obligation to pay the plaintiff as much as his labor and materials are fairly worth.

It is apparent that Mr. Garde had authority to make these orders for extra work. The directions by him for the performance of this work not called for by the contract are necessarily and of themselves a waiver of any requirement for written orders by the architects. O'Keefe v. St. Francis' Church, 59 Conn. 551, 22 Atl. 325. The provision of the contract as to written orders is that: "No alterations shall be made in the work done or described by the drawings and specifications, except upon a written order of the architects." The labor and materials furnished which are the subject of this action cannot be considered as "alterations" within the meaning of the contract. It was not therefore necessary for the plaintiff, Mahoney, to obtain the written order of the architects. Beattle v. McMullen, 80 Conn. 161, 67 Atl. 488.

The admission of Mahoney's books of ac-

count was not erroneous. These were his only books of account, compiled by his bookkeeper from slips made by the foreman on the job. Butler v. Cornwall Iron Co., 22 Conn. 335, 359; Cobb v. Wells, 124 N. Y. 77, 26 N. E. 284; Kent v. Garvin, 1 Gray (Mass.) 148. The foreman was called as a witness, and testified that the items all represented the work and materials actually furnished on the building. After making the entries in the books these slips were destroyed under the belief that they were not necessary. The fact that the entries in these books were made at intervals after such transactions was not fatal to the competency of the books. This objection went to the weight, and not to the admissibility, of the testimony. Kent v. Garvin, supra. If the foreman's slips were the original entries, their destruction under the honest belief that they were no longer needed would permit the introduction of secondary evidence of their contents. Wigmore on Evidence, \$ 1198; Holmes v. Marden, 12 Pick. (Mass.) 169, 170; Tucker v. Bradley, 33 Vt. 324, 328.

The plaintiff was asked these questions: "Q. Who was present when you signed this contract, Mr. Mahoney? A. Mr. Bayley and Mr. Garde. Q. Did you have any conversation with Mr. Bayley in Mr. Garde's presence about that purple ink clause in the addenda?" The last question was objected to by the defendant, for the reason that its purpose was to vary the terms of the written contract. The question was not admitted for the purpose of varying the contract, but as calling for one of the circumstances under which the contract was executed. The reply to this question related to payment for "rainwater leaders, drains," etc. The clause in the specifications to which this question and the answer refer is so imperfectly stated that this court cannot now understand the object or effect of this testimony. Assuming that it refers to the general drainage system of the Batterson building, the admissibility of this evidence is demonstrated by what we have already said upon this subject. If the evidence referred to certain rainwater conductors condemned by the plumbing inspector, the defendant has suffered no injury by the ruling complained of, as it appears that the court below refused to allow the plaintiff's claim for this work.

Evidence by the plaintiff that he furnished the extra work and materials in controversy under an agreement that he was to receive payment for them was properly admitted.

The defendant questions several rulings of the court below as to the admission of evidence upon the ground, that the testimony was not proper rebuttal. The admission of evidence on rebuttal, instead of receiving it in chief, is within the discretion of the trial court. Hoadley v. Savings Bank, 71 Conn. 599, 42 Atl. 667, 44 L. R. A. 321.

There is no error. The other Judges concurred.

(82 Conn. 343)

FENTON v. MANSFIELD et al.

(Supreme Court of Errors of Connecticut. July 20, 1909.)

1. Pleading (§ 237*) — Amendment — Conformity to Proof.

in an action for services to dece-Where, dent, the undisputed evidence showed that plaintiff was to continue the services during the lives of decedent and her sister, instead of until decedent's death, as alleged in the complaint, such discrepancy was not a total failure of proof, and could have been cured under Practice Book 1908, p. 245, § 149, by amending the com-plaint in the trial court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 603-619; Dec. Dig. § 237.*]

2. APPEAL AND ERROR (§ 197*)—PRESENTATION AND RESERVATION OF GROUNDS OF REVIEW—QUESTIONS NOT CONSIDERED BELOW.

The question of variance is not properly presented where not raised in the trial court.

[Ed. Note.—For other cases, see Appeal and cror, Dec. Dig. § 197;* Pleading, Cent. Dig. §§ 1428-1441.]

3. Appeal and Error (§ 231*)—Presentation and Reservation of Grounds of Review—Questions Not Considered Below.

A statement that there was a fatal variance between the allegations and proof was insufficient, because failing to specifically state the claimed variance, to obtain a ruling upon the question of variance in the court below, so as to entitle a review of that question.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 231;* Pleading, Cent. Dig. § 1439.]

4. TRIAL (§ 136*)—QUESTIONS FOR COURT OF JURY—VARIANCE.

Where the particular facts, alleged to materially differ from the allegations, are undisputed, the question whether they constituted a variance is one of law for the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 324; Dec. Dig. § 136.*]

5. New Trial (§ 68*) — Grounds — Verdict Against the Evidence.

Where, without disregarding the instructions, the jury based its verdict on undisputed facts variant from the averments, the fault was not theirs, and a motion for a new trial be-cause the verdict is against the evidence is not a remedy for the variance.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 68.*]

6. EXECUTORS AND ADMINISTRATORS (§ 221*)— CLAIMS AGAINST DECEDENT—ACTIONS—SUF-FICIENCY OF EVIDENCE.

Evidence, in an action for services to a decedent, held to warrant a finding, approved by the trial court, that a sum promised plaintiff by decedent was intended, not as a gift, but as compensation for her services.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 221.*]

7. EXECUTORS AND ADMINISTRATORS (§ 451*)—CLAIMS AGAINST DECEDENT — ACTIONS—IN-STRUCTIONS.

An instruction, in an action for services to a decedent, that there were certain affirmative allegations in the answer, which the reply denied, as to which the burden was on defendants, and that if a certain person took the note merely as decedent's agent, and without intention by her to relinquish control, there was no sufficient delivery, but that it might, however, with the other evidence be sufficient to establish with the other evidence be sufficient to establish

plaintiff's services, and that the giving of such note to such other person by decedent was intended as a guaranty that plaintiff should be sufficiently compensated, and that if such a conclusion should be reached by the jury, they clusion should be reached by the jury, they should determine what remained due to plaintiff, is not objectionable as containing a misstatement of the rule of burden of proof, and charging that plaintiff could recover on a quantum meruit, though no evidence was offered of the value of the services, and was a ruling that the note could be regarded as a guernity the note could be regarded as a guaranty.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 451.*]

8. EXECUTORS AND ADMINISTRATORS (§ 221*)—CLAIMS AGAINST DECEDENT—ACTIONS—ADMISSIBILITY OF EVIDENCE.

In an action for services to a decedent, In an action for services to a decedent, there was no error in permitting a witness for plaintiff, who had testified that after decedent's death he delivered a note of the amount of the claim and a letter to an executor of decedent, to be asked if he could not state more definitely when he delivered them, he answering that he could only say it was soon after decedent's death; he couldn't tell when.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 221.*]

Appeal from Superior Court, New Haven County; William S. Case, Judge.

Action by Nellie Fenton against Burton Mansfield and others, executors of the will of Lucy H. Boardman, deceased. Judgment for plaintiff, and defendants appeal. No er-

The complaint alleges, in substance, that from June 1, 1891, to March 29, 1906, the plaintiff was in the employ of the defendants' testatrix, Lucy H. Boardman, as a confidential secretary, companion, and at-That on divers days they contendant. ferred regarding additional compensation for such services, and finally agreed that, in consideration of the plaintiff's serving until the death of Mrs. Boardman, she would pay her \$5,000 above her regular wages, and in addition to previous gifts or provisions made, or to be made, in her will. That to secure payment of that sum from her estate, Mrs. Boardman, on March 22, 1906, signed and delivered to one Fields a note reading as follows: "New Haven, Conn., March 22, 1906. \$5,000. On demand after date I promise to pay to the order of Nellie Fenton, five thousand dollars at the National Tradesmen's Bank. Value received. Lucy H. Boardman" -and a letter addressed to Fields reading thus: "I hand you herewith my note of five thousand dollars (\$5,000) to the order of Nellie Fenton. Should I not give to her this sum during my life I desire that the note be handed to her to be paid out of my estate. This is intended as a gift in addition to the provision made in my will for her benefit during her life"-and the next day informed the plaintiff of the signing and delivery of said note and letter. That the plaintiff, partly in consideration of said agreesuch an agreement between the parties as to ment, continued to serve Mrs. Boardman unsupport the action for any unpaid balance for til her death, and afterwards presented her ment, continued to serve Mrs. Boardman un-

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

which was refused. Upon the trial the plaintiff offered evidence to prove these facts:

During the period of the employment of the plaintiff between 1891 and 1906 Mrs. Boardman paid her first \$3.50, then \$4, and finally \$5 a week. Soon after Mrs. Boardman employed the plaintiff, she agreed to give her compensation in addition to her wages, provided she would continue in her service, and that of her sister, Mrs. Wade, until the death of the survivor of them. At that time no definite agreement or promise was made as to the amount of such additional compensation, but Mrs. Boardman promised to provide for plaintiff in her will, and that she would compensate her. The plaintiff thereupon promised Mrs. Boardman to so continue in service. During all of said period from 1891 to 1906 Mrs. Boardman and her sister, Mrs. Wade, who lived with Mrs. Boardman, were invalids. Mrs. Boardman was 71 years of age, and Mrs. Wade 74 years of age, in 1891. The plaintiff took care of both Mrs. Boardman and Mrs. Wade; read to them; served them at meals; sewed for them; looked after Mrs. Boardman's correspondence; wrote her letters; saw callers at the house; did the shopping; and during the last five years of Mrs. Boardman's life slept in the same room with her, rendering many of the services of a trained nurse. For 11 years the plaintiff was only absent from Mrs. Boardman's service for one night.

In the early part of her employment Mrs. Boardman informed the plaintiff that she had given her a legacy of \$2,000 in a will which she had made. About 1899, when the plaintiff had lost a small investment, Mrs. Boardman said that she would amply provide for her. After making a later will, dated May 13, 1904, which is the will proved as her last will, Mrs. Boardman told plaintiff she had given her in her will the life use of \$10,000. Finally, on March 23, 1906, Mrs. Boardman told plaintiff that she had left a note with Mr. Fields for \$5,000, which would be paid out of Mrs. Boardman's estate in case it was not paid in her lifetime, provided plaintiff continued in the service of her sister and herself as agreed upon. The plaintiff, relying upon and in consideration of said promises of additional compensation, continued in the service of Mrs. Boardman until her death on March 29, 1906, performing all services required of her to the full satisfaction of Mrs. Boardman, and thereafter continued in the service of Mrs. Wade until her death, about two years later.

On March 22, 1906, Mr. Fields, the business adviser of Mrs. Boardman, acting under her instructions and at her request, prepared said letter and note made a part of the com-Mrs. Boardman signed the letter and note, and delivered them to Mr. Fields, who took them to the bank of which he was president, and kept them until after Mrs. M. Daggett, for appellee.

claim for \$5,000 to the executors, payment of | Boardman's death, when he handed them to Mr. Mansfield, one of the executors of Mrs. Boardman's will, who retained them in his possession until they were produced in court at the trial. When the letter and note were delivered to Mr. Fields, Mrs. Boardman told Mr. Fields that she could not repay the plaintiff for her services, which had been indispensable. No payment by way of the said additional compensation has ever been made to the plaintiff. She presented her claim against Mrs. Boardman's estate for \$5,000, and it was disallowed. Mrs. Boardman left an estate of \$890,000. The only provision in her will for the plaintiff was a life use of \$10,000. The defendants offered no evidence.

The only parts of the charge of the court upon which error is predicated are the following: "There are two certain affirmative allegations in the answer which the reply denies, and here the burden of proof is upon the defendants, though as the case reaches you, I think you will scarcely get beyond the allegations of the complaint and denials of the answer. • • • There is this to be said in that aspect of the case: If Mr. Fields took the note merely as Mrs. Boardman's agent, and without intention on her part to relinquish control of them in his hands, there was of course no delivery of this, and no such surrender of it by Mrs. Boardman as to perfect its validity as a binding legal obligation to pay its face amount to the plaintiff. It might still, however, in connection with other evidence as to its underlying character and purpose, be sufficient to establish such an agreement between the parties as to support an action here for any unpaid balance for Miss Fenton's services, should you find that it was believed and understood that she was insufficiently compensated, and that this act of Mrs. Boardman's was intended as a guaranty by her that any such deficiency should be made good from her estate. Should such a possible conclusion be reached by you, it would be your duty to determine, if the evidence should warrant such a computation, what, if anything, remains honestly due to the plaintiff for her serv-

Mr. Fields as a witness for the plaintiff, having testified that after Mrs. Boardman's death he delivered the note and letter to the defendant Mansfield, was asked if he could not state more definitely when he delivered them. This question was objected to, and admitted, and the witness answered: "I can only say it was soon after Mrs. Boardman's death; I can't tell when."

The jury having rendered a verdict for the plaintiff for \$5.830.33, the defendant moved for a new trial upon the ground that the verdict was against the evidence, which motion was denied.

Burton Mansfield and James E. Wheeler, for appellants. Henry C. White and Leonard HALL, J. (after stating the facts as above). There are but four reasons of appeal assigned in this case. They are: First, the denial of the defendants' motion for a new trial, upon the ground that the verdict was against the evidence; second and third, the instruction given the jury by the language of those parts of the charge complained of, as above stated; and fourth, in admitting the question asked the witness Fields.

It appears from the evidence to have been undisputed that the plaintiff was to continue the services, for which she claimed Mrs. Boardman promised to pay her the additional \$5,000, during the lives of Mrs. Boardman and of Mrs. Wade, instead of until the death of Mrs. Boardman, as alleged in the complaint. This discrepancy did not amount to a total failure of proof of the alleged cause of action. A mere variance, though material, could have been cured by amending the complaint in the trial court. Practice Book 1908, p. 245, § 149. But the question of variance is not properly presented by the record. No such question was raised in the trial court. It does not appear that any objection was made to proof that the consideration of Mrs. Boardman's alleged promise was that the plaintiff should continue her services during the life of both Mrs. Boardman and her sister, nor that the court was requested to instruct the jury that such proof was variant from the allegations of the complaint. the statement in the finding, among the facts which the defendants claimed were proved by the evidence, that "there was a fatal variance between the allegations and the proof" can be regarded as a claim of law, actually made to the court to obtain a ruling upon the question of variance, it was insufficient for that purpose, since it failed to specifically state the claimed variance. Woodruff v. Butler, 75 Conn. 679, 681, 55 Atl. 167. As the particular facts which are claimed to materially differ from the allegations of the complaint were not in dispute, the question whether they constituted a variance was one of law for the court. Morris v. Bridgeport Hydraulic Co., 47 Conn. 279, 288. There is no claim in the reasons of appeal that the court erred in charging, or in failing to charge, upon the question of variance. without disregarding the instructions of the court, the jury based its verdict upon undisputed facts which were variant from the averments of the complaint, the fault was not theirs, and a motion for a new trial for verdict against evidence is not a remedy for the variance.

The defendants made 20 written requests to charge in the trial court, but no failure to charge as requested is made a reason of appeal. Indeed, the only serious question presented in this court arises upon the alleged error of the trial court in denying the motion for a new trial, upon the ground that the verdict was against the evidence, and that question is whether the evidence showed that the

\$5,000 in question was intended by Mrs. Boardman as a gift to the plaintiff, or as an agreed compensation for her services. The trial court clearly instructed the jury that, if they found that it was intended as a gift, the plaintiff could not recover, and with equal clearness that the plaintiff's case, which to enable her to recover she was required to prove by a preponderance of evidence, rested upon a claim for compensation arising out of a claimed contract or agreement entered into between the plaintiff and Mrs. Boardman, whereby Mrs. Boardman, in consideration of the plaintiff's services rendered, and to be rendered, promised to pay the specific sum of \$5,000. The court said to the jury: "It is upon this alleged agreement that the plaintiff bases her claim and rests her case; and, as this is a vitally essential feature of the matter, I stop long enough to impress upon you here that to furnish the basis for a recovery here there must have been some valid and binding agreement between the parties, an offer and an acceptance with consideration, and a mutual understanding and agreement by the parties of and to the binding terms of the undertaking."

Among the circumstances which it is urged support the claim that Mrs. Boardman intended by her said acts to make a gift to the plaintiff of the \$5,000, and not to pay it as compensation for services, are the facts that the plaintiff during the entire term of her services was paid her regular wages; that the sum of \$5,000 was a large one to be paid as additional compensation considering the services rendered, and the sums already paid or promised; and that in the letter with Mr. Fields with the note Mrs. Boardman says: "This is intended as a gift. * * *" On the other hand, in support of the claimed agreement to pay this sum as additional compensation, it is claimed that the evidence shows that the weekly compensation paid to the plaintiff was inadequate, and was admitted by Mrs. Boardman to be inadequate for the services rendered; that Mrs. Boardman said to Mr. Fields and to the plaintiff that the plaintiff's services were invaluable, and that "she could not begin to compensate her for what she had done for them"; that Mrs. Boardman told the plaintiff that if she would stay with her and her sister during their lives, she would give her additional compensation, and that the \$5,000 was given, or promised to be paid, in fulfillment of that agreement; and that Mrs. Boardman states in the note for the \$5,000 that it is for "value received." The question whether the \$5,000 was intended as a gift or as a payment under such an agreement was fairly submitted to the jury, and they must have found that it was intended as compensation, and not as a gift. The trial judge, who heard the testimony and observed the witnesses, has refused to set the verdict aside. We do not find that he erred in such refusal.

773

The criticism of those portions of the had charge of the business of the firm, which harge set forth in the second and third reasons of appeal, upon the grounds that they ontain a misstatement of the rule of the urden of proof, as applicable to this case, assessed for taxation in U. charge set forth in the second and third reasons of appeal, upon the grounds that they contain a misstatement of the rule of the burden of proof, as applicable to this case, and an instruction that the plaintiff could recover on a quantum meruit although no evidence was offered regarding the value of the services rendered, and a ruling that the \$5,000 note could be regarded as a guaranty, is not justified. These portions of the charge must be read in connection with the remainder of the charge. We have already said that we interpret the charge as clearly instructing the jury that the plaintiff could not recover without proving that there was an agreement to pay the \$5,000 as additional compensation for services. In speaking of the note as a "guaranty" that word was evidently not used in its legal sense, but as meaning that the note might be regarded, in connection with other evidence, as a written statement of Mrs. Boardman that there was an unpaid balance for services under a special agreement, and as a statement made to enable the plaintiff to collect the balance "honeafly due to the plaintiff for her services" under such agreement.

There was no error in admitting the question asked the witness Fields.

There is no error. The other Judges concurred.

(82 Conn. 266)

JACKSON et al. v. TOWN OF UNION. (Supreme Court of Errors of Connecticut. July 20, 1909.)

1. TAXATION (§ 538*)-RECOVERY OF TAXES PAID.

A payment of taxes to avoid the seizure and sale of the property of the taxpayer is not voluntary, and he may recover it on showing that the taxes were illegally assessed and that in equity the municipality had no right to retain the same.

[Ed. Note.—For other cases, see Taxa Cent. Dig. §§ 999, 1000; Dec. Dig. §§ 538.*]

2. Taxation (§ 72*)—Assessment—Peoperty of "Trading or Mercantile Business"—
"To Trade"—"Mercantile."

"To Trade"—"Mercantile."

A firm engaged in the business of buying standing timber in large quantities, and cutting and sawing the same. and selling the lumber, is engaged in a "trading or mercantile business," within Gen. St. 1902, § 2342, providing for the assessment for taxation of the property of any trading or mercantile business; "to trade" being to engage in the purchase or sale of merchandise, and the word "mercantile" being defined as of or pertaining to merchants, or the traffic carried on by merchants. the traffic carried on by merchants.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 72.*

For other definitions, see Words and Phrases, vol. 5, pp. 4477, 4778.]

8. TAXATION (\$ 263*)—ASSESSMENT—PLACE OF ASSESSMENT.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 263.*]

4. Taxation (§ 587*)—Recovery of Taxes PAID.

Where personal property was properly tax-able in the town where it was assessed, the owner, on paying the tax to avoid seizure and sale of the property, could not recover the taxes paid merely because the amount of the tax, though just, was not determined in the manner provided by statute, and he could recover back, if anything, only the excess of the amount paid over what would have been the tax, had it been regularly assessed.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 537.*]

5. TAXATION (§ 543*) - RECOVERY OF TAXES PAID-PRESUMPTIONS.

Where, in an action to recover a tax on the property of a trading business, it was not shown that the tax was larger than it would have been had the average amount of goods kept on hand for sale during the year been taken in making the assessment, as required by Gen. St. 1902, § 2342, nor that the amount of goods on hand at the date of the assessment was not the average amount kept during the year. not the average amount kept during the year, the court could not assume that any part of the tax was excessive.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 543.*]

Appeal from Superior Court, Windham County; George W. Wheeler, Judge.

Action by F. R. Jackson and others against the Town of Union. From a judgment for defendant on sustaining a demurrer to the complaint, plaintiffs appeal. Affirmed.

Charles E. Searls, for appellants. Charles Phelps and Willis H. Reed, for appellee.

HALL, J. The complaint alleges substantially these facts: The plaintiffs, who resided in the town of Eastford, in this state, were, on October 13, 1906, engaged as copartners in the business of purchasing standing wood and timber in this state and elsewhere, and cutting and sawing and selling it and the lumber made from it, and were on said day the owners of certain sawed lumber stacked upon the land upon which it had been cut, in the defendant town of Union. The only fixed location of the plaintiffs' business, so far as it had one, was their office in the store of two of said conartners in the town of Eastford, but the business of cutting, sawing, and stacking said wood and lumber was done in the town of Union, although no person residing in the town of Union had charge of such business. At its meeting on the first Monday of October, 1906, the defendant town laid a tax of 25 mills on a dollar on its assessment list of A firm engaged in the business of buying standing timber, cutting and sawing it, and selling the lumber, stacked the sawed lumber on the land on which it had been cut in U., and sold it from there. No person residing there

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that it was illegal, but finally, to save their property from sale under levy, paid the same under protest, and have demanded the repayment of it, which has been refused. The defendant town demurred to this complaint, upon the ground that it appeared therefrom that the said goods were the property of a trading, or mercantile, or manufacturing, or mechanical business, and were properly assessed in the name of the plaintiffs. The court sustained the demurrer, and rendered judgment for the defendant.

The payment of the tax by the plaintiffs to avoid the seizure and sale of their property was not a voluntary one, and they are entitled to recover it back if the alleged facts show that the tax was illegally assessed, and that in equity and good conscience the defendant has no right to retain it. Goddard v. Town of Seymour, 30 Conn. 394, 401; Hubbard v. Brainard, 35 Conn. 563, 567. The tax in question was assessed under section 2342 of the General Statutes of 1902, which provides that: "The property of any trading, mercantile, manufacturing, or mechanical business shall be assessed in the name of the owner or owners in the town, city or borough where the business is carried on; and the list of any such owner or owners shall be given in by the person having charge of such business residing in the town, city or borough, when the owner or owners do not reside therein. The average amount of goods kept on hand for sale during the year, or any portion of it, when the business has not been carried on for a year previous to the first day of October, shall be the rule of assessment and taxa-* * This section shall apply to the property of all persons whether residents of this state or not and to the property of all corporations whether domestic or foreign." Section 2343 provides that "traders of any kind when their business is not located shall be assessed in the same manner as is provided in section 2342, in the list of the town, city or borough where they reside.

Under its demurrer the defendant insists that the complaint fails to show that the sawed lumber in question was unlawfully assessed under section 2342, while the plaintiffs contend that it appears from the facts alleged, first, that their sawed lumber in the town of Union was not the property of any trading, mercantile, manufacturing, or mechanical business; second, that, if it was the property of either of said kinds of business, such business was not carried on in the town of Union; and, third, that, if it was the property of such a business carried on in the defendant town, the tax was illegally assessed, because the average amoun, of goods kept on hand for the year or portion of a year during which the business was carried on previous to October 1, 1906,

The words of the statute, "any trading or mercantile business," are sufficiently comprehensive to include such a business as that described in the complaint. To trade is to engage in the purchase or sale of goods, wares, and merchandise. Century Dictionary; Webster's International Dictionary. The adjective "mercantile" is defined as "of or pertaining to merchants, or the traffic carried on by merchants." Century Dictionary. One engaged in the business of keeping and selling lumber in considerable quantities is properly called a "lumber merchant," and his business a "mercantile business." From the amount of the tax, it would appear that the plaintiffs kept lumber for sale in the town of Union to the value of at least several thousand dollars. complaint says that the purchasing of standing wood, and cutting, sawing, and selling it, and the lumber made from it, was a business in which the plaintiffs were en-This, of course, means that they gaged. were following this occupation for profit.

There is no express averment in the complaint that the business to which the taxed property belonged was not carried on in the town of Union, and was carried on in the town of Eastford; nor do the facts alleged show that such was the case. Gower v. Jonesboro, 83 Me. 142, 21 Atl. 846. The averment of the complaint is that, "so far as it had a fixed location," the business was carried on at a store belonging to two of the plaintiffs in Eastford, where the plaintiffs had their only office. What part of their business, if any of it, was carried on at this office in a store not belonging to the copartnership does not appear. The timber was cut, and the lumber prepared and stored, and apparently delivered to purchasers, in the town of Union. It is entirely consistent with the alleged facts that the timber from which the lumber in question was sawed was purchased in the town of Union, and that the lumber sold, which had been sawed and stacked in that town, was sold there. Had there been a fair question as to which town the business should be considered as carried on in, for the purposes of taxation, the assessors might properly have regarded an election of the owners made in good faith to list their goods for taxation in the town in which they resided. But it is not suggested in the complaint that the plaintiffs ever listed or attempted to list this property anywhere for taxation, or that it has been taxed elsewhere than in the town of Union.

It appears from the complaint that the property so assessed and taxed in the town of Union was the property owned by the plaintiffs in that town in connection with said business on the 1st of October, 1906. It does not appear that the rule fixed by the statute, namely, "the average amount of goods kept on hand for sale during the year or portion of a year, * * *" was followed was not adopted as the rule of assessment. in making the assessment and taxation. It

is not, however, alleged that it was not, nor after December 27, 1907, and did not file his that the tax imposed was larger than it certificate of lien until March 26, 1908, was not would have been had the stephtory rule entitled to a lien under such certificate, though would have been, had the statutory rule been followed. It does not appear that the rule was not in effect followed, since it does not appear, and we cannot assume, that the amount of goods on hand on the 1st of October was not the average amount kept on hand for sale during the previous year or part of the year in which the plaintiffs were engaged in said business. It is further to be noted that this is not a proceeding by a municipality for the collection of a tax, requiring proof that the tax was assessed in accordance with the statutory requirements, but an action to recover back a tax already paid. If the plaintiffs' goods were taxable in the town of Union, they cannot in this action recover back the \$75 they have paid merely because the amount of such tax, although just, was not determined in the manner provided by the statute. Goddard v. Town of Seymour, 30 Conn. 401. If, after such payment of the tax, they could recover back anything upon the ground of such irregular assessment, it would only be the excess of the amount paid over what would have been the tax, had it been regularly assessed.

There is no error. The other Judges concurred.

(82 Conn. 298)

BOOTH v. VON BEREN et al.

(Supreme Court of Errors of Connecticut. July 20, 1909.)

1. MECHANICS' LIENS (§§ 121, 132*)-MATERI-ALMAN—LIENS—REQUISITES.

A materialman, furnishing material to a A materialman, furnishing material to a building contractor not under a written contract assented to by the owner, in order to acquire a valid lien, must lodge with the town clerk his verified, written certificate describing the premises, stating the amount of the lien claimed, the date he began to furnish materials, the amount claimed to be justly due, within 60 days after he ceased to furnish such material, and give notice to the owner of his intention to claim a lien within the same period, as required by Gen. St. 1902, §§ 4136, 4137.

FEd. Note.—For other cases, see Mechanica'

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. §§ 121, 132.*]

2. MECHANICS' LIENS (§ 172*)—MATERIALMAN—MATERIALS SUBSEQUENTLY FURNISHED.
Under Gen. St. 1902, § 4136, requiring a materialman, in order to obtain a lien, to file a certificate with the town clerk within 60 days for materials furnished, etc., a materialman cannot acquire a lien for materials furnished after lodging the certificate, though he may give no-tice that he intends to claim a lien for materials to be thereafter supplied.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 303; Dec. Dig. § 172.*]

3. MECHANICS' LIENS (§ 132*)-MATERIALMAN

—CERTIFICATES—FILING—TIME.

Under Gen. St. 1902, § 4136, requiring a naterialman, in order to obtain a lien, to file a certificate with the town clerk within 60 days ifter ceasing to furnish materials, a material-nan having no contract with the contractor, who furnished no material to him for a house

he subsequently furnished materials to complete the house to another contractor, for which he was paid.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 182.*]

4. Mechanics' Liens (§ 129*)—Materialman -RIGHT TO LIEN.

A materialman, not having filed a certificate for a lien in time to perfect a lien for ma-terials furnished the original contractor, subseceriais rumished the original contractor, subsequently furnished more material to the contractor's successor, who completed the building. Held that, having lost his right to a lien for the materials first furnished, such right could not be revived by the filing of a new certificate covering material furnished to both contractors; the materials purchased the second contractors. the materials purchased the second contractor having been paid for prior to the verification of such second certificate.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 203; Dec. Dig. § 129.*]

Appeal from Superior Court, New Haven County; Joel H. Reed, Judge.

Action by John R. Booth, as trustee in bankruptcy of one Humphrey, to determine the validity of certain mechanics' liens on the property of Ferdinand Von Beren and others, the bankrupt's debtor, and for a judgment requiring the latter to pay plaintiff the sum due the bankrupt less the amount of the liens found to be valid. From a judgment sustaining the flen of defendant Mansfield, plaintiff appeals. Reversed.

The court found these facts:

On October 1, 1907, one Humphrey, a builder, entered into a written agreement with the defendant Von Beren to build a house for the latter for the sum of \$5,475, and for which there is now due Humphrey under the contract the sum of \$1,275. Humphrey carried on the work by himself and subcontractors until about the middle of February, 1908, at which time the house had been plastered and the exterior work nearly completed. On March 6, 1908, Von Beren, because of Humphrey's failure to satisfactorily advance the work, terminated Humphrey's employment, and neither Humphrey, nor any of the subcontractors under him, have since by order of Humphrey rendered any services or furnished any materials in the construction of said house. On March 24, 1908, Humphrey, on his own petition, was adjudicated a bankrupt, and the plaintiff was duly appointed and qualified as trustee on his estate. At that time, and for six months prior thereto, Humphrey was indebted to Mansfield in about \$7,000 for lumber supplied for use in various houses which Humphrey had built. On March 17, 1908, Von Beren entered into a written agreement with one Murdock to complete said house for the sum of \$2,300, and Murdock thereupon finished the house in accordance with his said agreement. The defendant Mansfield has for many years been engaged in the business of selling lumber of all kinds, and Hum-

"For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

phrey had for a long time been one of his; materials and services was \$827.77, and that regular customers, and for about a year prior to October 1, 1907, Mansfield had furnished him all the lumber he required in his work as building contractor. Mansfield commenced to deliver material upon the order of Humphrey at the Von Beren house October 21, 1907, and ceased to deliver material to, or render any services in, the construction of said house upon the order of Humphrey December 27, 1907. The value of the materials so furnished by Mansfield was \$827.77. The material so furnished was charged to Humphrey upon the books of Mansfield. record of sale and deliveries of materials was by Mansfield kept separate from the record of materials furnished upon order of Humphrey for the construction of other houses, and the account against Humphrey for materials so furnished for the Von Beren house was kept separate from the accounts against Humphrey for materials furnished in the construction of other houses. None of this material was ever ordered by or charged to Von Beren.

On or about December 27, 1907, Mansfield became informed, both by the statements of Humphrey and by personal observation, that the house was ready for plastering, and that the material which he had furnished to that date was substantially all that was necessary to complete the exterior work on the house. From his knowledge and experience of building he knew that in the usual course no further orders for the lumber required for the completion of the interior would be given for several weeks. On February 8, 1908, and again on or about February 17th, Mansfield was informed by Humphrey that the plaster was nearly dry, and that he would order the lumber for the completion soon. On March 1st Mansfield was again informed by Humphrey that he expected to get into the house in a few days, and would send him a list of the lumber needed for interior completion. At this time Mansfield did not know that Humphrey was in failing circumstances, but he did know it some time before the filing of the petition in bankruptcy, and knew that Humphrey had stopped work on the Von Beren house early in February.

On March 25, 1908, Mansfield gave notice to Von Beren that he had commenced to furnish materials, and of his intention to claim a lien therefor, and on March 26, 1908, lodged a certificate of a mechanic's lien on the premises of Von Beren in the town clerk's office of New Haven. In said certificate Mansfield stated under oath that, in accordance with a certain contract between himself and said Humphrey, as the contractor and agent for said Von Beren, he commenced to furnish materials and render services in the construction of a building of said Von Beren on the 21st of October, 1907, and ceased furnishing such materials and rendering such services on the 27th of De-

that sum with interest from said 27th of December was the amount due him, and for which he claimed a lien.

Mansfield was informed about March 10th that the contract for the completion of the Von Beren house was to be taken by said Murdock, who was a regular customer of Mansfield, and a man of responsibility and credit; and, on March 18, 1908, Mansfield began to furnish materials upon the order of Murdock for the completion of the Von Beren house, and thereafter continued so to do. ceasing to furnish such materials on May 4. 1908. The materials so furnished were of the value of \$247.94. They were ordered by Murdock to be for use in the completion of the Von Beren house, and were used therein. Some were delivered on the Von Beren premises, but the larger part to Murdock, who took them to his own shop, and worked them before using them. The records of the orders and deliveries and the accounts for the materials so furnished for the Von Beren house were kept by Mansfield separate from other records and accounts against Murdock. These materials were furnished in the regular course of business, in good faith, and not for the purpose of thereby extending the time for filing his certificate of lien for the materials furnished upon the order of Humphrey.

On June 29, 1908, Mansfield filed for record in the town clerk's office in New Haven a certificate of lien, in which he stated under oath that, in accordance with a contract between himself and Humphrey, and also a contract between himself and said Murdock. each of them contractors and agents of Von Beren, he had furnished materials and rendered services in the construction of a building of said Von Beren; that he commenced to furnish materials and render services on his contract with Humphrey on the 21st of October, 1907, and ceased on the 27th of December, 1907, and commenced to furnish materials and render services on the contract with Murdock on the 18th of March, 1908, and ceased on the 1st day of May, 1908; that there was then due him under the contract with Humphrey \$827.77, and under the contract with Murdock \$247.94; and that he claimed a lien for said sums with interest. Mansfield in fact ceased to furnish materials and render services upon the order of Murdock, which were used in the construction of the Von Beren building, on the 24th of April, 1908, unless four clothes posts delivered by Mansfield to Murdock in good faith on May 1, 1908, and stated to be for the Von Beren house, and which were included both in Von Beren's contracts with Humphrey and that with Murdock, are to be deemed materials used in the construction of the Von Beren house or its appurtenances.

At the time defendant Mansfield subscribed and swore to the certificate of lien of June cember, 1907, and that the value of such 29, 1908, there was nothing due to him from



Murdock for any materials furnished or serv-| terials thereafter rendered or furnished. ices rendered in the construction of said house, because said Murdock had prior to said time paid defendant in full for all such materials and services. Mansfield has furnished no material, and rendered no services, in the construction of the Von Beren house after December 27, 1907, for which he was not paid, but Mansfield signed and swore to said certificate in good faith, believing that said Murdock account had not been paid.

Upon these facts the court held, among other things, that the Mansfield lien was valid, and that the amount of it, \$869.15, should, with other sustained liens and claims, be deducted from the indebtedness of Von Beren to Humphrey, and the balance of \$30.-12 paid to the plaintiff.

J. Birney Tuttle, for appellant. Leonard M. Daggett and James K. Blake, for appellee.

HALL, J. (after stating the facts as above). All the facts having been found under the issues raised by the plaintiff's reply to the defendant Mansfield's answer, it is unnecessary to consider the ruling of the trial court upon the plaintiff's demurrer to that answer. The only question presented by this appeal is whether upon the facts found, Mansfield has, under our statutes, a valid mechanic's lien upon Von Beren's land and building.

Mansfield was not an original contractor for the construction of the house in question. nor did he have a written contract with the original contractor assented to by the owner. To acquire a valid lien for the materials which he furnished it was therefore necessary for him to comply with the provisions of sections 4136 and 4137 of the General Statutes of 1902. The former required him, within 60 days after he had ceased to furnish such materials, to lodge with the town clerk of New Haven his certificate in writing, describing the premises, the amount of the claimed lien, the date of the commencement of the furnishing of materials, stating that the amount claimed was justly due, as nearly as the same could be ascertained, and subscribed and sworn to by him. The latter required him, after commencing, and not later than 60 days after ceasing to furnish the materials, to give written notice to the owner of his intention to claim a lien therefor on said building. Mansfield gave one notice, and lodged two certificates. He gave the notice March 25, 1908, and lodged the first certificate the following day, and lodged the second certificate three months later, June 29, 1908, without further notice. decisive question is, Did he acquire a lien under either or both of these certificates?

Although one may properly give notice under the statute of his intention to claim a lien for services or materials which he has commenced, but has not yet ceased to render or furnish, he cannot by lodging a cer-

The materials or services for the furnishing or rendering of which a lien is sought to be acquired by the lodging of a certificate must have been furnished or rendered before the certificate is lodged with the town clerk. Section 4136 requires the certificate to be lodged within 60 days after the materials or services have been furnished or rendered. and requires it to state the amount of the claimed lien, and that that amount is justly due. Under his first certificate, therefore, Mansfield could only acquire a lien for materials furnished prior to March 26, 1908. But he actually furnished no materials to Humphrey after December 27, 1907, and furnished no materials to any person for this building between that date and March 18, 1908, when he began furnishing materials to Murdock, which are clearly not embraced in the first certificate. He, therefore, neither gave his notice, nor filed his first certificate, within 60 days after he ceased furnishing the materials described embraced in that certificate. unless he can properly be regarded as not having ceased to furnish materials on the 27th of December, 1907, but as having continued to furnish materials after December 27, 1907, and until a date within 60 days prior to March 26, 1908, or can be excused for having failed to file his certificate of lien for the materials described in his certificate within 60 days from the time he ceased to furnish them.

It does not appear that Mansfield was under any express contract with Humphrey to furnish to him even the materials furnished prior to December 27, 1907. Much less does it appear that he ever contracted with Humphrey to furnish to him, or to any one else, any other materials for the Von Beren house than those furnished on and prior to December 27, 1907, or that he was under any obligation to do so, or that Humphrey, or any other person, was under any obligation to purchase other materials of him for that purpose. Humphrey was merely a customer of Mansfield. While Mansfield may, in October, 1907, when he commenced to furnish materials to him for the Von Beren house, have intended to supply Humphrey with all the materials he might require for that purpose, and while the furnishing of materials from October 21, to December 27, 1907, may properly be regarded as a continuous transaction, it is not found, nor does it appear, that at any time after December 27, 1907, and within 60 days prior to March 26, 1908, he even intended to furnish Humphrey any further materials for the Von Beren house than those already furnished, nor that prior to March 18, 1908, or at the earliest prior to the 10th of March, when he learned that Murdock had been given the contract of completing the work, he intended to furnish further materials to any one for the Von Beren house. Mansfield learned early in February. tificate acquire a lien for services or ma- 1908, that Humphrey had stopped work on

the Von Beren house, and knew some time before filing the first certificate that Humphrey was in failing circumstances. have the evidence of Mansfield's own statements that he should not be regarded, and has not regarded himself, as having continued to furnish materials during the period of more than 60 days, between December 26, 1907, and March 18, 1908, when he commenced to furnish Murdock, and during which period he actually furnished no materials for this house to any person. He expressly states in his certificate of March 26th that he ceased to furnish materials on the 27th of December, 1907, and again in his second certificate of June 29, 1908, he repeats the statement that on the contract with Humphrey he ceased to furnish materials on the 27th of December, 1908, and again commenced with Murdock on the 18th of March, thus clearly leaving the interval between December 27th and March 18th when he did not consider that he was furnishing materials for this house, and he does not claim that he made these statements under any mistake. It is the policy of our law that incumbrances upon real estate shall appear of record. "The statute allows mechanics and materialmen 60 days in which to file their liens after their work is performed or materials furnished, and for obvious reasons it does not mean to allow a longer period." Flint v. Raymond, 41 Conn. 510, 514. Upon the facts before us Mansfield cannot be regarded as having furnished materials between December 27. 1907, and March 18, 1908. His first certificate was therefore filed too late to enable him to acquire the lien claimed therein.

When Mansfield filed his second certificate June 29, 1908, claiming a lien for both the \$827.77 for materials furnished Humphrey and the \$247.94 for materials furnished Murdock, he had already been paid the latter sum, and for all materials he had furnished to any person for the Von Beren house since December 27, 1907. He, therefore, acquired no lien under his second certificate, unless the furnishing of materials to Murdock after March 18, 1908, gave him a lien for those furnished Humphrey prior to December 27, 1907. Waiving the question of whether this second certificate is rendered invalid by the misstatement in it that there was due Mansfield \$247.94 for materials furnished Murdock between March 18, and May 1, 1908, when in fact Mansfield had been fully paid for all the materials he had furnished for the Von Beren house since December 27. 1907, and waiving also the further question of whether this certificate was filed within the statutory period of 60 days, since it appears that Mansfield ceased to furnish materials to Murdock on the 24th of April, unless May 1st should be regarded as the day when he ceased to furnish such materials, because on that day Mansfield furnished

Murdock four clothes posts for the Von Beren premises, Mansfield still acquired, under this second certificate, no lien for the materials furnished prior to December 27, 1908. The materials furnished to Humphrey and those furnished to Murdock for the Von Beren building, in so far as they were furnished under contracts, were furnished by Mansfield under entirely separate and independent agreements with each of these two persons. Having, by delaying to file his certificate within 60 days from the time he ceased to furnish materials to Humphrey, lost his right to lien for such materials, the two separate transactions of furnishing to Humphrey and to Murdock cannot be tacked together so as to revive that lost right, or to extend the time for filing a certificate for the materials furnished Humphrey. Farnham v. Davis, 79 Me. 282, 9 Atl. 725; Noye Mfg. Co. v. Thread Flouring Mills Co., 110 Mich. 161, 67 N. W. 1108; Maryland Brick Co. v. Dunkerley, 85 Md. 199, 36 Atl. 761; Nye Co. v. Berger, 52 Neb. 758, 73 N. W. 274; Brown v. Aliis, 98 Wis. 120, 73 N. W. 656; King v. Cleveland Ship Co., 50 Ohio St. 320, 34 N. E. 436; Phillips on Mechanics' Liens, § 324.

The defendant Mansfield has no lien upon the Von Beren building, and no part of his claim of \$869.15 should have been deducted from the sum due Humphrey from Von Beren.

There is error, and the case is remanded for the entry of judgment in accordance with the views above expressed.

The other judges concurred.

(82 Conn. 262)

McCARTHY v. HUGO, Sheriff.

(Supreme Court of Errors of Connecticut. July 20, 1909.)

1. CONTEMPT (§ 2*)—DEFINITION.

It is a "contempt" openly to insult or resist the powers of the court or persons of the judges, or to do acts which may lead to the disregard of their authority, and from their nature to require a summary interpositon to preserve order in the court and to maintain dignity of the judges.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 1-5; Dec. Dig. § 2.* For other definitions, see Words and Phrases, vol. 2, pp. 1489-1492; vol. 8, p. 7614.]

2. CONTEMPT (§ 3*)—"CRIMINAL CONTEMPT."
A "criminal contempt" is conduct that is directed against the dignity and authority of the court.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 4; Dec. Dig. § 3.* For other definitions, see Words and Phrases, vol. 2, pp. 1747, 1748.]

3. CONTEMPT (§ 3*)—PUBLOINING EVIDENCE.
Where defendant in a criminal prosecution, after court had been opened and during a recess, while the judge was present in his retiring room, purloined from the prosecuting officer a material instrument of evidence and substituted for it a false one, in order to impose

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

upon the court, he was guilty of criminal con- ed, he took from his pocket a bottle of

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 4; Dec. Dig. § 3.*]

4. CONTEMPT (§ 6*) — PRESENCE OF JUDGE - "PRESENT IN COURT."

The judge presiding at a criminal trial was "present in court" when an act constituting contempt was committed, though he was in his retiring room during a short recess while waiting for the arrival of an interpreter for a witness who had already been called to the stand.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 6-13; Dec. Dig. § 6.*

For other definitions, see Words and Phrases, vol. 6, p. 5529.]

5. Contempt (§ 35*)—Punishment-Jurisdic-

TION.

TION.

Under Gen. St. 1902, \$ 506, providing that any court may punish, by fine and imprisonment, any person who shall in its presence behave contemptuously, and that no justice of the peace shall inflict a greater fine than \$7 nor a longer imprisonment than 30 days, the town court of Branford had jurisdiction to punish a contempt by fine and imprisonment.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 105, 106; Dec. Dig. § 35.*]

6. CONTEMPT (§ 54*) — PROCEDURE — INFORMATION AND WARRANT.

Though contempt was committed in the presence of the court, it was proper to proceed by information and warrant.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 143-149; Dec. Dig. § 54.*]

Appeal from Court of Common Pleas, New Haven County; Earnest C. Simpson, Judge. Habeas corpus by Timothy J. McCarthy

against Philip Hugo, Sheriff. From a judgment dismissing the writ, petitioner appeals. No error.

James D. Hart, for appellant. Robert C. Stoddard, for appellee.

HALL, J. Upon the issues raised by the defendant's return to the writ of habeas corpus and the subsequent pleadings, the following facts were found by agreement in the trial court:

On January 11, 1909, the case of State v. Timothy J. McCarthy, charged with violation of the liquor law, was on trial before the town court of Branford, in the town courtroom in said town. The judge of said court was on the bench holding said court. Besides, inside the rail of said courtroom proper there were present the deputy judge and clerk of said court, the prosecuting attorney, a constable, acting as officer of said court, the court stenographer, the counsel for said McCarthy, and the defendant, Mc-The court was formally opened. Carthy. Mr. McCarthy was put to plea, and pleaded not guilty. All of these aforesaid persons were seated about the lawyers' table, which table was placed directly in front of the bench of the court, with the exception of Officer Bradley, who occupied the officer's chair, and the judge, who was on the bench. The prosecuting attorney was seated at the end of the table, and, after court had open-

whisky, which, it appeared in evidence, had been delivered to him as prosecuting attorney, and placed it on the table directly in front of him, which bottle was to be used in the trial of the case as an exhibit; the state claiming that this bottle contained the whisky that was illegally sold by said McCarthy. The trial of the case proceeded: one witness being called, his testimony taken, and dismissed. Another witness was then called. As he was a foreigner, and could not speak the English language intelligently, an interpreter was sent for. When the interpreter was sent for, the court ordered a short recess, and left the bench, and stepped into the judge's retiring room, which opens directly from the bench and from the courtroom. When the prosecuting attorney was not looking, McCarthy took said bottle of whisky and placed a similar bottle containing ginger ale upon the table at the place where the bottle of whisky had been. Mc-Carthy then left the courtroom, and did not return the bottle of whisky.

Upon the 15th of January, 1909, the petitioner, McCarthy, was arrested upon a warrant issued upon the information of the prosecuting attorney, charging him with having, during the progress of a certain criminal cause, then and there on trial before said town court, willfully, contemptuously, and with intent to deceive, insult, and impose upon the court, and obstruct and prevent the due administration of justice, taken said bottle of whisky in the manner above stated. It appeared by the mittimus, signed by said judge of the town court and made a part of the defendant sheriff's return to the writ of habeas corpus, that Mc-Carthy was found guilty of said acts of contempt, and was ordered to pay a fine of \$7 and the costs, taxed at \$29.71, and be imprisoned in the New Haven jail for the period of 30 days. Upon these facts the court of common pleas dismissed the writ of habeas corpus.

'Contempts are openly to insult or resist the powers of the court or the persons of . the judges, or to do acts which may lead to a general disregard of their authority, and from their nature require a summary interposition to preserve order in the court and maintain the dignity of the judges." 2 Swift's Dig. 380. A criminal contempt is conduct that is directed against the dignity and authority of the court. Church v. Pearne, 75 Conn. 350, 353, 53 Atl. 955, 957.

Upon the facts recited McCarthy was clearly guilty of a criminal contempt. He purloined from the prosecuting officer a material instrument of evidence, and substituted for it a false one, in order to impose upon the court and defeat the prosecution of a criminal case. His corrupt act was committed in the courtroom and while the court

and had not been adjourned. The recess was a mere suspension of the proceedings of the trial, which it was known might be resumed at any moment. The court officers had not been excused, but remained in attendance in the performance of their duties. The judge, though not on the bench, was present in his retiring room, ready to proceed with the trial upon the arrival of an interpreter for a witness who had already heen called to the stand.

1. Indictment and Information (§ 110*) — Sufficiency—Disturbance of Public As-

The act was committed in the presence of the judge. In State v. Smith, 49 Conn. 376-383, we held that the presiding judge at a criminal trial was present in court when he had withdrawn for a few moments to an antercom directly back of the bench, but was within hearing of the proceedings in court. In Savin's Petition, 131 U.S. 267, 9 Sup. Ct. 699, 33 L. Ed. 150, the alleged contempt consisted of an endeavor in the jury room, used as a witness room, and in the hallway of the courthouse, to bribe and prevent from testifying a person who was in attendance at court as a witness in behalf of one of the parties to a suit then being tried. It was held that the misbehavior was in the presence of the court, and that the court, when in session, was present in every part of the place set apart for its own use and the use of its officers, jurors, and witnesses.

The town court of Branford had jurisdiction to punish the contempt by the sentence of fine and imprisonment imposed. Section 506 of the General Statutes of 1902 provides that "any court may punish by fine and imprisonment any person who shall in its presence behave contemptuously or in a disorderly manner, but no justice of the peace shall inflict a greater fine than seven dollars, nor a longer imprisonment than thirty days; and no other court shall inflict a greater fine than one hundred dollars, nor a longer term of imprisonment than six months." This statute limits the penalty for contempts in the presence of the court. Welch v. Barber, 52 Conn. 147-156, 52 Am. Rep. 567. As McCarthy's misconduct was in the presence of the court, it is applicable to this case.

The manner of procedure by information and warrant does not affect the question of whether the act of misbehavior was in the presence of the court. Savin, Petitioner, 131 U. S. 277, 9 Sup. Ct. 699, 33 L. Ed. 150. Proceedings for the punishment of contempts should generally conform as nearly as possible to proceedings in criminal cases, and when witnesses are required to prove the act of contempt it is proper for an informing officer to bring the offense to the attention of the court. Church v. Pearne, 75 Conn. 353, 53 Atl. 955. It appears sufficiently clearly from the information filed

was in session. The court had been opened | that the contempt charged was committed in the presence of the court.

There is no error. The other Judges concurred.

(82 Conn. 321)

STATE v. CARROLL

(Supreme Court of Errors of Connecticut. July 20, 1909.)

SEMBLAGE-LANGUAGE OF STATUTE.

An information for disturbing a meeting of a board of aldermen, following the language of the statute, but not stating the act or means whereby accused disturbed the meeting, is insufficient; for, while it is generally sufficient to charge a misdemeanor in the language of the statute creating it, it is not so where the landau transfer of the statute creating it, it is not so where the landau transfer of the statute creating it, it is not so where the landau transfer of the statute creating it, it is not so where the landau transfer of the statute creating it, it is not so where the landau transfer of the statute creating it. mage includes cases not within the intent of the statute.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 110.*]

2. CRIMINAL LAW (\$ 970°)-MOTION IN AB-BEST—GROUNDS.

The objection that the information does not

The objection that the information does not describe in any way the offense for which accused is prosecuted can be raised by motion in arrest of judgment, as well as by demurrer. [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \$\frac{2}{3}\$ 2445-2462; Dec. Dig. \$\frac{2}{3}\$

3. Criminal Law (§ 400*)—Evidence—Best AND SECONDARY.

A petition presented by accused to the door aldermen on the occasion he was charged to have disturbed their meeting is the best evidence of its contents.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879-886; Dec. Dig. § 400.*]

Appeal from Criminal Court of Common Pleas, New Haven County; Isaac Wolfe, Judge.

Anthony Carroll was convicted of disturbing a meeting of the board of aldermen of the city of New Haven, and he appeals. New trial granted.

David E. Fitzgerald and Walter J. Walsh, for appellant. Robert J. Woodruff, Pros. Atty., for the State.

THAYER. J. The information charges that the defendant did "willfully and unlawfully interrupt and disturb a certain assembly of people met in the city hall of the town of New Haven for a lawful purpose, to wit, the board of aldermen of the city of New Haven, against the peace and contrary to the statute." After verdict the defendant duly filed a written motion in arrest of judgment upon the ground that the information is insufficient.

The objection to the information is stated in various ways, but the real ground of objection is that it does not state the act or means by which the defendant disturbed and interrupted the meeting of the board of aldermen. The information follows the language of the statute. This is ordinarily

eFor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

enough. But it is not so in all cases. Manifestly an assemblage of people may be disturbed and interrupted in a variety of ways, some within and some not within the prohibition of the statute. Such interruption may arise from language, noise, or conduct in the room where the people are assembled, or it may arise from acts and conduct outside of and at a distance from the place of assemblage. It may arise from the lawful and proper operation of a sawmill or other mechanical contrivance in the ordinary course of the owner's business, as well as from an unnecessary and unlawful noise, as by shouting or the firing of pistols or cannon in the neighborhood of the assemblage. The statute cannot intend to punish a person for the lawful conduct of his business, although it may interrupt or disturb persons who have assembled near by. But the language of the statute is general, and embraces within its terms cases not within its spirit and in-While it is generally sufficient to charge a statutory misdemeanor in the language of the statute creating it, it is not so where, as in the present case, that language includes cases not within the intent of the statute. State v. Bierce, 27 Conn. 319, 320; State v. Costello, 62 Conn. 128, 131, 25 Atl. 477. The language of the statute, which was followed in the information, did not with sufficient certainty apprise the defendant of the criminal act for which he was prosecuted.

It is claimed in behalf of the state that the defendant cannot now by a motion in arrest raise the question of the sufficiency of the information. It is said that he should have demurred, and that, having taken his chances with the jury, any defect in the information is cured by their verdict. Advantage may be taken by motion in arrest, as well as by demurrer, of a failure to set out in the information all the essential ingredients of the crime. State v. Keena, 63 Conn. 329, 330, 28 Atl. 522; State v. Costello, supra. defendant's objection to the information before us is that it does not describe in any way the criminal act for which he is prosecuted. This objection goes to the essence and merits of the charge, is shown to be true by a reading of the information, and can be taken advantage of by motion in arrest of

Complaint is made of the court's refusal to charge certain requests made by the defendant and of certain parts of the charge as given. The requests referred to and the portion of the charge objected to relate chiefly to the question of the defendant's good faith in what he did and to whether his conduct was willful. The charge adequately covered these grounds, and was very favorable to the defendant. He has no ground for complaint in these respects.

The defendant testified in his own behalf

board of aldermen at the time of the claimed disturbance, but that he did not willfully disturb the meeting, and that in what he did he acted honestly and in good faith and within what he honestly believed to be his legal rights. Upon cross-examination he was asked if he did not present a petition on that occasion to the board of aldermen. He answered affirmatively, and was then asked to state what the petition was. Objection was made upon the ground that the petition itself was the best evidence of its contents. This objection should have been sustained; but it was overruled, and the defendant was compelled to state the substance of the petition.

There was error, and a new trial is granted. The other Judges concurred.

(82 Conn. 289)

SCOTT v. WILSON et ux.

(Supreme Court of Errors of Connecticut. July 20, 1909.)

APPEAL AND ERROR (§ 1008*)—FINDINGS—EVIDENCE—REVIEW.

Determination of the trial court on the

facts will not be reviewed on appeal, unless legally or logically inconsistent with the decision complained of.

[Ed. Note.—For other case, see Appeal and Error, Cent. Dig. §§ 3955-3969; Dec. Dig. § 1008.*]

ADJOINING LANDOWNERS (\$ 6*) - SPITE FENCE-INJUNCTION.

Where the trial court correctly found that defendants maliciously constructed a division fence to injure plaintiff in the enjoyment of his property, plaintiff was entitled to an injunction for the removal thereof, under Gen. St. 1902, §§ 1013, 1107, providing for the removal of any erection by a landowner or a tenant with intent maliciously to injure the owner or leases of the adjoining property.

[Ed. Note.—For other cases, see Adjoining Landowners, Dec. Dig. § 6.*]

Appeal from Court of Common Pleas, New Haven County; Isaac Wolfe, Judge.

Action by Sarah J. Scott against Thomas K. Wilson and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Bernard E. Lynch, for appellants. Fitzgerald & Walsh, for appellee.

RORABACK, J. The parties own and occupy adjacent lots on the north side of Willis street in the city of New Haven. Willis street is a short street in a residential section, having on its north side 19 one-family dwelling houses, all similar in appearance and construction, with well-kept lawns extending from the houses to the sidewalk. The plaintiff's and defendants' lots each have a frontage of 33 feet and are about 100 feet in depth. Shortly before the commencement of this action the defendants, without consulting or obtaining the consent of the plaintiff, erected a tight-board fence about that he was present at the meeting of the 6 feet high on the boundary line between

the plaintiff's and defendants' lots. The fence extends northerly a distance of about 20 feet, from the sidewalk to a point nearly in line with the front of the plaintiff's and defendants' houses. Prior to the erection of this fence there was no fence or other structure between any of said lots from the front line of said houses to the sidewalk. It also appears that this structure is unsightly, unnecessary, cuts off the view from the plaintiff's premises, interferes with the circulation of air, and that the defendants are not on speaking terms with the plaintiff.

Section 1107 of the General Statutes of 1902, provides that "an action may be maintained by the proprietor of any land against the owner or lessee of land adjacent, who shall maliciously erect any structure thereon, with intent to annoy or injure the plaintiff in his use or disposition of his land," and section 1013, Gen. St. 1902, provides that "an injunction may be granted against the malicious erection by or with the consent of an owner, or lessee, or person entitled to the possession of land, of any structure upon it, intended to annoy and injure any owner or lessee of adjacent land in respect to his use or disposition of the same." The gist of this action consists in the fact that the fence was maliciously erected for the purpose of annoyance and injury to the plaintiff. The trial court reached the following conclusions: "That the fence in question serves, and was erected to serve, no useful purpose in the use and enjoyment of the defendants' land, that it is of a description, location, and surrounding indicative of a controlling purpose in its erection to injure the plaintiff, and that it does in fact injure the plaintiff in the use and enjoyment of her land, and that the fence was maliciously erected to annoy and injure the plaintiff in the use of her land." The substance of the defendants' reasons of appeal is that the court below erred in drawing certain of its ultimate conclusions from the facts found and in rendering a judgment which is unsupported by the finding. The determination of the trial court will not be reviewed by us for the purpose of reaching a conclusion from evidential facts, unless it appears that such facts, or some of them, are legally or logically inconsistent with the decision complained of. Layton v. Bailey, 77 Conn. 22, 58 Atl. 355. It is found that the defendants acted from malicious motives, with a design to unnecessarily injure the plaintiff. It is further found that the effect of the defendants' wrongful action is to injure the plaintiff in the use and enjoyment of her property. There is nothing in the finding to show that the trial court acted improperly in reaching these conclusions. The facts found justified the court in reaching the decision that this structure was maliciously erected, with the

Whitlock v. Uhle, 75 Conn. 423, 53 Atl. 891. There is no error. The other judges concurred.

(82 Conn. 324)

BLAKE v. MASON.

(Supreme Court of Errors of Connecticut. July 20, 1909.)

1. Elections (§ 57*)—Liability of Moderator — Rejection of Vote — "Ministerial Act."

A moderator of a voting district, who honestly rejects the ballot of an elector and returns it as prescribed by statute, is not liable in tort to the elector, though the act following the quasi judicial deermination of the invalidity of the ballot is a "ministerial act," which is performed in a given state of facts in obedience to the law, without regard to or the exercise of his own judgment on the propriety of the act being done.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 57.*

For other definitions, see Words and Phrases, vol. 5, pp. 4523-4525; vol. 8, pp. 7722.]

vol. 0, pp. 4023-4020; vol. 8, pp. 7722.]

2. CONSTITUTIONAL LAW (§ 46*)—DETERMINATION OF CONSTITUTIONAL QUESTIONS.

An elector, whose ballot was rejected by a moderator of a voting district on the ground of identification marks placed thereon by the elector in violation of the statute, and returned as a rejected ballot as prescribed by the statute, may not sue the moderator in tort and test the constitutionality of the statute under which the moderator acted.

[Ed. Note—For other cases, see Constitutional test than the constitutional test than the constitutional test the constitutional test than the constitution test than the constitution test than the constitution test than the constitution test that the constitution test than the constitution

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 46.*]

Appeal from Superior Court, New Haven County; Milton A. Shumway, Judge.

Action by Henry T. Blake against Frank H. Mason to recover damages for the alleged wrongful rejection by defendant, as moderator of a voting district, of a ballot cast by the plaintiff. From a judgment for defendant, rendered after sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

The complaint states in substance that the plaintiff was an elector qualified to vote at the election for state officers held on the 3d day of November, 1908, in the voting district in New Haven in which the defendant was the moderator; that in the manner prescribed by statute the plaintiff presented to the election officers for deposit in the ballot box as his ballot an official ballot containing printed thereon the names of those persons for whom he desired to vote, inclosed in a sealed official envelope procured from the booth tenders and properly indorsed by them, the said ballot and envelope being in all respects conformable to the requirements of statute, except that the ballot had on its margin, but not encroaching upon the printed parts thereof, certain marks by which it might be identified, and from which it might be told who had cast it, within the meaning and intent of the statute; that said ballot was received and deposited in the ballot box: and that after the closing of the polls and intent of injuring and annoying the plaintiff. | during the count of the ballots the defendant,

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in his capacity as moderator, having discovered said ballot among those cast, and no explanation as to the marks thereon having been offered or suggested, in obedience to the requirements of statute in such case, refused to count it or to permit it to be counted, and kept the same in his possession, and returned it to the town clerk in a separate package from that containing the ballots which were counted. The plaintiff claims to be aggrieved by this action of the defendant, following his decision that the ballot violated the provisions of the statute, to wit, his action in rejecting and refusing to count it, and in doing with it as the statute prescribes, because he says that the statute, in so far as it attempts to regulate that matter, contravenes the Constitution of this state, and is void, and because, by reason of the defendant's compliance with its directions, he, the plaintiff, was unlawfully deprived of his voice as an elector.

Henry T. Blake and George D. Watrous, for appellant. Edward H. Rogers and Edward P. O'Meara, for appellee.

PRENTICE, J. (after stating the facts as above). The plaintiff's purpose in instituting this action, as in those heretofore begun by him, was to secure a judicial declaration that those provisions of our statutes regulating the exercise of the right of suffrage which prescribe the disposition to be made of ballots marked in violation of the regulations contained in the statutes are unconstitutional and void. No charge is made that the defendant, as the moderator whose action is made the subject of the suit, acted otherwise than as he was commanded to do, or that he was actuated in what he did by malice or improper motive. The plaintiff's purpose is to reach the statute, and his complaint has avowedly been drawn to state a case which is not within the ruling of this court in Blake v. Brothers, 79 Conn. 676, 66 Atl. 501, 11 L. R. A. (N. S.) 501. Its allegations are studiously framed so that it should appear that the only act of the defendant which is complained of and made the basis of recovery is that of refusing to count or to permit to be counted the plaintiff's ballot, and of pursuing in respect to it the course directed It is contended that this act by statute. was a ministerial one, pure and simple; that, therefore, in respect to it the defendant cannot avail himself of the protection afforded to one who is engaged in the performance of a discretionary or quasi judicial act: and that, as a corollary of this latter proposition, the principles enunciated in Blake v. Brothers have no application to the situation now presented.

The first of these three propositions is undoubtedly a correct one. Upon the allegations, the quasi judicial duty which devolved upon the defendant had been performed, and confessedly correctly performed. There only remained to be done that which the law di-

rected to be done in a prescribed manner to carry into effect the conclusions judicially arrived at. "Every purely formal step in a legal proceeding, and everything which is necessary to carry into execution what has been judicially decided, is ministerial." Clark & Linsdell's Law of Torts, 732. "A ministerial act is one which a person performs in a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the act being done." American Casualty Ins. Co. v. Fyler, 60 Conn. 448, 460, 22 Atl. 494, 25 Am. St. Rep. 337.

The two remaining propositions, however, do not by any means follow from this one. It is true that this case differs from the former in the substantial facts presented as constituting the defendant's alleged delict. They are narrower in their range. But there is nothing here presented as furnishing a ground of action which was not in the former complaint. The difference is one which results from subtraction only. No new thing is added. The delict is now alleged to have consisted in the rejection of the plaintiff's ballot, and in that only. In the former action the rejection of the ballot was as distinctly set out as a wrongful act on the then defendant's part. It was in that case averred that the defendant committed a wrong in other associated matters also. But the present grievance was unmistakably there, and our conclusion that no cause of action was stated necessarily involved one that there was no right of action resulting from that part of the defendant's conduct which was identical with that which is now imputed to this defendant. The fact that the ministerial act now made the sole ground of action was in the former case associated with the quasi judicial act of determining the illegality of the ballot as preliminary to its rejection as illegal and void did not detract from whatever of force there was in the charge that the act of rejection had been committed. Neither is the effect which is to be given to that association lost, for the reason that, while it now appears as clearly as before, it is not now made the subject of complaint.

Just here lies the fundamental error under which the plaintiff labors, both in discussing the questions of law presented and in making application to the present complaint of the decision in Blake v. Brothers. That decision was but the formal adoption by this court of the generally accepted rule of law applicable to election officers, who in the performance of their duties are called upon to exercise discretionary powers in the matter of the reception of a proffered vote, and who act bona fide. The extent to which this rule has been recognized, and the reasons for it, well stated, appear in a note to the case of Blake v. Brothers, 11 L. R. A. (N. S.) 501. See, also, Perry v. Reynolds, 53 Conn. 527, 535. 8 Atl. 555. The rule, it will be seen, is

not one which is limited in its application to that portion of such official's duty which is quasi judicial in its character. Neither does it rest upon the general proposition that no personal responsibility is incurred for the manner in which discretionary duty is done, if done honestly and without malice. It is a rule which extends to the whole conduct of the election official in a matter in respect to which the law casts upon him both the quasi judicial duty of judging and the ministerial duty of giving effect to the conclusion thus arrived at. It recognizes the intimate association of the two branches of his conduct, in spite of a possible technical distinction between them. It recognizes that from a practical point of view it would be idle to throw the shield of legal protection over him as long as he merely thought, deliberated, or expressed opinions, if that protection was to be withdrawn from him as soon as he took any step to give effect to the conclusions arrived at. It recognizes that election officials are of necessity frequently, and indeed, generally, not lawyers, and that they are often called upon to determine legal questions of great difficulty, and to determine them promptly. It recognizes that it would be alike unjust to apply a principle of personal responsibility to honest and fair conduct under such conditions, unwise to interpose so serious an obstacle in the way of the enforcement of proper restraints upon the abuse of the elective franchise, and impolltic to countenance so effective a discouragement of honest and responsible men from accepting position attended with such hazards. Blake v. Brothers, 79 Conn. 676, 679, 66 Atl. 501, 11 L. R. A. (N. S.) 501; Perry v. Reynolds, 53 Conn. 527, 535, 3 Atl. 555.

other than those of public policy, the rule adopted in Blake v. Brothers has received its very general acceptance, so that where quasi judicial action is required of an official as a preliminary to other action resulting from his conclusion, he may, if he acts bona fide, invoke the protection of the rule, whether in strictness the particular thing complained of, when subjected to analysis, would be classed as quasi judicial or ministerial in their be the strictness the scope of the principle laid down in that case, and it is comprehensive enough to afford the defendant

protection for his good faith conduct in strict conformity with the law in respect to his rejection of the plaintiff's ballot.

The plaintiff urges upon us, in support of his position, that, unless he is permitted to maintain an action of this character, there is open to him no way in which he can test the constitutionality of the statutory provisions in question, and thus secure for himself what he concelves to be his constitutional rights. Were it so that, being forbidden an action of tort, he would be remediless, it would be a matter for serious consideration, although in Perry v. Reynolds, 53 Conn. 527, 535, 3 Atl. 555, a precisely similar claim was urged, and we held that such considerations were not sufficient to prevent the adoption of the rule there applied, and thence carried into the decision of Blake v. Brothers. But we are not now prepared to accede to the plaintiff's premise that the law permits him no redress in any other form of action than the present. We hold that he cannot secure the end he desires through the medium of a tort action against the election moderator. We have also held that certain proceedings instituted under sections 1683 and 1684 of the General Statutes of 1902 were not brought before us in such manner as to entitle the complainant to such redress as those sections might afford bim, and for that reason we then declined to adjudicate the questions attempted to be presented. Further than this we did not undertake to go. In re Blake, 77 Conn. 595, 60 Atl. 292. We did not decide that under no circumstances would those statutes afford redress. Mandamus, also, is a remedy to which one naturally turns who desires to compel the performance of official duty. We have never said that the plaintiff might not, by a resort to a proceeding of that character, obtain protection of his constitutional rights of suffrage, if they are being invaded by election officials acting under the sauction of invalid legislation and in a manner which is successfully evading redress. More than this we ought not to say concerning the questions and principles which might be involved in some other proceeding, in advance of their being properly before us and counsel having been heard thereon.

There is no error. The other Judges con-

(82 Conn. 376)

SISK v. MEAGHER.

(Supreme Court of Errors of Connecticut. July 20, 1909.)

1. APPEAL AND ERROR (\$ 847*)-TIME TO AP-

PEAL-JUDGMENT.

The time when the court files its memorandum of decision, and not the time when the judgment file is made out, which is only a matter of clerical action, fixes the date for an ap-

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1897; Dec. Dig. § 347.*]

2. JUDGMENT (§ 286*)—MEMORANDUM OF DE-CISION—JUDGMENT FILE—VARIANCE — REM-

Where there is a difference between the memorandum of decision filed by the court, which is the judgment, and the judgment file subsequently entered, the remedy is by proceedings for the correction of the judgment file to correctly express the judgment and until correctly express th correctly express the judgment, and, until corrected, the judgment file is conclusive of the facts stated therein.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 286.*]

8. APPEAL AND ERBOB (§ 804*)—VALIDITY OF APPEAL—OBJECTIONS.

An objection to the validity of an appeal because of a failure to comply in time with the requirements essential to an appeal is properly aken by a plea in abatement, and not by a motion to erase.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 804.*]

Appeal from Court of Common Pleas, New Haven County.

Action by James Sisk against Bridget Meagher. From a judgment for plaintiff, defendant appeals. Heard on plea in abatement and motion to erase the appeal. Plea in abatement sustained, and motion to erase denied.

William W. Stoddard, for appellant. James P. Pigott, for appellee.

RORABACK, J. The plaintiff filed in this court a plea in abatement and a motion to erase an appeal, both for the reasons that the defendant had not followed the requirements of the General Statutes relating to appeals. The following material facts are conceded: This case was tried to the court, and decided in favor of the plaintiff July 18, 1908, when the judge filed his written memorandum of decision. Notice of an appeal was filed by the defendant July 20, 1908. January 13, 1909, the judgment filed, dated as of July 18, 1908, was prepared by the judge and filed with the clerk. Afterwards, and upon January 13, 1909, the defendant gave another notice of an appeal. On January 19, 1909, the defendant filed her request for a finding and a draft finding, and attempted to complete her appeal upon a judgment rendered January 13, 1909. When the court filed its memorandum of decision July 18, 1908, that was the judgment of the court, which fixed the date for an appeal. Sturdevant v. Stanton, 47 Conn. 581; Goldreyer | COURSE—PRESUMPTIONS.

The rule that possession of a negotiable instrument is not enough to support a recovery thereon, where the holder must trace title through a fraudulent holder, because it will be presumed that the instrument continues in the hands of a fraudulent holder until the contrary is shown, applies whether the fraud was condevant v. Stanton, 47 Conn. 581; Goldreyer finding and a draft finding, and attempted to

v. Cronin, 76 Conn. 115, 55 Atl. 594; Bulkeley's Appeal, 76 Conn. 457, 57 Atl. 112. The preparation of the judgment file was a matter of subsequent clerical action. Bulkeley's Appeal, supra. By the provisions of the Public Acts of 1905 the two weeks in which the written request for a finding must be filed expired September 14, 1908. At no time was there a request for an extension of time. nor was any granted in reference to the taking of an appeal. It is apparent that the defendant has not complied with the requirements essential to the validity of an appeal. This the defendant concedes, except as she contends that the judgment file entered upon January 13, 1909, is materially different from the memorandum of decision dated July 18, 1908, so that there was in effect a judgment rendered at that time which became the judgment in the case. If such a difference exists, the defendant's remedy is to be found in proceedings for the correction of the judgment file to make it correctly express the judgment. Bulkeley's Appeal, 76 Conn. 456, 57 Atl. 112. The present judgment file is a record conclusive of the facts therein stated. Bulkeley's Appeal, supra; Corbett v. Matz, 72 Conn. 610, 45 Atl. 494, 48 L. B. A. 217; Cox v. McClure, 78 Conn. 486, 47 Atl. 757. The objection to the validity of the appeal by the motion to erase is not sustained, but was properly taken by a plea in abatement. The motion to erase did not relate to the jurisdiction of this court over the parties or the subject-matter, but to the manner in which the appeal was taken. O'Brien's Petition, 79 Conn. 58, 63 Atl. 777; James v. Morgan, 36 Conn. 348.

Plea in abatement sustained, and motion to erase denied. The other judges concurred.

(82 Conn. 233)

PARSONS V. UTICA CEMENT CO.

(Supreme Court of Errors of Connecticut. July 20, 1909.)

1. BILLS AND NOTES (§ 497*)—HOLDES IN DUE COURSE—PRESUMPTIONS—BURDEN OF PROOF -Statutes.

Negotiable Instruments Act (Gen. St. 1902, \$ 4229), providing that a holder is deemed prima facie a holder in due course, but, when the title of one who negotiated the instrument is de-fective, the burden is on the holder to prove that he, or some one under whom he claims, acquired title as a holder in due course, is merely declaratory of the common law.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1675–1687; Dec. Dig. § 497.*]

2. BILLS AND NOTES (§ 497*)—HOLDER IN DUE COURSE—PRESUMPTIONS.

PÉOOF.

A plaintiff, in an action on a bond payable to bearer, has the burden of proving the allegations of the complaint, and this burden remains to the end, but the production of the bond, due execution being admitted, raises a presumption of title establishing a prima facie case.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. §§ 218-226; Dec. Dig. § 130.*]

4. Bonds (§ 130*) - Actions - Burden of PROOF.

Where, in an action on a bond payable to bearer, defendant admitted its execution, and showed that it had been fraudulently taken from an intermediate holder, the prima facie case, established by plaintiff producing the bond, was overcome, and he had the burden of proving title by affirmative evidence that he obtained the bond for a valuable consideration and in good faith, without knowledge of the fraud, or without being chargeable with notice thereof.

[Ed. Note.—For other cases, see Bonds, Dec. Dig. § 130.*]

5. Bills and Notes (§ 363*) - "Bona Fide

HOLDER IN DUE COURSE.

Under the law merchant, a "bona fide holder in due course" of a negotiable instrument payable to bearer, is one who gave a valuable consideration for it before maturity, and without notice of any infirmity in his grantor's title, and obtained it in due course of trade, which rests on an exchange of values.

ind. Note.—For other cases, see Bills and Notes, Dec. Dig. § 363.*

For other definitions, see Words and Phrases, vol. 1, p. 823.]

6. Bonds (§ 131*) — Action on Instrument Payable to Bearer-Evidence.

In an action on a bond payable to bearer, evidence that another owns it is admissible to show that plaintiff is a holder in bad faith.

[Ed. Note.—For other cases, see Bonds, Dec. Dig. § 131.*]

7. Bonds (§ 120*)—Actions—Defenses.
Where, in an action on a bond payable to bearer, the evidence showed that it had belongbearer, the evidence showed that it had belonged to a corporation from whom it had been fraudulently taken by plaintiff's grantor, the fact that the affairs of the corporation had been wound up did not deprive defendant of the right to rely on the fraud, for the court might revive the corporation so that it could sue on the bond though defendant might placed limits. the bond, though defendant might plead limitations to such action.

[Ed. Note.—For other cases, see Bonds, Dec. Dig. § 120.*]

8. LIMITATION OF ACTIONS (§ 165*)-NATURE

OF LIMITATION.

The statute of limitations only applies to the remedy, without canceling the obligation. [Ed. Note.—For other cases, see Limitation of

Actions, Cent. Dig. \$ 649; Dec. Dig. \$ 165.*]

9. Bonds (§ 120*)—Actions—Defenses.

The maker of a bond payable to bearer, defending an action thereon on the ground that it had been fraudulently abstracted from a corporation which had owned it, need not, to rely on the fraud as a defense, attempt to procure the revival of the corporation, which had been wound up nine years previously, and then summon it as a party in interest.

[Fd. Note.—For other cases, see Bonds, Dec. Dig. § 120.*]

or occurred subsequently, to the prejudice of an intermediate holder.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. \$ 497.*]

3. Bonds (\$ 130*) — Actions — Burden of Proce. were on their face inaccurate.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 129.*]

11. Bonds (\$ 131*)—Actions—Evidence.

In an action on a bond payable to bearer, defended on the ground that plaintiff's husband, while president of a corporation owning the bond, had fraudulently taken it from the corporation, a memorandum signed by the secretary of the corporation, and found among the corporation papers by its receiver, reciting that plaintiff's husband had taken the bond to sell for the corporation subsequent to the date when plaintiff claimed she bought it, was admissible. [Ed. Note.—For other cases, see Bonds, Dec. Dig. § 131.*]

Appeal from Superior Court, Hartford County; Silas A. Robiuson, Judge.

Action on two negotiable bonds by Hannah G. Parsons against the Utica Cement Manufacturing Company. From a judgment for defendant, plaintiff appeals. Affirmed.

See, also, 80 Conn. 58, 66 Atl. 1024.

Henry T. Richardson, for appellant. John R. Buck and John H. Buck, for appellee.

BALDWIN, C. J. The result of a former trial of this cause, in which a verdict was rendered for the plaintiff, is reported in 80 Conn. 58, 66 Atl. 1024. On a second trial there has been a verdict for the defendant, and error is claimed in respect to the charge to the jury.

The complaint contained two counts, each alleging (as in Practice Book, form 334) that \$2,000 is due to the plaintiff from the defendant on an instrument under seal, of which a copy is annexed and marked as an exhibit. The first defense to each count was a general denial. A second defense to each was that the bonds, which were payable to bearer and matured January 1, 1890, more than 16 years before the suit was brought, were owned, in 1887, by the Continental Life Insurance Company, and were then fraudulently taken from its possession by the plaintiff's husband, who was its president, without any consideration moving to the company, and came into her possession with notice of that fact, without any consideration moving from her, and that she was never a bona fide holder. These allegations were denied by the reply. On the first trial the jury were instructed that, as the plaintiff had possession of the bonds, the burden of proof was on the defendant to show that she was not a bona fide holder, and that to do this it must satisfy them, by a fair preponderance of evidence, that she acquired the bonds, either without paying any value, or knowing that her husband had taken them from the insurance company improperly and fraudulently.

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

having been an undisputed fact, during that trial, that her husband's title was defective, we held this charge erroneous, since the burden was upon her to show value paid or want of notice of the defect, not on the defendant to show no value paid or the existence of notice. In support of this conclusion we referred to the negotiable instruments act (Gen. St. 1902, §§ 4171, 4222, 4229). Our attention is now called to the provision in Gen. St. 1902, § 4170, that the succeeding sections of the chapter, which include those above mentioned, shall not apply to negotiable instruments made and delivered prior to 1897.

The negotiable instruments act, in most respects, was simply a codification of the common law in reference to the subject in hand. It was such in respect to the provision of section 4229 that "every holder is deemed prima facie to be a holder in due course; but, when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he, or some person under whom he claims, acquired the title as a holder in due course." In Byles on Bills (chapter 4, p. *60) the common law on this subject, with reference to the burden of proving a consideration, is thus "The defendant is not in general permitted to put the plaintiff on proof of the consideration which the plaintiff gave for the bill, unless the defendant can make out a prima facie case against him by showing that the bill was obtained from the defendant, or from some intermediate party, by undue means, as by fraud, felony, or force, or that it was lost, or that he received no considera-Where, as here, it appears that the negotiable paper in suit, though there was nothing wrong in its original issue, was obtained from an intermediate party by fraud, proof of consideration is only called for from the plaintiff because it would tend to show that he nevertheless is a "bona fide" holder within the meaning of that term in the law merchant. Whether he acquired the paper by purchase or gift would, under ordinary circumstances, be of itself unimportant. But after proof that it was once in the hands of a fraudulent holder, it may justly be presumed to continue in the hands of a holder of that character until the contrary be proved. Collins v. Gilbert, 94 U. S. 753, 761, 24 L. Ed. 170. The position of the holder of negotiable paper is of an exceptional character. He may acquire a title through a thief, and yet maintain it against the original owner. But his possession is not enough to support a recovery, after it once appears that he must trace title through fraudulent practices and unclean hands. Totten v. Bucy, 57 Md. 452. This is equally true whether the fraudulent practices were connected with the original inception of the paper, or, as in the present instance, occurred subsequently, to the prejudice of an intermediate holder. Ful-

having been an undisputed fact, during that trial, that her husband's title was defective, we held this charge erroneous, since the burden was upon her to show value paid or want of notice of the defect, not on the death of the defect, not on the design and Bills, *283; 4 Am. & Eng. Encycl. of Law, 322. The case of Kinney v. Kruse, 28 Wis. 183, asserts the contrary, but is opposed to the strong current of authority.

The cause went to the jury, as respects each count, on two issues. One was on the truth of the complaint; the other was on the truth of the special defense. As to the former issue, the plaintiff had the burden of proof from the outset and to the end. Lockwood v. Lockwood, 80 Conn. 513, 521, 69 Atl. 8. As to the latter issue, her production of the bond, its due execution being admitted, raised a presumption of title, which made out a prima facie case. But as soon as it appeared, either by her witnesses or those of the defendant, that this bond was fraudulently abstracted from the assets of a third party to which it originally belonged, this presumption no longer availed her, and her original burden of proof, only temporarily satisfied by its aid, rested upon her again, and now required her to show a title by affirmative evidence that she obtained the instrument both in good faith and for a valuable consideration. Her good faith she could only show by proof that, when the bond came to her, she had no knowledge of such fraud, and was not equitably chargeable with notice of it. Baxter v. Camp, 71 Conn. 245, 253, 41 Atl. 803, 42 L. R. A. 514, 71 Am. St. 169; Fulton Bank v. Phœnix Bank, 1 Hall (N. Y.) 577. The defendant, it is true, had the burden for certain purposes of proving that she took the bond with such notice, and without consideration; but these purposes were accomplished when the fact was established of its fraudulent abstraction from the assets of the insurance company by her grantor. One legal presumption established by the law merchant was thus met with another legal presumption established by the same law, which by that law was sufficient to destroy it. In a concurring opinion, often quoted, given in a case of a similar character, in which a ruling of his at nisi prius was pronounced erroneous, Baron Martin observed that he did not profess to understand how, when several facts were alleged in a plea, all necessary to make it good, and all put in issue, proof of one could relieve a defendant from the burden of proving the rest; but that, whatever might be the philosophy of that matter, the rule was so, and it was a useful one because it threw a difficulty in the way of fraudulent indorsements. Harvey v. Towers, 15 Jur. 544; 4 Eng. Law & Equity, 531.

support a recovery, after it once appears that he must trace title through fraudulent practices and unclean hands. Totten v. Bucy, 57 Md. 452. This is equally true whether the fraudulent practices were connected with the original inception of the paper, or, as in the present instance, occurred subsequently, to the prejudice of an intermediate holder. Fulton Bank v. Phænix Bank, 1 Hall (N. Y.) 562;

prima facie their owner in good faith, if time for their payment has arrived. the defendant had satisfied them by a fair preponderance of evidence that they were fraudulently obtained from the true owner, the insurance company, then the burden rested on the plaintiff of proving that she acquired them in good faith and for a valuable consideration, without knowledge of the fraud, or without being chargeable with knowledge of it. The law merchant, which governed the disposition of the cause, gave to bona fide holders, in due course, of negotiable bonds payable to bearer the valuable privilege of suing on them in their own name, with all the rights for the purposes of the action of an absolute owner. But it deemed no one a bona fide holder in due course who obtained possession without giving any valuable consideration in return. Brush v. Scribner, 11 Conn. 388, 29 Am. Dec. 303. It recognized the bona fide holder in due course, not as owner, but as having the rights of an owner for the purposes of suit, to be protected no farther than the necessity of maintaining the free negotiation of commercial paper requires. Olmstead v. Winsted Bank, 32 Conn. 278, 287, 85 Am. Dec. 260. There was no necessity of that description to call for the allowance of actions by holders of stolen securities who paid nothing for them, even if they accepted them before their maturity, and with no. notice of any infirmity in their grantor's title. They might be bona fide holders, but they were not "holders in due course"; for that term refers to due course of trade, and trade rests on an exchange of values. Roberts v. Hall, 37 Conn. 205, 212, 9 Am. Rep. 308.

A copy of the record of certain decrees of the court, entered at previous terms, in another suit, brought to wind up the Continental Life Insurance Company, was offered in evidence by the plaintiff in rebuttal, but excluded. One of these, passed soon after the time when she claimed that she acquired the bonds, placed it in the hands of receivers, and annulled its charter. Another, passed in 1897, finally discharged the receivers. This record was offered to show that the company was not in a position to make any claim to the bonds. A request by the plaintiff was also made and refused for an instruction to the jury that, it being undisputed that the insurance company was at one time owner of the bonds, and paid value for them, it would be no defense to this action against their maker should they find that the plaintiff paid no value for them, or acquired them from one who took them wrongfully from the company. These rulings bring up the fundamental question whether the defendant, not denying that it issued the bonds originally for value received, can escape payment on the ground that they do not belong to the plaintiff, when no one else has made, or is now in a position to make, any demand upon it for the performance of the obligation which they

They are presented by a bearer who has been such for 16 years. How can it be a defense that a corporation, now extinct, was more than 16 years ago their bearer, and, were it still in being, might be entitled, as against the plaintiff, to reclaim their possession by a paramount title? The bearer of such an instrument does not prove title by his possession. As already stated, his mere production of it entitles him to recognition as invested with the rights of an owner only so far as the necessities of trade require. Proof that another owns it, if not always admissible to show that he does not, is admissible at least where, as here, it tends to support the claim that he is a holder in bad faith. It was undisputed that at some time the bonds in suit belonged to the Continental Life Insurance Company, and the defendant had introduced evidence tending to show that in November, 1887, they were fraudulently abstracted from its possession by the plaintiff's grantor. natural inference from this evidence, if it stood unanswered, would be that the plaintiff had notice of his fraud. To prove that, soon after that fraud, the charter of the company was annulled, and its affairs wound up, could not help to rebut this inference. It was still within the power of the courts to revive it, and it could, if thus revived, sue for the vindication of its title to the bonds, or to enforce their payment. Sullivan Co. Railroad v. Conn. River Lumber Co., 76 Conn. 464, 474, 57 Atl. 287. Should in such case a suit of the latter description be brought against the present defendant, it may be that no plea of the statute of limitations would be set up. That statute may prevent a remedy, but cancels no debts. Belknap v. Gleason, 11 Conn. 160, 164, 27 Am. Dec. 721. Both of the rulings in question by the court below were therefore correct.

It is unnecessary to inquire whether the plaintiff is right in asserting it to be a rule of law that adverse possession of the personal property of another, for so long a period as to make the statute of limitations a defense against any claim by him of title, has the effect of divesting him of title, and transferring it to the party in possession. See Campbell v. Holt, 115 U. S. 620, 622, 6 Sup. Ct. 209, 29 L. Ed. 483; Chapin v. Freeland, 142 Mass. 383, 8 N. E. 128, 56 Am. Rep. 701. It did not appear that the Continental Life Insurance Company ever had any knowledge of the fact that the plaintiff held these bonds, and there was evidence tending to show that she intentionally concealed that fact from it, and also from the defendant until the institution of this suit. Whether, in view of the evidence before the jury, and of the provisions of Gen. St. 1902, §§ 1108, 1129, the statute of limitations could be successfully interposed to an action against her for the recovery of the bonds by the company or its assigns was express. They are payable to bearer. The a matter on which the court and jury could

not be called upon to pass on the issues closed in this suit to which the company was not a party. It is suggested that the defendant cannot set up the title of the insurance company because it has, so far as appears, made no effort to procure its revival, and then summon it in as a party in interest. It was not bound to make such an effort in this suit. brought 9 years after the company had been dissolved.

The plaintiff claimed to have taken the bonds, in October, 1887, from her husband. who was then both president of the insurance company and treasurer of the defendant, in good faith, in exchange for a transfer then made to the insurance company of certain shares which she owned of the capital stock of the defendant. The defendant introduced certain entries in its stock books, and claimed that they showed that she then bad no such shares to transfer. The plaintiff thereupon, in cross-examining the secretary of the company, by whom the entries had been produced, offered to introduce certain other entries, in these books, of transactions having no connection whatever with any matters involved in the action, under the claim that they were on their face inaccurate, and therefore tended to show that the entries relied on by the defendant were also inaccurate. The evidence thus offered was so remote that the court committed no error in excluding it, both at this time, and when afterwards offered in rebuttal.

The plaintiff produced a witness who testified that he received the bonds in suit from Mr. Parsons in the latter part of the year 1887 for safe-keeping, and a few weeks afterwards delivered them to Mrs. Parsons, and that, while she held them, he had a conversation with Mr. Parsons in regard to them, in the plaintiff's presence, but whether before or after she bought them he did not say. It was proper to exclude further testimony from him as to what this conversation was. For aught that appeared it was mere narration of past events, which as to the defendant would be pure hearsay.

The defendant introduced a memorandum dated November 23, 1887, signed by the person then secretary of the insurance company, and found in the inside steel safe in the vault of the company by the receivers, on their appointment, stating that "Nos. 41 and 42" had been "taken by Parsons to be accounted for." These were the numbers of the bonds in suit. This paper, when found, was folded inside a receipt of the same date, signed "J. S. Parsons, Pt.," for "two bonds Utica Cement Mfg. Co. for sale, account Continental Life Ins. Company." There was clearly no error in admitting these papers. They tended to show that the bonds in suit were in the hands of the president of the insurance company

that when the plaintiff claimed she had bought them.

A few other rulings are made reasons of appeal which were so obviously correct as to merit no discussion.

There is no error. The other judges concur.

(82 Conn. 378)

NEW HAVEN COUNTY v. PARISH OF TRINITY CHURCH OF NEW HAVEN.

(Supreme Court of Errors of Connecticut. July 20, 1909.)

. WILLS (\$ 664*) — LEGACIES—CONDITIONS— IMPOSSIBILITY OF PERFORMANCE.

The failure of a church, receiving a legacy on condition that it shall be used in building a Sunday school room on described real estate, to perform the conditions because the premises are taken by a county for a public use does not operate to deprive the church of the right to the legacy, or work a breach of trust after its payment.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1560; Dec. Dig. § 664.*]

2. Eminent Domain (§ 131*)—Assessment of Damages—Market Value.

A county condemning land, which had been conveyed to a church which had received a legacy on condition that it should use the same in building a Sunday school room on the premises, need only pay the market value of the premises, which will stand in the place of the property taken, and need not pay to the church the amount of the legacy, on the theory that the same will be lost to the church for inability to comply with the conditions.

comply with the conditions.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 131.*]

3. Eminent Domain (§ 148*)-Damages-Interest.

Interest runs, on the damages assessed for the taking of property for a public use, from the date of the filing of the report of the committee appointed to assess the damages, on the Supreme Court of Errors advising the superior court to accept the report.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 397-399½; Dec. Dig. § 148.*]

Case reserved from Superior Court, New Haven County; Edwin B. Gager, Judge.

Proceedings by the County of New Haven against the Parish of Trinity Church of New Haven to condemn land. Proceedings reserved for the advice of the Supreme Court of Errors, on remonstrances to the acceptance of the report of the committee appointed to assess damages. Superior Court advised to accept the report.

John K. Beach, for the County of New Haven. A. Heaton Robertson, for the Parish of Trinity Church. Burton Mansfield and James E. Wheeler, for the Estate of Lucy H. Boardman. George E. Beers, for residuary legatees under Mrs. Boardman's will.

in admitting these papers. They tended to show that the bonds in suit were in the hands of the president of the insurance company for sale for its account, at a date long after slleging that the county of New Haven had

[•]For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

voted to take certain described premises, beionging to the parish of Trinity Church of New Haven, for the site of a county courthouse, and that the county commissioners were unable to agree with the owner upon the amount to be paid for said land, a judge of the superior court appointed a committee to ascertain the value of said land and assess just damages to the owner. The committee reported the value of the land to be \$58,000, and that "that sum should be assessed as just damages therefor to the defendant [the Parish of Trinity Church], unless the sum should be increased in accordance with the facts below stated." The report then proceeds as follows: "The property in question, known as 57 Elm street New Haven, was conveyed to the parish of Trinity Church by the executors of Caroline S. Edwards, by deed dated July 14, 1906, as a gift to said parish from Lucy Hall Boardman of New Haven. Said Lucy Hall Boardman died on the 29th day of March, 1906, leaving a will duly admitted to probate in the district of New Haven, and the fifth clause provided, among other things, as follows: 'Fifth. I give and bequeath the following sums as hereinafter stated: * * * twelve thousand dollars (\$12,000) to the rector, wardens and vestrymen of Trinity Church of New Haven, Connecticut, for use in building a Sunday school room and for such other improvements to the property at No. 57 Elm street, New Haven, Connecticut, as may be needed. As this property may not be acquired during my lifetime the bequest herein made, in the hands of the rector, wardens and vestrymen aforesaid may be allowed to accumulate until the property comes into the possession of the said church.' Said estate of Mrs. Boardman is now in process of settlement, is solvent, and fully able to pay said legacy, but the same has not yet been paid or received by said Trinity parish. If the law be so that in consequence of the condemnation of the premises in question, said parish will lose the benefit of the above-described legacy of \$12,000, then and in that event your committee assess as just damages for the taking of said premises the sum of \$70,000, with whatever interest may be due on said legacy. If, on the other hand, the law is so that the condemnation of said premises does not affect the right of said parish to said legacy above described, then and in that event the committee assess as just damages for the taking of said premises the sum of \$58,000. * * The executors of the estate of Mrs. Boardman, who were cited in as co-defendants, remonstrated against the acceptance of the committee's report, upon the ground that said legacy of \$12,000 to the Trinity Church was not a proper matter for the consideration of the committee, and the plaintiff remonstrated against the acceptance of so much of the report as assessed the damages at \$70,000 if the parish would lose the benefit of the legacy of \$12,000.

Among the questions upon which our advice is asked by the reservation are these:
(1) Is the legacy of \$12,000 to the parish of Trinity Church valid and collectible upon the facts reported by the committee? (2) Will the condemnation of said land for the site of a courthouse work a forfeiture of the \$12,000 legacy? (3) What judgment or decision should be rendered?

Section 4107 of the General Statutes of 1902 provides that the acceptance of the report of committee appointed to assess the damages "shall have the effect of a judgment in favor of the owner of the land against the county for the amount of the assessment made by the committee." It has been suggested that under the statute cited the committee should in its report have made one unconditional assessment of a certain amount, instead of two conditional assessments of different sums. As all the parties before us have waived this question, we shall treat the report as assessing only that one of the two sums which we hold to be the correct one. Whether by the language of the will the legacy of \$12,000 is valid, and if so, whether by such language the \$12,000 can be used by the church for any other purpose than those of constructing a Sunday school room upon the premises No. 57 Elm street, and making improvements upon that particular property, are questions which this proceeding is scarcely adapted to raise, and which we find it unnecessary to decide, since, however they may be answered, the amount of damages properly assessable against the plaintiff in these proceedings will be the same. The only questions regarding this legacy with which we are concerned are, will the taking of the premises 57 Elm street by the plaintiff, under the lawful exercise of the right of eminent domain, necessarily deprive Trinity Church of this legacy of \$12,000? and, if it will, can the injury for such loss be an element of damages in these proceedings? As the first of these two questions must be answered in the negative, we need not consider the second.

If by the terms of the will the \$12,000 is given upon condition that it shall be expended upon the premises No. 57 Elm street, and these premises are taken for a public use, it is the act of the law, and not the act or fault of the legatee which renders the literal performance of such condition impossible. "Lex nemini faciat injuriam." failure for such reason to perform the conditions of the gift ought not to work an injury to the church, nor a benefit to the Boardman estate, nor compel the county, in addition to the full value of the premises, which the church held unconditionally, to pay \$12,000 for something which it does not take. The inability of the church from such cause to strictly perform the conditions of the gift, by expending the \$12,000 in precisely the manner stated' in the will, will neither relieve the executors of Mrs. Boardman from

the duty of paying the legacy, nor furnish 5. INSURANCE (\$\$ 777, 778*) - MUTUAL BENEFIT STOUND for a claim of forfeiture or breach of -- IMPROPEE DESIGNATION OF BENEFICIABYground for a claim of forfeiture or breach of trust after its payment. Scovill v. McMahon, 62 Conn. 378, 389, 26 Atl. 479, 21 L. R. A. 58, 36 Am. St. Rep. 350. To the extent of enabling the church to take and retain the legacy the law will regard the \$58,000, received under the condemnation proceedings, as standing in the place of the property tak-The law requires the plaintiff to pay to the church only the market value of the premises taken.

The legal construction of the report is that damages are assessed in favor of the parish of Trinity Church for \$58,000, interest on which would run from the date on which the report was filed. We advise the judge of the superior court to accept the report of the committee. No costs will be taxed in this court. The other Judges concurred.

(82 Conn. 315)

SUPREME LODGE, NEW ENGLAND OR-DER OF PROTECTION, v. HINE et al.

(Supreme Court of Errors of Connecticut. July 20, 1909.)

1. INSURANCE (§ 715*) - MUTUAL BENEFIT -

The application for membership in a fra-ternal benefit society, and the certificate issued, form the contract.

[Ed. Note.—For other cases, see Inc. Cent. Dig. § 1853; Dec. Dig. § 715.*]

2. INSUBANCE (§ 712*) - MUTUAL BENEFIT-

PLACE OF CONTRACT.

A member of a foreign fraternal benefit society is bound by the laws of the state where the society is domiciled, the certificate being there issued, so far as his contractual relation with the society is concerned, though the certificate is delivered in Connecticut.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 173-175, 1934; Dec. Dig. § 712.*]

8. INSURANCE (§ 769*) — MUTUAL BENEFIT-PERSONS WHO MAY BE BENEFICIARIES-"RELATIVE."

"RELATIVE."

Rev. Laws Mass. 1902, c. 119, § 6, provides that a fraternal death benefit shall be payable only to the husband, wife, etc., or relative of the member named in the certificate. The charter of a fraternal benefit society declared its object to be to establish a fund from which, on a member's death, a sum not exceeding a certain amount should be paid to his family or a relative of the state of a member's ucata, a sum not exceeding a certain amount should be paid to his family or a relative, and its constitution declared its object to be to create a fund from which a sum not exceeding a certain amount should be paid to the husband, wife, or relative of a member. Hcld, that a son-in-law of a member was not a "relative" of such member, and could not be named of such member, and could not be named beneficiary; only a relative by blood beas a beneficiary; only a relative by blood being intended to be included in that expression. [Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1932–1938; Dec. Dig. § 769.*

For other definitions, see Words and Phrases, vol. 7, pp. 6054-6058.]

4. Insurance (§ 777*) — Mutual Benefit — Improper Designation of Beneficiary — EFFECT.

The improper designation of a beneficiary does not avoid the contract between a fraternal benefit society and its member.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1944; Dec. Dig. § 777.*]

EFFECT.

Where no beneficiary of a benefit certificate has been designated, or the designation is void, the classes of persons fixed by statute who may be named as beneficiaries take, unless otherwise provided by statute or the laws of the society. [Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1944, 1945; Dec. Dig. §§ 777, 778.*]

6. INSURANCE (§ 782*) — MUTUAL BENEFIT — PAYMENT OF DUES BY BENEFICIARY—RIGHT TO RECOVER

A beneficiary under the old certificate cannot recover the dues and assessments paid by him on a change of beneficiary by the member, where, under the laws of the order and the terms of the certificate, the member could at any time cause the old certificate to be canceled, and a new one issued, naming a new beneficiary.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1948; Dec. Dig. § 782.*]

7. Insurance (§ 743*) — MUTUAL BENEFIT — PAYMENT OF DUES BY BENEFICIABY—RIGHT TO RECOVER.

Under Rev. Laws Mass. 1902, c. 119, \$ 8, prohibiting any contract, conditioned on an agreement that the person to whom a fraternal benefit certificate is made payable shall pay the dues and assessments, no equity to a lien on the proceeds of a certificate can exist in favor of a person who, believing himself to be properly named as beneficiary, paid the dues and assessments; such payment violating the spirit of the law spirit of the law.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1888; Dec. Dig. § 743.*]

Appeal from Superior Court, New Haven County; Joel H. Reed, Judge.

Interpleader by the Supreme Lodge, New England Order of Protection, against Charles F. Hine, Mary A. Hines, and others, to determine the person entitled to death benefits under a certificate issued to James H. Hines. Judgment for Mary A. Hines, and Charles F. Hine appeals. Affirmed.

Seymour C. Loomis and Ernest C. Simpson, for appellant. Richard H. Tyner, for appellee.

THAYER, J. The plaintiff is a fraternal beneficiary society located in the commonwealth of Massachusetts. James H. Hines of New Haven, now dead, was a member of the society. It issued its certificate for death benefits payable in the event of his death to his beneficiaries. The amount was \$2,000. It admits its willingness and readiness to pay this sum to such person, or persons, as the court shall direct. We have to consider, therefore, only the rights of the claimants to the fund as between themselves.

On August 2, 1895, the plaintiff, in compliance with an application made by said Hines, issued a certificate to him numbered 26.031, certifying that he was a member of the order, and entitled to participate in the relief and benefit fund to the amount of \$2,000, and stating that said sum should at his death be paid to "Mary A. Hines, wife, Charles F. Hine, son-in-law." On the 19th certificate, and by indorsement thereon requested that a new certificate be issued to him in lieu thereof, for the same amount, payable in case of death to "Charles F. Hine, son-in-law." In compliance therewith the plaintiff issued to him the certificate now in question, numbered 44,909, stating therein that the amount, \$2,000, "was at his death to be paid to Charles F. Hine as son-in-law." This certificate was issued at Boston on the 19th day of October, 1900. James H. Hines died on the 2d day of January, 1908. cording to the laws of the lodge and the laws of the state of Massachusetts the amount named in the certificate became payable at the death of the member. Said Charles F. Hine, who is one of the present claimants, was married to Margaret L. Hines, a daughter of said James H. Hines, prior to the issuance of either of the certificates mentioned above, and three children were born of said marriage prior to the death of James H. Hines, and still survive. On October 18, 1907, said Charles F. Hine and Margaret L. Hine, in an action brought by the latter, were divorced, and the custody of the three children was granted to her. Two of the children are now living with, and are, and since their birth have been, supported by their father. Neither he nor his former wife have since married. Mary A. Hines, the successful claimant in the court below, is the widow of James H. Hines. These are the only defendants now claiming the fund. The remaining defendants are the children of said James H. and Mary A. Hines. They have assigned any rights they may have in the fund in controversy to their mother, Mary A. Hines, and make no claim to it.

The application of Hines for membership, and the certificate issued to him by the plaintiff, constituted a contract between him and the company. The plaintiff was a Massachusetts corporation, and the certificate was issued in Boston. But Hines was a member of the plaintiff order, and was bound by the laws of that state so far as relates to his contractual relation with the order. This is true, although, as appears to have been the case, the certificate was delivered in New The contract, therefore, is to be Haven. construed in accordance with the laws of that state and the charter and general laws of the corporation. It is provided in section 6, c. 119, of the Revised Laws of Massachusetts of 1902, that death benefits of fraternal benefit societies shall be payable only to the husband, wife, betrothed, child by legal adoption, parent by legal adoption, or relatives of, or persons dependent upon, the person named in the certificate. One of the objects of the plaintiff order as provided in its charter is to establish a relief and benefit fund from which, upon the death of a beneficial member, "a sum not exceeding \$5,000 shall be paid to such member or members of his or her

day of October, 1900, Hines surrendered this | lated to him or her as he or she may have directed to be paid as is provided by general laws." And section 1, art. 1, of its constitution declares it to be one of the objects of the order to create such a fund, from which a sum not exceeding \$3,000 shall be paid to the "husband, wife, affianced husband, affianced wife, relatives of or persons dependent upon such member." The corporation was thus authorized by the statute to establish a relief and benefit fund to be paid to certain classes of persons only, and its constitution declares that the fund is to be raised for the purpose of paying benefits to the classes of persons so fixed by the statute. Beneficial societies cannot create funds for the benefit of persons outside the classes mentioned in the statute, and no one outside of those classes can be a beneficiary. American Legion of Honor v. Perry, 140 Mass. 580, 589, 5 N. E. 634; Tepper v. Supreme Council, 61 N. J. Eq. 638, 640, 47 Atl. 460, 88 Am. St. Rep. 449; Lavigne v. Ligue des Patriotes, 178 Mass. 25, 26, 59 N. E. 674, 54 L. R. A. 814, 86 Am. St. Rep. 460.

> The first question presented by the appeal is whether the appellant is within either of the classes mentioned in the statute and the charter of the corporation. The superior court has found that he was not dependent upon the member, James H. Hines, to whom the certificate was issued, and it is not claimed that he was eligible for designation as a beneficiary unless he was "a relative of" such member. He was the husband of the member's daughter at the time the certificate was issued, and he claims that this made him a relative within the meaning of the statute and the constitution of the order. The appellee claims that a sonin-law is not a relative of the member within the meaning of the statute and charter, but that, if he is, the divorce terminated that relationship between the appellant and Hine before the latter's death.

A son-in-law is a relative only by affinity. The statute provides specially that certain relatives by affinity—the husband or wifemay be made beneficiaries. This provision was unnecessary if relations by affinity, as well as by blood, were intended to be included in the words "relatives" as used in the We think that only relatives by statute. blood were intended to be included in that expression. And this seems to be the construction placed upon it by the Massachusetts courts. In Shea v. Massachusetts Benefit Association, 160 Mass. 289, 35 N. E. 855. 39 Am. St. Rep. 475, the court, in accordance with the contention of both parties, held that a daughter-in-law was not within the classes of persons who may be beneficiaries under this statute. The designation of the appellant as beneficiary was therefore invalid from the beginning, and it is not necessary to inquire how his status would have been affected by the divorce had the origfamily, person or persons dependent or re- inal designation been valid. The superior court properly held that the appellant was not entitled to the fund.

But the improper designation of a beneficiary did not render void the contract between the society and the member. The designation was void, and left matters as though no designation had been attempted. Doherty v. A. O. H. Widows, etc., Fund, 176 Mass. 285, 287, 57 N. E. 463. Where statutes fix the classes of persons for whom the fund shall be accumulated, the persons so indicated will take where there had been no designation, or a void designation, of a beneficiary, unless otherwise provided by statute or the laws of the society. Shea v. Mass. Benefit Ass'n, supra; Clarke v. Schwarzenberg, 162 Mass. 98, 101, 38 N. E. 17; Britton v. Royal Arcanum, 46 N. J. Eq. 102, 109, 18 Atl. 675, 19 Am. St. Rep. 376; Knights of Columbus v. Rowe, 70 Conn. 545, 561, 40 Atl. 451. The widow and children of the deceased were the persons for whom the fund had been obtained under the statute and laws of the society, and, the children having assigned any interest they might have to the widow, she was entitled to the fund. But if this were not so, the appellant cannot complain of the judgment, as he has no interest in the fund, and the plaintiff consents that it be disposed of as the court shall order.

It appears from the finding that the appellant, believing himself to be a legal beneficiary under each of the certificates, paid to the order all the necessary fees and assessments becoming due and owing to the order by the member Hines by reason of his being admitted thereto, and entitling him to participate in its relief and benefit fund. The money was not advanced as a loan to Hines, nor, so far as appears, under any agreement proper or improper with him, but voluntarily because it was supposed that the appellant was the legally designated beneficiary. He claims that if he is not entitled to the fund as beneficiary, he is entitled to be reimbursed for the moneys so paid. Under the laws of the order and the terms of the certificates the member could at any time cause the old certificates to be canceled, and new ones issued, naming a new beneficiary of the fund. It is well settled that in such a case a beneficiary under the old certificate, who has paid dues and assessments, cannot recover money so paid by him. The beneficiary has no vested interest in the fund during the life of the member. The contract is with the latter, who during his life may appoint any person within the permitted classes to be the beneficiary. A beneficiary who, knowing this, pays the assessments takes his chance of remaining beneficiary until the death of the member. If a change is made, he has no lien or claim upon the fund for the money so paid. person improperly designated can stand in

this respect in no better position than he would had he been properly designated. The payment in either case is voluntary. The court properly held that the appellant was not entitled to reimbursement of the money paid by him. Independently of other considerations, no equity to a lien can exist in view of the Massachusetts statutes (chapter 119, § 8), prohibiting any contracts between a member and another under which the latter, if made a beneficiary, shall pay the dues and assessments. The payment by the appellant violated the spirit of this law.

There is no error. The other Judges concurred.

(82 Conn. 286)

Appeal of HULL

(Supreme Court of Errors of Connecticut. July 20, 1909.)

1. APPEAL AND ERROR (§ 364*)—PROCEEDINGS FOR TRANSFER OF CAUSE—STATEMENT OF TIME AND PLACE OF HOLDING THE COURT TO WHICH APPEAL IS TAKEN.

An appeal fails to comply with Gen. St. 1902, §§ 791, 798, where it does not state either the time or place of the holding of the court to which the appeal is taken, or even that it is to the next term in the judicial district.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 364.*]

APPEAL AND EBROR (§ 804*)—Proceedings FOR TRANSFER OF CAUSE-VALIDITY.

The joining of an appeal from the denial of a motion to set aside the verdict with an appeal from the final judgment would not render the former appeal any the less abatable, upon the ground that as originally taken it was not in proper form, nor taken within six days after the judgment, than it would have been, had there been no such joinder.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 804.*]

3. APPEAL AND ERROE (§ 804*) — PLEA IN ABATEMENT TO APPEAL—TIME FOR FILING.

There is no merit in the claim that a plea in abatement to an appeal should have been filed at the Appli intended of the Tune term. filed at the April, instead of the June, term, where the appeal was not made returnable to the April term nor entered thereat.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 804.*]

4. APPEAL AND ERROR (§ 364*)-AMENDMENT OF APPEAL-RIGHT TO.

An amendement of an appeal, making it returnable to a term to which it does not appear it was ever intended to be returned, and was not in fact returned, and to which it cannot be returned because the term has expired, will be denied; no sufficient reason appearing therefor.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 364.*]

5. APPEAL AND ERROR (§ 428*)—Notice of APPEAL—TIME FOR FILING.

A notice of appeal, filed within the specified time after the acceptance of the verdict, though before the date of the judgment as stated in the ing judgment file, and not withdrawn, is to be rejudgment as a continuing notice after the date of judgment as fixed by the judgment file, and so to be a notice filed after the rendition of the judgment within Gen. St. 1902, § 790, requiring

a notice of appeal to be filed within one week wards certified by the court and made a part after judgment.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 428.*]

Levea A. Hull presented a claim to the administrators of the estate of Joseph W. Kindregen, deceased, and from the commissioners' report she appealed to the superior court of New Haven county, where there was a judgment in her favor, and from a refusal to set aside the verdict and the judgment the administrators appealed. Claimant filed pleas in abatement to the appeals to which the administrators demurred. Demurrer to one plea overruled, and to the other sustained.

Hull, McGuire & Hull, for the plea. James M. Lynch and William E. Thomas, opposed.

HALL, J. The appellant, in the superior court, Levea A. Hull, whom we shall call the "plaintiff," presented to the appellees, (defendants) administrators of the estate of Joseph W. Kindregan, a claim for about \$25,000, for compensation for services, expenses, etc., rendered and incurred by the plaintiff, under an agreement, in the care of said Kindregan and his wife during some nine years prior to May, 1907, the date of death of said Kindregan. From the report of the commissioners upon said claim, the plaintiff appealed to the superior court of New Haven county, where, upon the trial of the case to the jury, a verdict was on the 5th of March, 1909, rendered for the plaintiff for \$10,000.

March 6, 1909, the defendants filed a motion to set aside the verdict and for a new trial, upon the ground that the verdict was against the evidence. March 8, 1909, the defendants signed and filed the following notice of appeal: "Hull's Appeal from Commission-Superior Court, New Haven County, March 8, 1908. Notice of Appeal. In the above-entitled action the defendants appeal from the judgment rendered therein to the Supreme Court of Errors." March 19, 1909, the court denied the defendants' motion to set aside the verdict. March 19, 1909, the clerk signed and filed the judgment file, of that date. March 25, 1909, the defendants signed and filed the appeal, in the following form: "Levea A. Hull's Appeal from Commissioners. New Haven County, Superior Court, March 24, 1909. Appeal from Denial of Motion to Set Aside Verdict. The appellees in the above-entitled case hereby appeal to the Supreme Court of Errors, from the denial of the motion for a new trial, on the ground that the verdict was against the evidence, and herewith file a copy of all the rulings and evidence in said case, and hereby request the court to certify the same, together with the exhibits, to the Supreme Court of Errors and make it part of the rec-

of the record. April 30, 1909, the trial judge filed a finding of facts in the case. May 8, 1909, the defendants filed an appeal, which, after the proper caption, was as follows: "In the above-entitled cause the appellees (defendants) appeal from the judgment of said court, and from the refusal of said court to set aside the verdict as against the evidence, to the Supreme Court of Errors to be held at New Haven on the first Tuesday of June, 1909, for the revision of the errors," etc. One of the several reasons of appeal assigned in this appeal is that the court erred in denying the appellees' motion to set aside the verdict as against the evidence. May 26, 1909, the plaintiff filed two pleas in abatement with the clerk of this court, one to the appeal from the denial of the motion to set aside the verdict, upon the grounds, among others: (1) That the attempted appeal stated neither the time nor place of the holding of the court to which the appeal was taken; and (2) that the defendants did not appeal from the denial of the motion to set aside the verdict within six days from the rendition of the judgment. And the other to the appeal form the final judgment, upon the ground, among others, that the defendants did not, within "one week after the rendition of the judgment in such cause," file with the clerk of the court in which the judgment was rendered a written notice of appeal, as required by section 790 of the General Statutes of 1902. The defendants moved that the plea in abatement to the appeal from the denial of the motion to set aside the verdict be struck out, as filed too late, and also moved for leave to amend that appeal by adding, after the words "appeal to the Supreme Court of Errors," the words "next to be held at Bridgeport in and for the Third judicial district on the second Tuesday of April, 1909," and also demurred to both pleas in abate-

The attempted appeal of March 25th, from the denial of the motion to set aside the verdict, should, under section 788, have been taken to the Supreme Court of Errors next to be held at Bridgeport on the second Tuesday of April, 1909, as that was the next term of the Supreme Court of Errors to be held in the Third judicial district after the filing of the appeal. If so taken and duly entered, it would have been open to the appellant to move at that term for a continuance, in view of the proceedings related to an appeal from the final judgment and of a possible consolidation of the two appeals at a subsequent term. It was not so taken, nor was it taken to any term of the Supreme Court. It failed to comply with the requirements of sections 791 and 798, since it failed to state either the time or place of the holding of the court to ord." The evidence and rulings were after- which the appeal was taken, or even that it

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was taken to the term next to be held in that | judgment file, was a sufficient notice to enjudicial district. In re Application of Shelton St. R. Co., 70 Conn. 329, 331, 39 Atl. 446; Hayden v. Fair Haven & W. R. Co., 76 Conn. 355, 358, 56 Atl. 613. This appeal would have been abatable at the April term of the Supreme Court held at Bridgeport, had it been entered there. Instead of entering it there, the defendants have attempted to join it with the appeal of May 8th, from the final judgment; but, as a part of that appeal, it is equally abatable upon the ground that it was not, nor was any appeal from the denial of the motion to set aside the verdict, taken in the form required by the statute, and as required by section 805, within six days after the entry of the judgment on the verdict, which was March 19th. Assuming, without deciding, that the appeal of March 25th, had it been taken in proper form might, even though not entered at the April term, have been joined with the appeal of May 8th from the final judgment, returnable to the June term, yet such union of the two appeals would not render the appeal from the denial of the motion to set aside the verdict any the less abatable, upon the ground that, as originally taken, it was not a valid appeal, and that no valid appeal was taken within six days after the rendition of judgment, then it would have been, had there been no joinder of the two appeals. Stillman v. Thompson, 80 Conn. 192, 194, 67 Atl. 528.

There is no merit in the claim that the plea in abatement to the appeal from the denial of the motion to set aside the verdict should have been filed at the April term at Bridgeport, instead of the June term at New Haven. The appeal of March 25th was not made returnable to the April term, nor was it entered at that term. The demurrer to the plea in abatement to the denial of the motion to set aside the verdict is overruled, and the plea sustained.

The motion to amend the appeal of March 25th is denied. No sufficient reason appears why we should permit an amendment making an appeal returnable to a term to which it does not appear it was ever intended to be returned, nor was in fact returned, and to which it cannot now be returned, since that term has expired.

The notice of appeal of March 8th, filed after the verdict and before the date of the

title the defendants to appeal from the final judgment. Under section 790 such notice of appeal must be filed "within one week after the rendition of the judgment." A judgment is in fact rendered in a cause tried to the court when the trial judge officially announces his decision either orally in open court, or by memorandum filed with the clerk, and the party desiring to appeal may at any time within a week thereafter properly file his notice of appeal, although no judgment file has been formally written out, and when prepared in such a case the judgment file should bear the date of the announcement of the decision. Bulkeley's Appeal, 76 Conn. 454, 458, 57 Atl. 522. But in the case of a jury trial of a civil cause there is not, as in the trial of court cases, either an announcement by the judge of a decision or of a judgment, either orally or by an official memorandum filed with the clerk. While the announcement by the jury and the acceptance by the court of a verdict differs technically from the announcement by a trial judge of its decision, yet there is such a relation between the acceptance of a verdict and the entry of judgment upon the verdict that a notice of appeal, filed within the specified time after such acceptance, and not recalled, ought fairly to be regarded as a continuing notice in analogy to the effect given to a request to place a cause upon the jury docket in Fuller v. Johnson, 80 Conn. 493-495, 68 Atl. 977.

The demurrer to the plea in abatement to the appeal of May 8th from the judgment is sustained, and the plea overruled. The other Judges concur.

(82 Conn. 701)

KENDALL V. LUTHER.

(Supreme Court of Errors of Connecticut. July 20, 1909.)

Action by Harriet P. Kendall against Estelle E. Luther, administratrix. Judgment for plaintiff, and defendant appeals. Plaintiff pleads in abatement to the appeal for failure to file a notice of appeal. Plea in abatement overruled.

William W. Bierce, for the plea. Edwin S. Thomas, opposed.

PER CURIAM. The plea is everruled, for the reasons stated in Hull's Appeal, 82 Conn.

—, 73 Atl. 798.

(1 Boyce, 10)

In re SHELLY.

(Superior Court of Delaware. Kent. July 5, 1909.)

ATTACHMENT (§ 64*) — PROPERTY SUBJECT -FUNDS IN HANDS OF SHERIFF.

Attachment of the distributive share of the proceeds of a sheriff's sale in the hands of the sheriff, before the sale was confirmed or the property distributed, by a creditor of such distributee, was invalid; it being against public policy to disturb the administration of public duties by public officers.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 181-188; Dec. Dig. § 64.*]

Petition by Mary E. Shelly to pay money out of court. Application granted.

Argued before CONRAD, WOOLLEY, and HASTINGS. JJ.

John B. Hutton, for petitioner. William M. Hope, for attaching creditor of petitioner.

WOOLLEY, J. It appears from the records of this court and from the several petitions filed in this cause that at the term, A. D. 1908, a judgment was entered in favor of Jennie W. Hawkins against Thomas S. Maughn, which became a lien on the lands of the said Thomas S. Maughn. On the 15th day of June, A. D. 1908, Thomas S. Maughn granted and conveyed the said lands so incumbered unto Thomas R. Adams. On the 16th day of June, A. D. 1908, a judgment was entered in this court in favor of Mary E. Shelly against Thomas R. Adams for the real debt of \$432, which became a lien upon the land so conveyed by Thomas S. Maughn to Thomas R. Adams. To the February term, A. D. 1909, a writ of venditioni exponas was issued upon the judgment against Thomas S. Maughn, addressed to William E. Maloney, sheriff of Kent county, pursuant to the mandate of which the sheriff sold the lands incumbered by the two judgments aforesaid at public auction and made proper return of the said writ, with his deings thereunder indorsed thereon. It appears that the February term, A. D. 1909, of the court commenced on Monday, the 1st day of February, A. D. 1909. It does not appear when and upon what date the sheriff distributed the proceeds of the sale. Thursday, the 4th day of February, A. D. 1909, a writ of fieri facias with an attachment clause appended, issuing from S. Brady Cooper, a justice of the peace for Kent county, was laid in the hands of the sheriff, and the rights and credits of Mary E. Shelly in her judgment against Thomas R. Adams were attempted to be attached.

The amount of the proceeds of the sale then or afterwards ascertained to be applicable to the judgment in favor of Mary E. Shelly and against Thomas R. Adams was the sum of \$85.45, which sum being demanded by the said Mary E. Shelly by virtue of the fund of Mary E. Shelly as a claimant was lost by her when her rights and credits were attached by Harriett D. Cooper in the hands of the sheriff, and as a consequence Harriett D. Cooper is the only the rights as plaintiff in the said judgment there were not several claimants with con-

against Thomas R. Adams, and being also demanded by Harriett D. Cooper, the judgment creditor of the said Mary E. Shelly under the attachment fleri facias laid in the hands of the sheriff as aforesaid, the sheriff of Kent county presented his petition to this court and asked and obtained leave to pay the same into the registry thereof. At the April term, A. D. 1909, Mary E. Shelly presented her petition, praying that the sum of \$85.45 so paid into court be paid and delivered to her. The prayer of the petition was resisted by Harriett D. Cooper, the attaching creditor of Mary E. Shelly, upon the grounds, first, that the money was improperly paid into court, and, second, that the attachment was properly laid, and therefore the money should be paid unto her as the attaching creditor of Mary E. Shelly, instead of being paid to Mary E. Shelly.

Considering, first, the question as to the propriety of the court's order, allowing the prayer of the sheriff's petition to pay into court the money which was due some one under the judgment against Thomas R. Adams, it appears that the sheriff acted under section 3 of chapter 32 of the Revised Code, wherein he is authorized to bring into court money for the payment of which there are several claimants, and that upon the face of his petition he complied with section 4 of rule 7 of the rules of the superior court in making "a written statement of the facts and of the several claimants." By his petition it further appears that one claimant is Mary E. Shelly, who demanded the money because of her position as judgment creditor of Thomas R. Adams, terre-tenant of the lands from the sale of which the money in dispute arose, and that the other claimant is Harriett D. Cooper, who demanded the money because of her position as a creditor of the said Mary E. Shelly, and because of rights claimed under the attachment process laid in the hands of the sheriff. While obviously two people were claiming of the sheriff one fund, and while the sheriff received two demands for the payment of one sum, the counsel resisting the petition to pay the money out of court urges that Harriett D. Cooper was the creditor of Mary E. Shelly, and as Mary E. Shelly was the creditor of Thomas R. Adams, to the payment of whose judgment in part the fund was applicable, there was in theory but one claimant, and that claimant was the person who in law was entitled to the fund applicable to Adams' He further contends that the judgment. right to the fund of Mary E. Shelly as a claimant was lost by her when her rights and credits were attached by Harriett D. Cooper in the hands of the sheriff, and as a consequence Harriett D. Cooper is the only claimant. If this be true, it is urged that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ute and the rule, and therefore the money was improperly paid into court on the sheriff's petition.

While it is true that the sheriff might have pleaded nulla bona to the attachment, and in the trial of that plea, either before a justice of the peace or on appeal to this court, have had determined and adjudicated the right of a creditor of a distributee to attach in the hands of the sheriff the funds to be distributed, or while recovery might be had in an action at law against the sheriff for funds improperly applied or withheld by him, yet the court does not feel that in this case, when the claims were submitted to it for its decision without objection from either party seeking the fund, the sheriff's petition on its face showing there were two claimants with conflicting claims, it should annul its order and cause the question involved, and to be next considered, to be returned to it in another manner and by a circuitous route.

The remaining objection to the prayer of the petition, urged by the counsel resisting, is that the rights of Mary E. Shelly in the · fund applicable to her judgment against Thomas R. Adams have been attached in the hands of the sheriff; hence the money should be paid, not to her, but to her attaching creditor. Counsel for the contesting claimants agree that in law the alience of the defendant in the writ succeeds to the right of his grantor to be paid any balance of the proceeds of the sale remaining after payment of all legal demands against the defendant, and that, when there are judgments against the alienee, the balance which otherwise would be paid to the alienee should be applied to the payment and discharge of those judgments. There is, therefore, left for determination but one question, which is the manner and time in which money in the hands of a sheriff may be diverted, by attachment process, from the ordinary channels of distribution.

The courts of this state have quite uniformly held that money held by a public officer or other person in a fiduciary capacity is not liable to attachment while so held. Farmers' Bank v. Ball, 2 Penn. 374, 377, 48 Atl. 751; Jaquett's Adm'r v. Palmer, 2 Har. 144; In re Truxton, 2 Marv. 373, 43 Atl. 257; Fitchett v. Dolbee, 3 Har. 267; Plunkett v. Le Huray, 4 Har. 436; Lyon's Adm'r v. Houston's Adm'r, 2 Har. 349; Johns v. Allen, 5 Har. 419; Rossell v. Bartram, 1 Penn. 242, 40 Atl. 242. The reason of this rule, among others, is that it is against private rights to disturb, by legal process, the lawful administration of a fiduciary relation, and it is against public policy to embarrass or disturb, by execution process, public officers in the orderly administration of public duties. The rule, however, is limited in its duration to the period of the fiduciary relation; the language of our decisions being that "money

flicting claims, as contemplated by the stat- | fiduciary capacity is not liable to attachment while so held." As the sheriff is a public officer acting in a fiduciary capacity, it is necessary to ascertain how and when he ceases to act in that capacity, in order to ascertain how and when he is liable to attachment for money received in his hands officially and held in his hand unofficially.

Counsel, in opposing the prayer of the petition, urges that the time at which to determine the order of distribution and to ascertain the existence of a surplus due the defendant in the writ or his alience is upon the return day of the selling writ, and not upon a subsequent day when actual distribution is made. It is contended that upon the return day of the writ all rights are fixed, and all persons entitled to share in the proceeds of the sale are ascertained. The court holds otherwise, as it is of the opinion that no persons obtain fixed rights in the proceeds of a sheriff's sale until, at least, the sale is confirmed, which cannot be until the first Friday after the return day of the writ. Even after confirmation, the order of the distribution and the personnel of the distributees may change from time to time. After confirmation and before final distribution, one or more judgments against the defendant might be assigned, paid, or vacated, or the method of distribution changed and diverted by the decree of the Chancellor. Cornog v. Cornog, 3 Del. Ch. 407; Gemmill v. Richardson, 4 Del. Ch. 599. In Jaquett's Adm'r v. Palmer, 2 Har. 144, the court held that a surplus in the hands of the sheriff, "after all executions are satisfied," may be attached, thereby indicating that the fiduciary capacity of the sheriff did not cease to exist until he had applied the proceeds to the satisfaction of all legal demands. In re Truxton, 2 Marv. 373, 43 Atl. 257, the court held that the sheriff could not be held on attachment for not answering as garnishee, unless it should appear that he had a balance in hand to be paid over to the defendant.

It therefore appears by the decisions in this state that money in the hands of a sheriff cannot be attached until after he has performed his fiduciary duties by applying the proceeds of a sale to all legal demands. When the money is applied to all legal demands, and a balance or overplus is ascertained, then such balance or overplus is held by him otherwise than in his fiduciary capacity, and for it he is liable either to be sped or attached. Fitchett v. Dolbee, 3 Har. 267. As the attachment in this case was laid one day before the day of the confirmation of the sale, its purpose could not have been to reach a surplus, for no distribution is shown to have been made before confirmation; its object was to reach and get the share of one of the legal distributees before distribution was made and completed, and its effect was to embarrass and disturb the sheriff as a public officer in the orderly distribution of funds held by a public officer or other person in a held by him in his fiduciary capacity.

The court is of the opinion that the attaching creditor of Mary E. Shelly takes nothing by her process, and that Mary E. Shelly, as plaintiff in the judgment against Thomas R. Adams, is entitled to the money paid into court, less the costs of her petition, and directs an order to be drawn accordingly.

(29 R. I. 343)

NEWELL v. WHITE et al.

(Supreme Court of Rhode Island. Dec. 19, 1908.)

1. WILLS (§ 289*) - PROBATE - TESTIMONY OF ATTESTING WITNESSES.

Where attesting witnesses to a will not only deny that testator signed the will in their presence and that they signed in his presence, but deny their signatures thereon, and they are disdeny their signatures thereon, and they are discredited by proof that the signatures are genuine, the maxim, "False in one thing, false in everything," may be applied in considering their testimony, and the presumption applicable to deceased attesting witnesses, en proof that they subscribed the will, may be applied to such attesting witnesses. testing witnesses.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 289.*]

2. WITNESSES (§ 322*)—RIGHT TO CONTRADICT WITNESSES.

One bound by law to produce a witness, such as a subscribing witness to a will, does not youch for his credit; and he may contradict the witness giving damaging evidence against him, and prove the truth of any particular fact by any other competent testimony in direct contradiction to such witness.

[Ed. Note.—For other cases, see W. Cent. Dig. § 1095; Dec. Dig. § 322.*] Witnesses,

3. WILLS (§ 303*) - EXECUTION - EVIDENCE-SUFFICIENCY.

A will may be supported against the testimony of some or of all the subscribing wit-

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 711-723; Dec. Dig. § 303.*]

4. EVIDENCE (§ 70*)—PRESUMPTIONS.

The presumption that all things have been done regularly includes regularity in the order of signatures on an instrument.

[Ed. Note.—For other cases, see Cent. Dig. § 91; Dec. Dig. § 70.*] see Evidence,

5. WILLS (\$ 289*) - EXECUTION - PRESUMP-TIONS.

As the purpose of procuring the attestation of witnesses to a will is to give effect to the instrument as a will, it will be presumed, in the absence of proof to the contrary, that testator, procuring the authentication of the instrument, signed before the witnesses.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 653-656; Dec. Dig. § 289.*]

6. WILLS (§ 324*) - EXECUTION - QUESTION FOR JURY.

Whether, in proceedings to probate a will, the signatures of testator and attesting witnesses on the instrument offered for probate are gen-uine, and whether the will was properly executed, are for the jury.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 770; Dec. Dig. § 324.*]

7. WILLS (§ 302*) — PROBATE — EXECUTION — EVIDENCE—SUFFICIENCY.

mony of the attesting witnesses denying their signatures.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 302.*]

8. APPEAL AND ERROR (§ 1005*)-VERDICT-CONCLUSIVENESS.

A verdict approved by the presiding justice will not be disturbed, without weighty reasons against it.

[Ed. Note.—For other cases, see Appeal and rror, Cent. Dig. §§ 3948-3954; Dec. Dig. § Error, 1005.*]

Blodgett, J., dissenting.

Exceptions from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Judge.

Proceedings by Eli S. Newell for the probate of the will of William E. Newell, deceased, contested by J. Ellis White and others. There was a decree of the superior court admitting the will to probate, rendered on appeal from a decree of the probate court refusing to probate the will, and Emily R. Newell, widow of the deceased, brings exceptions. Overruled, and case remitted to the superior court.

Louis L. Angell, for appellant. Nathan W. Littlefield and Thomas P. Corcoran, for appellee Newell.

DUBOIS, J. This is a probate appeal to the superior court from the decree of the probate court of the city of Pawtucket, whereby said court refused to admit to probate an instrument as the last will and testament of William E. Newell, late of said Pawtucket, deceased. Upon trial in the superior court the jury rendered a verdict that said instrument is the last will and testament of said William E. Newell, and the case is now before this court upon the exceptions of Emily R. Newell, the widow of said deceased, to the decision of the superior court denying her motion for a new trial.

The only portions of the will that need be referred to as being important in this consideration are the following:

"In testimony whereof I hereunto set my hand and seal this twenty-sixth day of October A. D. 1905.

"Wm. E. Newell. [Seal.] "On this twenty-sixth day of October, 1905, we three, at the request of the abovenamed William E. Newell, in his presence and in the presence of each other, hereunto subscribe our names as witnesses.

"Edmund D. Roberts. "Earl H. Roberts. "Roy L. Roberts."

The requisites of a valid will are contained in Gen. Laws 1896, c. 203, § 13: "No will shall be valid, excepting as provided in sections twenty and thirty-six of this chapter, unless it shall be in writing and executed in In proceedings to probate a will, evidence held to authorize the jury to find that the will was duly executed, notwithstanding the testimanner hereinafter prescribed; that is to

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and by his express direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary. and no other publication shall be necessary."

At the trial in the superior court the death of the testator and of the person who wrote the will having been proved, the subscribing witnesses to the alleged will were called upon to testify, and they severally denied that they signed the will in question, and each of the witnesses Edmund D. Roberts and Roy L. Roberts, in addition to denying his signature, testified that he could not have signed said will at the time of the date thereof, because of his absence from the place of its execution at the time thereof. The former testified that on the morning of October 26, 1905, he left home "between 8 and perhaps quarter past, along there," and went to his business, at Abraham Bros., in Providence, where he remained all the business day; that he left there at 5 o'clock, and walked home, arriving at about a quarter to 6; that he did not go to dinner that day, and was not at home between the hours of 11 and 2 o'clock; that he fixed these times from a diary which he kept at that time. Roy L. Roberts testified that on the 26th day of October, 1905, he was in attendance at the Pawtucket High School, and stayed there until school closed, at half past 1; that the school was about a mile and a quarter from the house, and that it would take him about 20 or 25 minutes to go from the school to his house; that it was about 2 o'clock when he reached home on the day in question. He was asked if there were any days when he was excused earlier than the hours he had named, and he replied: "Not to my memory." The witness was further examined by counsel for the appellee, without objection or exception, as follows: "Q. Have you taken any pains to verify your attendance on that day? A. Yes. Q. What are they? A. A letter from the principal, Mr. Hosmer: 'Mr. Roy L. Roberts, 2 State Street, Worcester, Mass.: I have looked up your matter, and find you were present in school on October 26, 1905 Wishing you and the other Pawtucket boys who are in Worcester, continued success, I am, very truly yours, E. S. Hosmer."

Admittedly genuine signatures of the attesting witnesses to the will on other writings were submitted to the jurors for comparison with the disputed writing, in order that they might determine the genuineness, or otherwise, of the writing in dispute, under the provisions of Court and Practice Act 1905, \$ 399, which reads as follows: "Comparison of a disputed writing with any writing proved to the satisfaction of the judge

some other person for him in his presence by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute." In a case where the sole issue was whether the defendant signed a bond, it was held that legal evidence of that fact was admissible, although the defendant had been called as a witness by the plaintiff and had denied it. The evidence admitted and approved in that case consisted of genuine signatures of the defendant, together with the testimony of a witness who compared the same with the disputed writing. Municipal Court v. Kirby, 28 R. I. 287, 67 Atl. 8. The difference between that case and the case at bar in this particular is that no witness was called in this case to make comparison between the genuine and disputed writing, but the genuine signatures were submitted to the court and jury as evidence of the genuineness of the writing in dispute. No objection was made to the introduction of such evidence, and no exception was taken to its allowance by the court.

Genuine signatures of the testator upon other instruments were also offered to the jury to compare with the signature upon the will in question, and in addition the appellant testified: That this instrument was prepared at his residence by Rufus G. Fairbanks, a lawyer and second cousin to the deceased, who came specially from West Medway, Mass., for that purpose. That said Fairbanks said to the testator: "Are you ready to fix up your will now?" That the witness and his wife were the only persons present at that time, and that they were requested to step out, and did step out into the kitchen. That this was about 11 o'clock on the 26th day of October, 1905. That the testator left about 12 o'clock, and went across the street to a newspaper store, and got a paper, and then went down to where the witnesses Roberts lived, the place where he was getting his meals at that time. That the testator returned to the house of the appellant some time after 1 o'clock of the same day and said: "I had Roy sign it too." That William E. Newell had the will with him when he returned, and the appellant then saw the signatures of the testator and of the three witnesses, the same that are there The appellant further testified: "And now. then he said he had executed this will, and named Rufus as executor, because he didn't want Emily or Stuart to have anything to do with settling up his business. Q. Do you know who he referred to as Emily? A. Yes; his wife. Q. Do you know who he referred to as Stuart? A. Yes, sir. Q. Who? A. William T. Stuart. * * Q. Whether or not Mr. Stuart you have referred to is a person who had transacted some business for Mrs. Emily Newell? A. I suppose he acts to be genuine shall be permitted to be made as her financial agent. • • • Q. Who was present at the time? A. My wife. Q. And to what such witness may have testified; and I think you said Rufus was present? A. Rufus, and my wife, and I. Q. Rufus, you say, died in his lifetime? A. The 17th day of January, 1907. Q. And is your wife in court? A. No, sir. Q. Was she able to come to-day? A. No."

The principal argument against the will is that there is no evidence either that the testator signed the will in the presence of the witnesses or acknowledged his signature theretofore made to be such in their presence. In the case of death of the witnesses, this court has decided (Christopher Fry's Will, 2 R. I. 88) that proof that the witnesses subscribed is proof that they signed in the testator's presence and he in theirs. "Omnia præsumuntur rite et solemniter esse acta donec probetur in contrarium." In the case of witnesses who deny not only that the testator signed the will in their presence and that they signed the same in his presence, but who also deny their signatures thereon, and who are discredited by proof that those signatures are genuine, another maxim, "Falsus in uno, falsus in omnibus," may be applied in considering their testimony, and the former presumption that applies in the case of deceased witnesses may be applied in their case, for so far as the truth of the case is concerned they might as well or better be dead.

The genuineness of the signatures of the testator and witnesses having been proved to the satisfaction of the jury and of the judge who presided at the trial in the superior court, the appellee contends as follows: "The question is whether, in the absence of any evidence that the testator made or acknowledged his signature in the presence of two or more witnesses present at the same time, such an imperfect attestation clause is sufficient to raise the presumption that the testator did so sign or acknowledge his signature to the will." The point is not a novel one in this state. In the case of Christopher Fry's Will, supra, at page 91, Brayton, J., speaking for the court, says: "Proof that the witnesses subscribed is proof that they signed in the testator's presence and he in theirs." Where a party is bound by law to produce a certain witness, such as a subscribing witness to a will, he is not deemed to vouch for his credit, and, if such witness give damaging evidence against him, he may contradict him. See 29 Am. & Eng. Encycl. Law (1st Ed.) p. 816, note 1, and cases cited. "Where the witness is not one of the party's own selection, but is one whom the law obliges him to call, such as the subscribing witness to a deed, or a will, or the like, here he can hardly be considered as the witness of the party calling him, and therefore, as it seems, his character for truth may be generally impeached. But, however this may be, it is exceedingly clear that the party calling a witness is not precluded from proving the

this is not only where it appears that the witness was innocently mistaken, but even . where the evidence may collaterally have the effect of showing that he was generally unworthy of belief." 1 Greenl. Ev. § 443, and cases cited. This doctrine is recognized in Hildreth v. Aldrich, 15 R. I. 163, 1 Atl. 249. "The law is well settled that a will may be supported against the testimony of some, or even of all, of the subscribing witnesses thereto, if their testimony is overborne by other evidence. * * * Were the law otherwise, any will might be defeated by a corrupt attesting witness." Will of Jenkins, 43 Wis. 612, approved in Will of Meurer, 44 Wis. 401, 28 Am. Rep. 591. "It is, of course, too late to claim that the facts making due execution must all, or any of them, be established by the concurring testimony of the two subscribing witnesses. Both of those witnesses must be examined; but the will may be established, even in direct opposition to the testimony of both of them. This is too well settled to call for the citation of authorities." Trustees of Auburn Seminary v. Calhoun (1862) 25 N. Y. 425, citing Tarrant v. Ware, 25 N. Y. 425, note.

In Orser v. Orser, 24 N. Y. 52, Selden, J., stated the law as follows: "The result of the authorities upon the probate of wills is that the question of the due execution of a will is to be determined, like any other fact, in view of all the legitimate evidence in the case, and that no controlling effect is to be given to the testimony of the subscribing witnesses. Their direct participation in the transaction must, of course, give great weight to their testimony; but it is liable to be rebutted by other evidence, either direct or circumstantial. A will, duly attested upon its face, the signatures to which are all genuine. may be admitted to probate, although none of the subscribing witnesses are able to swear, from recollection, that the formalities required by the statute were complied with, and even although some of them should swear positively that they were not, if the other evidence warrants the inference that they were. It might be difficult, though, I think, not impossible, to establish the will, if all the subscribing witnesses should state positively that the statutory requisites were not observed. But, however this may be, the authorities are abundant to show that, where testimony favorable to the due execution of the will is derived from some or one of those who subscribed it as witnesses, it becomes a mere question as to the relative weight of the evidence, whatever may be the testimony of the others. Jauncey v. Thorne, 2 Barb. Ch. 40, 45 Am. Dec. 424, and cases there cited." In Ela et al. v. Edwards, 16 Gray (Mass.) 91, it is stated by Dewey, J., as follows: seems, therefore, to be well established that the fact of the want of an attestation clause truth of any particular fact, by any other does not invalidate the will. It does not, in competent testimony, in direct contradiction the case of the death or absence from the

jurisdiction of the court of one or all the witnessess, defeat the probate of the will, but only changes the nature of the proof. Instead of its being shown by the attestation clause that there was a compliance with the statute, the court, or jury, if the case is tried by a jury, are to be reasonably satisfied of the fact of a proper attestation from other sources and the circumstances of the case."

mistaken as to the fact of acting as witnesses to the execution of this will, it would almost necessarily follow that they were also mistaken in their testimony as to the several particulars occurring at the time of such signing. 'If so important a fact as the signing. 'If so important a fact as the signing, their names as witnesses has escaped recollection, the accompanying incidents must have shared the same fate.' 'The de-

The case of Matter of Will of Cottrell, 95 N. Y. 333, is similar in some respects to the case at bar, and the following extracts from the opinion of Ruger, C. J., therein are pertinent in the present inquiry:

'Although the occasions in which all of the subscribing witnesses testified positively against the due execution of a will have been infrequent of late years, a number of such instances are reported among the earlier English cases, which have been cited with approval, in recent cases in our courts. Those cases are collated and commented upon in the case of Tarrant v. Ware, 25 N. Y. 425, note, by Judge Denio, reported as a note to the case of Trustees of Auburn Seminary v. Calhoun, 25 N. Y. 425. * * * The determination of the question of fact involved in the inquiry as to whether a will has been properly executed or not is governed by the same rules which control in the trial of other questions of fact. The proponent has the affirmative of the issue, and, if he fails to convince the trial court by satisfactory evidence that each and every condition required to make a good execution of a will has been complied with, he will necessarily fail in establishing such will. It would undoubtedly have been competent for the trial court in this case to have denied probate to the will in question upon the evidence before it, and in that event we should have been bound by its decision. This, however, it has not done, but, on the contrary, has found that the will was duly executed. Upon referring to the evidence in the case, we certainly find quite an unusual and extraordinary condition. The two persons purporting to have signed this will as subscribing witnesses not only each testify that none of the formalities required by the statute were complied with in its execution in their presence, but also positively deny that either of them was present at its execution or signed the attestation clause. No greater weight can be given to that part of the evidence of these witnesses wherein they deny that the several formalities required by the statute were unperformed in the execution of this will than to their more important testimony that they were not present on the occasion and did not sign the attestation clause. It follows, of course, that if they do not recollect or perversely refuse to testify to the interview itself, that they would also deny the several incidents which accompanied such an interview.

"If, therefore, it was established by competent evidence that these witnesses were to belief. While no motive or reason ap-

es to the execution of this will, it would almost necessarily follow that they were also mistaken in their testimony as to the several particulars occurring at the time of such signing. 'If so important a fact as the signature of their names as witnesses has escaped recollection, the accompanying incidents must have shared the same fate." 'The denial of the principal event necessarily involves all the details in the same result.' Peebles v. Case, 2 Bradf. Sur. (N. Y.) 226. Upon looking into the evidence, we find that it was in proof that the testator boarded and lodged with the alleged subscribing witnesses (who were husband and wife), not only at the time the will purported to have been executed, but had done so for several years previous thereto; that the husband had been a subscribing witness to a will previously executed by the testator; and that the will in dispute, apparently properly executed. was found among the papers of the deceased after his death. It also appeared that the will, as well as the attestation clause, was wholly in the handwriting of the testator, and also bore his undoubted signature at the end thereof. The testator declared during his last sickness that the will executed as he had described it was either among his papers or that he had given it to his executor. A bag containing the testator's papers, and among which was the will in question, was produced by the executor at a meeting of the testator's relatives, including the contestants, held at such executor's house on the day of the testator's death, and its contents were then for the first time made known to the parties interested by one of such relatives, who read it in the presence of the persons there assembled. Specimens of the handwriting of each of the subscribing witnesses were properly put in evidence on the trial, and, from a comparison of such specimens with the signatures of the witnesses to the attestation clause, experts testified that such signatures were respectively in the genuine handwriting of such witnesses. * * The surrogate has found as a fact; upon conflicting, yet competent, evidence, that the subscribing witnesses to the will in question in fact signed the attestation clause. * * The witnesses to the will have, by signing the attestation clause, certified to facts taking place upon its execution, directly conflicting with the evidence given by them upon the trial. To believe this evidence requires us to suppose that the testator deliberately forged the names of witnesses to his will at a time and under circumstances when it was just as convenient for him to have obtained their genuine signatures thereto. Upon this evidence the surrogate has refused to give credit to their testimony, and must, we think, necessarily have found, for reasons appearing sufficient to him, that none of the evidence given by them was entitled pears upon the face of the evidence incorporated in the record before us for imputing corruption or perjury to the subscribing witnesses in giving such evidence, yet to believe what they testify to on the subject involves consequences so unnatural and improbable that we are constrained to hold that the surrogate was justified in discrediting their testimony.

"The affirmative evidence tending to show an omission on the part of the testator and witnesses to comply with the requirements of the law in the execution of the will having been thus discredited by the court below, it only remains to determine whether there was, within the rule, sufficient evidence of the facts to authorize the surrogate to find the due execution of the will. It would seem from the language of the Code that proof of the handwriting of the testator, and of the subscribing witnesses, to a proper attestation clause, was regarded as the most important and conclusive fact on the trial of an issue as to a proper execution of a will. Such evidence, in connection with other circumstances tending to prove its due execution, would seem, within all the authorities, to justify a decree admitting it to probate, even against the positive evidence of the subscribing witnesses. It was always considered to afford a strong presumption of compliance with the requirements of the statute in relation to the execution of wills that they had been conducted under the supervision of experienced persons, familiar not only with the forms required by the law, but also with the importance of a strict adherence thereto. Chambers v. Queen's Proctor, 2 Curteis, 415; In re Kellum, 52 N. Y. 519; Cove v. Cawen, 3 Curteis, 151; Peck v. Cary, 27 N. Y. 9, 84 Am. Dec. 220. We think that that presumption also arises in this case. The testator had not only once correctly gone through the ceremony of executing a will, but by drawing the attestation clause in question he had at the time necessarily brought before his mind each one of the conditions imposed by the statute as necessary to its valid execution. It is quite unreasonable to suppose that such a person having drawn and signed a will, and having added thereto a proper attestation clause, should have provided witnesses therefor, and required them to sign a certificate to the effect that each of the required formalities had then been observed, without also providing for their actual performance. He had knowledge of the necessity of the act required to the validity of the business he was then transacting, and to hold that he omitted it would oblige us to ascribe to him the intention of performing a vain and useless ceremony at the expense of time and labor to himself and the commission of a motiveless crime.

"The presumptions arising from the certificate of the subscribing witnesses, and the supervision of an experienced person that the in conformity herewith.

requisite formalities were complied with, are fortified by the acts and conduct of the testator. Nearly three years elapsed between the date of the will and the death of the testator, and he had, therefore, ample time and opportunity to supply any defects in its execution, if any existed; but at the last moment, when the subject of a will was brought to his attention, he evidently supposed that he had made a valid testamentary disposition of his property. It also appears that it was executed while the testator was living in the family of the alleged witnesses, that one of them had formerly acted in a similar capacity for him, and that they were both persons who, for convenience as well as from their relations to the testator, would naturally have been selected as witnesses to a will drawn by himself, and whose execution he personally supervised. We think the various circumstances to which we have referred, in connection with the full and regular attestation clause in the handwriting of the testator, proved to have been signed by the witnesses, were, sufficient to authorize the finding by the court below establishing the will."

The presumption that all things have been done regularly includes regularity in the order of signatures upon an instrument. As was well said in Dewey v. Dewey, 1 Metc. (Mass.) 354, 35 Am. Dec. 367: "The purpose of procuring the attestation of the witnesses was to give effect to the instrument as a valid will. It can hardly be supposed that the testator, who was by his own active agency procuring the authentication of the instrument by the requisite witnesses, would have omitted the first step necessary to its due execution, viz., the signature of himself." In Allen v. Griffin et al., 69 Wis. 533, 35 N. W. 22, the court said: "We think, in the absence of clear proof that the witness or witnesses signed before the signing of the testator, it should be presumed that the testator signed first. This would be the usual order of signatures." "That the testator signed the will first is indicated by the will" (citing Dewey v. Dewey, 1 Metc. [Mass.] 354, 35 Am. Dec. 367). Barnes v. Barnes, 66 Me. 296.

Whether the signatures of the testator and those of the witnesses on the instrument in question are genuine or not, and whether the will was properly executed, were questions of fact, and clearly within the province of the jury to determine. Their verdict in favor of the will has been approved by the justice of the superior court who presided at the trial. A verdict so approved is not to be disturbed without weighty reasons against it. Wilcox v. Rhode Island Company, 29 R. I. 292, 70 Atl. 913. No such reasons appear in this case.

The exceptions of Emily R. Newell are therefore overruled, and the case is remitted to the superior court for further proceedings in conformity herewith.



BLODGETT, J. (dissenting). persons whose names purport to be subscribed to the instrument in question severally testify that the signatures thereon are not their signatures, and that the deceased not only did not sign the instrument in question in their presence, but that they did not even know that he had left an alleged will until after his decease. No one of these witnesses is related, either by blood or marriage, either to the deceased, to any of his heirs at law, or to any of the legatees or devisees under the will, and each one of them is without pecuniary interest of any kind whether probate be granted or denied. Their reputation for veracity is not impeached, and two of them testify that they were not at the house in Pawtucket where it is claimed they acted as witnesses at the time the instrument is supposed to have been executed; one being in Providence, and the other in attendance at the Pawtucket High School, more than a mile distant, and the testimony of the latter being confirmed by a reference to the school record, which shows his presence at school on the day in question. No attempt, even, is made to deny this alibi of these witnesses; but the case for the proponents rests solely on certain admittedly genuine signatures of these witnesses to certain letters and checks, which were submitted to the jury without a word of expert testimony as to their similarity or identity with the signatures in question, and the only contrary testimony is that of the brother of the deceased, who is also the principal beneficiary under an instrument purporting to be the last will and testament of a childless testator, more than 70 years of age, who thereby gave his wife only "her dower right in my estate." This witness does not testify that the deceased and the three persons whose names are subscribed as witnesses even met on the day in question, but avers that the deceased told him that he had executed a will, and says he saw it (but did not read it), and that the three names were there then as they are there now. I see no reason to believe that three disinterested witnesses are more liable to be in error or to swear falsely concerning the genuineness of their own signatures than one interested witness is to be in error in respect of his testimony, and am of the opinion that in this case the testimony so strongly preponderates against the verdict that it should be set aside and a new trial ordered. At such trial further evidence may be offered on the alibi of the two witnesses above referred to, which may or may not be of assistance in determining the issue presented.

There is a further consideration to which it seems proper to advert. The attestation clause is as follows: "On this twenty-sixth day of October 1905, we three, at the request of the above-named William E. Newell, in his presence and in the presence of each the deceased, and the presumption is no great-

The three nesses." There is no word here which indicates that the instrument so subscribed is a will; neither is it claimed that there is any evidence in the record that the deceased declared the same to be his will, or that knowledge of this fact was in any way imparted to, or, indeed, possessed by, any of them. The attestation clause is defective, also, in that it does not purport to set forth that the signature of the testator was made or acknowledged in the presence of the subscribing witnesses. In other words, if the subscribing witnesses should admit not only the genuineness of their signatures, but also should confirm, by their affirmative testimony, every fact set forth in the attestation clause, there would still remain a failure to prove that the testator either signed in their presence, or, having previously signed, declared the signature to be his in their presence; and that requirement of the statute would rest only on the presumption that, inasmuch as the statutory number of witnesses testified that they signed as witnesses at the request of the testator and in his presence and in the presence of each other, it must follow that the testator on his part had previously made or acknowledged his signature in the presence of all of them and of no number less than all of them. I am not unmindful of the decision of this court in Re Christopher Fry's Will, 2 R. I. 88; but in that case all the witnesses were dead, and here there is the testimony of three witnesses against the presumption.

> In Re Will of Cottrell, 95 N. Y. 329, supra, the facts are not dissimilar to those in the case at bar; but there are three observations to be made on that case: First, that the court there expressly says in the opinion that by a recent statute it was limited to a consideration of questions of law only, expressly stating, also, that if the verdict had been against the will in that case they would have been powerless to disturb such a verdict on the evidence; second, though not necessarily controlling, the Code of New York expressly provided for the method of proceeding when the subscribing witnesses should either forget or deny the fact of signature; and, lastly, that in that case the attestation clause completely set forth all the requirements of the statute of New York concerning the execution of a will. In this case no witness pretended to say whether the deceased signed at his brother's house or at the newspaper store which he immediately entered after the interview with the attorney who prepared the instrument and then later acknowledged his signature at the residence of the three persons whose names are subscribed as witnesses, or whether he signed the same at such residence.

From beginning to end of this record there is not a word to indicate the time or place of the actual signature of this instrument by other, hereunto subscribe our names as wit- er in favor of any one of these three places and two methods of execution than in favor | frank or open in the matter, and unreasonof any other of them. Yet in two of these places it is not claimed that the witnesses were present, and the validity of the instrument is thus dependent upon several presumptions, each of which is negatived by the testimony of three witnesses, viz., the presumption that the deceased signed (for no person claims to have seen him sign), and the further presumption that he subsequently declared his signature in the presence of all three, and not of any one only, or of any two only, of the three, thus adding one presumption upon another.

The facts undoubtedly present a most unusual and extraordinary case; but upon this record I am of the opinion that the burden of proving the due and solemn execution of this instrument, which the law wisely casts upon the proponents, has not been sustained, and that there should be a new trial.

(75 N. H. 801)

In re ALLEN,

(Supreme Court of New Hampshire. Rockingham. June 26, 1909.)

ATTORNEY AND CLIENT (§ 44*)-DISBARMENT -USE OF CLIENT'S MONEY.

An attorney who, having collected part of judgments of his clients, uses the money for his own purposes without their knowledge, not inown purposes without their knowledge, not intending to defraud, but hoping to be able to obtain funds when it was necessary to make payment, having, however, no certain means of doing so, will be removed from office as an unfit person, though his friends, when settlement is rendered imperative, furnish him the money to make it.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 55-62; Dec. Dig. § 44.*]

Complaint against Harry F. Allen, an attorney of the court, charging, among other things, the conversion of his client's money and misrepresentation to the client of the progress of the collection of the latter's demand against a third party. The facts were heard before a single justice, who found the foregoing charges proved, and others set forth in the complaint not sustained. The respondent, in making use of his client's money, did not intend to defraud, but hoped to be able to obtain the funds in some way when it became necessary to make payment. The client was not defrauded; for, when settlement was rendered imperative, the respondent's friends by loans or gifts furnished the necessary funds. When the money was used by the respondent, he had no certain means of replacing it, and no reasonable grounds for expecting he could do so, except by obtaining it in the manner he did. He did intend to take to himself the use of his client's money while it remained in his possession, and did so. If he did not intentionally misrepresent to his client as to the progress of the collection, he was not profession to maintain. Allen is found to be

ably delayed reporting the completion of the collection and making settlement. Respondent removed.

Edwin G. Eastman, Atty. Gen., and Charles H. Batchelder, for complainant. John W. Kelley, for respondent.

PARSONS, C. J. The only particulars in which this case differs from Delano's Case, 58 N. H. 5, 42 Am. Rep. 555, are that the money Delano appropriated did not come to him by reason of his office of attorney. and his friends were not able to restore all that he had appropriated. In that case it was thought unsafe to trust Delano with the money of his clients when he had misapplied trust funds in his possession, because the temptation to which he had yielded was one to which he would be constantly exposed in the practice of his profession. Allen, when exposed to this temptation, yielded. Expecting, doubtless, that he could postpone a settlement until the whole amount of the judgments was collected, he took to his own use the money which he received by virtue of his office. "It is indispensable that an attorney be trustworthy. And he is not trustworthy if he is capable of improperly applying to his own use his client's money, whether he intends to return it or not." In Delano's Case, it was inferred he was capable of misapplying a client's money because he had misapplied money received by him as collector of taxes. The respondent here has done what it was inferred Delano was capable of doing. The fact that Allen's friends have paid the client does not remove the doubt as to his integrity in the future. If reliance on his friends was the consideration under which he ventured to use money not his own, when he had no certain means of replacing it, his success in this instance does not tend to produce a belief that he may not again regard that consideration as a sufficient reason for similar conduct; nor does the favor done him in this instance authorize the court to continue to hold him out as worthy of confidence, upon the theory that such favor will be repeated should there be occasion. The profession cannot be free from all suspicion if persons are permitted to continue members of it who have once been untrue to the profession and their clients. Money collected by an attorney for his client, while in the hands of the attorney, is the money of the client, and not capital for the use of the attorney in his business. Unless the client elects to create the relation of debtor and creditor, any use of the client's money by the attorney for his own advantage is a breach of trust, which cannot be tolerated for a moment without risk to the high reputation in such matters which it is the pride and the duty of the

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

an unfit person to hold the office of attorney, and must be removed from office.

Respondent removed. All concurred.

(111 Md. 209)

HARRIS V. CONSOLIDATION COAL CO. (Court of Appeals of Maryland. June 29, 1909.)

1. Evidence (§ 508*)-Opinion Evidence

ADMISSIBILITY

Persons having technical knowledge on certain subjects may, as a general rule, give their opinions, when the jurors are incompetent to draw their own conclusions from the facts.

[Ed. Note.—For other cases, see Cent. Dig. \$ 2311; Dec. Dig. \$ 508.*] Evidence,

EVIDENCE (§ 545*)—OPINION EVIDENCE—COMPETENCY OF WITNESSES.

Before a witness can testify as an expert,

his fitness must be established by a preliminary examination, and the court may examine the witness, or find the fact from the testimony of

[Ed. Note.—For other cases, see Eviden Cent. Dig. §§ 2360-2362; Dec. Dig. § 545.*] see Evidence,

8. Appeal and Heroe (§ 971*)—Discretion of Trial Court—Rulings on Competency

OF EXPERT WITNESS.

The competency of a witness to testify as an expert is within the discretion of the trial court, and its rulings will not be disturbed unless clearly erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3852; Dec. Dig. § 971.*]

EVIDENCE (§ 539*)—OPINION EVIDENCE-COMPETENCY OF WITNESS.

A metal worker of 35 years' experience, who learned his trade with a railroad company, and was familiar with high-grade pressure steel pipes, and knew the effects of sulphur water on them, but who had not worked in mines, and did not know the methods of inspecting high-pressure pipes by those engaged in mining, was not competent to testify as an expert as to whether it was safe to maintain high-grade pressure pipes in sulphur water in a coal mine, whether a proper testing of the pipes would dis-close a defect therein, and whether the method of inspecting the pipes was proper.

[Ed. Note.—For other cases, see Eviden Cent. Dig. §§ 2349-2352; Dec. Dig. § 539.*] see Evidence.

5. MASTEE AND SERVANT (§ 124*)—INJURY TO SERVANT—NEGLIGENCE.

A coal miner, relying on the failure of the operator to inspect high-pressure pipes, must show that the defect causing the injury by the bursting of a pipe was discoverable by the ordinary methods of inspection commonly adopted by those engaged in mining. by those engaged in mining.

[Ed. Note.—For other cases, see Master and ervant, Cent. Dig. §§ 235-242; Dec. Dig. §

6. MASTER AND SERVANT (§ 96*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.

In an action for injuries to a servant, the negligence alleged, and the injuries sued for, must bear the relation of cause and effect.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 96.*]

7. MASTER AND SERVANT (§ 129*)—INJURIES TO SERVANT—PROXIMATE CAUSE.

The negligent failure of a coal mine op-

erator to provide a safe and available manway for the miners is not the negligence causing injury to a miner while passing through an unmine known as 'Ocean Mine No. 1' in Alle-

derground heading by the bursting of a compressed air pipe therein.

[Ed. Note.—For other cases, see Master and servant, Cent. Dig. §§ 257-263; Dec. Dig. §

8. MASTER AND SERVANT (§ 219*)—INJURY TO SERVANT—ASSUMPTION OF RISK.
Where the condition of the manway and

of the heading in a coal mine were a source of danger, open and obvious, the miners using the way or heading assumed the risk incident thereto.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 219.*]

9. Master and Servant (§ 217*)—Injury to Servant—Assumption of Risk.

SERVANT—ASSUMPTION OF RISK.

The rule that one remaining in a service which necessarily exposes him to hazardous risks, the dangerous character of which he knows, or has an opportunity to know, assumes the risk is an exception to the principle requiring the master to use ordinary care to provide a safe place to work

safe place to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

D. MASTER AND SERVANT (§ 185*)—FELLOW SERVANTS—WHO ARE.

A servant in a coal mine, employed to in-

spect the pumps, mining machinery, and pipe line in the mine, is a fellow servant of one em-ployed to dig coal, and the latter cannot recov-er from the master for injuries incurred by the sole negligence of such servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 399, 406-410; Dec. Dig.

185.*1

11. MASTER AND SERVANT (\$ 287*)—FELLOW SERVANTS—WHO ARE—QUESTION FOR COURT.

Whether on a given state of facts one is a fellow servant or a vice principal is for the court; and, where the facts are undisputed, the court must determine the question.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1062; Dec. Dig. § 287.*]

12. TRIAL (\$ 295*)—INSTRUCTIONS.

An instruction, in an action for injuries to a coal miner by the bursting of a compressed air pipe, that if the injury was caused by the negligence of the pipe inspector, there could be no recovery, etc., was not objectionable as ignoring the testimony of the master's failure to provide a safe place to work, and maintaining a high-pressure pipe in sulphuric acid water, and in failing to provide a proper system of inspection and testing of the pipe, where such matters were properly left to the jury under other instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \$\frac{2}{5} 708-717; Dec. Dig. \frac{2}{5} 295.*]

Appeal from Circuit Court, Allegany County; Robert R. Henderson, Judge.

Action by Thomas A. Harris against the Consolidation Coal Company. From a judgment for defendant, plaintiff appeals.

The court granted plaintiff's first and second prayers after modifying them by striking out the phrases inclosed in parentheses and italicized, as follows:

"(1) The plaintiff by his counsel prays the court to instruct the jury that, if they believe from the evidence that the defendant

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

gany county, Md., and was operating said ant on his way through the heading to his mine on the 5th day of February, 1907, and prior thereto, and that the rooms of said thine were connected with its mouth by a long underground heading, through which the employes of the defendant were accustomed to walk in passing to the rooms in which they work, and if the jury further find that the defendant pumped compressed air of great pressure through a pipe leading from the mouth of the mine along said heading underground to a place within said mine at which the compressed air was transferred to a compressed air charging station, and further find that the said pipe was negligently laid and maintained along the side of said heading close to the ground, and largely under sulphur water, and that sulphur water weakens pipes of the kind used in this place by the defendant (and further find that the only available entrance for employés or miners to enter said mines was in and along said heading and along and near the said pipe, even though the jury may find there was a manuay intended for the use of miners, that that was not available condition for the employés to pass through), and if the jury further find that the said heading was dangerous and unsafe for the miners and employes of said company to pass through (and if the jury further find that defendant failed to provide any other available means of entrance for the miners than through the said heading, except the manway, if they find the said manway was not available), and if the jury further find that the plaintiff on the 5th day of February, 1907, was employed by the defendant, and in the line of his duties and employment was passing through the said gallery or heading to the rooms of said mine at which he was employed by the defendant to dig coal, and that while walking along said heading the plaintiff Harris was knocked down by the bursting of a pipe in said gallery, and that the bursting of the pipe and injury to the plaintiff were caused by the negligence of the defendant (in failing to maintain a safe place for him to pass through or) in failing to properly place and maintain said pipe while the plaintiff was in the exercise of due care and caution on his part, and that by reason of the bursting or explosion of said pipe the plaintiff was injured, and further find that the defendant knew that the place was dangerous and unsafe, or by the exercise of ordinary care could have known that it was dangerous and unsafe, and further find that the plaintiff was ignorant of the unsafe and dangerous condition of the said heading, and the plaintiff was using due care and caution on his part, then the plaintiff is entitled to recover in this action, and the verdict of the jury must be for the plaintiff.

"(2) If the jury find from the evidence that at the time of the accident or injury to the plaintiff for which this suit is brought review seven rulings of the court below made

work as described in the testimony, and at that time the defendant operated said mines, and in the said heading through which the plaintiff was traversing as aforesaid was operating a high-pressure steel pipe conveying compressed air of from 400 to 900 lbs. a square inch pressure, and that the said pipes lay to some extent in sulphur water, and that sulphur water eats into and weakens pipes of this kind, and further find that at the time of the accident the said heading was eight or nine feet wide, through which was laid a track and rails over which passed motor cars carrying coal when the said mines were in operation, and further find that, through the said heading passed a large force of coal diggers and other workmen of from 100 to 180 men daily (and further find that the manway referred to by the witnesses was not an available one for the said workmen to pass through on account of the quantity of mud and water in it, and that therefore the said workmen were required to travel the heading instead of the manway), and if the jury shall further find that the pipe of compressed air exploded under its high pressure and sulphur water, and with great force and violence knocked down the plaintiff while he was using the said heading as a means of passage to his work, then the jury are instructed that they have a right to infer, in the absence of any evidence on the part of the defendant showing how the accident happened, that the explosion of the pipe was occasioned by the negligence of the defendant in not providing safe appliances, or a safe place for the appliances, and if they find such negligence of the defendant, and that the plaintiff was injured thereby, then their verdict must be for the plaintiff, unless they further find from all the circumstances in the case that the plaintiff was guilty of a want of ordinary care and prudence which directly contributed to the injury."

Argued before BOYD, C. J., and BRIS-COE, PEARCE; SOHMUCKER, BURKE, WORTHINGTON, and THOMAS, JJ.

A. Taylor Smith and Albert A. Doub, for appellant. Wilbur V. Wilson and Robert H. Gordon, for appellee.

BURKE, J. The appellee on this record is a body corporate, engaged in mining coal in Allegany county in this state. It owned and operated a coal mine in that county known as "Ocean Mine No. 1." The appellant was a workman employed by the appellee to work in that mine, and brought this suit to recover damages for personal injuries received by him therein on the 5th day of February, 1907. The verdict and judgment were for the defendant, and this is the plaintiff's appeal, which presents for the plaintiff was in the employ of the defend- during the progress of the trial. Six of these



relate to matters of evidence, and the other in said dangerous and unsafe place of said to the court's action upon the prayers.

The rooms of this mine, in which the men worked, were connected with the mouth of ing or gallery mentioned, and had laid and maintained a 21/2-inch steel air line pipe of the thickness of about 5/16 of an inch along the side of this heading. This pipe was laid close to the ground, and in wet seasons was found its way into the gallery. From the machinery and engine at the mouth of the mine compressed air of great pressure was pumped through this pipe to a point within the mine at which it was transferred to compressed air engines, which were used to haul coal over a motor road in the heading from the rooms of the mine to the bottom of the slope of the mine. The pressure of this pipe was about 900 pounds to the square inch.

On the morning of the accident, while the appellant was passing through this heading to the room in the mine in which he was employed by the defendant to dig coal, the pipe suddenly burst and injured him. At the point where it burst the pipe was covered with sulphur water. The declaration alleges that the pipe was negligently laid along the side of the heading so close to the ground, and largely under water which drips from the side of the gallery, and that the pipe which carried the compressed air through the heading was not of sufficient strength to bear the high pressure of the compressed air which was forced in and through it from the machinery and engine at the mouth of the mine; that the only entrance for the employes, or miners was in and through the heading, and along and near the pipe line, and that because of the high and dangerous pressure of the compressed air transported through the heading and the insufficiency of the pipe to support or sustain this high pressure through the same, which was negligently laid, and allowed to be or to become covered with sulphur water, and thereby weakened, it was dangerous and unsafe for the miners and employes of the defendant to pass through the gallery into the rooms of the mine. It is also alleged that the place was dangerous because of the neglect of the defendant to provide any other safe or available means of entrance to the rooms of the mine. The precise neglect which caused the injury is stated as follows: "That the high pressure of compressed air in said pipe caused the bursting of said pipe, and that the explosion therefrom was the cause of the said injuries to the plaintiff, while he was pass- he could not say whether they were above ing to his work, in the line of his duty, in the water or not; that he left the employexercise of due care and caution on his part, ment of the defendant in January before the

gallery, and that in consequence of such dangerous and unsafe condition of said place he was knocked down and injured by the the mine by an underground heading or bursting of said pipe, and that the defendant gallery several miles long, through which the knew that said place was dangerous and unworkmen of the defendant were accustomed safe, or by the exercise of ordinary care and to walk in going to and from their work. prudence could have known that it was dan-The defendant had installed an engine and gerous and unsafe, and in time to remedy certain machinery at the mouth of the mine, and prevent said accident, and that the plainand compressed air engines within the head- tiff was ignorant of the unsafe and dangerous condition of said heading or gallery of said place, and could not by the use of ordinary care and prudence on his part have known the same."

To prove his case, the plaintiff introduced largely covered by sulphur water, which his own testimony and that of seven other witnesses, viz., Thomas S. Harris, John Eagan, Daniel Nolan, and Drs. A. B. Smith and E. L. Jones, and L. Lee Pagenhardt. The exceptions to the ruling of the court upon questions of evidence were all taken during the examination of the last-named witness. The plaintiff testified that he was a miner, and 26 years old; that he had been working in this particular mine for about 8 years; that he described the pipe line and engines and machinery and the purposes for which they were applied as set forth in the declaration. He said that the pipe carried a high pressure of compressed air, the gauge on the motors showing nine hundred pounds, and that the pipe was laid in sulphur water; that the motors were used to haul the cars in and out of the mine through the heading; that the workmen to the number of about 150 to 180 passed through this heading to their work. There was a manway leading into the mine. but on the day of the accident it was about knee-deep with water, and that was the reason he did not use it, but he came out this manway after the accident. He said the compressed air pipes, which were in use that day, exploded and knocked him down; that the explosion put out the lights in the mine, and rendered him unconscious-"it sounded like the world was coming to an end." He did not know whether anything had struck him; his head was injured, and he was soaked with water. He went that afternoon to see Dr. Smith, who treated the injury to his head. He testified he suffered from nervousness and sleeplessness as the result of the explosion, and that his hearing in his right ear was thereby destroyed. He said he never saw any one making an inspection of the pipes, but that before the accident he regarded the heading as safe.

Thomas S. Harris, the father of the plaintiff, testified that he had worked in this particular mine, but at the time of the accident was employed by another coal company; that he knew the pipes spoken of; that sometimes they were underneath, and sometimes above, the water, but at the time of the accident to travel. That it was in a miserable condition. "The motor road is not safe. When a motor goes in, it fills up the whole heading, and if you met it in the dark, it would kill you; nobody could hear you holler." He never knew of any inspection or testing of the pipe. John A. Eagan confirmed the testimony of the preceding witness as to the condition of the manway, and said the men used the motor road, and walked on the rails to keep dry; he said the gauge on the motor cars showed a pressure of 900 pounds.

Daniel Nolan testified he knew the point of the accident described by the plaintiff, and that the pipe laid in sulphur water, he supposed, mine water, "under the water in spots and places"; that he never saw the miners use the manway; that they used the motor road. Mr. Tucker testified that the pipe was a 21/2-inch steel pipe of the thickness of 5/16 of an inch, and Dr. Smith testified as to the nature and extent of the plaintiff's injuries. L. Lee Pagenhardt testified that he was a metal worker, and had worked in all kind of metals for 35 or 38 years. Asked if he was familiar with iron, cast iron, and steel, he replied that he was "about as near an expert as any one you have in Maryland or any other state." He said that no cast iron or steel will stand sulphur water any great length of time; that it will perforate it in a short time, unless the pipe is very heavy; that a defect in the pipe would not be apparent by merely looking at it; that it would be necessary to give it a test; and that a test would not always disclose the defect. He said he had worked "pretty much all over the United States, but not for no mining company." He said sulphur water would eat through metal quicker than anything else; that he had learned his trade as a machinist with the Baltimore & Ohio Railroad Company, and had run locomotives and tramroad engines at various places; that he was familiar with high-grade pressure steel pipes, and knew the effects of sulphur water on them. He was asked the following questions: "(1) State whether or not it is safe for the employes for a company to maintain steel pipes-high-pressure pipes-which carry compressed air of 900 pounds to the square inch, in sulphur water, when the heading through which it passes is traveled daily by 100 or more men. (2) According to the testimony of the plaintiff in this case Mr. Harris, on the 5th day of February, 1907, when passing through a heading 8 or 9 feet widein that heading was a pipe, with compressed air of the pressure of about 900 pounds to the square inch; the pipe laid in sulphur water, partly or entirely, and had been lying in that state for some time—as he was passing along, suddenly there was a tremendous roar, the pipe bursted, knocking down the plaintiff and injuring him. Now will you state to the jury what was probably the cause of the

accident. He said the manway was not fit of that injury? (3) If there was defect in the pipe that caused the accident, would a proper testing of the pipe have disclosed this defect? (4) State whether a pressure of compressed air of 900 pounds to the square inch in a pipe 5/16 of an inch thick, when the pipe is steel, laid in sulphur water, and in a narrow way 8 feet wide, traveled daily by 150 men at least, is or is not dangerous.' The court, upon the objection of the defendant, refused to allow the witness to answer either of these questions, and these rulings constitute the first, second, third, and fourth bills of exception. This witness was not shown to have had any knowledge of the machinery at the defendant's mine, or of mine plants of any kind, or to have any knowledge of their construction, or of the usual or proper method of inspection or testing of mine plants of any description. The court held that he had not qualified himself as an expert to testify as to the matters embraced in the interrogatories, and in these rulings we agree. The general rule as to the admissibility of expert evidence is that persons having technical and peculiar knowledge on certain subjects are allowed to give their opinions when the question involved is such that the jurors are incompetent to draw their own conclusions from the facts without the aid of such evidence. 12 Am. & Eng. Ency. of Law, 422; Baltimore & Yorktown Company v. Crowther, 63 Md. 558, 1 Atl. 279; Turnpike Company v. Cassell, 66 Md. 419, 7 Atl. 805, 59 Am. Rep. 175. The principal object in view in the examination of expert witnesses being to elicit from them opinions or conclusions from the facts, rather than the facts themselves, this species of testimony forms in this respect a notable exception to well-established rules of evidence. The rules governing the introduction of this species of testimony should therefore not be relaxed, but should be strictly enforced with the greatest caution and discrimination. Before a witness can be allowed to testify as an expert, his fitness and character as such should be established by a preliminary examination. and in ascertaining his competency the court may examine the witness himself, or may find the fact from the testimony of others. 8 Ency. of Pl. & Prac. 744, 745. "How much knowledge a witness must possess before a party is entitled to his opinion as an expert which, in the nature of things, must be left largely to the discretion of the trial court, and its rulings thereon will not be disturbed, unless clearly erroneous." Chateaugay Ore & Iron Company v. Blake, 144 U. S. 476, 12 Sup. Ct. 731, 36 L. Ed. 510.

In Dashiell v. Griffith, 84 Md. 377, 35 Atl. 1004, the court said: "It is an unsafe practice in the admission of testimony to allow witnesses to speak as experts, unless the court is well satisfied that they possess the requisite qualifications, not alone on this account, but the effect of such testimony is bursting of that pipe, or what was the cause most difficult to estimate, from the fact that

to it, and gives to it an importance upon the minds of a jury to which it is not fairly or reasonably entitled." The court then quotes from 1 Wharton on Evidence, \$ 434, as to the distinction between the expert and nonexpert witness, "that the nonexpert testifies as to the conclusions which may be verified by the adjudicating tribunal; the expert to conclusions which cannot be so verified. The nonexpert gives the results of a process of reasoning familiar to everyday life; the expert gives the results of a process of reasoning which can be mastered only by special . science." The court further says that "the rule allowing expert evidence will, in our opinion, be less objectionable, and more conducive to justice, if it be somewhat restricted, rather than relaxed. It is largely within the discretion of the trial judge, but always subject to the opinion of the appellate court." In Turnpike Company v. Leonhardt, 66 Md. 77, 5 Atl. 351, it is said: "It is proper to lay before the jury all the facts which are necessary to enable them to form a judgment on the matters in controversy; and, where the subject under investigation required special skill and knowledge, they may be aided by the opinions of persons whose pursuits or studies or experience have given them a familiarity with the matter in hand, but where the question can be decided by such evidence and knowledge as are ordinarily found in the common business of life, the jury are competent to draw the inferences from the facts, without having the opinion of witnesses." Assuming that the matters embraced in the questions were proper subjects for expert evidence, we are satisfied that the witness was not qualified to testify as an expert respecting them.

The court refused to allow this witness to testify, when recalled at the close of the defendant's case as to the proper method of testing the pipes in question, nor to allow him to testify that the method adopted by the defendant was not a proper one. For the reasons stated the court was right in this ruling, which constitutes the fifth and sixth bills of exception. In South Baltimore Car Works v. Schaefer, 96 Md. 107, 53 Atl. 667 (94 Am. St. Rep. 560), it is said: "There can be no doubt of the general rule which requires an employer, after providing proper and safe machinery, to supervise, examine, and test it as often as custom and experience require. Thompson on Negligence, 984. * * *" was the duty of the plaintiff, if he relied on failure to inspect, to have offered some testimony which would have justified the jury in finding that the defect causing the injury was one which could have been discovered by the usual and ordinary methods of inspection commonly adopted by those in the same kind of business which was conducted by the defendant. "Absolute safety is unattainable, and employers are not insurers. They are li- | ter and off the ground. Q. Is that correct?

undue importance not unfrequently attaches; able for the consequences, not of danger, but of negligence, and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business." Bailey, Master's Liability, 23. Before the offers embraced in the fifth and sixth exceptions were made, the court inquired of the witness if he knew of the method of inspecting highpressure pipes used by those engaged in the mining business, and the witness replied that he knew nothing about the mining business. . The defendant proved by the witness Clark that at the point where the accident occurred there was a kind of basin in the mine. Water would accumulate there. That he was a trackman in the employ of the defendant, and it was his duty to keep the track in good condition. That he saw Harris after the accident, and that Harris told him he was not hurt, but scared, and that he gave no evidence of being hurt as he went out of the mine. That the condition of the manway was about the same as the motor road. The testimony of Dr. Fechtig and of the witness Campbell tended to show that the plaintiff was not seriously injured. The witness Rempell testifled that he usually traveled the manway; that it was wet and muddy, "but you had a chance to get through it dry-footed, but you could not go through the motorway dry." Charles Shields was an employe of the defendant company at Ocean mine No. 1 on the day of the accident. He was a member of what was called the "chain gang," whose duty it was to look after the pumps, mining machinery, and pipe line. He said it was considered his duty to examine the pipe line, and that he passed it three, four, five, and six times a day; that if he saw anything wrong with it, he either fixed it, or reported it to be fixed, and it was attended to immediately: that it was never neglected. In his examination in chief he testified as follows: State what your means of inspection were. A. My means of inspection we consider when the pressure is on is a thorough test. Q. When is that pressure put on? A. It is on all the time. Q. Is it on at night as well as day? A. Yes, sir. Q. Is it put on in the evenings when the engines stop running? A. Yes, sir. Q. Did you examine the pipe the evening before this accident occurred? A. I believe I was the last man out by this point the evening before the explosion, and nothing at all was the matter that I could see or hear. Q. When there is a weakness in the pipe at a point or in the pipe, does it give any symptoms by which you can tell same? A. Yes, sir. Q. What is the symptom? A. A blowing or bubble or a noise. A little leak will make a noise. Q. Did you examine the pipe carefully? A. No, sir; except to go past it. It was under water at times, and at times it wasn't. Q. How was the pipe fixed? A. It laid along by the side of the road on 2x4 scantling, so as to keep it out of wa-

A. Exactly, sir. Q. Then it was not covered with water and at all times? A. No, sir. Q. Was this a very wet season of the year? A. Yes, sir; very wet. Q. How was the water in there at this particular time? A. Well, I judge it would be about four inches deep on the rail at that paticular time, because it was just at a wet season. Q. How was it at other times at that place? A. It was dry. Q. Was the conditions there the ordinary conditions? A. No, sir; I would say they were extraordinary." On cross-examination he said that he had held this position with the company for about 7 years. That the only method of testing the pipes, so far as he knew, was the one mentioned. That there are other men who have the same duty to perform. They are called the "chain gang," they look after machinery, make repairs, put in new pipes when necessary. The witness said that he was the one who examines the pipe line, and if the other men happen to be along, they also examine it. That he inspected it frequently during the day, and if anything was wrong, he repaired it. He said he could go through the manway without going through water or mud of any depth; that one could go through without getting his feet wet, and that he had been through a few days before the accident.

After the close of the whole case the plaintiff submitted three prayers and the defendant five for instructions to the jury. plaintiff's third prayer was conceded. court modified the plaintiff's first and second prayers by eliminating the parts thereof inclosed in parentheses. The reporter will set out these prayers in the report of the case, and will italicize the part stricken from each prayer. The court granted the defendant's second and refused its other prayers. To the granting of the defendant's second prayer, and the modification made by the court to the plaintiff's first and second prayers, the plaintiff excepted. This is the seventh and last bill of exceptions.

By the defendant's second prayer the jury were told "that, if they shall find that the bursting of the pipe was the result or occasioned by the negligence of Charles Shields the inspector employed by said defendant company, and employed to look after the air pipe line in its mines, and was occasioned by his neglecting his duty in that respect, then and there the said Charles Shields was a fellow employé of the plaintiff, and the jury must find for the defendant, unless they shall further find that the defendant company was negligent in employing the said Charles Shields as its inspector, and that there is no evidence to show any such negligence on the part of the defendant company in the employment of the said Charles Shields." This being a suit by a servant against his master for personal injuries, negligence is the gravamen of the action, "and the negligence alleged, and the injuries sued for, must bear the relation of cause and effect. The con- is a question of law to be decided by the

currence of both and the nexus between them must exist to constitute a cause of action." Benedick v. Potts, 88 Md. 55, 40 Atl. 1007, 41 L. R. A. 478.

The only injury of which the plaintiff complains in the first and second prayers is the elimination therefrom of the parts we have indicated. In an earlier part of this opinion we transcribed the averments of the narr. which charge the negligence of the defendant upon which the plaintiff relied; and, assuming that the case was one which should have been left to the jury, the appellant has no good reason to complain of the modifications made by the court to the prayers offered by him. The granted prayers submitted the whole case under the pleadings as fairly and as favorably to the appellant as he could expect. If it be conceded that the failure of the defendant to provide a safe and available manway was negligence, it must likewise be admitted that that negligence was not the cause of the injury sued Besides, the condition of the manway and the heading was well known to the plaintiff. If their condition were a source of danger to persons working in the mines. it was a danger which was open and obvious, and he must be held to have assumed all risks incident thereto. "An employé who contracts for the performance of hazardous duties assumes such risks as are incident to their discharge from causes open and obvious, the dangerous character of which he had an opportunity to ascertain. B. & O. R. R. Co. v. Stricker, 51 Md. 47, 34 Am. Rep. 291. One who remains in a service which necessarily exposes him to hazardous risks from causes open and obvious, the dangerous character of which he knew, or had an opportunity of knowing, must be considered as having assumed such risks, and, if injured in consequence thereof, has no claim against the employer. Pennsylvania Railroad Company v. Wachter, 60 Md. 395; Yates v. McCullough Iron Company, 69 Md. 370, 16 Atl. 280. This doctrine is firmly grounded in the law of this state, in the law of England, and probably every state in the federal Union, and, though usually stated as a general rule, constitutes, in reality, an exception to or qualification of the broad principle which requires the employer to use ordinary care to provide a reasonably safe place in which the servant may perform his work." There was no special exception filed to the defendant's second prayer. There was no proof that the defendant did not use reasonable care in the selection of Charles Shields, or that, after notice of his incompetency or negligence (if any such existed), it retained him in its service, and there can be no doubt that, upon the evidence, he was a fellow servant with the plaintiff. Whether upon a given state of facts a party is a fellow servant, or a deputy master, or a vice principal.

court. In this case where the facts are undisputed, it was the duty of the court to decide whether under them Shields was a fellow workman of the plaintiff or not. Yates v. McCullough Iron Company, supra.

It is well settled that, if the injury sued for resulted from the negligence of Shields, a fellow servant, the plaintiff cannot recover, as that negligence was one of the risks he assumed when he entered the service of the defendant. The prayer, therefore, announced a correct legal principle. The appellant insists with great earnestness that this prayer ignores the testimony showing the defendant's failure to provide a safe place for the plaintiff to work, and in failing to perform a positive and nonassignable duty, and that it ignores the defendant's negligence in maintaining its high-pressure pipe in sulphuric acid water, and it ignores all reference to the duty of the defendant to provide a proper system of inspection and testing of the pipe. But we do not understand the prayer as being open to that objection. It does not exclude from the jury the consideration of any negligence on the part of the defendant causing the injury. All such evidence was fully left to the consideration of the jury under the first and second prayers granted by the court. This prayer merely asserts that Shields was a fellow servant of the plaintiff, and then leaves it to the jury to find that the injury was occasioned by his negligence—that is, by his sole negligence and then asserts that, if they so find, the plaint cannot recover.

We find no error in any of the rulings of the lower court, and therefore the judgment will be affirmed. Judgment affirmed with costs.

(105 Me. 121)

BONNEY v. BLAISDELL

(Supreme Judicial Court of Maine. Feb. 10, 1909.)

SALES (§\$ 81, 93, 176, 286, 384*)—Time of Per-FORMANCE — WAIVER — REASONABLE TIME— REASONABLE OPPORTUNITY TO CURE FAULTS —ASSENT TO RESCISSION—MEASURE OF DAM-AGER

The plaintiff sold to the defendant a gasoline launch, and agreed to put the boat into commission and "have the same ready for delivery between June first and ninth," 1906. The launch was not prepared for delivery until some time after June 9th. On June 21st the plaintiff informed the defendant that the launch was "ready for trial." On the day following, both parties went out in her for a trial trip. On the trip several trivial and easily remediable defects in the engine were disclosed. On the same day, June 22d, the defendant notified the plaintiff that he would not take the launch, assigning no reasons other than the imperfecassigning no reasons other than the imperfec-tions in the engine. Afterwards the plaintiff let the launch and then sold her for less than the defendant had agreed to pay.

Held: (1) If the time named for the delivery of the

◆For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

evidence was plenary that strict performance of this stipulation was waived by the defendant. (2) In such case, it was the duty of the plain-tiff to be prepared to deliver the launch within a reasonable time. (3) It must be assumed that it was, or ought to have been, fairly within the contemplation of the parties that if trivial and easily remediable faults, such as existed in this case, were disfaults, such as existed in this case, were disclosed on the trial trip, the proffer of which the defendant had accepted, a reasonable opportunity was to be had to cure them. Such

would be an obvious purpose of a trial trip.

(4) The refusal of the defendant to take the (4) The retusal of the defendant to take the launch without giving the plaintiff a reasonable further time to remedy the troubles which were found, was, under the circumstances, unwarrantable, and was a breach of his contract.

(5) The evidence did not support the defendant's claim that the plaintiff assented to a resistion of the center of the contract.

scission of the contract.

(6) The plaintiff was entitled to recover the difference between the contract price and the fair market value of the launch at the time of the breach of the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 217, 258, 436, 809, 1098; Dec. Dig. § 81, 93, 176, 286, 384.*]

(Official.)

Report from Supreme Judicial Court, Waldo County.

Assumpsit by George M. Bonney against Philo C. Blaisdell. Case reported to the law court for decision. Judgment for plaintiff.

Action of assumpsit to recover damages for breach of a contract for the sale of a gasoline launch. Plea, the general issue.

At the conclusion of the testimony, and by agreement of the parties, the case was reported to the law court for decision upon so much of the evidence as was legally admis-

Argued before EMERY, C. J., and WHITE-HOUSE, SAVAGE, SPEAR, KING, and BIRD, JJ.

Dunton & Morse, for plaintiff. Thompson, for defendant.

SAVAGE, J. Action to recover damages for breach of contract. The case comes up on report. By written contract dated June 1, 1906, made in pursuance to a previous oral agreement, the plaintiff agreed to sell and deliver his gasoline launch named "Naoma," to the defendant for \$10,000, and the defendant's launch "Ellie," which was in the trade called worth \$3,000. The defendant agreed to pay the \$10,000 and to put his yacht in commission and deliver her to the plaintiff "in Boston Harbor at the earliest possible date, and not later than June 20th, wind and weather permitting." The plaintiff further agreed "to put his vessel in commission and have same ready for delivery between June first and ninth." The parties mutually agreed to put their boats "in as good order and condition as though they were to be used by themselves, with their full equipment and inventories on board." plaintiff did not put his boat in commission, launch was of the essence of the contract, the and it was not prepared for delivery, until

some time after June 9th. The defendant made a partial payment of \$500. The yacht Naoma was then in the Baker Yacht Basin in Quincy, Mass. June 18th, for certain personal reasons, the defendant, by letter, asked the plaintiff to release him from the contract. In reply the plaintiff wrote that he should expect the defendant to take the boat as agreed, and that he should get it in order as soon as possible. June 21st the plaintiff wired his agent in New York that the boat was "ready for trial." This information was communicated to the defendant, and June 22d he arrived in Boston and went to the "Yacht Basin." The two parties and others started to make a trip in her. After a little while the engine began to miss explosions, and finally stopped entirely. The trouble arose from an imperfectly adjusted clutch, and from the fact that the two forward cylinder inlet valves were not properly ground. The clutch has been put in new since the last season. The difficulty had not been discovered until they were out on this trip. After the engine stopped, the parties were set ashore, and on the same day the defendant notified the plaintiff that he would not take the boat, and ever afterwards persisted in the refusal. Within a day or two the trouble with the engine was remedied by grinding the valves and adjusting the clutch and reverse gear, taking one man less than one day's time. Later the plaintiff chartered the boat for 10 weeks, for which he received \$1,400, and in the following winter sold her for \$8,000.

Upon these facts the plaintiff claims to recover for breach of the contract to accept and pay for the boat.

The defense as stated in argument is threefold: First, that the defendant was justified in refusing to accept the boat, because of the failure of the plaintiff to have the boat ready for delivery in reasonably good order and condition on or before June 9th; secondly, that the plaintiff acceded to the rescission of the contract by the defendant; and, lastly, that the plaintiff has not shown that he was damaged.

The defendant contends, in the first place, that the time mentioned in the contract for the delivery of the boat was of the essence of the contract, that he had a right to insist upon performance—that is, having the boat ready for delivery by June 9th—and that the failure of the plaintiff in that respect relieved him from any further responsibility. It will not be necessary to determine whether this point is well taken in law, for the evidence is plenary that the defendant waived strict performance of this part of the contract. Later than June 9th he was at the "Yacht Basin" advising about the work then being done on the yacht. In his letter of June 18th he asked to be released from the contract, and intimated a willingness to compensate the plaintiff therefor, and on June

made no complaint that day of the delay. When he refused to take the yacht, he did so, not on the ground that she was not ready for delivery on contract time, but because, as he expressed himself in a letter to the plaintiff's New York agent, "The trial to-day was a complete failure." Moreover, the uncontradicted testimony of the plaintiff is that the defendant expressly assented to some delay at least.

The defendant having waived strict performance as to time, it was the duty of the plaintiff to be prepared to deliver the yacht within a reasonable time. Upon this hypothesis the defendant says he should have been prepared to deliver her on June 22d. We do not think this follows. The plaintiff was to put the yacht in commission in good order and condition. That means that the boat and her engine and machinery were to be in a good practical, workable condition, all fitted to do their several parts well. The plaintiff had an old, imperfect clutch replaced by a new one, adjusted by an engineer sent by the concern that made the engine. The engine was then tested by running it while the yacht was tied to her mooring. It seemed to work satisfactorily. Then the plaintiff made a proffer of a "trial trip," which was accepted by the defendant. The trial trip was made June 22d and disclosed faults, but trivial and quickly and easily remedied faults, faults that were quickly remedied by grinding two valves and adjusting a clutch and the reverse gear. Can it be said that under such conditions it was not reasonable that the plaintiff should be permitted to remedy such faults, if he did so within a reasonable time? We think not. One obvious purpose of a "trial trip," among others, is to discover if there are any faults. It is assumed that there may be; and we think it is to be assumed that it was, or ought to have been, fairly within the contemplation of the parties that, if faults were disclosed, such as existed in this case, a reasonable opportunity was to be had to cure them.

The defendant claims further that as late as June 29th the engine needed "a new and dry spark coil." The only evidence of this, however, is found in a letter written by a third party to one who had been the plaintiff's agent in the sale. It is hearsay, is not admissible, and cannot be considered. If it were otherwise, it would only show another fault, as trivial and as remediable as the others.

We conclude therefore that it was not unreasonable that the plaintiff be allowed reasonable further time after the "trial trip" to remedy the troubles which were found.

"Yacht Basin" advising about the work then being done on the yacht. In his letter of June 18th he asked to be released from the contract, and intimated a willingness to compensate the plaintiff therefor, and on June 22d he went to Quincy to try the yacht, and am not going to wait for Mr. Bonney to

get her into condition." Unless the plaintiff, 2. Mortgages (§ 82*)-Deed as Mortgageassented to this refusal, we think this was a breach of the contract.

Did the plaintiff assent? It appears that after failure of the "trial trip" the plaintiff and defendant had a conversation on their way in to Boston. The defendant testified that he asked him if he expected him to take the boat in the condition she was in, and that the plaintiff answered, "No." The plaintiff testified as follows: "I told Mr. Blaisdell that I was very sorry that the engine went wrong, and that I felt that it was the fault of an incompetent engineer in not putting the valves in proper order, and Mr. Blaisdell said he had left an important directors' meeting in order to try the bout, and I offered to make an allowance to him. Mr. Blaisdell said he wouldn't decide until later, that he would think the matter over." These statements are not contradictory, and we assume both to be true; but they do not show assent to a rescission of the contract.

The defendant, in support of the theory of such an assent, places great stress upon the fact that the plaintiff afterwards chartered the boat to another, and then sold her. Why should he not? The defendant had refused to take her. The boat was the plaintiff's, and he had no option but to keep her. He had a perfect right to charter or sell her. It did not concern the defendant what he did with her. The defendant had repudiated any claim he might have for her. It is elementary law that, when a purchaser unjustifiably refuses to accept the thing purchased, he simply becomes liable to respond in damages. The thing remains the property of the vendor, just as if there had never been any contract of sale.

No valid defense has been shown, and the plaintiff is entitled to recover the difference between the contract price and the fair market value of the yacht, at the time of the breach; in other words, the profit of his bargain. Bush v. Holmes, 53 Me. 417. The evidence is meager, and not very satisfactory; but we think the plaintiff should have judgment for \$3,100 and interest from the date of the writ.

Judgment for plaintiff, accordingly.

(72 N. J. E. 210)

CRAMER et al. v. CALE et al. (Court of Chancery of New Jersey. Oct. 23, 1906.)

1. Fraudulent Conveyances (§ 277°)—Conveyance to Wife — Consideration — Bur-DEN OF PROOF.

In a contest between creditors and the wife of their debtor, where she seeks to sustain a con-veyance as a security for a debt, the burden is on her of showing the amount of the debt sought to be protected, and is not discharged by a mere general statement regarding the amount due.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. 814; Dec. Dig. 1

EVIDENCE.

Evidence examined, and the conveyance to the wife held to be only a mortgage, given to secure whatever advancements of moneys she may have made from her separate estate; the equity in the property comprised in the deed of conveyance being subject to the payment of complainants' debt.

Cent. Dig. § 60; Dec. Dig. § 32.*)

(Syllabus by the Court.)

Bill by John Pratt Cramer and Alfred C. McClellan against Warren M. Cale and others. Decree for complainants.

Eli H. Chandler, for complainants. Charles C. Babcock, for defendants.

BERGEN, V. C. On the 14th of March, 1904, the complainants and defendant Warren M. Cale executed a bond to a trust company in Atlantic City. A breach of the condition of the bond occurred, and in the month of April, 1905, their liability under the bond being ascertained, so far as it could then be, the obligors executed and delivered a promissory note for the deficiency. The complainants being required to pay the note without the assistance of Warren M. Cale, one of the makers commenced a suit against him for his proportion, which resulted in a judgment, entered April 14, 1906, for \$2,809.71.

At the time the debt upon which the judgment is founded was created, the defendant Warren M. Cale was the owner of real estate in Atlantic City, particularly described in the bill of complaint, and thereafter, by deed dated June 10, 1905, but not acknowledged until June 21st, he conveyed the property to Sarah A. Zimmerman, who in turn conveyed it to Edna, the wife of Warren M. Cale, by deed acknowledged November 10, 1905. The consideration expressed in these deeds was one dollar and other good and valuable considerations. No consideration was in fact paid at the time of the conveyances, and it is admitted that their sole purpose was to transfer the title from the husband to his wife. The husband acquired the property in 1902, paying therefor the sum of \$12,-000, which he satisfied by other property and cash to the extent of \$6,000, and by accepting title subject to a mortgage of \$6,000. The testimony shows conclusively that, when the conveyance was made to the wife, the husband was in an embarrassed financial condition, that the bond executed by him with the complainants was in default, and was so recognized by him when he joined with the complainants in making the note in satisfaction of the then ascertained deficiency, and it is admitted that, after he had stripped himself of the property conveyed to his wife, he had no estate to meet his maturing obligations.

It therefore appears: That, when the debt | ly examined. A party seeking to sustain a was incurred upon which the complainants' judgment is based, the defendant was the owner of an equity in real estate worth at least \$6,000; that thereafter, becoming financially embarrassed and unable to meet his just obligation, he caused the property in controversy to be first transferred to Sarah A. Zimmerman (then in his employ), who held the title from June until November, 1905, when it was conveyed to his wife. This condition of affairs, if not explained, justifies the presumption that the conveyance was fraudulent, and made with intent to hinder and delay creditors in the collection of their debts. The wife, however, seeks to justify the conveyance upon the grounds: That, when she married the defendant Cale, she was possessed of personal property amounting to about \$6,000; that, commencing in 1901, she had advanced money to her husband, which he was to repay by putting it in a home, the title to which would stand in her name, and in satisfaction of this promise the conveyances above referred to were made; and that after such conveyances were made she continued to advance money to her husband until the total sum amounted to \$5,700. The husband and wife both testified that the sum last mentioned was about the amount advanced and received, but beyond the production of checks, amounting in the aggregate to \$631, covering a period beginning in August, 1900, and ending in October, 1905, there is no evidence beyond the statements of the husband and wife, given in the broad terms above recited, to sustain the claim that the wife advanced to or intrusted her husband with the large sum which they now allege to be due from the husband to the wife. No account was ever kept by either, nor was any settlement made, or attempted to be made, to ascertain the amount due at the time this conveyance was made. The wife testified that she had produced all of the checks which she could conveniently find relating to the transactions between them, although other checks may be packed away in her house; but, as she was evidently aware that it was necessary to support her claim by producing checks which she had given to her husband, the neglect on her part to search in the only place where she testifies she would be likely to find others, if there were any such, justifies the conclusion that she had no expectation that any such search would put her in possession of other checks to her hus-She knew the importance of the checks in establishing her claim, because she produced certain of them, and it is difficult to account for the nonproduction of others, which were within her reach, except upon the theory that they do not exist.

This is a contest between creditors and the wife of their debtor as to the right of priority in payment, and the facts must be critical-

conveyance as a security for a debt would have, and ought to have, the burden of showing the amount of the debt sought to be protected, and it seems to me that this rule ought to be more rigidly applied in the case of an alleged secret trust between a husband and wife, and that something more than a general statement regarding the amount due ought to be forthcoming to sustain such a claim. This wife claims that the property was to be conveyed to her. The husband testifies that it was not conveyed to her earlier because it would affect his credit, and it is hardly consistent with equitable principles to permit a wife, under such circumstances, to absorb all the property of her husband, to the exclusion of his other creditors without more convincing proof of the amount of the debt due from the husband to the wife than they have seen fit to present in this case. Under the circumstances shown I am of the opinion that the conveyance to the wife must be held to be only a mortgage given to secure whatever may be found due to her and to that extent only is she entitled to protection in preference to the debt of these complainants, and that, beyond securing the wife to the extent to which she has advanced her husband moneys from her separate estate, the equity in the property should be made subject to the payment of complainants' debt. It therefore becomes important to determine the amount due to the wife which it was intended should be secured.

Transactions of this character, having for their object the creation of a preference over other creditors of the husband in favor of the wife, must be regarded with suspicion, and, where a conveyance for such purpose is attacked for fraud and collusion, it is incumbent on the wife to show the correctness of her claim, to secure which the conveyance or mortgage was given. Especially is this so when the conveyance is made under suspicious circumstances. A conveyance by way of preference, to a wife, made by the husband upon the eve of insolvency, to secure a debt which had been accruing during a period of five years just previous to the insolvency and conveyance, imposes upon the wife the burden of showing, with reasonable certainty not only that she had a separate estate, but also the sums advanced to or paid out for her husband from her separate estate. There is no presumption that such advancements were intended as gifts: but the confidential relations existing between a husband and wife would make a fraud easily accomprished, unless the wife is called upon to show by affirmative proof, and with some little regard to detail, the amount for which she should be preferred, where the contest arises between the wife and creditors of her husband, whose debts existed before the conveyance, and which were incurred



while he was the ostensible owner of the | ments are so full, clear, and convincing as property. As was said by the court in Seltz to make the fairness and justice of the v. Mitchell, 94 U. S. 580, 24 L. Ed. 179: "Such is the community of interest between husband and wife, such purchases are so often made a cover for a debtor's property, are so frequently resorted to for the purpose of withdrawing his property from the reach of his creditors and preserving it for his own use, and they hold forth such temptations for fraud, that they require close scrutiny. In a contest between the creditors of the husband and the wife, there is, and there should be, a presumption against her which she must overcome by affirmative proof."

In the present case the wife had received from the estate of a former husband, 5 years before her second marriage, and nearly 10 years before the conveyances complained of were made, about \$6,000, and she was able to give, with great particularity, the sources from whence it came and the different amounts received at that time going to make up the total: but, with the exception of some bank stock, a portion of which she still holds, she gave no testimony regarding its subsequent investment, or the sale of the securities in which it was invested, if ever invested, in order to raise money for her husband, and, aside from several checks drawn to the order of her husband for different sums aggregating \$631, and covering a period of five years, she was unable to state, with any particularity, at what time she advanced other moneys, or to give the amounts, and calls upon the court to adjudge to her as due from her husband \$5,700 upon her unsupported statement, and that of her husband, that about that sum had passed to the husband's hands. Not the slightest attempt was made to give any of the ordinary details which usually surround such transactions, and we are asked to rely upon the bald statements of the wife and husband that at different times during a period of five years the estate of the wife, to the extent claimed, was given to the husband by her, to be used as he saw fit. To assume that such testimony is satisfactory proof of a husband's debt to his wife would open the door to unlimited fraud. The conveyance of lands by insolvent husbands to their wives, in satisfaction of an alleged secret trust between them, is becoming too common to justify a court of equity in supporting such claims without satisfactory proof that the trust exists, and the character of the proof should be such as to convince the mind of the court that there is a debt due to the wife, and also disclose, with some detail and precision, the amount of it, for "claims of this kind should always be regarded with watchful suspicion, and when attempted to be asserted against creditors upon the evidence of the parties themselves, uncorroborated by other proof, they against Elizabeth Beardslee and others. Deshould be rejected at once, unless their state- cree rendered.

claim manifest. Any other course will encourage fraud and multiply the hazards of most business ventures." Besson v. Eveland, 26 N. J. Eq. 468, 472. The wife has not maintained the burden cast upon her by any evidence that would justify a finding in her favor beyond the sum of \$631. Her case was well prepared and tried by able The checks showing payments counsel. which she produced covered nearly the whole period of her married life, and the fair presumption is that she had produced all that she has. As I have before stated, she claimed that some of her checks are at the house on the disputed property, and that they were so packed away that it was not convenient to examine them; but in the usual course of events checks that are preserved are filed with reference to their dates, and it is difficult to understand how she was able to produce checks covering a period of five years without having had access to the other checks given during the same period, nor does she offer any explanation of this strange circumstance, and I am inclined to the belief that all of the checks showing payments to the husband during the disputed period were selected and produced at the trial.

The conclusion which I have reached is that the wife is entitled to have her conveyance stand as a mortgage to secure the payment of \$631, and that the complainants' judgment be decreed to be a lien upon the lands mentioned in the bill of complaint, subject to the payment of \$631 to the wife and the mortgage of \$6,000 which incumbered the property at the time of the conveyance to the husband; the testimony showing that there was no other incumbrance on the property when it was transferred to the wife.

(72 N. J. E. 283)

McKIERNAN et al. v. BEARDSLEE et al. (Court of Chancery of New Jersey. Nov. 1, 1906.)

WILLS (§ 775*) - CONSTRUCTION - LAPSE OF LEGACY-"HEIRS FOREVER."

In the absence of any clause or expression in a will showing an intent to the contrary, a devise or bequest from a wife to a husband "to him and his heirs forever" lapses upon the death of the husband in the lifetime of the testatrix; the words "heirs forever" being words of limitative to the contract of the testatrix. tion and not of substitution.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1997; Dec. Dig. § 775.*

For other definitions, see Words and Phrases, vol. 4, p. 3266.]

(Syllabus by the Court.)

Bill by Samuel G. McKlernan and others

George S. Hilton, for complainants. Abram intention to substitute the next of kin in the Klenert, for defendants.

LEAMING, V. C. The will of Emeline A. Doremus contained the following provision:

"After the payment of all my just debts and funeral expenses, I give, bequeath and devise all my property, both real and personal, wheresoever situate, and whatever the same may be to my husband, Cornelius Doremus, of the city of Paterson, in the county of Passaic and state of New Jersey, to him and his heirs forever."

Cornelius Doremus, the devisee and legatee named in the will, died April 1, 1899.

Emeline A. Doremus, the testatrix, died November 10, 1904.

The sole question for determination is whether the devise and bequest lapsed by reason of the husband predeceasing his wife, or whether the heirs of the husband take the estate which the husband would have received under the will in the event of the husband having survived testatrix.

It is well settled that a devise or bequest to "A. and his heirs" lapses upon the death of A. in the lifetime of the testator; the word "heirs" being a word of limitation which is used to denote the quality or duration of the estate to be taken by the devisee or legatee, and not a word of substitution denoting an

intention to substitute the next of kin in the place of the deceased devisee or legatee. The rule is the reverse in the case of a devise or bequest to "A. or his heirs," for the reason that in such case there is an apparent intention of substitution. If an intention to substitute the next of kin in the place of the deceased devisee or legatee, so as to save a lapse, can be deduced from some other clause or expression in the will, the rule above stated may be overcome. Zabriskie v. Huyler, 62 N. J. Eq. 697, 51 Atl. 197, affirmed on appeal 64 N. J. Eq. 794, 56 Atl, 1133.

In the present case the portion of the will above quoted constitutes the entire will, except a clause appointing the executor, and no intention can be imputed other than that manifest from the language of the clause quoted.

The word "forever," in the devise and bequest in question, imports no more than that the person who is to take shall take absolutely, and does not alter the character of the person who is to take. Doody v. Higgins, 9 Hare, 32 (Append. xxxii).

Gen. St. 1895, p. 8763, \$ 84, making provision against the lapse of estates devised or bequeathed, does not extend to a devise or bequest to the husband of testatrix. Canfield v. Canfield, 62 N. J. Eq. 578, 50 Atl. 471.

I will advise a decree accordingly.

(82 Vt. 824)

STEVENS & BALDWIN v. SAYERS. (Supreme Court of Vermont. Orange. Aug. 4, 1909.)

1. Logs and Logging (§ 3*)—Conveyance of Timber—Construction.

Defendant owning under a deed from H. the timber on land, with right, however, to remove it only before October 12, 1908, conveyed to plaintiffs the soft wood, with right to remove it only before May 1, 1908, and afterwards to them all the wood timber conveyed to him by H.. "excepting, however, the portion already conveyed to said grantees." Held, that the latter conveyance included defendant's right in the soft wood between May 1, 1908, and October 12, 1908.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 9; Dec. Dig. § 8.*]

2. Trial (§ 45*)—Offer of Evidence.

The offer to show the "surrounding circumstances and conditions" at the time a deed was made, as evidence that the deed included only the hard wood on land, is too general; the circumstances and conditions or their character not being indicated.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 111; Dec. Dig. § 45.*]

Exceptions from Orange County Court; Willard W. Miles, Judge.

Trespass quare clausum fregit by Stevens & Baldwin against J. M. Sayers. Plea the general issue and notice. Judgment for plaintiffs. Defendant brings exceptions.

Argued before ROWELL, C. J., and MUN-SON, WATSON, HASELTON, and POWERS, JJ.

Smith & Smith, for plaintiffs. Fred S. Wright, for defendant.

POWERS, J. John S. Hanson owned a timber lot in Newbury. On October 12, 1905, by a quitclaim deed, he conveyed to the defendant all the wood and timber standing thereon, with the right to enter upon the lot to cut and remove the same at any time within three years from said date. It was stipulated in the deed, however, that the defendant was to have no title to any wood or timber not removed within the three years. On January 4, 1906, the defendant by his warranty deed conveyed to the plaintiff all the soft wood and basswood which he acquired of Hanson. This deed gave the plaintiffs the right to enter upon the lot to remove this timber at any time before May 1, 1908, but not after. On October 4, 1907, the defendant gave the plaintiffs a warranty deed of certain wood and timber therein described as follows: "Certain wood and timber on land in Newbury * * * described as follows: All and the same wood and timber on land which was conveyed to me by John S. Hanson by his deed dated the twelfth day of October, A. D. 1905, * * * excepting, however, the portions of said premises which have been already conveyed to said grantees."

In this deed was a reservation of certain hardwood logs, but this is not here involved On March 30, 1908, Hanson conveyed the land to the plaintiff subject to "any right granted to take off timber from said land." Thereupon the plaintiffs went into possession of the land, and have been in possession ever since. In June, 1908, the defendant entered upon the premises, and cut some balsam and spruce trees. It is on account of this cutting that this suit is brought. The defendant's right to cut wood and timber under his deed from Hanson did not expire until October 12, 1908, but the right which he conveyed to the plaintiffs by his first deed expired May 1, 1908. He now claims that his right to such of the soft wood and basswood as the plain tiffs failed to remove before May 1, 1908, was not covered by his second deed to the plaintiffs, and therefore he was within his rights when he did the cutting herein complained of. This depends, of course, upon the true meaning of the deed of October 4, 1907.

We are unable to agree with the narrow construction which the defendant puts upon this deed. Before it was executed the defendant owned the hard wood on the lot, subject to the limitation as to time of removal, and he also owned the right to cut so much, if any, of the soft wood and basswood as the plaintiffs should leave on the lot May 1, 1908, subject to the same limitation. But after the execution of his second deed neither the hard wood nor his interest in the soft wood and basswood remained. It all passed to the plaintiffs under that deed, the true meaning of which by fair construction is the same as if it read "all the wood and timber not before conveyed." This is the effect of it if we write into it the provisions of the former deed-as the defendant asks us to do.

The only exception to the exclusion of evidence which the defendant here relies upon is thus stated in the bill: "* * The defendant offered to show (2) that the deed itself (October 4, 1907) in view of the surrounding circumstances and conditions at the time it was made, which conditions and circumstances defendant offered to show, would construe the deed to mean hard wood only." This offer was excluded, and the defendant excepted. The offer was too general. What the particular circumstances and conditions were is not stated in the offer. Nor does the offer indicate their character, and there is no way for us to determine whether or not they would shed any light on the true meaning of the deed. More than all that, the deed itself is plain and unambiguous. There is no occasion to resort to any facts outside the instrument itself to get at its true meaning. Therefore there was no error in the exclusion of the offer.

Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(111 Md. 274)

SMITH v. PHILADELPHIA, B. & W. R. CO. (Court of Appeals of Maryland. June 28, 1909.)

1. MASTER AND SERVANT (§ 219*)—INJURIES TO SERVANT—ASSUMED RISK.

An employé who contracts to perform a hazardous duty assumes such risks as are incident to the discharge thereof from causes open and obvious, or the dangerous character of which he had an opportunity to ascertain.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*]

2. MASTER AND SERVANT (§ 219*)—INJURIES TO SERVANT—SAFE PLACE TO WORK.

The rule that a master must use ordinary care to provide a reasonably safe place in which the servant may work is subject to the exception that one who remains in a service which necessarily exposes him to hazardous risks from causes open and obvious, the dangerous character of which he has an opportunity of knowing, assumes such risks, and, if injured in consequence thereof, cannot recover.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*]

3. MASTER AND SERVANT (§ 265*)—INJURIES TO SERVANT—"NEGLIGENCE"—BURDEN OF PROOF.

In an action for injuries to a servant, the burden is on plaintiff to establish defendant's negligence, viz., failure to discharge its legal duties toward him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908; Dec. Dig. § 265.*

For other definitions, see Words and Phrases, vol. 5, pp. 4743-4763; vol. 8, pp. 7729-7731.]

4. MASTER AND SERVANT (§ 278*)—INJUBIES TO SERVANT—NEGLIGENCE—EVIDENCE.

In an action for injuries to a car repairer by moving the car under which he was working, evidence *held* insufficient to establish defendant's negligence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 278.*]

5. Master and Servant (\$ 219*)—Injuries to Servant—Assumed Risks.

Where the risks of plaintiff's work as a car repairer underneath a railroad car by the movement of which he was injured were open and obvious, and plaintiff was acquainted with the dangerous character of the work, he assumed the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*]

G. MASTER AND SERVANT (§ 190*)—INJURIES TO SERVANT—FELLOW SERVANTS — CAR IN-SPECTOR—NEGLIGENCE,

Where a car repairer was injured while attempting to escape from under a car on which he was at work after the engine had started to move the cars, the failure of the car inspector and gang foreman to place a signal flag to protect the men working under the cars in accordance with the company's rules was the negligence of fellow servants, for which the railroad company was not liable.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 190.*]

Appeal from Circuit Court, Cecil County; James A. Pearce, Wm. H. Adkins, and Philemon B. Hopper, Judges.

Action by J. Carroll Smith, by Charlotte E. Smith, his next friend, against the Philadelphia, Baltimore & Washington Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRIS-COE, SCHMUCKER, WORTHINGTON, THOMAS, and HENRY, JJ.

Albert Constable and A. Freeborn Brown, for appellant. Fred. T. Haines, for appellee.

BRISCOE, J. This is a suit by the appellant against the appellee to recover damages for alleged personal injuries sustained by him while in the employ of the appellee corporation as a carpenter in the repair of certain freight cars near the city of Wilmington, Del. The suit was instituted in the circuit court of Cecil county, and resulted in a verdict and judgment in favor of the defendant. At the trial of the case, the court below, upon the conclusion of the plaintiff's testimony, granted the defendant's prayers, which practically withdrew the case from the consideration of the jury. They were as follows: "The defendant prays the court to instruct the jury that the plaintiff cannot recover in this case: First. Because there is no evidence legally sufficient to be submitted to the jury of the defendant's negligence. Second. Because from the uncontradicted evidence the accident occurred from dangers which were open and obvious, and the risk of which the plaintiff assumed.

The declaration contains two counts and will now be considered. The first count charges that on the 9th day of October, 1906, the plaintiff was employed by the defendant as a carpenter and engaged in the repair of one of the defendant's freight cars, which was placed on the siding for repair, when without any notice or warning whatsoever to the plaintiff one of the defendant's trains was backed in on said siding and struck the cars under which the plaintiff was working, thereby causing said cars under which the plaintiff was working to be moved and backed over the leg of the plaintiff, mashing the same, and causing much pain and suffering, necessitating medical treatment and skill and the shortening of the plaintiff's leg about two inches, caused by the negligence of the defendant in not providing the plaintiff with a reasonably safe place to work, although the plaintiff was using due care and caution and did not contribute directly thereto, and the said injuries are permanent. The second count charges that the accident was caused by the negligence of the defendant in not using and exercising ordinary care in the selection of competent employes, although the plaintiff

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was using due care and caution and did not contribute directly thereto and the said injuries are permanent.

The general principles of law applicable to cases of this character are well settled in this state, and need but few citations of authority to sustain them. The cases of Gans Salvage Co. v. Byrnes, 102 Md. 247, 62 Atl. 155, 1 L. R. A. (N. S.) 272, and Wood v. Heiges, 83 Md. 269, 34 Atl. 872, are directly in point. In the former case it is said an employé who contracts for the performance of hazardous duties assumes such risks as are incident to their discharge from causes open and obvious, the dangerous character of which he had an opportunity to ascertain. One who remains in a service which necessarily exposes him to hazardous risks from causes open and obvious, the dangerous character of which he knew or had an opportunity of knowing, must be considered as having assumed such risks, and, if injured in consequence thereof, has no claim against the employer. This doctrine, while stated as a general rule, constitutes an exception to or qualification of the broad principle which requires the employer to use ordinary care to provide a reasonably safe place in which the servant may perform his work. B. & O. R. R. Co. v. Stricker, 51 Md. 47, 34 Atl. 291; Yates v. McCullough Iron Works, 69 Md. 370, 16 Atl. 280, 20 A. & E. Ency. of Law, 114. In the case of Wood v. Heiges, 83 Md. 269, 34 Atl. 872, it is also said the master is not, an insurer of the servant's safety. He cannot be bound for his servant's injury without being chargeable with some neglect of duty measured by the standard of ordinary care. On the other hand, the servant is under an obligation to provide for his own safety when danger is either known to him or discoverable by the exercise of ordinary care. He must take ordinary care to learn the dangers which are likely to beset him; and, where the servant is as well acquainted as the master with the dangerous nature of the instrument' used, he cannot recover. An examination of the record in the case at bar will disclose an absence of evidence legally sufficient to show that the accident to the defendant was caused by failure of the appellee to discharge any of its legal duties toward the appellant. The burden of proof was upon the plaintiff to establish negligence upon the part of the defendant company; that is, that it failed to discharge its legal duties toward him, and, failing to offer evidence tending to prove these, it would have been error in the court below to have refused the defendant's prayers.

The plaintiff was a young man of 20 years of age, and was employed as a carpenter and an iron worker in the repair yards of the defendant company. His general duty consisted in making repairs on any part of the cars, and in replacing rods and iron work. On the day of the accident he was working

under a freight car in the repair yard, and while so working a locomotive belonging to the appellee backed on the track for the purpose of removing other cars, and in attempting to extricate himself he was caught and injured. He had worked for the company for four months under freight cars, and had full knowledge of the risk surrounding this kind of work. The plaintiff testified (1) that he knew, when he went in there, "that they ran engines in there on that track." He further testified, in answer to the following questions: "Q. You knew if an engine came in there and struck the car that was standing there, and that ran against the car you were under, that it might hurt you, didn't you? A. If I thought of it I would have known it. Q. You knew that as a matter of fact, didn't you? A. Yes. Q. Did you make any inquiry as to whether an engine was coming in there? A. No. Did you do anything to protect yourself in any way? A. No. Q. Did you say anything to the gang foreman about protecting you? A. No. Q. Did you say anything to Hessian about it? A. No. Q. You didn't say anything to Hessian about it? A. No; not about protection. Q. You did know if a car ran against the one you were under you would be hurt? A. We would be very apt to be. Q. That was obvious to anybody? A. Yes. Q. You didn't have the idea that you were made safe under there? A. No. Q. You never heard anything about that? A. No. Q. Did you ever see a flag set around on the track? A. No. Q. You never saw a flag on the car or track? A. If I did, I didn't notice it. I didn't pay any attention to it if I did; but I don't remember seeing any. Q. You didn't see any flag of any kind around there? A. No. Q. Did you ever hear any man going down there warning you to get from under there or see if you were under there? A. Did I hear? A. Yes." Q. On other days? There was evidence also to the effect that the company had established and promulgated rules and regulations to protect men working under cars in their repair yards and shops by placing blue or red flags as signals, but that "the gang inspector" on the occasion of the accident failed to place such a flag.

We are of the opinion that the record in this case does not furnish any legally sufficient evidence of negligence of the appellee causing the accident, and the prayers of the appellee were propertly granted. There was positive and uncontradicted evidence to the effect that the risks attending and surrounding the accident were perfectly open, patent, and obvious, and the plaintiff was well acquainted with the dangerous nature of the work as the defendant corporation. It was a danger that was seen, and willingly assumed by the plaintiff, and was in no way hidden or concealed. As to the failure of the car inspector and gang foreman to place

under the cars, we need only say that these persons were employes of the defendant company and co-employes of the plaintiff, and their negligence was the negligence of a fellow servant, for which the master was not responsible; there being no evidence whatever that the appellee had employed unfit and unsuitable persons to perform the work. Moret v. Car Works, 99 Md. 471, 58 Atl. 447; Natl. Enameling Co. v. Cornell, 95 Md. 524, 52 Atl. 588; 12 A. & E. Ency. of Law, 967; Wood v. Heiges, 83 Md. 268, 34 Atl. 872; N. & W. R. Co. v. Hoover, 79 Md. 255, 29 Atl. 994, 25 L. R. A. 710, 47 Am. St. Rep. 392.

Finding no error in the rulings of the court, and for the reasons stated, the judgment will be affirmed.

Judgment affirmed, with costs.

(111 Md. 288)

ant's evidence.

PENNSYLVANIA R. CO. v. CECIL

(Court of Appeals of Maryland. June 30, 1909.)

1. TRIAL (§ 420*)—EXCEPTIONS TO REFUSAL TO DIRECT VERDICT—WAIVER.

A defendant who, after the refusal of the court to direct a verdict at the close of plaintiff's case, offers evidence in his own behalf waives his evention to the refusal. waives his exception to the refusal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 983; Dec. Dig. § 420.*]

2. TRIAL (§ 178*)—INSTRUCTIONS—APPLICA-BILITY TO EVIDENCE.

Where defendant, after the refusal of the court to direct a verdict at the close of plaintiff's case, offered evidence materially strengthening plaintiff's case, an instruction that plaintiff had offered no evidence sufficient for recovery was properly refused, because plaintiff's evidence must be taken in connection with defend-

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 178.*]

3. Railboads (§ 398*)—Injuries to Person on Track—Negligence—Evidence.

In an action for injuries to a brakeman. caught between a car in a train of his employer run into the yards of defendant pursuant to a traffic arrangement and a car of defendant on a side track standing hear a switch, evidence held to show defendant's negligence in failing to place its car far enough from the switch to en-able the train to pass with safety.

-For other cases, see Railroads, [Ed. Note.-Dec. Dig. \$ 398.*]

4. Railroads (§ 400*)—Injuries to Person on Track—Contributory Negligence— EVIDENCE.

Whether a brakeman, injured by being caught between a car in a moving train of his employer, while running into the yards of defendant under a traffic arrangement, and a car of defendant standing on a side track near the switch, was guilty of contributory negligence held under the evidence for the jury.

[Ed. Note.-For other cases, see Railroads, Dec. Dig. \$ 400.*]

5. Railroads (§ 387*)—Injuries to Person on Track — Contributory Negligence —

Where a brakeman of a railroad running its trains into the yards of another railroad had notice that the cars of the latter, standing on a

the flag as a signal to protect the men working | side track, were close to the clearance of the under the cars, we need only say that these | train of the former, and he was injured by being caught between a car on which he was riding and a car of the latter, and the clearance space was called to his attention by a car inspector of the latter, but the brakeman placed himself in position of danger, and contributed to his injury, there could be no recovery, though the lat-ter was negligent in leaving its car too close for the clearance of the train.

[Ed. Note.—For other cases, see Cent. Dig. § 1314; Dec. Dig. § 387.*] see Railroads.

6. Trial (§ 260°)—Instructions—Refusal to GIVE INSTRUCTIONS COVERED BY THOSE GIVEN.

It is not reversible error to refuse a requested prayer accurately embodied in prayers

[Ed. Note.—For other cases, see Trial, Cent. Dig. \$\$ 651-659; Dec. Dig. \$ 260.*]

7. Railboads (§ 358*)—Injuries to Person on Track—Liability.

Where two railroads had a traffic arrangement whereby the trains of one were run into the yards of the other, the latter must provide the employes of the former with a safe place in which to do the work of running the trains into which to do the work of running the trains into the yards, and the latter, negligently permitting a car in its yards to so protrude towards a lat-eral track, on which the train of the former was entering under permissive signals, as not to leave sufficient space for the safe passage of the train and the crew thereon while engaged in the duties of their employment, so that a brake-man was injured while exercising his duty, was liable therefor.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 358.*]

8. RAILEOADS (§ 400*)—INJURIES TO PERSON ON TRACK—Assumption of Risk—Question FOR JURY.

Whether a brakeman, injured by being caught between a car in a train of his employer, running into the yards of defendant under a traffic arrangement, and a car of defendant standing on a side track near a switch, assumed the risk of injury held, under the evidence, for the jury.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 400.*]

Appeal from Circuit Court, Allegany County; M. L. Keedy, Judge.

Action by Frank Cecil against the Pennsylvania Railroad Company. From a judgment for plaintiff, defendant appeals. Af-

The court modified and granted plaintiff's first prayer as follows: "The plaintiff by his counsel prays the court to instruct the jury that, if they shall find from the evidence that on the 11th day of December, 1906, the plaintiff was employed as a brakeman by the Georges Creek & Cumberland Railroad Company, and that said railroad company had certain traffic arrangements with the defendant company, under which the former had certain running rights to and into the state line yards of the defendant near Ellerslie, and that by virtue of such running rights the train and crew of the plaintiff entered upon the tracks of the defendant, and received the permission signal of defendant and instruction to enter in trainyards on

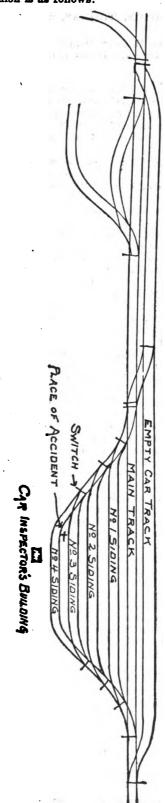
For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

track No. 4, and shall further find that pursuant thereto the plaintiff's train did so enter, and shall find that said yards were under the control of the defendant, and that the defendant negligently permitted one of the freight cars on its said yard to so corner or protrude towards a lateral track of the defendant in said yard upon which the train of the plaintiff was entering, under the permissive signals aforesaid, as not to leave sufficient space for the safe passage of the cars of the plaintiff's train, and the crew thereon while engaged in the duty of handling said train in an ordinary, prudent, and careful manner, and shall find that as a result of such negligence, if the jury so find, the plaintiff while exercising due care and caution on his part, and while exercising his duty as such brakeman, was caught and rolled and sorely injured between such protruding car and one of the cars in his own train by reason of the negligence aforesaid, and was sorely injured and damaged thereby, then the plaintiff is entitled to recover in this case."

The court granted defendant's second prayer, as follows: "The defendant by its counsel prays the court to instruct the jury that, if they find from the evidence that the plaintiff was hurt while standing on the side of a freight car, which was passing a car standing on another track, and that before he placed himself in such a place of danger, he had notice that the cars standing on the adjoining track were close to the clearance of the car on which plaintiff was riding, and that the attention of the plaintiff to said clearance space was further called by John R. Porter, car inspector of the Pennsylvania Railroad Company, and that the plaintiff, notwithstanding such notice and attention being called, placed himself in such position of danger, and thereby contributed to his own injury, their verdict must be for the defendant, even though the jury may believe that the defendant was negligent in leaving the car too close for the clearance of the passing train."

The court rejected defendant's third prayer, as follows: "The defendant prays the court to instruct the jury that, if they find from the evidence that the injury complained of was caused by reason of the defendant's agent having placed a freight car on a track too close for the clearance of a train on an adjoining track, and that in the daytime the plaintiff's train, before passing said freight car, slackened speed, and plaintiff got off of the same and examined the situation of said freight car, and signaled his train to go ahead, and thereupon, before reaching the said freight car, plaintiff got on the stirrup of a freight car of his own train, and was injured by striking against said freight car standing as aforesaid, then the plaintiff was guilty of negligence contributing to his own injury, and cannot recover in this case.

The blue print plan referred to in the opinion is as follows:



Argued before BOYD, C. J., and BRIS-COE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, THOMAS, and HENRY, JJ.

De Warren H. Reynolds, for appellant. F. C. Hendrickson and David J. Lewis, for appellee.

PEARCE, J. This suit was brought by the appellee to recover damages for an injury occasioned by the alleged negligence of the appellant, and the result was that the appellee was given a verdict and judgment for \$8,000.

The principal facts of the case are these: The plaintiff, Frank Cecil, on December 12, 1906, being then a little over 19 years of age, was in the service of the Georges Creek & Cumberland Railroad Company as a brakeman upon a train of coal cars, and had been so employed for about five weeks previously. He had been manumitted by his father, and authorized to contract for himself, and to receive and retain the wages of his labor. The Georges Creek & Cumberland Railroad connected with the Pennsylvania Railroad, and delivered loaded coal cars to it for transportation at the state line yards of the latter company, and for this purpose had a contract for what was termed "running rights" over the tracks of the Pennsylvania Railroad at its state line yards.

A copy of a blue print plan of said yard showing all these tracks and the exact spot of the accident will be inserted in this opinion by the reporter. When approaching this yard for the delivery of coal cars, the operator in a tower of the Pennsylvania Railroad signals the approaching train, directing what track it shall take in the yard, and at the time of this accident the operator signaled the engineer of the coal train to take track No. 4, indicated on the copy of the blue The coal train being on the main track when this signal was received, it was necessary, in order to reach track No. 4, that four switches should be opened and passed through, and it was the duty of the plaintiff as brakeman to open these switches, being sometimes aided in this by some employé of the Pennsylvania Railroad Company. On this occasion he stepped from the slowly moving train, and went ahead of it to open these switches. He states that he threw the switch from the main track, and also those to the third and fourth side tracks, while one of the defendant's car inspectors, who was near by, threw the switch to the first side track, and he thinks also that to the second side track, and in this the recollection of the engineer, Mr. Carberry, agrees with that of the plaintiff; but Mr. Porter, the car inspector in the daytime, and the only one shown by the record to have been present that morning, testified that he did not open any switch. While these several switches were being opened, the train moved

walk, according to the testimony. When the switch leading into track No. 4 was opened, the plaintiff then stepped into the space between tracks No. 3 and No. 4, and walked back between these tracks to mount the moving train, as his duty required him to do in order to cut off the engine and leave the cars on track No. 4. As the train came on, he caught the handhold on second car behind the engine, placed his foot in the stirrup provided on each car for the purpose, and attempted to swing up on the car, when he was caught and rolled between the car he was mounting, and a car of the Pennsylvania Railroad left standing on track No. 3. As the train moved further out on track No. 4, he dropped to the ground, unable to walk or stand, and soon after was sent to a hospital at Cumberland where he remained two weeks. His hip and shoulder, or collar bone, were injured, the latter being broken, and the sciatic nerve somewhere in the hip being seriously injured, resulting in the wasting of the muscles of the left leg, the shrinkage of the whole limb, and a total inability for any labor sufficient for his support.

The testimony of Dr. Wiley, as well as of the other physicians who testified, was that there is no remedy for so serious an injury to the sciatic nerve; that neither the knife nor medicine does any good. The car standing on track No. 3 with which the plaintiff came into contact is designated in the testimony as a "cornered" car and it was one of several cars standing there; that one being nearest to the switch. A "cornered" car as explained by the testimony means one placed so near the opening of the switch as not to leave the regulation space required for safety between it and cars on the next track leading out of that switch. This regulation space according to the testimony of Mr. Burket one of defendant's witnesses and supervisor of its tracks at that yard was from 2 feet 3 inches to 2 feet 1 inch, according to the width of the cars and the evidence showed that the space between the rear of this cornered car and the car passing on track No. 4 was not over six inches. The evidence also was that it is the custom of well-regulated railroads to set posts in the ground near switches indicating the distance from a switch where cars can be placed without cornering, and that there were no such posts, or any other guides for that purpose at that place.

while one of the defendant's car inspectors, who was near by, threw the switch to the first side track, and he thinks also that to the second side track, and in this the recollection of the engineer, Mr. Carberry, agrees with that of the plaintiff; but Mr. Porter, the car inspector in the daytime, and the only one shown by the record to have been ly one shown by the record to have been present that morning, testified that he did not open any switch. While these several switches were being opened, the train moved steadily in, about as fast as a man could

attention to that car, and said "it did not second prayer on the measure of damages. look like it would clear," and that the plaintiff went "and examined the place same as I did, and said he thought it would clear all right-he would try it. He stood on the inside rail of No. 4, and touched the car with his hand. The rules are if you can stand on a rail and touch the car across from you by the ends of your fingers, it will clear all right." The plaintiff denied this, or any other, conversation with Mr. Porter at that time. The inherent improbability of such a conversation and experiment at that time must occur to the mind. According to the testimony of Mr. Carberry the distance from the main track to the point of the accident was about twice the length of the courtroom in which the trial was held. The appellee's brief, not contradicted verbally or otherwise by the appellant, states this distance to be 120 feet. The undisputed evidence is that the train came steadily in about as fast as a man's ordinary walk. Estimating this at three miles an hour, a man would cover 120 feet in about 30 seconds. While the train was moving over this distance, the plaintiff had to keep in advance of it, and, according to Porter's testimony, opened three switches. It is hard to understand how there was time and opportunity, in addition to these duties, to hold the conversation and make the experiment testified to by Porter, but this conflict of testimony was for the jury, and appears to have been settled to their satisfaction. At the close of the plaintiff's testimony the defendant asked the court to instruct the jury that under the pleadings in the case the plaintiff had offered no evidence legally sufficient to entitle him to recover, and their verdict must be for the defendant, but this instruction was refused, and the first exception was taken to that ruling. As the defendant, however, proceeded with the case by offering evidence in its own behalf, that exception has been waived, and will not be considered.

After the testimony had been concluded upon both sides, the plaintiff offered two prayers, the first reciting the facts necessary to a recovery, and the second being the usual prayer as to the measure of damages in cases of this character; and the defendant offered three prayers, the first being a renewal of the prayer to take the case from the jury, and the second and third being founded on the doctrine of contributory negligence as claimed to be established by the testimony of Porter as mentioned above. The court granted the plaintiff's first prayen in connection with the defendant's second prayer, which was conceded by the plaintiff, and also granted the plaintiff's second prayer, which was conceded by the defendant as correct, if the plaintiff was entitled to recover at all, and the court rejected the defendant's first and third prayers. We shall request the reporter to set out the plaintiff's first prayer, and the defendant's second and third prayers.

It is not necessary to set out the plaintiff's

The defendant's first prayer, however, is unusual, and we will transcribe it here: "The defendant, by its counsel, prays the court to instruct the jury that under the pleadings in this case the plaintiff has offered no evidence legally sufficient to entitle him to recover, and their verdict must be for the defendant." The peculiarity of the prayer is that, while offered after the close of testimony on both sides, it asks for a verdict for defendant upon the testimony of the plaintiff alone. It is, word for word, the same prayer which was offered and rejected at the close of the plaintiff's testimony. As we have already said, all exception to the insufficiency of the plaintiff's evidence alone has been waived by the defendant. Barabasz v. Kabat. 91 Md. 55. 46 Atl. 337; Cowan v. Watson, 91 Md. 344, 46 Atl. 996. In the latter case Judge Fowler said, "By proceeding with the case after its first prayer was refused, the defendant must be held to have waived its exception to that action of the court," and that is now the settled law of this state, based upon sound reason and policy. In Consolidated Railroad v. Pierce, 89 Md. 506, 43 Atl. 940, the defendant at the close of the whole case, offered two prayers, both based in express language upon the testimony of the plaintiff alone, and asking a verdict for defendant. Both were rejected, and in affirming this ruling Judge Boyd said: "So far as the plaintiff's evidence is concerned, that was to be taken in connection with the other evidence in the case. If it be conceded that, if the evidence of the plaintiff be true, it alone did not make out a case against the defendant, and that the evidence of the defendant, if believed by the jury, was sufficient to acquit it of default (if that offered by the plaintiff was excluded), the difficulty still exists that the court, in passing on the prayers, was not authorized to consider the one and exclude the other. but was compelled to take all the testimony on both sides into consideration.'

The case of the Phil., B. & W. R. R. v. Hand, 101 Md. 236, 61 Atl. 285, is an illustration of the strictness with which the court applies the principle involved in the ruling now under consideration, in order not to trench upon the province of the jury to consider and weigh all the evidence. that case the jury were instructed that "they were not entitled to presume that the plaintiff was guilty of negligence, but that fact, if relied on by the defendant, must be proved by the defendant by preponderating testimony, and that if their minds are in a state of equipoise as to whether she was guilty of negligence or not, then they cannot find she was guilty of negligence." This prayer, it was contended, was correctly granted, as substantially the same as a prayer upheld in P., W. & B. R. R. v. Anderson, 72 Md. 519, 20 Atl. 2, 8 L. R. A. 673, 20 Am. St. Rep. 483. There the jury were instructed that, "in order to defeat a recovery on the ground of

contributory negligence on the plaintiff's part, | of the rejection of such prayer. the defendant must satisfy the jury by preponderating evidence of two facts: First. that the plaintiff was negligent; and, secondly, that such negligence directly contributed to the injury." In holding that the instruction in the Hand Case was erroneous the court pointed out that it is the existence of negligence, and not the party by whom its existence is proved, that is material, and that, while under the instruction in the Anderson Case the defendant could rely upon any evidence adduced in the case, under the natural construction of the language of the instruction in the Hand Case the defendant could only resort to that adduced by itself. It will be seen from an examination of the record that much of the testimony offered by the defendant, or extracted from its witnesses, materially strengthened the averments of the declaration, and it would have been a grave error indeed to have granted that prayer as offered. But even if this prayer had been based upon all the evidence in the case, it would have been necessary to reject it, because, as we have just said, there was evidence on the part of the defendant tending to sustain the plaintiff's case: that is, to establish negligence on the defendant's part causing the injury complained of, without any such proof of negligence on the plaintiff's part as would warrant the withdrawal of the case from the jury on that ground. So that, in whatever light the defendant's first prayer may be regarded, there was no error in its rejection.

The defendant's second prayer was very properly conceded. It fully and fairly left to the jury the question of contributory negligence of the plaintiff, upon the conflict of testimony between the plaintiff and Porter as to the deliberate assumption of the risk of the cornered car by the plaintiff. The third prayer of the defendant was properly rejected. The only testimony in the case which we have been able to discover tending to support the theory of contributory negligence is that of Mr. Porter, which we have heretofore mentioned, and upon which the defendant's second prayer, which was conceded, is based, and, as is humorously expressed in the brief of the appellee, "so far as it is based upon testimony, it is only tuned in another octave from the conceded prayer." If the second prayer had not been offered, the third prayer might have been perhaps a proper one to grant, and in such case, if we may judge from the concession of the second prayer, we may be allowed to infer that the third would have been conceded. But the defendant received under the second prayer the full benefit of everything contained in the third, and in language clearer and more specific than that of the third. It has long been settled that, where the law of the rejected prayer is accurately embodied in other granted prayers, the court will not reverse because of McDade, with instructions which did not

Poe's Prac. § 303; Spencer v. Trafford, 42 Md. 21.

The plaintiff's first prayer was granted in connection with the defendant's conceded prayer, and the jury was thus plainly instructed that, in finding the facts enumerated in that prayer, they still could not render a verdict for plaintiff, if they also found the facts enumerated in the defendant's second prayer. The plaintiff's first prayer, except as to the defense of contributory negligence, covers the whole law of the case in clear and explicit terms, and the defendant's second prayer, which by the action of the court was practically made an addition to that prayer, covered the law, as to contributory negligence in that case, in terms equally clear and explicit. There was abundant evidence of negligence on the defendant's part in placing the cornered car as it was placed, in the failure to set posts or guides near the switches to enable those in charge of the cars to place them safely without cornering, and in the failure of the car inspector in charge of that matter to inspect or supervise the location of such cars with reference to the danger of cornering. Georges Creek & Cumberland Railroad Company having running rights at the place of the accident, the defendant was under the same obligation to provide the employes of the Georges Creek & Cumberland Railroad Company with a safe place in which to do the work required of them in the performance of their duties, in connection with those running rights, as they were to their own employés in the performance of their duties. The plaintiff's duties required him to leave the train when and as he did, and to open these switches while the train was moving, and in the time thus allowed for it. They required him to mount the train again when he attempted to do so, and the evidence shows that his attempt was made in the natural and usual manner, and the testimony of Porter himself, if accepted, shows that he knew the custom was to mount the train on the side next to the switch, since otherwise he would not have called the plaintiff's attention to the cars standing on track No. 3, and have expressed a doubt that plaintiff would clear these cars. from the evidence of Porter, we can discover no evidence of negligence on the plaintiff's part in not discovering the dangerous position of the cars on track No. 8.

In Choctaw, Oklahoma & Gulf R. R. v. McDade, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96, the plaintiff's intestate, who was a brakeman on the railroad, was riding on top of a furniture car, wider and higher than the average car, and was killed as a result of being struck by an overhanging spout from a water tank. In affirming a judgment in favor of the plaintiff, the Supreme Court said: "The court left to the jury the question of the assumption of risk on the part

permit of recovery if he either knew of the liberating as to the extent of their official duty danger of collision with the spout, or by the observance of ordinary care on his part ought to have known of it. The servant assumes the risks of dangers incident to the business of the master, but not of the latter's negligence. • • • Neither the assumption of risk nor the contributory negligence of the plaintiff below was so plainly evident as to require the jury to be instructed to find against the plaintiff, but, under the facts disclosed, these matters were properly left to the jury." In the case at bar the facts disclosed offer less support to the theory of assumption of risk, or of contributory negligence, than in the case last mentioned. That case was cited with approval in P., B. & W. R. R. Co. v. Devers, 101 Md. 842, 61 Atl. 418, where a watch box, after being removed for repair, was replaced, but negligently fixed nearer to the track, so that it was struck by a passing engine, and Devers was injured. This court held that "he assumed the risks that were incident to the use of a box properly located, and such others as he knew, or ought to have known by the exercise of reasonable care, but he did not assume the risk of a watch box placed without his knowledge so close to the track as to be liable to be struck by a passing train." An interesting discussion of the law applicable to a case where one, riding on a car where his duty required his person to protrude beyond the car he was on, was struck by a stationary "cornered" car will be found in Kansas City, Memphis & Birm. R. R. v. Burton, 97 Ala. 240, 12 South. 88, from the Supreme Court of Alabama, in which the same view was expressed as in the case from 191 U.S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96, supra, but more elaborately. We do not think it necessary, however, to prolong this opinion by more than reference to it as well reasoned, and as presenting the precise question presented here, under circumstances almost the same.

For the reasons given, the judgment will be affirmed.

Judgment affirmed; costs above and below to be paid by the appellant.

(105 Me. 184)

HUTCHINSON v. INHABITANTS OF CARTHAGE.

(Supreme Judicial Court of Maine. Feb. 16,

1. PAUPERS (§ 8°)—OVERSEERS OF THE POOR— DUTY.

It is made the duty of the overseers of the poor of the town where a person may be found in distress to institute an inquiry, not as to any means he may possess, of which he cannot then avail himself, but whether immediate relief is necessary. Were it otherwise, the party might be left to suffer while the officers were de-

and the nature of their remedy.

[Ed. Note.-For other cases Cent. Dig. § 10; Dec. Dig. § 3.*]

2. PAUPERS (§ 3°)—OVERSEERS OF THE POOR—CONCLUSIVENESS OF DETERMINATION.

If the overseers of the poor act in good faith and with reasonable judgment touching the necessity of relief of persons found in need, their conclusions will be respected in law.

[Ed. Note.—For other cases, see Paupers, Dec. Dig. § 3.*].

3. PAUPERS (§ 44*)—OVERSEERS OF THE POOR—AUTHORITY TO CONTRACT.

The doctrine that the overseers of the poor may make a contract for the relief and support of those found in need of relief in their town is well established.

[Ed. Note.—For other cases, see Paupers, Cent. Dig. § 195; Dec. Dig. § 44.*]

4. PAUPERS (§ 1*)—NEEDY PERSON—CAUSE. It is immaterial whether a person in need is brought into that condition by quarantine, neglect of the board of health, or otherwise, inasmuch as it is the fact of the situation, not the method of producing it, that requires the action

of the officers of a town. [Ed. Note.—For other cases, see Paupers, Cent. Dig. § 1; Dec. Dig. § 1.*]

5. Paupers (§\$ 2, 43, 52°)—Recovery for Services—Sufficiency of Evidence—Stat-

UTORY PROVISIONS—REPEAL—APPLYING FOR OR RECEIVING PAUPER SUPPLIES.

The plaintiff brought an action to recover \$25 for services alleged to have been rendered \$20 for services alleged to have been rendered by him for the defendant town through a con-tract with the overseers of the poor. The evi-dence showed that Samuel Kittridge, his wife, and several children, were taken ill with the measles, quarantined by order of the board of health, and left in this helpless situation with-out nurse or attendant. So serious was the out nurse or attendant. So serious was the condition of the father and mother that they both died from the results of the disease. Under the stress of these circumstances, the attending physician called opon one of the selectmen and overseers of the poor, who, when informed of the situation, with one of his associates made a personal investigation, and then, with the approval of both of his associates, employed the plaintiff to take charge of the afflicted family. After the death of Mr. Kittridge, while he had no real estate, nor money in a bank, it was discovered that he had a small amount of personal reporters all in chattel form estimated to be covered that he had a small amount of personal property all in chattel form, estimated to be about \$200, after payment of debts. The defendant town admitted that the services charged for were rendered for the Kittridge family, and that the amount claimed was reasonable. The presiding justice ordered a verdict for the plaintiff, and the defendant town excepted.

Held:

(1) That the wardiet was distalled.

(1) That the verdict was rightly ordered upon the question of fact.
(2) That Rev. St. c. 27, § 11, providing that "towns shall relieve persons having a settlement therein, when, on account of poverty, they need relief," is absolute in its terms, and was not repealed expressly or by necessary implication by the act (Rev. St. c. 18) creating the board of health

(3) That Rev. St. c. 27, § 2, only applies to cases where the settlement of the pauper is in question, and that that question did not arise in the case at bar.

[Ed. Note.—For other cases, see Paupers, Dec. Dig. §§ 2, 43, 52.*]

Exceptions from Supreme Judicial Court,

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Assumpsit by Elisha T. Hutchinson against | the Inhabitants of Carthage. Verdict for plaintiff, and defendants except. Exceptions overruled.

Action of assumpsit brought in the municipal court of Farmington, Franklin county, to recover the sum of \$25 for services rendered by the plaintiff to the defendant town by virtue of an alleged contract with the overseers of the poor of the defendant town whereby the plaintiff took care of Samuel Kittridge and his family, residents of the defendant town, while sick with a contagious disease. Plea, the general issue. By appeal on the part of the plaintiff, the action was transferred to the Supreme Judicial Court in said county and was tried at the May term thereof, 1908. At the conclusion of the testimony, the presiding justice ordered a verdict for the plaintiff for the amount sued for, and the desendant town excepted.

The case is stated in the opinion.

Argued before EMERY, C. J., and SAV-AGE, PEABODY, SPEAR, and BIRD, JJ.

Nathan G. Foster, for plaintiff. Joseph C. Holman, for defendants.

SPEAR, J. This is an action of assumpsit for the recovery of \$25 for services alleged to have been rendered by the plaintiff for the defendant town through a contract with the overseers of the poor. It appears from the evidence that Samuel Kittridge, his wife, and several children were taken ill with the measles, quarantined by order of the board of health, and left in this heipless situation without nurse or attendant. So serious was the condition of the father and mother that they both died from the results of the disease. Under the stress of these circumstances, the attending physician called upon one of the selectmen and overseers of the poor, who, when informed of the situation, with one of his associates made a personal investigation, and then, with the approval of both his associates, induced the plaintiff, much against his inclination, to accept the employment of administering care to the afflicted family. After the death of Mr. Kittridge, while he had no real estate, nor money in a bank, it was discovered that he had a small amount of personal property all in chattel form, estimated by the administrator to be about \$200 after payment of debts. The defendants admit that the services charged were rendered for the Kittridge family and that the amount claimed is reasonable.

Upon this state of facts, the defendants say that the order of the verdict for the plaintiff was erroneous: First, because there was sufficient evidence to raise the question of fact, which should have been submitted to the jury, whether the selectmen or overseers of the poor acted as agents of Mr. Kittridge or as agents of the town; second, that it was the duty of the board of health to "fur-

sick with such diseases who cannot otherwise be provided for"; third, that the overseers of the poor were not authorized by any provision of the statute to contract for the services rendered.

Briefly restating the case, in order to get its logical bearing, it appears: That Mr. Kittridge and his family became seriously ill with a contagious disease in the house occupied by him as a home. That the house was quarantined by order of the board of health. That the board of health failed to provide any assistance, and he and his family were left in distress and need. The overseers of the poor were notified of the condition of the family, investigated, and ascertained the truth of the facts; and thereupon, in their capacity as overseers, as they say, employed the plaintiff to take care of the Kittridge family. Under this chain of events, granting the most favorable inference which could be drawn from the testimony in favor of their first contention, that the agency of the overseers should be submitted as a question of fact, we are of the opinion that the defendants have failed. While the question might be raised, yet the evidence is so overwhelmingly in favor of the plaintiff upon this point that a verdict of the jury to the contrary could not be permitted to stand. The defendants' second contention, that the statute authorizing the board of health to furnish medical treatment and care was intended to abrogate the statute authorizing overseers of the poor to aid persons found in distress, is clearly untenable.

The statute, which says: "Towns shall relieve persons having a settlement therein, when, on account of poverty, they need relief"-is absolute in terms and was not repealed expressly or by necessary implication by the act creating the board of health.

It is immaterial whether the person in need is brought into that condition by quarantine, neglect of the board of health, or otherwise, inasmuch as it is the fact of the situation, not the method of producing it, that requires the action of the officers.

In this connection the defendants intimate that the fact that Mr. Kittridge left something like \$200 in his estate should operate to defeat the adjudication of the overseers of the poor that he was in need of relief when they employed the plaintiff to take care of him; but our court has several times held that it is the duty of the overseers of the poor to relieve a person found in their town in distress, although he may have property of his own not available for his immediate relief. The court held this to be a true interpretation of the statute, although the person found in need of relief was a nonresident, and the action was between the town furnishing the supplies against the resident town of the pauper. Norridgewock v. Solon, 49 Me. 385. The reasoning in this case should nish medical treatment and care for persons apply with increased force to the case at bar,

inasmuch as the overseers were acting in behalf of their own town in furnishing the relief, instead of for another town. Yet upon this issue it was said: "But it is contended that he was not, in fact, a pauper; that he had means by which he could have paid for or secured his own support. this may be true and the overseers still be liable, under the statute to furnish relief."

In a case involving this point (Alna v. Plummer, 4 Greenl. 258), the court hold: "It is made the duty of the overseers of the town where a person may be found in distress to institute an inquiry, not as to any means be may possess, of which he cannot then avail himself, but whether immediate relief is necessary. Were it otherwise, the party might be left to suffer, while the officers were deliberating as to the extent of their official duty and the nature of their remedy." All the cases hold that, if the overseers act in good faith and with reasonable judgment touching the necessity of relief of persons found in need, their conclusions will be respected in law. It requires no evidence in this case to satisfy a reasonable mind that the overseers of the poor acted in good faith with reasonable judgment, and in accord with the demand of humanity. Upon this point the decisions quoted were in construction of a statute practically the same as Rev. St. c. 27, § 11, is to-day.

Upon the third point, the doctrine that the overseers of the poor may make a contract for the relief and support of those found in need of relief is too well established to require discussion.

In Conley v. Woodville, 97 Me. 241, 54 Atl. 400, it is said: "It is entirely true that a town may become liable to the inhabitants of another town for relief furnished a pauper by virtue of a contract between the town and a person furnishing relief." In Palmyra v. Nichols, 91 Me. 17, 39 Atl. 338: "Overseers of the poor have the care and oversight of the poor, and in the discharge of their duties they are the authorized agents of the town. Necessarily they may direct a variety of business, incidental to their general powers." See, also, upon this point, Clinton v. Benton, 49 Me. 550; Corinna v. Exeter, 13 Me. 321.

But the defendants contend that the care furnished came within the rule of "pauper supplies" and must be applied for or received "as pauper supplies," as required by Rev. St. c. 27, § 2. But this question does not arise in this case. It becomes material only in suits between towns where it is sought to interrupt a five years' pauper settlement by evidence of the alleged pauper having received "supplies as a pauper." The requirement therefore of section 2, c. 27, Rev. St., only applies to cases where the settlement | Washington County. of the pauper is in question.

In this case there is no such question. The overseers of the poor adjudged that the Kittridge family needed services and that the town should furnish them. They then, in behalf of the town, employed the plaintiff to render the services so adjudged and needed, and he rendered them. That is sufficient to sustain the action. The town, having hired the plaintiff, should pay him. He has no concern of the question whether Kittridge applied for or received his services as pauper supplies such as would interrupt the effect of the five years' settlement. The order of the verdict must be sustained.

Exceptions overruled.

(105 Me. 140)

FOSS v. McRAE et al.

(Supreme Judicial Court of Maine. Feb. 16. 1909.)

1. EVIDENCE (§ 94*)—BURDEN OF PROOF.
While the burden of evidence may be said to have shifted from a plaintiff to the defendant when the plaintiff has made out a prima facie case, and from the defendant to the plaintiff again when the defendant's evidence has overcome the prima facie case of the plaintiff, yet the burden of proof has not changed at all; but it is incumbent upon the plaintiff in the but it is incumbent upon the plaintiff, in the end, upon all the evidence, however it may have shifted from one side to the other, to establish the truth of the allegation upon which he seeks to recover.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 116, 117; Dec. Dig. § 94.*]

Cent. Dig. §§ 116, 117; Dec. Dig. § 94.*]

2. Evidence (§ 94*)—"Burden of Proof."

"Burden of proof" and "burden of evidence" are often confused. The phrase "burden of proof" is, in fact, more philosophical than practical. It means generally that a plaintiff, however often the evidence shifts, must upon the whole persuade the jury, by legal evidence, that his contention is right. The risk of non-persuasion is all the time upon him. If he fails to persuade, he loses his case. The risk of non-persuasion is the burden which he must assume.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 116, 117; Dec. Dig. § 94.*

For other definitions, see Words and Phrases, vol. 1, pp. 904-907; vol. 8, p. 7593.]

3. GUABANTY (§ 89°) — BUBDEN OF PROOF — PARTY ASSERTING FACT.

PARTY ASSERTING FACT.

The plaintiff brought an action on a certain written instrument purporting to be a guaranty by the defendants' testator of the payment of certain promissory notes transferred by him to the plaintiff. The defendants gave written notice to the plaintiff of their denial of the execution of the instrument. At the trial a subscribing witness to the instrument testified that at the time of the execution and delivery of the at the time of the execution and delivery of the instrument it did not contain the last four words, "and will guarantee them." There was also evidence upon both sides of this issue. The plaintiff contended that upon this issue the burnard of the state den of proof was on the defendants; but the presiding justice instructed the jury otherwise. Held, that the instructions were correct.

[Ed. Note.—For other cases, see Guaranty, Dec. Dig. § 89.*]

(Official.)

Exceptions from Supreme Judicial Court,

Action by Mary E. Foss against Maurice E.

Asa T. McRae, deceased. Verdict for defendants, and plaintiff excepts. Exceptions overruled.

Action on an alleged guaranty by the defendants' testator of the payment of some 50 overdue promissory notes transferred by him to the plaintiff. The notes were given by the various promisors to Walter H. Foss, the husband of the plaintiff, and had been by him transferred to the defendants' testator, and later transferred by him to the plaintiff in settlement of matters between them. The record does not disclose the plea nor for whom was the verdict; but presumably the plea was the general issue, and that the verdict was for the defendants. During the trial the plaintiff excepted to certain rulings of the presiding justice.

The case is stated in the opinion.

Argued before WHITEHOUSE, SAVAGE, SPEAR, KING, and BIRD, JJ.

R. J. McGarrigle, for plaintiff. John F. Lynch and H. H. Gray, for defendants.

SPEAR, J. This case comes up on exceptions to instructions given by the presiding justice to the jury. The case does not show, but inasmuch as the exceptions are by the plaintiff, we assume, that the verdict was for the defendant.

The case involved an action on the alleged guaranty by the defendants' testator of the payment of certain overdue promissory notes transferred by him to the plaintiff. To sustain her allegations the plaintiff offered in evidence a typewritten instrument bearing the signature of the defendants' testator of the following tenor.

Machias, Me., April 11, 1907.

"This is to certify that I have this day, in a settlement of business transacted with Mary E. Foss, conveyed and sold to her a lot of notes for which I have received payment in full. And will guarantee them.

"[Signed] Asa T. McRae.

"Witness: M. E. McRae."

The defendants had seasonably given written notice to the plaintiff of their denial of the execution of this instrument, and at the trial the subscribing witness, who was one of the defendants' executors, testifled that at the time of the execution and delivery of the instrument it did not contain the last four words, "and will guarantee them." There was also evidence upon both sides of this issue.

The plaintiff contended that upon this issue the burden of proof was upon the defendants; but the presiding justice instructed the jury as follows, viz:

"So the question is narrowed right down to this: Were those words, the final four words in this paper, written on there when Mr. Asa T. McRae signed that paper? And

McRae and others, executors of the will of | or her agents, who conduct the suit, to convince you by evidence that in fact and in truth those words were upon that paper when signed by Asa T. McRae; and has she done so? She claims that she has, and she first relies upon the circumstances that the words are found to be on the paper now. That is prima facie evidence that they were there when it was signed, but only prima facie. By 'prima facie' we mean that, if nothing more appeared, if that was all there was, just the paper itself, with no contradiction, it would be taken as sufficient evidence that they were there when signed; but, it appearing that it is disputed that they were there, and there being some evidence to the contrary, the burden is still upon the plaintiff throughout to convince you by evidence that, upon the whole, you believe the words were there when signed."

The instructions were correct. The plaintiff, under the notice and rule, was required to prove the execution of the instrument upon which she sought to recover. To accomplish this the subscribing witness was put upon the stand. His evidence clearly developed the real issue in the case. When he had testified to the execution of the paper, as we presume he did under the notice, the plaintiff had established a prima facie case, as the words in dispute appeared upon the face of the paper whose execution had been proven. Had the case stopped here, the plaintiff would have been entitled to recover. This is precisely what the presiding justice instructed the jury at this stage of the proceedings; but the case did not stop here. The very witness the plaintiff relied upon to prove execution testifled that the disputed words—the substance of the plaintiff's case—were not upon the instrument when he witnessed the defendant's signature. Again, it is apparent, if the case had stopped at this point, the defendant would have been entitled to the verdict, as the testimony of the witness, showing a material alteration, is undisputed and must therefore prevail. Hence it follows that it was incumbent upon the plaintiff, to entitle her to recover, to proceed further and introduce evidence tending to overcome the testimony of the attesting witness. The issue of alteration now having been raised, it became her duty to assume the burden upon all the evidence of persuading the jury that the words of guaranty were upon the paper when it was executed.

Now, while the burden of evidence may be said to have shifted from the plaintiff to the defendant, when she had made out a prima facie case, and from the defendants to the plaintiff, again, when their evidence had overcome the prima facie case, the burden of proof had not changed at all. It was incumbent upon the plaintiff, in the end, upon all the evidence, however it may have shifted from one side to the other, to establish the the burden is upon the plaintiff, Mrs. Foss, truth of the allegation upon which she sought

practical. It means generally that a plaintiff, however often the evidence shifts, must, upon the whole, persuade the jury, by legal evidence, that his contention is right. The risk of nonpersuasion is all the time upon him. If he fails to persuade, he loses his case. risk of nonpersuasion is the burden which he must assume.

Exceptions overruled.

(105 Me. 144)

HUNTINGTON V. CITY OF CALAIS. (Supreme Judicial Court of Maine. Feb. 18, 1909.)

1. MUNICIPAL CORPOBATIONS (§ 755°) - DE-

TECTIVE WAYS—LIABILITY.

The lishility of cities and towns for damages sustained by travelers by reason of defects in highways is created solely by the Legislature, and all of the conditions and limitations upon which the remedy is granted must be strictly observed, as prescribed by the statute. Rev. St. 1903, c. 23. § 76.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1587; Dec. Dig. § 755.*]

2. MUNICIPAL CORPOBATIONS (§ 812*)—CLAIMS FOR INJURIES—NOTICE TO MUNICIPAL OFFI-

The duty imposed upon the person injured to "notify one of the municipal officers" within 14 days thereafter is absolute and imperative. The statute is not merely directory; it is mandatory. Such notice is a condition precedent to a plaintiff's right of action.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1697; Dec. Dig. § 812.*]

3. MUNICIPAL CORPOBATIONS (§ 812*)—CLAIMS FOR INJURIES-NOTICE TO MUNICIPAL OFFI-CERS.

When a person seeks to recover of a city or town for damages sustained by reason of a defect in a highway, it must affirmatively appear that such person or some one in his behalf no-tified "one of the municipal officers" of his in-jury within 14 days thereafter in the manner specified in the statute.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1697; Dec. Dig. § 812.*]

4. NOTICE (§ 1*)—"NOTIFY."

To "notify" one of a fact is to "make it known to him." to "inform him by notice."

[Ed. Note.—For other cases, see Notice, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 5, pp. 4845, 4846.]

5. MUNICIPAL CORPORATIONS (§ 812*)—"MUNICIPAL OFFICERS OF CITY"—WHO ARE. Under the provisions of Rev. St. 1903, c. 1, § 6, rule 25, the mayor and aldermen constitute the "municipal officers of cities."

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1696; Dec. Dig. § 812.*

For other definitions, see Words and Phrases, vol. 5, pp. 4628, 4629; vol. 8, p. 7726.]

to recover, that the instrument contained the disputed words.

"Burden of proof" and "burden of evidence" are often confused. The phrase "burden of proof" is, in fact, more philosophical than practical. It means generally that a plaintiff,

[Ed. Note.—For other cases, see Municipal Corporations, Cent Dig. § 341; Dec. Dig. § 128.*]

7. MUNICIPAL CORPORATIONS (§ 812°)—CLAIMS FOR INJURIES—NOTICE TO MUNICIPAL OFFI-CERS—PRESUMPTION.

CERS—PRESUMPTION.

Where the plaintiff, claiming to have sustained a personal injury by reason of an alleged defect in a public street in the city of Calais, gave to the city clerk of Calais the 14 days' written notice required by Rev. St. 1903, c. 23, § 76, keld: (1) That it did not appear that this notice was ever in any manner brought to the attention of the municipal officers, or any one of them. (2) That there was no presumption either of law or fact that the notice given to the clerk would be brought to the attention of the municipal officers, or any one of them, within the time stated. (3) That the statute required that the information specified in the notice should be actually communicated to one of the should be actually communicated to one of the municipal officers within the period named, and evidence that the information was given to the city clerk fell short of this requirement.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1690-1707; Dec. Dig. § 812.*]

(Official.)

Exceptions from Supreme Judicial Court, Washington County.

Action by Melvina Huntington against the City of Calais. \erdict for plaintiff, and defendant excepts. Exceptions sustained.

Special action on the case under Rev. St. c. 23, \$ 76, to recover damages for a personal injury alleged to have been received by the plaintiff through a defect in a public street which the defendant city was bound by law to maintain and keep in repair. It is assumed that the plea was the general issue, and that the verdict was for the plaintiff, although the record is silent on both points. The defendant city excepted to certain rulings of the presiding justice,

The case is stated in the opinion.

Argued before WHITEHOUSE, SAVAGE, SPEAR, KING, and BIRD, JJ.

R. J. McGarrigle, for plaintiff. H. J. Dudley, City Sol., for defendant.

WHITEHOUSE, J. This is an action on the case to recover damages for a personal injury alleged to have been received by the plaintiff through a defect in a public street which the defendant city was bound by law to maintain and keep in repair. The action is based on section 76 of chapter 23 of the Revised Statutes, which provides that a person seeking to recover damages for an injury thus sustained "shall within fourteen days thereafter, notify one of the municipal officers of the town, by letter or otherwise, in writing, setting forth his claim for damages and specifying the nature of his inju-

effer other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ries and the nature and location of the defect which caused such injury."

At the trial the plaintiff attempted to prove a compliance with this requirement of the statute by offering evidence that such "14 days' notice" had been given to the city clerk. This evidence was admitted by the court subject to objection, and thereupon the defendant's counsel requested an instruction that notice to the city clerk was not a compliance with the statute. The presiding justice declined to give this instruction and for the purposes of the trial ruled that notice to the city clerk was sufficient. The case comes to this court on exceptions to this ruling.

The liability of cities and towns for damages sustained by travelers by reason of defects in highways is created solely by the Legislature, and all of the conditions and limitations upon which the remedy is granted must be strictly observed as prescribed by the statute. The duty imposed upon the person injured to "notify one of the municipal officers" within 14 days thereafter is absolute and imperative. The statute is not merely directory; it is mandatory. The notice in question thus becomes a condition precedent to the plaintiff's right of action.

It must therefore affirmatively appear that the plaintiff, or some one in her behalf, "notified one of the municipal officers" of her injury within 14 days thereafter in the manner specified in the statute. The mayor and aldermen constitute the "municipal officers of cities" (Rev. St. c. 1, § 6, par. 25), and by the charter of the defendant city (Priv. & Sp. Laws 1883, p. 412, c. 825, § 11) the city clerk does not thereby become one of the municipal officers; and there is no evidence in the case that any one of the municipal officers was ever notified of the plaintiff's injury. To notify one of a fact is to "make it known to him, inform him by notice." only appears that such notice was given to the city clerk. It does not appear that it was ever in any manner brought to the attention of the municipal officers or any one of them. It is true that the city clerk is the proper custodian of all papers requiring the consideration of the mayor and aldermen at their regular meetings; but inasmuch as the notice in question must be delivered to one of the municipal officers within 14 days, and that portion of the time remaining after the receipt of the notice by the city clerk would probably expire in a majority of instances before the next regular meeting of the mayor and aldermen, there is no presumption either of law or fact that such a notice would be brought to the attention of the municipal officers or any one of them within the time stated. The statute requires that the information therein specified should be actually communicated to one of the municipal ofclerk obviously falls short of this requireficers within the period named. Evidence

that the information was given to the city ment.

Exceptions sustained.

(105 Me. 127)

STATE v. KAPICSKY.

(Supreme Judicial Court of Maine. Feb. 10, 1909.)

1. Intoxicating Liquors (§ 143*) — "Common Nuisances" — Place Used for Illegal Sale—Place of Resort.

GAL SALE—PLACE OF RESORT.

Section 1 of chapter 22 of the Revised Statutes provides that: "All places used * * * for the illegal sale or keeping of intoxicating liquors, and all houses, shops, or places where intoxicating liquors are sold for tippling purposes, and all places of resort where intoxicating liquors are kept, sold, given away, drunk or dispensed in any manner not provided for by law, are common nuisances." Held, that it was the intention of the Legislature by this enactment to declare all places to be common nuisances whenever they should commonly and habitually be used for the illegal sale or keeping of intoxicating liquors, and also whenever common intoxicating liquors, and also whenever common-ly and habitually used as places of resort where such liquors are "given away, drunk or dis-pensed in any manner not provided for by law."

Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 152; Dec. Dig. § 143.*
For other definitions, see Words and Phrases, vol. 6, pp. 5799-5804.]

2. INTOXICATING LIQUORS (§ 143*) — "NUI-SANCE"—PLACE OF RESORT. Under the provisions of Rev. St. c. 22, § 1, any place that is resorted to—that is, a place of resort—for the mere purpose of drinking in-toxicating liquors is a nuisance; any place of resort where intoxicating liquors are illegally kept is a nuisance; any place of resort where intoxicating liquors are given away is a nui-sance; and any person keeping or maintaining such a place may be punished therefor as provided by statute.

[Ed. Note.-For other cases, see Intoxicating Liquors, Cent. Dig. § 152; Dec. Dig. § 143.*

For other definitions, see Words and Phrases, vol. 5, pp. 4855-4864; vol. 8, p. 7734.]

3. INTOXICATING LIQUOBS (§ 143*) — "NUI-SANCE"—PLACE OF RESORT—CLUB.

Under the statute, a place of resort is a nuisance if used by a club either to sell intoxi-cating liquors to its members, or to distribute among its members intoxicating liquors owned by them in common, or to procure for and dis-pense, to its members intoxicating liquors which are bought for and belong to them individually.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 152; Dec. Dig. § 143.*]

4. Intoxicating Liquors (§ 143*)—"Common Nuisance"—Place of Resort—Club.

If a club, by its agent, purchases and stores intoxicating liquors for its members, and deals out in portions to each member upon his order the liquors belonging to and kept for him, and bears a place for that number such place is keeps a place for that purpose, such place is a common nuisance under the statute.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. \$ 152; Dec. Dig. \$ 143.*]

5. Intoxicating Liquors (\$ 223*)-Nuisance -EVIDENCE-TIME.

Where the defendant was indicted under Rev. St. c. 22, § 1, for maintaining a common nuisance, to wit, keeping and maintaining a certain tenement as a place of resort where intoxicating liquors were unlawfully kept, sold, given away, etc., from the 1st day of May. 1908, to the day of the finding of the indictment at the September term, 1908, of the Supreme Judicial Court, Androscoggin county, held, that it was not incumbent upon the state to show that the place was used for such unlawful purposes during the entire period named in the indictment. Proof that the defendant kept and maintained a tenement for any one of such purposes during any part of the time comprised within the days named in the indictment would warrant a conviction. It is the nature of the acts done, not the length of time during which acts done, not the length of time during which they are committed, that constitutes the offense The case is made out, the offense is committed, if for a single day between those dates that place was so used. If for a single hour in the day it was so used, for that hour it was a common nuiand whoever for that hour maintained the place was guilty of keeping and maintaining a common nuisance.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. \$ 273; Dec. Dig. \$ 223.*] (Official.)

Exceptions from Supreme Judicial Court. Androscoggin County.

Paniel Kapicsky was convicted under Rev. St. 1903, c. 22, \$ 1, for maintaining a common nuisance, in that he kept a place of resort where intoxicating liquor was unlawfully kept, sold, given away, and dispensed, and he excepts. Exceptions overruled. Judgment for the State.

The defendant, a member of the St. Bartholomew Society, of Lewiston, was indicted under the provisions of Rev. St. c. 22. § 1, for keeping and maintaining a commou nuisance. Verdict, guilty. During the trial. the defendant excepted to several rulings made by the presiding justice.

The case is stated in the opinion. The indictment was as follows:

"State of Maine. "Androscoggin—ss.: At the Supreme Judicial Court begun and holden at Auburn within and for the county of Androscoggin, on the third Tuesday of September in the year of our Lord one thousand nine hundred and eight, the grand jurors for said state upon their oath present that Paniel Kapicsky of Lewiston, in said county of Androscoggin, laborer, on the first day of May in the year of our Lord one thousand nine hundred and eight, and on divers other days and times between that day and the day of the finding of this indictment, at Lewiston, aforesaid, in the county of Androscoggin, aforesaid, did keep and maintain a certain place, to wit, a tenement there situate, then and on said divers other days and times there used for the illegal sale and for the illegal keeping of intoxicating liquors, and where on that day and on said divers other days and times intoxicating liquors were sold for tippling purposes, and which said place was then and on said divers other days and times there a place of resort where intoxicating liquors then and on said divers other days and times were there unlawfully kept, sold, given away, drunk, and dispensed, and which said place, being so used as aforesaid, was searched the premises and found the beer

then and there a common nuisance, to the great injury and common nuisance of all good citizens of said state, against the peace of said state, and contrary to the form of the statute in such case made and provided. "A true bill.

> "J. B. Isaacson, Foreman. "Frank A. Morey,

"Attorney for the State for said County."

Argued before EMERY, C. J., and WHITE-HOUSE, SPEAR, KING, and BIRD, JJ.

Frank A. Morey, Co. Atty., for the State. George S. McCarty, for defendant.

WHITEHOUSE, J. This is an indictment against the defendant under section 1 of chapter 22 of the Revised Statutes, for maintaining a common nuisance from the 1st day of May, 1908, to the day of the finding of the indictment at the September term, 1908, of court in Androscoggin county. It is aleged that "the defendant kept and maintained a certain tenement as a place of resort where intoxicating liquors were unlawfully kept, sold, given away, drunk, and dispensed in a manuer not provided for by law."

The defendant was one of 204 members of the St. Bartholomew Society occupying the premises mentioned in the indictment. The society had occupied the premises from April, 1908, to the time of the trial of the case in September. The premises consisted of one large lodge room, a billiard room, and a small "barroom," so called, in connection with the latter. The society itself was regularly organized, having a constitution and by-laws, and from the dues assessed to the members sick and death benefits were paid. The billiard room was open practically all of the time for the recreation of the members. The defendant claimed that the barroom was open three times each week, and that at these times cigars and nonintoxicating drinks were sold to the members; the profits of the sales being devoted to the payment of rent, lights, heat, and other expenses incident to the running of the rooms. A member of the society acted as janitor and keeper of the barroom, each in turn for two weeks and without compensation.

The state introduced evidence tending to prove that, on two separate occasions during the time mentioned in the indictment, intoxicating liquors were sold upon the premises by the respondent. The first occasion was on the evening of August 29th, when the officer, looking through a window, saw the defendant making numerous sales of what they claimed to have been ale. The other occasion that of September 5th, when the officers, looking through a hole in the curtain overhanging this same window, saw the respondent making sales of beer alleged to be intoxicating, and later in the evening

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

which proved upon analysis to contain sufficient alcohol to be in fact intoxicating. The defendant claimed that the beer selzed was bought in common by the members of the society in anticipation of Labor Day, September 7th; each contributing a certain amount for which he was to receive his proportionate part of the beer. It was in evidence that some of the members began to drink their allowance during the afternoon of September 5th, and that the drinking continued and was in progress from that time to the time of the seizure late in the afternoon.

The jury returned a verdict of guilty, and the case comes to this court on exceptions to certain instructions to the jury given in the charge of the presiding justice.

It was obviously the intention of the Legislature by this enactment to declare all places to be common nuisances whenever they should commonly and habitually be used for the illegal sale or keeping of intoxicating liquors, and also whenever commonly and habitually used as places of resort where such liquors are "given away, drunk or dispensed in any manner not provided for by law." State v. McIntosh, 98 Me. 397, 57 Atl. 83; State v. Stanley, 84 Me. 555, 24 Atl. 983.

But it is not incumbent upon the state to show that the place was used for such unlawful purposes during the entire period named in the indictment. Proof that the defendant kept and maintained a tenement for any one of such purposes during any part of the time comprised within the days named in the indictment will warrant a conviction. Commonwealth v. Mitchell, 115 Mass. 141, and cases cited. In Commonwealth v. Gallagher, 1 Allen (Mass.) 592, the defendants erected a temporary tent or booth, constructed of boards, and covered with cloth, and on the following day had there several kinds of intoxicating liquors, and between the hours of 9 and 11 o'clock in the forenoon, made four or more sales of such liquors. The land on which the booth was erected was hired for three days: but the booth was torn down by the officers at 11 o'clock of the first day. The defendants were found guilty of maintaining a common nuisance. In the opinion the court say: "Tue evidence was sufficient to warrant the jury in convicting the defendants. A disturbance of the public peace by the assembly of noisy and dissolute persons, the illegal sale of intoxicating liquors; and other similar acts which tend to make disorder and injure public morals, and thus to create a common nui-

sance in a house or tenement, may be proved to have occurred in the course of a few hours, as well as during a number of days, a week, or a month. It is the nature of the acts done, not the length of time during which they are committed, that constitutes the offense."

In the case at bar the presiding justice correctly defined the word "resort" and sufficiently explained the meaning of the phrase "place of resort," as employed in the statute. The following instruction was then given to the jury:

"All places of resort where liquors are 'given away,' and again all places of resort where liquors are 'drunk,' even if they are not 'sold' or 'given away,' if it is a place of resort under the definition I have given you. and, when there, those men drank the liquor which is intoxicating, that makes it a nuisance under the laws of this state."

In further defining what constitutes a "nuisance" under the law, the presiding justice used the following quotation in instructing the jury, viz.:

"'Among other things the Legislature has said, and it applies to this case, that any place of resort where intoxicating liquors are kept, sold, given away, drunk, or dispensed in any manner not provided for by law, is a nuisance. Any place that is resorted to —that is, a place of resort—for the mere purpose of drinking intoxicating liquors, is a nuisance; any place of resort where liquors are illegally kept is a nuisance; any place of resort where liquors are given away is a nuisance. It must be a place of resort, and then the statute goes on to say that any person keeping or maintaining such a place shall be found guilty and be punished therefor.

"'In this case the state says that between the 1st day of May last, and the day of the finding of this indictment, at some time between those dates, this place described here, the tenement, and so forth, was a place contrary to the form of this statute, a place of resort, and that at that place of resort, at some time during this space of time, liquors were kept, sold, given away, drunk, or dispensed in some manner not provided by law. The state need not prove that this place was so kept and used during the whole of that time. The case is made out, the offense is committed, if for a single day between those dates that place was so used. Nay, if for a single hour in the day it was so used, for that hour it was a common nuisance, and whoever for that hour maintained the place was guilty of keeping and maintaining a common nuisance.'

"It makes no difference, you see, under this statute, whether the men were joined as a club, and chipped in in advance, contributed their 16 cents and bought this liquor and paid for it and had it come, if when it came there it was drunk there on the premises resorted to, that would be no defense whatever."

To these instructions the defendant has exceptions; but it will be observed upon ex-

amination of the language used that it is for the most part essentially a restatement of the terms of the statute, and that the comments of the presiding justice, as well as the paragraphs quoted by him, are in entire harmony with the previous rulings and decisions of this court, as well as the authorities cited from Massachusetts, and are obviously a correct interpretation of the true meaning and purpose of the statute.

In support of the last paragraph of the instructions to which exceptions were taken, that "it makes no difference under this statute whether the men were joined as a club, and chipped in in advance and bought the liquor, if when it came there it was drunk on the premises resorted to," the case of Commonwealth v. Baker, 152 Mass. 337, 25 N. E. 718, may be cited as an authority. That was an indictment for maintaining a nuisance under the Massachusetts statute of 1887 (page 771, c. 206, § 1), which provided that: . "All buildings or places used by clubs for the purpose of selling, distributing or dispensing intoxicating liquors to their members or others, shall be deemed common nuisances." In the opinion the court says: "A place would be equally a nuisance under the statute if used by a club either to sell intoxicating liquor to its members, or to distribute among its members intoxicating liquors owned by them in common, or to procure for and dispense to its members intoxicating liquor which was bought for and belonged to them individually. If the club, by its agent, purchased and stored intoxicating liquors for its members, and dealt out in portions to each member upon his order the liquors belonging to and kept for him, and kept the place for that purpose, the place was a common nuisance under the statute."

Finally the defendant's counsel requested the following instructions: "In order to find the respondent guilty of maintaining a common nuisance, the jury must find that the place mentioned in the indictment must have been habitually, commonly used for the purpose."

The presiding justice gave this instruction in the following language: "This is the law of the state; but there is no limit as to the time as I have stated to you. A nuisance may be maintained and kept in two hours or two weeks or two days if you find the facts are sufficient."

It has already been seen that this instruction respecting the length of time during which it must appear that the nuisance was maintained in order to warrant a conviction is directly and fully supported by Commonwealth v. Gallagher, 1 Allen (Mass.) 592, above cited.

It is, accordingly, the opinion of the court

exceptions were taken are considered in their proper relation to the entire charge and applied to the facts in evidence in this case, no exceptionable error is disclosed.

The certificate must therefore be: Exceptions overruled.

Judgment for the State.

(72 N. J. E. 224)

THOMAS v. INTERNATIONAL SILVER CO. et al.

(Court of Chancery of New Jersey. Jan. 11, 1907.)

1. Corporations (§ 474*)—Power of Pledger

—Corporate Stock.

A corporation, by pledging its own stock as collateral to another corporation, cannot empower the pledgee corporation to exercise a power or incident of ownership which the real owner does not possess

fEd. Note .--For other cases, see Corporations Dec. Dig. \$ 474.*]

CORPORATIONS (§ 474*)—Sufficiency of EVIDENCE.

Evidence examined, and held to show a pledging of stock, not made in good faith for the purpose of affording additional security for loans, but for the purpose of placing the stock in the hands of those friendly to the existing management. in order that it might be voted on to retain them in power, and thus avoid the letter and spirit of the prohibition contained in the thirty-eighth section of the general corporation act of this state. P. L. 1896, p. 277.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 474.*]

(Syllabus by the Court.)

Bill by Edward R. Thomas against the International Silver Company and others. Decree advised for complainant.

Robert H. McCarter, Atty. Gen., and Otto Hess, for complainant. John W. Griggs and Graham Sumner, for defendants.

BERGEN, V. C. The United States Silver Company is the owner of 93.000 shares of the common and 5,000 shares of the preferred stock of the International Silver Company, and the latter company owns all of the capital stock of the United States Silver Company, and controls, through such ownership, its management. The direct result intended by this arrangement is the voting of the shares of the International Company, registered in the name of the United States Company by the officers of the International Company for such persons as they may desire to continue in, or appoint to, the management of their company; the directors of the United States Company being also directors of the International Company. The testimony shows that all of the capital stock of the United States Silver Company was purchased by, and now belongs to, the International Company, although some of the shares stand in the names of the officers of the International Company for the purpose of qualifying them as directors. That the that, when all of the instructions to which International Company is the real owner of

Tor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



allowed to exercise the voting power usually incident to stock ownership, either directly as owners, or indirectly through its control of the United States Company, seems to me very clear, and their right to vote the stock was not seriously pressed on behalf of the defendants on the argument. No substantial change in the situation upon this branch of the case has occurred since the matter was passed upon by the Court of Errors and Appeals in O'Connor v. International Silver Co., 68 N. J. Eq. 680, 62 Atl. 408, and the argument for the defendants was based upon the assumption that, in equity, the International Company was the owner of the stock. The present controversy arises over the right claimed by certain pledgees, to whom the stock has been assigned in pledge as collateral for the debts of the International Company, to vote at the next annual meeting of that company for the election of officers. The evidence shows that, just previous to the filing of the bill of complaint by O'Connor, the stock owned by the United States Company was transferred to several banks and trust companies as collateral security, in some cases for loans already made to, and in others for loans expected by, the International Company. The present proceeding looks to an injunction preventing the pledgees from voting on the hypothecated stock held by them respectively, which in each case was regularly transferred to them on the books of the International Company; the transfer expressly empowering each pledgee to vote thereon.

The first question presented is: Can a corporation, by pledging its own stock as collateral to another corporation, empower the pledgee corporation to exercise a power or incident of ownership which the real owner does not possess? Section 38 of the corporation act of this state (P. L. 1896, p. 290) declares: "Shares of stock of a corporation belonging to said corporation shall not be voted on directly or indirectly." And if by pledging stock as collateral security the directors of a corporation can endow the stock with a virtue it does not possess in the hands of the real owner, and the disqualification of the pledgor to vote the stock does not extend to the pledgee, it would appear that, in every case where a corporation is the

the stock, and that its officers should not be his act he shall empower the pledgee to vote thereon. The transaction is a contract between the parties, settling as between them who shall exercise the voting power incident to the ownership of the stock. It is in its nature a proxy given by the pledgor to the pledgee to represent the voting power of the owner, and may be revoked by the pledgor at any time by redeeming his pledge. the directors may sell the stock, and thereby restore its voting power, does not meet the question, for an absolute sale of the stock deprives the pledgor of any right in, or control over, the stock, it is not subject to redemption, and the real owner in such case takes the voting power, not by way of contract or proxy, but as a right incident to his ownership. To interpret our statute otherwise would open the door to a constant evasion of the law which prohibits directors from voting, directly or indirectly, on the stock of their own company, because temporary loans could always be made by them just prior to the annual election, and the stock pledged with a voting power to persons known by the directors to be friendly to their aspirations.

My conclusion is that under our law, whenever the owner of stock is disqualified to vote it, that disqualification is not removed by simply hypothecating the stock as collateral for a loan, and that the right which the law gives to the pledgor to empower "the pledgee to vote thereon" is limited to such pledgors as are themselves possessed of the right to vote on the stock which they own, and that the pledgees in this case hold the stock of the International Company subject to the same disqualification, so far as the power to vote thereon is concerned, as that which the statute imposes on the pledgor.

The second question presented is whether the pledging of this stock was made in good faith for the purpose of affording additional security for loans made to the International Company, or for the purpose of placing the stock in the hands of those friendly to the existing management in order that it might be voted to retain them in power, and thus avoid the letter and spirit of the prohibition contained in our law. The evidence convinces me that the directors pledged this owner of its own stock, a ready method is stock, not as security, but simply for the provided by which the officers of a corpora- purpose of restoring to it a voting power that tion desiring to perpetuate themselves in of- the pledgees might exercise in their interest. fice can bring about that result, and it should. It was a palpable attempt to evade the law not be allowed unless the law plainly re- and to secure the benefit of the votes which quires it, because it is in effect an indirect the stock would represent in the hands of a way of voting the stock. According to sec- duly qualified owner. This stock had only tion 37 of the same act, the pledgor may rep- a nominal value, and was intrinsically worthresent his stock at all meetings and vote less as security independent of the fact that thereon as a stockholder, "unless in the it could have no possible value until the very transfer to the pledgee on the books of the debts it was given to secure had been liqcompany he shall have expressly empowered uidated, for all of the assets of the company the pledgee to vote thereon." The right to which supported the stock would be first liavote on stock pledged as collateral remains, ble for the debts of the company, and, if the under our law, with the pledgor, unless by assets would not so far extend, then the

stock would be absolutely worthless either | that, upon the receipt of the circular letter to pledgor or pledgee.

We do not have to look very far to ascertain the motive of these directors. In March, 1904. a circular letter was mailed to all of the stockholders of the International Company by three of its stockholders, who claimed to be the largest individual holders of the stock of the International Company, one of them being the complainant in this cause, requesting the attendance of stockholders at the next annual meeting, for the purpose of securing representation on the board of directors for such stockholders as were not elther officers or managers of the company. A careful reading of the letter, shows that there is nothing improper or unfair in its statements, nor does it indicate any motive other than a desire to bring about what they esteemed to be a more economical management of the company. Whether they were justified in their claim that the business could be conducted with greater economy than was then being exercised, I am not called upon to determine; but the right of stockholders largely interested to appeal to their fellow members of the company to attend the annual meeting, and urge reforms and retrenchments in the management of the company, or, if unable to attend the meeting, to send a proxy that others might represent them, is not an act which the officers of a well-managed company ought to complain of or discountenance, and I cannot find in it any cause for the alarm which Mr. Rockwell, the president of the First National Bank of Meriden, Conn., said induced him to start a concerted movement by the banks to secure from the company a pledge of its own stock as collateral for its debts, existent and anticipated. It is not denied that up to this time the International Company kept large balances in the institution to which the stock was afterwards pledged, and that its credit was sufficient for it to procure all necessary funds to carry on its business without giving any collateral, and, as an effort by stockholders to reduce the expense of conducting the business was not likely to injuriously affect its credit, I do not deem it necessary to analyze in detail the large amount of testimony taken in this cause. It is sufficient to say that it convinces me that the movement started by Mr. Rockwell, which resulted in the pledging of the stock in question, had but one real purpose, and that was to have the stock transferred with a voting power, to friendly parties who would exercise it in the interest of the directors of the International Company, and thereby continue them in its management, and is but a thinly disguised scheme to have stock owned by the corporation voted upon indirectly.

The evidence shows: That Mr. Rockwell was a very intimate friend of Mr. Dodd, the president of the International Company, and

to which I have referred, he went to New York City from Meriden, where the general office of the International Company is located, and visited the officers of the American National Exchange Bank, the National City Bank, both of New York City, and of the Hackensack Trust Company, and arranged that those institutions should make a demand upon the International Company for a pledge of its stock, being the banks and trust company which he knew were at times loaners of money to the International Company, and told them that the bank he represented, as well as the Home National Bank of Meriden, intended to demand a pledge of the stock of the International Company, and suggested that they pursue the same course, in order, as he said, that they might be represented at the stockholders' meetings with a right to vote on the stock to be transferred to them. At the time of his visit to New York, the American Exchange Bank had no claim against the International Company, while the company then had on deposit with that bank a large balance. Nor was there any debt owing at that time to the Hackensack Trust Company; but, on the contrary, the trust company was indebted to the International Company for a considerable deposit balance. It is true that the International Company was then a borrower from the National City Bank, and also from the two banks in Meriden, for which accommodation, however. the International Company carried large balances. The transfer of this stock took place about the 17th of March, 1904, at which time the indebtedness of the company to the National City Bank was \$50,000, while its credit balance there was nearly \$46,000; its indebtedness to the Home National Bank was \$40,000, while its credit balance was nearly \$63,000; its indebtedness to the First National Bank being \$20,000, while its credit balance was \$15,000.

Under these circumstances, coupled with the fact that the International Company had, up to that time, been considered by all these financial institutions as solvent and entitled to a very liberal credit, at the same time keeping generous balances with each of them, and no change in their financial condition being asserted, it is impossible to come to the conclusion that these institutions were at all alarmed about the financial condition of the company, and had no real desire to have the stock of the International Company pledged as security, beyond a willingness to aid the persons in control of a profitable customer to continue in power. The stock was taken, not because it was a collateral of any value, or as security, but in order, as it was expected, to restore a suspended voting power to be exercised on behalf of the officers of the company making the pledge. That the officers, representing a brother of the secretary of that company; the pledger and pledgee corporations, testify

that no bargain was made regarding the persons for whom the votes should be cast, and that the power of the pledgee to vote as it pleased was not restricted by any agreement, I am justified in inferring from the evidence that there was a well-founded expectation on the part of the officers of the International Company that the pledgee would vote the stock in their interest, and I have no doubt, from the various efforts made by the directors of the International Company, as disclosed in this case, to control the voting power of this stock, that, if they were at all doubtful as to the intention of either of these pledgees, the pledge would have been promptly redeemed and hypothecated with a more steadfast friend.

On this branch of the case, my conclusion is that these pledgees are not bona fide holders of this stock as collateral for loans made by them, but took it for the sole purpose of aiding in the indirect voting of the stock of a corporation owned by the corporation itself, and that the pledgees hold this stock in equity, in trust for the International Company, and without any real interest therein, and that to permit them to vote it would effect the very evil which the law intended to prohibit when it forbade the voting by the corporation of its own stock either directly or indirectly.

I will advise an injunction preventing the defendant pledgees from voting on the stock held in pledge.

(78 N. J. L. 131)

CHESTER V. CAPE MAY REAL ES-TATE CO.

(Supreme Court of New Jersey. July 21, 1909.) DEATH (§ 76*)-EVIDENCE-SUFFICIENCY.

In an action to recover damages for the death of the plaintiff's intestate, where the fact is that the injury resulting in death was occasioned by one of two causes, for one of which the defendant is responsible, and for the other not, the plaintiff must fail if his evidence does not show that the injury was produced by the not show that the injury was produced by the former, or if it is just as probable that it was caused by one as by the other.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 94; Dec. Dig. § 76.*]

(Syllabus by the Court.)

Action by Ida Chester, administratrix, against the Cape May Real Estate Company. Verdict for plaintiff. Rule to show cause made absolute.

Argued June term, 1909, before GUM-MERE, C. J., and TRENCHARD and MIN-TURN, JJ.

John W. Wescott, for plaintiff. J. Spicer Leaming and Gaskill & Gaskill, for defend-

TRENCHARD. J. This action was brought by the administratrix of Arthur S.

Company to recover damages for his death caused by asphyxiation while working in a sewer. The plaintiff's intestate was working for the Etter Erecting Company. This company was constructing a sewer for Cape May City along Beach avenue, in that city. On August 13, 1906, the day of the accident, the sewer was still unfinished and had not been turned over to the city. The work consisted of a large trunk sewer from 24 to 30 inches in diameter, which began at a manhole at Baltimore avenue and extended westward 2,500 or 8,000 feet at a depth of from 14 to 16 feet below the surface of the ground. The land through which the sewer extended was meadow or marsh land which had been filled over to a depth of 4 feet by sand pumped from the inlet or harbor. Three days before the accident the defendant company began the construction of a lateral house sewer which opened into the manhole of the trunk sewer at Baltimore avenue. For this purpose an opening 8 inches in diameter was cut in the manhole about 5 or 6 feet below the surface of the ground into which the lateral pipe was inserted, and ditching for this lateral sewer was carried back towards the house; but the connection with the house had not been made at the time of the accident. On the day of the accident the plaintiff's intestate attempted to plug this lateral sewer from the inside of the manhole so as to prevent water flowing into the trunk sewer through this connection. most immediately upon entering the manhole for that purpose, the plaintiff's intestate was asphyxiated with gas, and this action was brought to recover for his death. The trial at the Cape May circuit resulted in a verdict for the plaintiff, and the defendant obtained this rule to show cause why the verdict should not be set aside.

Among the reasons assigned for a new trial are the refusal of the trial judge to grant the defendant's motions to nonsuit the plaintiff and to direct a verdict for the defendant. These motions were grounded upon the reason that the evidence failed to show that the injury resulting in death was occasioned by negligence upon the part of the We think the motions should defendant. have been granted. The evidence taken at the trial tended to show that the meadows adjacent to the sewers generated hydrogen sulphite gas, and that the presence of such deadly gas in the manhole caused the death of plaintiff's intestate. It was the contention of the plaintiff that the gas was introduced into the manhole through the inlet cut by the defendant company, which inlet it was further contended was made unlawfully. Assuming, but not deciding, that the evidence showed that the opening was made in the manhole without authority, we are unable to find from the evidence that the Chester against the Cape May Real Estate opening was responsible for the presence of

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the gas. It must be conceded that the plain- | which killed the plaintiff's intestate to other tiff was bound to show something more than that the defendant was possibly responsible for the decedent's death in order to entitle him to a verdict. It was incumbent upon the plaintiff, in the absence of direct evidence of the fact, to show not only the existence of such possible responsibility, but the existence of such circumstances as would justify the inference that the death was caused by the wrongful act of the defendant, and would exclude the idea that it was due to a cause with which the defendant was unconnected. Suburban Electric Co. v. Nugent, 58 N. J. Law, 658, 84 Atl. 1069, 82 L. R. A. 700; Stumpf v. Delaware, L. & W. R. Co. (N. J. Sup.) 69 Atl. 207; Houston v. Traphagen, 47 N. J. Law, 23. And this, it seems to us, the plaintiff has not done.

The verdict for the plaintiff necessarily rests upon the theory that the gas found its way into the sewer through the lateral pipe introduced into the manhole by the defendant through which some muddy water was flowing at the time of the accident; but we think, as the defendant contended, that the evidence demonstrated that it was at leas. equally probable that the gas came from the open "working end" of the main trunk sewer which rested in a ditch 16 feet deep, which ditch was at the time or shortly before the accident filled with water by reason of rainfall and temporary stoppage of pumping. It was made to appear at the trial that an effort was made to keep what is known as the "working end" of both sewers closed when not laying pipe; but the evidence indicates that the closing was so imperfect in both cases that both gas and water, if present, would not be prevented from entering the sewers. The evidence also shows: That the gas in question is heavier than air and was always present in the ditch at the "working end" of the main sewer, and sometimes in the sewer itself; that the gas does not rise, but moves along the level under pressure from wind, water, or the like. As we have pointed out, the main sewer was from 24 to 30 inches in diameter, and its "working end" was at the bottom of a long ditch 16 feet deep, and by reason of the water the gas there is certainly shown to have been under heavy pressure; while, on the other hand, the lateral sewer was but 8 inches in diameter, and its "working end" was at the bottom of a ditch only from 3 to 5 feet deep. When it is remembered that the meadow proper, which is said to have generated the gas, was 4 feet beneath the surface of the ground, it will be seen that it is at least equally probable that the gas in question came from the ditch at the "working end" of the main sewer as that it came from the "working end" of the lateral sewer.

We think therefore that the jury could

causes with quite as much reason as they have attributed it to the act of the defendant. The circumstances would warrant the former inference quite as clearly as the latter. The case is one, we think, where it appears that the primary cause of the injury proceeded from one of two sources, or was produced by one of two agencies, for one of which the defendant might be responsible, but not for the latter. The plaintiff must fail because the evidence does not show that the injury was the result of some cause for which the defendant was responsible. Stumpf v. Delaware, L. & W. R. (N. J. Sup.) 69 Atl. 207; Searles v. Manhattan Ry. Co., 101 N. Y. 661, 5 N. E. 66; Ruppert v. Brooklyn Heights R. Co., 154 N. Y. 90, 47 N. E.

The rule to show cause will be made abso-

(72 N. J. E. 515)

DUKE v. DUKE et al.

(Court of Chancery of New Jersey. May 8, 1906.)

1. DIVORCE (§ 129*)—ADULTERY—EVIDENCE.
On a husband's petition for divorce, evidence held to establish adultery on the part of the wife with the party charged as co-respond-

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 411; Dec. Dig. § 129.*]

2. DIVORCE (§ 189*)—Costs—LIABILITIES.

In such case, where the party charged as co-respondent intervenes as provided under Divorce Act (P. L. 1902, p. 506) § 14, he is liable to the husband for the payment of his costs and counsel fees incurred in prosecuting the suit

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 577; Dec. Dig. § 189.*]

(Syllabus by the Court.)

Action by James B. Duke against Lilian N. Duke and Frank T. Huntoon. Decree for complainant.

See, also, 70 N. J. Eq. 135, 62 Atl. 466; 70 N. J. Eq. 149, 62 Atl. 471; 65 Atl. 1117.

Richard V. Lindabury, Alvah A. Clark, Junius Parker, and W. W. Fuller, for petitioner. Samuel Kalisch and Chauncey G. Parker, for defendant Lilian Duke. Alan H. Strong, for defendant Huntoon.

PITNEY, V. C. An appeal having been taken, I am asked to give my reasons for that decree for use on the hearing of the appeal. To this end I will give a short history of the cause itself.

The petition was verified by the petitioner on the 31st day of August, 1905, and was filed on the 2d day of September, and a copy served on that day on the defendant at her residence in the city of New York. Shortly afterward she moved to have the service set aside on the ground that the court could achave attributed the presence of the gas quire no jurisdiction of her by extraterritori-

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

al service, because her husband was not a taking of testimony proceeded on the days resident of the state of New Jersey. That motion was disposed of against the petitioner, and on the 2d of November, 1905, she filed a plea to the jurisdiction, which plea, after hearing, was overruled on December 22d, as reported in 70 N. J. Eq. 135, 62 Atl. 466. A motion to stay the proceedings pending an appeal from that order was also overruled, as reported in 70 N. J. Eq. 149, 62 Atl. 471, and that action by this court was sustained by the Court of Errors and Appeals. On the 19th day of January, 1906, an answer was filed by Mrs. Duke, denying the adultery charged in the petition, and combining therewith a cross-petition against the petitioner charging him with adultery with certain persons named. This cross-petition was answered by Mr. Duke on the 26th of January. In the meantime Mr. Huntoon, the co-respondent named in the original petition, applied on the 26th day of October, 1905, and obtained an order to intervene as defendant, under the fourteenth section of the act concerning divorces. P. L. 1902, p. 502, at page 506.

In March, 1906, application was made by Mrs. Duke, by petition, for an order against her husband for a counsel fee, and to her petition in that behalf the husband filed an elaborate verified answer, which was afterwards, at the final hearing, put in evidence against him by his wife and the co-respondent. The cause was set down for hearing on the 23d. 26th, and 27th of April, and the 2d, 3d, and 4th of May, giving the defendants ample time to prepare their defense after the complainant's case was made. On the 23d of April all the parties appeared with their counsel and the taking of testimony was proceeded with all that day, and was then adjourned over to the 26th. At the opening of the court on that day neither of the parties defendant appeared in person. No reason was ever offered why Mr. Huntoon did not appear, nor was any postponement asked by reason of his absence. Counsel for Mrs. Duke stated, and offered to prove, that she was confined to her house by illness, and asked for a postponement on that account. In my discretion I declined to postpone, and directed the taking of testimony to proceed on the part of the petitioner, but did not compel the defendant to cross-examine in the absence of the defendants until they should have an opportunity to confer with her, or it should appear that she was able to appear in court. By consent of all the counsel, I instructed a competent physician to visit Mrs. Duke, ascertain her physical condition, and report it to the court. This was done, and the physician next morning, April 27th, reported, under oath, that he found her somewhat indisposed, but had no doubt that she was entirely able to attend court on that day. Neither she nor Mr. Huntoon, so far as I could observe, appeared further in person,

named until the afternoon of May 3d, when, as before stated, I at once pronounced in favor of a decree for the petitioner, and advised a decree against the defendant Huntoon for costs and counsel fees. This latter was done in accordance with a practice which I understood to have the sanction of the chancellor, and seems to me according to reason, and I believe is according to the English practice. The defense was conducted jointly and in concert by both of the defendants, so that in proving a case against the female defendant the petitioner also proved it against the co-respondent. There was no allegation of a marital offense committed with any other person. The cross-petition was abandoned. The defendant Huntoon claimed at the hearing the benefit of the position of a full defendant, and on his objection certain depositions taken in North Carolina were, after full argument, excluded because he did not have notice of their taking. The order for costs against him carefully excluded the costs of the hearing on the plea to the jurisdiction.

Coming now to the merits of the case, the following historical facts appear: [Here follows an examination of the evidence, concluding with a finding of the defendants guilty, omitted by the consent of the vice chancellor. The remainder of the opinion is a transcript of the stenographer's notes.]

One other matter, which was disposed of by me at the beginning of the defendant's case, may be mentioned here. I have stated that the defendant Huntoon applied for leave to intervene in October, and prior to the filing of the plea to the jurisdiction of the court. Mr. Huntoon had no notice of the trial of that issue, and, before any production of evidence on the part of the defense on the final hearing on the merits, his counsel, Mr. Strong, moved the court, on behalf of Mr. Huntoon, to dismiss the petition on the ground "that the court has no jurisdiction to entertain it," because the complainant had offered no proof of the residence of either of the parties in the state of New Jersey, and there was no proof of, and the case did not show, service of process within this state, and he argued that Huntoon had the right to set up in his defense that the court had no junisdiction of Mrs. Duke, and that he (Huntoon) was not bound by the finding of this court upon the issue raised by the plea of want of jurisdiction.

Now, previous to the recent revised divorce act, a party charged as a particeps criminis, in a suit for divorce based on adultery, had no means of defending himself or herself against the charge of adultery, and a perfectly innocent man or woman might be wrongfully subjected to a quasi conviction of that offense without any opportunity to be heard. In fact, by perjured evidence, offered in an undefended case, such conviction might be, and neither was offered as a witness. The and probably was, often pronounced. The

suit for divorce might have been collusive, | made in the preparation of and trial of this and the procuration of the divorce might in reality have been by consent. Now this state of things was liable to work, and in many instances did work, an injustice against innocent persons. Now, the object of the statute was manifestly and notoriously to remedy that wrong. Hence the new section introduced into the statute, as follows: "In actions for divorce, because of adultery, it shall be lawful for the chancellor, in his discretion, at any time before final decree, to allow any person charged in the pleading with committing adultery with either of the parties in the suit to intervene for the purpose of defending himself or herself against the charge so made."

Now, here it is quite manifest that the purpose for which the defendant may intervene is limited to the defense against the charge. It seems to me quite clear that the intervener has no right to challenge the jurisdiction of the court over the person of the real defendant. Besides, by intervening generally, as the defendant did in this case, without any protest as to the jurisdiction, he appeared generally and submitted himself to the jurisdiction of the court, and that intervention was made before the plea of the jurisdiction was interposed. Although he did not have notice of the trial of that plea, he is presumed to have kept a general watch on the progress of the cause, and, if he had any desire or intention to question the jurisdiction of the court, he might have added to his extremely short pleading a plea of that kind. I was unable, after hearing the very ingenious argument of Mr. Strong, to see the least merit in it, and subsequent reflection has not changed my view.

Mr. Lindabury: Now, if your honor please, we ask for judgment for costs against the co-respondent Huntoon.

The Court: I have already had occasion to examine that question, and by the advice of the chancellor, after submitting the matter to him, I gave judgment in a case similar to this for costs and counsel fee against the co-respondent, hence you are entitled to that judgment. It will not include, however, the cost of the proceedings to test the jurisdiction of this court. You will have costs against the co-respondent from the time he intervened, but not the costs of that issue of inrisdiction.

Mr. Lindabury: No, your honor; preparation of this case, trial of this case, which he did make by voluntarily coming into it.

The Court: In the case in mind a man came in afterward, and I gave the whole costs against him.

Mr. Strong: Does your honor care to hear from Mr. Huntoon's counsel.

The Court: I only tell you what I did after consultation with the chancellor. I will give you the name of that case now if you wish it.

Mr. Lindabury: I can see no reason why Mr. Huntoon should not pay all the costs costs, and also for counsel fees. I think 1

issue. As one of my associates says, it is a saying in the South that "two dance in company, but one must pay the fiddler alone," and it would seem highly proper that Mr. Huntoon should occupy that situation. He is a man of very large income, great wealth, I am told, and he has put us-

The Court: That don't make any differ-

Mr. Lindabury: No, but he has helped to put us to great expense. We have been required, as your honor will remember, to pay the defendant, his copartner in this defense and the circumstances that led to it, \$3,000.

The Court: I don't consider anything of that kind. I don't take that into consideration here, except as measuring the importance of the cause.

Mr. Lindabury: You are making an allowance to the petitioner in this case on account of the costs and on account of the counsel fees which he has incurred, and it strikes me that it is a matter that may be taken into account that the petitioner has been compelled to disburse that sum as one of the items of the prosecution of the cause, and one for which the defendant Huntoon is responsible. I ask that your honor allow us judgment against Huntoon for the taxable costs of the cause and for a counsel fee commensurate with the importance of the case.

The Court: Will you please mention the amount of counsel fee you think you ought to have?

Mr. Strong: Your honor understands me, of course, as insisting that no order should be made against Mr. Huntoon.

Mr. Lindabury: We think the allowance of counsel fee should not be less than \$5,000.

Mr. Strong: It seems to me that the figure suggested is absurd, in the first place; but, I started to say before, there is no authority in the court, by statute or otherwise, that I know of, to make any order whatever for the expenses of the suit, counsel fees, or otherwise, against Mr. Huntoon, if it were a matter of discretion, nor has Mr. Huntoon in any way enhanced the costs of this suit. desire to direct your honor's attention to that point. He has not appeared here and offered independently testimony such as to increase the burden of the petitioner's case. The proof which the petitioner has made in this case he was obliged to make if Mr. Huntoon had not appeared, and under such circumstances, where the appearance of the corespondent has not aggravated the expense to the complainant, there seems to be no reason for the exercise of a discretion, if the court has a discretion, to impose upon the co-respondent any of the expenses which he would otherwise have incurred-would otherwise have incurred necessarily.

The Court: I think that, when a man makes himself a defendant, under the statute he becomes liable for the petitioner's will take into consideration the fact that the defendants did not go very far with their trouble you much.

Mr. Lindabury: They made us believe they were going to, and we prepared to meet it. Mr. Strong: Gave you an awful scare, didn't we?

The Court: Well, I don't see how I can give less than I did to the other side earlier in the proceedings; but I think that is enough, Mr. Lindabury, \$3,000. I will advise a counsel fee of \$3,000, and the costs of the issue. If you waive the costs of the issue on the jurisdiction, if you omit it entirely, the whole thing will go against both defendants; but, if you put those costs in, they can only go against the female defendant. However, you can frame your decree to suit yourself on that hereafter.

Mr. Lindabury: I ask that the costs of supplying copies of the testimony to both parties in the cause be included in the taxed costs.

The Court: The rule, as I recollect about that, is this: You see, the stenographer looks out for his pay from the parties who employ him, except as to one copy for the court, and you are entitled to recover one copy, supplied to your side, costs of one copy, and if you pay the whole of the court's copy, why, then you are entitled to recover for two copies. and the bill may be made out to you, Mr. Lindabury, just made out to Lindabury, Depue & Faulks, cost of one copy for counsel and cost of another copy for the court. Then all I do is to write across it "Tax it in."

Mr. Lindabury: We have gotten three copies, and one has been furnished to the other side.

The Court: They must pay that. I have nothing to do with that. The stenographer looks to them for that, and looks to you for what he has furnished to you; but the court is entitled to one copy, and the rule is that each party must pay one-half of the copy furnished to the court; but, if that one-half each in point of fact is not paid, and the successful party chooses to pay the whole of the court's copy, he may include that in his costs. You are not obliged to pay but one-half of that, and the stenographer may call on the counsel for the defendant to pay the other half; but I suppose they would prefer that it be taxed in the petitioner's costs: but you are not obliged to do that. If you choose to do that, Mr. Lindabury, you can have both copies taxed in the costs of the complainant: but you are not obliged to do it. You are obliged to pay one-half, and you are entitled to have that one-half put in the bill of costs. If you think you cannot recover it, you don't want to take that plan. Perhaps you better take the half and let the counsel for the defendant pay their half.

(72 M. J. H. 941)

DUKE v. DUKE.

defense, Mr. Lindabury, not far enough to Court of Errors and Appeals of New Jersey. June 17, 1907.)

Appeal from Court of Chancery. Bill by James B. Duke against Lilian N. Duke. Decree for complainant (73 Atl. 837), and defendant appeals. Affirmed.

Chauncey G. Parker and Samuel Kalisch, for appellant. Alvah A. Clark and Richard V. Lindabury, for respondent.

PER CURIAM. The decree appealed from will be affirmed, for the reasons stated in the opinion of Vice Chancellor Pitney (73 Atl. 837), delivered in the court below.

(72 N. J. E. 942)

DUKE v. DUKE (HUNTOON, Intervener). (Court of Errors and Appeals of New Jersey. June 17, 1907.)

Appeal from Court of Chancery.
Bill by James B. Duke against Lilian N.
Duke and Frank T. Huntoon, intervener. Decree for complainant (73 Atl. 837), and intervener appeals. Affirmed.

Alan H. Strong, for appellant. Alvah A. Clark and Richard V. Lindabury, for respond-

PER CURIAM. The decree appealed from will be affirmed, for the reasons set out in the opinion of Vice Chancellor Pitney (73 Atl. 837), delivered in the court below.

(78 N. J. L. 295)

ANDERSON v. PUBLIC SERVICE CORPO-RATION OF NEW JERSEY.

(Supreme Court of New Jersey. July 19, 1909.)

STREET RAILROADS (§ 114*)—INJURIES TO PERSON ON TRACK—EVIDENCE.

Under the circumstances of this case, where it appeared by a preponderance of testimony that plaintiff had been seen intoxicated shortly before the accident, and the negligence attributed to the defendant rested substantially upon the plaintiff's uncorroborated story, which appears inconsistent with the situation in which he was found after the accident, and which, even if true, discloses negligence on his part, a verdict for the plaintiff is set aside.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 248; Dec. Dig. § 114.*]

(Syllabus by the Court.)

Action by Christian A. Anderson against the Public Service Corporation of New Jer-Verdict for plaintiff. Rule to show cause made absolute.

Argued June term, 1909, before GUM-MERE, C. J., and TRENCHARD and MIN-TURN; JJ.

George S. Silzer, for plaintiff. Leonard J Tynan, for defendant.

MINTURN, J. According to the testimony of the plaintiff, he was walking along the highway between Perth Amboy and Metuchen, about 7 o'clock on the evening of September 7, 1907, when he was overtaken by an automobile, and stepped aside to let it pass. In making this movement he stepped

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digg. 1907 to date. & Reporter Indexes

company, which was laid upon the easterly side of the highway. Within a minute or two after the passage of the automobile, the plaintiff says he was struck by a trolley car, upon the right shoulder, was tripped up by the car fender, and thrown upon the track; the car passing over both feet, which necessitated their amputation. The men upon a work car, following the car in question, a few minutes later discovered the plaintiff, picked him up, and he was subsequently taken to the hospital. The verdict in the case was for the plaintiff for \$6,500, and the rule to show cause raises the question of the propriety of this verdict under the testimony and the law.

The case, with the exception of the plaintiff's testimony, is almost barren of any direct testimony upon the happening of the accident, and the verdict therefore is largely the product of presumptions, claimed to exist by reason of the existence of proved facts. The plaintiff's explanation of his inability to avoid the car which struck him was that the automobile left a cloud of dust behind it. and that the car, coming from behind him two or three minutes thereafter, gave no warning by bell or by light of its coming. His explanation of his physical and mental condition at that time, as testified to by himself and others, throws light upon the question of the plaintiff's contributory negligence, and serves to elucidate the question of the proximate cause of the accident. He knew the tracks were there, and says that, while the automobile was passing, he moved up closer to the tracks. The road was a wide macadamized road, without sidewalks, but with ample room upon the roadway proper to enable a wayfarer to avoid a collision. The plaintiff, as a resident in the neighborhood, presumably was familiar with the road and the tracks, and, at the time of the accident, was walking from a public house to his home, a distance of a mile. He says he left Perth Amboy at about a quarter of 5 o'clock upon a trolley car, and was taken sick thereon; that he alighted and went to the house of a friend; that he again took a trolley car, but, feeling sick again, he alighted at Underhill's Hotel, where he sat upon the stoop until he decided to walk home. Upon the nature of the sickness which induced plaintiff, as he alleges, to leave the cars on two occasions, other witnesses place a different construction. Thus, Martin saw him at noon staggering, from which he concluded that plaintiff was intoxicated. At nearly 2 o'clock Dolan saw him board a car, and he says plaintiff "was under the influence of liquor. Appeared to be cursing in the car when I went up to him. He was noisy all the way down until he got off." This witness saw the plaintiff again at about an hour before the accident, and he appeared to him then "to be very drunk." Pierson, the postmaster

close to the trolley track of the defendant | that day 25 cents, after which plaintiff immediately went to Meyer's saloon across the street, and at that time Pierson says the plaintiff "had been drinking" and was saying foolish things, "like anybody will say when they have been drinking." Miss Lamporten, who saw him on the car coming from South Amboy, and who sat on the seat with him, testified that "he had been drinking," .and she says, "He had money in his hand and offered it to me, and he said something, I don't know what."

> Without further recital of testimony of this character, it will suffice to say that to us the conclusion seems unavoldable that at the time of this accident the plaintiff was in an intoxicated condition, and that his version of the circumstances under which he received the injury must appear entirely untrustworthy. While his intoxication would not ipso facto invalidate his testimony, and it should not be ignored if at all substantiated, it must be, nevertheless, judicially noticed that intoxication is productive of the existence of a mental condition which renders testimony unreliable and impairs credibility. Rice on Ev. 28; Wharton on Ev. 401. He himself admits that he had a drink of whisky early that morning, and divided a kettle of beer with a painter at lunchtime, and that about 2 o'clock he went to a saloon where he remained an hour, and where he imbibed more beer. and "a couple of five-cent drinks," and still later, at Meyer's saloon, he had "a couple of drinks upon a sick stomach," which he says he had been "troubled with for a couple of days." The only testimony adduced in behalf of the plaintiff to explain the happening of the accident was that of one Wagner, who was a passenger on the car, and who testifled that he felt four bumps at the point where the plaintiff was injured, and, looking back, saw an object on the ground; but he also testified that the car was lighted, that the work car which followed carried a headlight, and that the track from that point for quite a distance was straight. The plaintiff was found lying at the right-hand side of the right track, at a right angle to the track, with his feet stretched over the right-hand rail, and, in passing, it may be remarked that no evidence was adduced to explain his position at that place, and we cannot reconcile it with his recital of the circumstances under which he was struck, for clearly, when struck, he was walking upon the other side of the track, and we can only conjecture as to how he reached the side where he was found.

Without reviewing the testimony more in detail, it will suffice to say that it is not apparent how, upon any correct conception of tort liability, negligence can be attributed, under the plaintiff's version of the circumstances of this case, to the defendant. The mere happening of the accident will not afford a basis for liability, and this has been so often judicially determined that citation of at Metuchen, loaned plaintiff at his request authorities to support the proposition is need-

Smith on Negligence, 248; Smith v. G. E. Ry. Co., L. R. 2 C. P. 10. Most assuredly some substantive testimony affording a basis for reasonable inference—testimony which does not carry in its statement elements contradictory of its probability-must be adduced to warrant liability for alleged tort-feasance. To us it seems manifest that, if the story of the plaintiff be accepted, his negligence in failing to see or hear the car, under the circumstances, in time to avoid the accident, or, if the conditions made that impossible, then his remaining in such close proximity to the track, after the automobile had passed, when the same conditions must have made it impossible for a person operating a car to see him, was the proximate cause of his injury; but, upon the entire case, and in view of the great preponderance of testimony as to the facts leading up to the accident, we are unable to discover in the testimony any ac. of tort-feasance on defendant's part upon which liability can be predicated. Hummer v. Lehigh Valley R. R. Co., 75 N. J. Law, 703, 67 Atl. 1061.

The rule to show cause should therefore be made absolute.

(76 N. J. E. 104)

SULLIVAN et al. v. MARONEY et al. (Court of Chancery of New Jersey. June 11, 1909.)

1. INSURANCE (§ 203*)—LIFE INSURANCE—AS-SIGNMENT OF POLICY BY INSURED.

An assignment by insured of a life policy payable to her children, if they survived her, which they did, otherwise to her estate, was ineffectual against her children, who alone could assign their interest.

[Ed. Note.—For other cases, see Cent. Dig. § 471; Dec. Dig. § 203.*] see Insurance.

2. INSURANCE (\$ 203*) — LIFE INSURANCE CHANGE OF BENEFICIARIES.

\ 1160 policy being made payable to certain beneficiaries, their interest can be divested in favor of other beneficiaries only in the manner provided by the policy for such a change; so that, the method provided by the policy for change of beneficiaries not being pursued in any respect, an instrument, in form simply an a signment, signed by insured, to whose estate the policy was payable only if her children, the ben-eficiaries, did not survive her, which was not the case, could not change the beneficiaries.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 203.*]

3. INSURANCE (§ 587*) — LIFE INSURANCE — CHANGE OF BENEFICIARIES.

The rights of parties between themselves as to the proceeds of a life policy, depending on whether there was a change of beneficiaries, are not affected by the insurance company not contesting the question of change of beneficiary, but admitting its liability to some one.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 587.*]

Suit by Dennis J. Sullivan, as next friend, against John F. Maroney and others. Heard on bill, answers, replications, and proofs in open court. Decree for complainants.

This is a bill filed by the next friend of four infants to secure the proceeds of a life insurance policy. The defendants are the life insurance company and those who claim adversely to the complainants. The life insurance company defaulted, and a decree pro confesso has been taken against it.

Merritt Lane, for complainants. Mark A. Sullivan, for answering defendants.

GARRISON, V. C. John F. Maroney was a life insurance agent doing business in Jersey City. Edward and Margaret Cahill, husband and wife, were people of the working class living in Jersey City. Marie Schaefer, subsequently married to McCabe, was a sister of Maroney's wife. In January of 1906 Maroney induced the Cahills to take out \$12,000 worth of life insurance, \$6,000 on the life of each. These policies were as follows: On the life of Margaret, \$3,000 in the Equitable Insurance Company, payable to Edward; \$2,000 in the State Life Insurance Company of Indianapolis, payable to the four children of the parties (the complainants); \$1.000 in the State Life aforesaid, payable to Edward; on Edward's life, \$3,000 in the Equitable Insurance Company, payable to Margaret; \$2,000 in the State Life Insurance Company of Indianapolis, payable to Margaret; \$1,000 in the State Life aforesaid, payable to Margaret. The premiums on all these policies taken together for the first year amounted to \$315. Maroney, who attended to all of the business, and acted as agent in the entire transaction, testifies that he secured the money to pay the premiums from Marie Schaefer (now McCabe) by an agreement between her and the Cahills, which was that she was to pay these premiums and was to have assigned to her all of the policies excepting the policy for \$1,000 on the life of Edward, payable to Margaret, issued by the State Life Insurance Company. He also says that she was to pay \$35 more than all of the premiums; that is to say, she was to pay \$350, instead of \$315. and that this extra \$35 was to go to Mrs. Ca-And, further, he says that it was agreed that she should pay all of the debts of Margaret Cahill which were owed by the latter at the time of her death, and, further still, he said that, as part of the agreement. \$200 out of any insurance collected on the life of Margaret was to be paid to Edward. He asserts that he obtained the money to pay these premiums from Miss Schaefer shortly after the time that the policies were taken out in 1906, and that it was at that time, that the agreement was made. In January of 1907 Mrs. Cahill was seriously ill of the disease of which she died on the 2d of March, 1907, and while in bed she signed assignments of the policy in question, and at or about the same time Edward Cahill signed assignments to Marie Schaefer of the \$3,000 policy in the Equitable Life and the \$1,000 policy in the

eFor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

State Life, on the life of Margaret, payable to him. No assignments were ever procured from Margaret on the \$3,000 policy on Edward's life payable to her, issued by the Equitable, or of the \$2,000 policy in the State Life on the life of Edward, payable to her, nor of the \$1,000 policy in the State Life on the life of Edward, payable to Margaret. The last-named policy was not to be assigned, but was agreed to be kept up for the benefit of Margaret, according to Maroney's testimony.

This controversy concerns the \$2,000 policy in the State Life Insurance Company of Indianapolis, Ind., issued on the 16th of January, 1906, on the life of Margaret, payable to the four children. Although Maroney and Schaefer each testify that the agreement was made and the premiums paid over by her to Maroney, and by Maroney to the company in January or February of 1906, it is very difficult for me to believe this. I incline to the opinion that no payment was made to the company for the first year-probably Maroney's commissions were sufficient to at least satisfy the first year's premiums—and the fact, I believe, is that the first payment was actually made at the beginning of the second year, which was the time when the assignment was obtained. Undoubtedly these policies were taken out by Maroney in a spirit of speculation. There is not the slightest pretense that the Cahills were ever in the position to take out any such amount of insurance, or to pay for any insurance at all out of their meagre means. At the time that the assignments were obtained from Margaret Cahill and from Edward Cahill, Margaret was a very sick woman, and was dying, and shortly afterwards died. It will be observed that assignments were only obtained for those policies which were upon her life. No assignments were obtained upon the policies upon the life of Edward. Part of the agreement, Maroney says, was that the debts due by Margaret Cabill at her death should be paid by Miss Schaefer, as a portion of the consideration; and he also says that it was agreed that \$200 out of the insurance collected upon Margaret's death should go to Edward, her husband. It is inconceivable to me that any such agreements were made in Jancary of 1906, when, so far as it appears, Margaret was in good health, and there was no reason to suppose that she would either dle soon, or would die before her husband. However this may be, the taking out of the policies was a pure speculation, as was the participation therein of Miss Schaefer. has been before stated, Margaret Cahill died on the 2d day of March, 1907, and the policy of \$3,000 on her life in the Equitable has been collected by Miss Schaefer, as has the \$1,000 policy in the State Life. It will be recalled that each of these policies on the life of Margaret were payable to Edward, and

State Life, on the life of Margaret, payable by virtue of the alleged agreement of Januto him. No assignments were ever procured ary, 1906, to Miss Schaefer.

The assignment of the policy in suit is in the following terms: "Form of Assignment Otherwise Than as Collateral Security. To be attached to and retained with the policy for use as evidence when required. For one dollar, to me in hand paid, and for other valuable consideration (the receipt of which is hereby acknowledged) I hereby assign, transfer and set over all my right, title and interest in policy No. 149,191 on the life of (myself) Margaret Cahill issued by the State Life Insurance Company of Indianapolis, Ind., and all money which may be payable under same to Marie Schaefer of Hoboken, N. J., whose P. O. address is 612 Washington street, and for the consideration above expressed 1 do also for my executors and administrators guarantee the validity and sufficiency of the foregoing assignment to the above-mentioned assignee, her executors, administrators and assigns; and the title to the said policy will forever warrant and defend. In witness whereof, I have hereunto set my hand and seal, this 19th day of Jan uary, 1907. Margaret Cahill. Edward Cahill."

The policy provisions which are material are in the following language:

"The State Life Insurance Company of Indianapolis, Ind., hereby insures the life of Margaret Carril, of Jersey City, state of New Jersey (hereinafter called the insured) and agrees to pay the sum of two thousand dollars at the home office of the company at Indianapolis, Ind., to Dennis, Edward, Katie, and William Cahill, her children, share and share alike (or to such other beneficiary or beneficiaries as may be designated by the insured as hereinafter provided), if living, otherwise to the insured's executors, administrators or assigns, upon receipt and approval of proofs of the death of the insured, this policy being then in force, less any indebtedness of the insured or beneficiary to the company."

"Assignment. This policy may be assigned upon written approval of the president but the company will not assume any responsibility for the validity of any assignment."

"Change of Beneficiary. The insured may, at any time during the continuance of this policy, provided the policy is not then assigned, and subject to the rules of this company regarding assignments and beneficiaries, change the beneficiary or beneficiaries by written notice to the company, at its head office; such change to take effect on the endorsement of the same on the policy by the company."

of \$3,000 on her life in the Equitable has been collected by Miss Schaefer, as has the \$1,000 policy in the State Life. It will be recalled that each of these policies on the life of Margaret were payable to Edward, and were by him assigned, in January of 1907,

assignment or valid change of beneficiary which, in law, deprives the complainants (the four children named in the policies as beneficiaries) of their rights thereunder, and prays that it may be so adjudged. The defense rests upon the assignment heretofore quot-

It will be observed from a reading of the policy that the contract was, upon the death of Margaret Cahill, to pay the insurance money either to the four children, if they were living at the time of their mother's death, otherwise to the mother's executors, administrators, or assigns. There were therefore always two sets of interests in this policy—the beneficiaries (who would get the money if they were living at the death of the insured), and the representatives of the insured (to whom the money would come if the insured outlived the beneficiaries). Each of these interests was undoubtedly subject to assignment. Neither one could, in my view, assign anything excepting that which would come to that one, and the assignment of neither could possibly impinge upon the rights of the other. In other words, the beneficiaries, if of age, could undoubtedly assign their interests under the policy, and the insured could undoubtedly, as against her estate and so as to bind it, assign that interest, i. e., the interest which would come to her estate. It is provided that the policy may be assigned upon written approval of the president, and it is claimed by the complainant that this assignment was not approved in writing by the president, and this is so. It might be material to determine this question if it affected any issue in the suit; but in my view it does not. It is not necessary for me to determine whether this assignment would be effectual against the personal representatives of Margaret Cahill, because in the present juncture they have no The four children outlived their interest. mother, and therefore are entitled to the proceeds of the policy as against the representatives of the mother, or any one to whom the rights of such representatives had been assigned. It is therefore immaterial to determine whether this assignment should be recognized in default of the written approval of the president of the company, because, whether recognized or not, it does not affect the issue. The authorities are numerous, and, with the exception of Wisconsin, unanimous, that in an ordinary life policy the interest of the beneficiary is vested and cannot be divested by an assignment of the policy by the insured. Union Central Life Ins. Co. v. Buxer, 62 Ohio St. 385, 57 N. E. 66, 49 L. R. A. 737. It seems perfectly plain, upon principle, that, where the contract of A. is to pay B. upon the death of C., C. may not by any assignment of that contract cause the money due thereunder to be paid to anybody but B., or B.'s assignee, and so the cases hold. See the cases in the notes last cited, 49 L. R. A. at page 740; to which add cate, or policy. This is directly decided in

Cyrenius v. Mutual L. Ins. Co., 145 N. Y. 577, 40 N. E. 225, and a statement to the same effect in Golden Star Fraternity v. Martin (Ct. of Er. 1896) 59 N. J. Law, 216, 35 Atl.

The contention of the defendants, however, is that this assignment must be treated as if it effected a change of beneficiaries, and substituted in the place of the four children (the beneficiaries named in the policy) Marie Schaefer (the person named in the assignment). I cannot accede to this argument, and, in fact, do not think that there is anything to support it. The paper, in form, is an assignment. It is made by a person who has an assignable interest, and carries that interest. The interest, as has been pointed out, was contingent but assignable. It does not purport in any way to make a change of beneficiaries, or to affect their interests. The method of change of beneficiary is pointed out in the contract, and that method was not pursued in any respect. It is not even attempted to be shown that it was effected according to the rules of the company as required, or that any written notice thereof was given to the company, or that it took effect by indorsement on the policy of the company, all of which are requisites.

I think it entirely clear from the authorities that, where a contract of insurance is made payable to certain beneficiaries, their interests therein can only be divested in favor of other beneficiaries by changing the contract in the manner in which the contract points out that it must be changed to effect that result. American Legion of Honor v. Smith, 45 N. J. Eq., at page 472, 17 Atl. 770 (Van Fleet, V. C., 1889); Travelers' Ins. Co. v. Grant, 54 N. J. Eq., at page 217, 33 Atl. 1060 (Pitney, V. C., 1896); A. O. U. W. of N. J. v. Gandy, 63 N. J. Eq. 692, 53 Atl. 142 (Grey, V. C., 1902); Pennsylvania R. R. Co. v. Warren, 69 N. J. Eq. 706, 60 Atl. 1122 (Bergen, V. C., 1905). And I do not find that there is anything in the contention of the defendants that the company, by not contesting the question concerning the change of beneficiaries, has altered in any way the rights of the parties as between themselves. If the provisions required by the contract, or by the charter, constitution, by-laws, or statute laws regulating a beneficial order, which make part of their contracts, have not been complied with, the change has not taken place, the properly named beneficiaries have not been displaced; and the fact that the company, or the order, pays the money into court, or admits its liability to pay, cannot affect the question. The question always remains, who are the beneficiaries, and they must be named in accordance with the contract, including therein, of course, that which is held to be part of the contract in the cases where the whole contract is not comprised in one paper, certifiour own court (A. O. U. W. of N. J. v. Gandy, supra, and Penna. R. R. Co. v. Warren, supra), and is in accordance with sound reasoning and other authorities. Freund v. Freund, 218 III. 189, 75 N. E. 925, 109 Am. St. Rep. 283; Sangunitto v. Goldey, 88 App. Div. 78, 84 N. Y. Supp. 989; 25 Cyc. 893, 894. Equities, of course, may arise which prevent the application of the normal rule. For such an instance, see Sup. Council, Cath. Benev. Legion v. Murphy, 65 N. J. Eq. 60, 55 Atl. 497 (Pitney, V. C., 1903). But they emphasize and do not weaken the rule.

The righteousness of the decision thus far announced would seem to me to be undoubted, were it not for the opinion in the case of Landrum v. Knowles, 22 N. J. Eq. 594 (Ct. of Er. 1871), and the construction that may have been, or may seem to have been, placed upon it in the following cases: De Ronge v. Elliott, 23 N. J. Eq., at page 493 (Dodd, V. C., 1873); Brown v. Murray, 54 N. J. Eq., at page 596, 85 Atl. 748 (Stevens, V. C., 1896); Locomotive Eng. Ass'n v. Winterstein, 58 N. J. Eq., at page 198, 44 Atl. 199 (Reed, V. C., 1899); Spengler v. Spengler, 65 N. J. Eq., at page 178, 55 Atl, 285 (Stevens, V. C. 1903). It becomes necessary therefore to carefully consider the case of Landrum v. Knowles, and I have taken occasion to get excerpts from the original papers and briefs so as to get at the very point decided. The policy in that case recited that, in consideration of the premium paid by Lucy A. Landrum and of the annual premium to be paid thereafter, they did assure the life of Samuel Landrum, her husband, in the amount of \$2,000, "for the sole use of the children of the said Lucy and Samuel. * * * And the said company do hereby promise and agree to and with the said assured, their assigns, well and truly to pay or cause to be paid the said sum insured to the said assured, their assigns, * * * " at the death of Samuel. It recites that the policy is accepted "by the assured" upon certain conditions. It is further recited that: "In case the said Lucy A. Landrum shall not pay the said annual premiums, * * * the said company shall not be liable to the payment of the sum insured." It is recited in the policy: "If assigned, notice to be given the company, and the party to whom the policy is transferred must sign all premium notes with the assured."

It is quite evident from the reading of this policy that Lucy A. Landrum was the assured, and, with this in mind, I think we can clearly understand the opinion of the Court of Appeals, and clearly see that it does not apply to a different kind of insurance contract, and does not run counter to the well-nigh unanimous decisions regarding assignments of policies made payable to beneficiaries. The policy was taken out in 1850. In 1860 Lucy Landrum, with the assent of her husband, assigned this policy to

her husband. Lucy paid the premiums due on the policy up to 1860. Knowles paid the premiums afterwards for nine years, when Landrum died. The chancellor decreed that the children were entitled "to the cash value of the policy of insurance in question * at the time the policy ceased to be kept alive by the payment of the premiums by Lucy A. Landrum, * * *" and that the balance of the money owing on the policy was to be paid to Knowles. This was affirmed by the Court of Appeals upon the theory that, from the facts, it was evident that Mrs. Landrum, the assured, took out this policy upon the life of her husband, payable to herself, for the use of her children as a gift to the children, and that so long as she kept up the payments she was continuing to increase, so to speak, or keep alive the gift to the children; but that when she assigned this policy, in which she was the assured, she thereby indicated her intention no longer to continue the gift, and only so much would be allotted to the children as had then been given-that is, the cash surrender value of the policy at that time.

Many, if not all, of the cases which comment upon this case of Landrum v. Knowles make the mistake of supposing that the money was payable to the children, and the Chief Justice himself, in his opinion, makes this mistake. The policy plainly shows that the money was not to be paid to the children, but was to be paid to "Lucy A. Landrum, the assured." The policy recites that it is for the sole benefit of the children, and much, if not all, of the reasoning of the case revolves around this difference. Lucy A. Landrum, having taken out a policy in which she is the assured, and which provides that the money is to be paid to her, as the assured, has it stated in the policy that it is for the benefit of her children. It may well be that one who is thus constituting one's self a voluntary trustee will only be held to be trustee to the extent that the gift is effectuated; but the reasoning which would apply to such a situation would not apply to a case where the policy was payable to the beneficiaries. In such a case, as has been before pointed out, no assignment by any one excepting the beneficiaries can affect their interest, and their interest can only be changed by the substitution of new beneficiaries in accordance with the terms of the contract or the laws of the order, if it be a beneficial order.

There was no point in the brief for the children, in the Landrum Case, that this policy was, as against them, not assignable; in fact, in counsel's third point he concedes unquestionably that it was assignable. The point he made was that the assignee stood in the place of the assignor as trustee for the children. However this may be, I am clear that the decision in Landrum Knowles should not be held to extend any Knowles in payment of debts due to him by | further than the exact facts comprised in it.

If we confine that case to the right of a person to whom the money is to be paid—the assured, in other words—to assign that interest, we are at liberty to place New Jersey in harmony with all other jurisdictions, so far as I know, excepting Wisconsin, in the holding that an assignment of an insurance policy, made payable to beneficiaries, by any other persons than the beneficiaries, cannot affect their interests. That this is the proper holding seems to me to be beyond dispute.

The complainant makes the further contention that Marie Schaefer had no insurable interest in the life of Margaret Cahill, and that therefore the assignment is void. In other jurisdictions there is authority for this contention, and a very strong argument can be made that such, under the authorities, should be the law of New Jersey; but I find it unnecessary to consider or decide this question because of my opinion with respect to the other points involved, which is dispositive of the case.

In conclusion I find that the assignment, if considered good, notwithstanding that it was not upon "the written approval of the president," carries only the interest which the assignor had, and that was the interest, as against her own estate, to receive the payment if she outlived her children. That assignment was not in any sense a change of beneficiary, and cannot be so considered.

Since the insurance company has, by not answering, and by the effect of the decree pro confesso, admitted it owes the money, the decree should provide for the payment of that money to the complainants, with costs against the answering defendants.

MONTROSE REALTY & IMPROVEMENT CO. v. ZIMMERMAN.

(Court of Chancery of New Jersey. May 26, 1909.)

1. Specific Performance (§ 95*)—Marketable Title.

A purchaser will not be compelled to specifically perform a contract to purchase real estate, where the title is not free from reasonable doubt.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 257-277; Dec. Dig. § 95.*]

O. VENDOR AND PURCHASER (§ 129*)—TITLE OF VENDOR—SUFFICIENCY.

Where a testator devised real estate to his

Where a testator devised real estate to his executors in trust at the expiration of three years after his decease, or as near thereto as might be reasonably convenient to convey the property to a trust company on certain other trusts and to sell the same for cash or on credit, and title offered to a purchaser depended on the existence of the power of sale in the executors six years after testator's death and also on a conclusion that it was competent for the executor to convey all or a part of the land in consideration of the issuance to him of stock in a land company, such objections were so substantial that an unwilling purchaser would not be required to take the title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 241; Dec. Dig. § 129.*]

Suit by the Montrose Realty & Improvement Company against Arthur Z. Zimmerman for specific performance of a contract to convey land. On motion to strike bill from file. Granted.

William H. Corbin, for complainant. Samuel W. Beldon, for defendant.

HOWELL, V. C. In my opinion the title offered by the complainant in this case is such that a court of equity ought not in its discretion to force it upon an unwilling purchaser. The objections made to it are not frivolous, but substantial, and under the circumstances I do not think that the defendant should be compelled to take a title which he might have difficulty in disposing of or which might involve him in a lawsuit. The questions arise out of a power contained in the will of Henry A. Page, and they relate (1) to the extent of the power, and (2) to its execution. By the seventh paragraph of this will the testator devises all the residue of his estate to his executors, of whom Edward D. Page is now the sole acting executor, upon certain trusts therein declared, with power "to sell and dispose of the same or any part thereof either at public or private sale and wholly for cash or partly for cash and partly for credit and upon such terms and conditions as they may think most conducive to its interests and to make, execute and deliver good and sufficient deeds, conveyances, assurances and transfers therefor to the purchasers thereof," and upon the trust to invest the proceeds of such sales and apply the income to certain uses therein expressed. In the same paragraph occurs this clause: "And in further trust to my said executors, upon the expiration of the period of three years from and after my decease or as nearly thereto as may be reasonably convenient and expedient for them so to do, or upon the event of the decease of my said son Edward within such period, the entire principal of my estate then in their hands, including any income which from the decease of any one entitled thereto as aforesaid may not have been distributed, and similarly all other principal of my estate as may thereafter from time to time come to their hands to convey. assign, transfer or set over" to the United States Trust Company of New York upon certain other trusts therein declared a further power of sale was conferred upon the trust company. The trust which is committed, first, to the executors and, second, to the trust company, includes the payment of income to certain of the testator's children, with remainder in a certain specified event to their issue, so that it is quite possible that children may yet be born who may participate in the benefits conferred by the will. In 1905 the only persons in esse having a vested interest in the lands of which the testator died seised, all of whom were of

•For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tor in disposing of some of the Essex county real estate, organized the complainant corporation with an authorized capital of \$100,-000. This corporation in June, 1905, some six years after the testator's death, took title to the real estate in question in this suit and issued therefor to Edward D. Page, as sole surviving executor, its capital stock to the amount of \$600. This stock was delivered to the trust company and was accepted by it as a part of the trust fund which the executor was required to transfer to it.

The bill sets out all these facts in extenso, and a motion is made under the 213th rule to strike the bill from the files for the following reasons: That the trust committed to the executors for the management of the estate was limited to the period of three years from the date of the death of the testator, and that immediately upon the expiration of that period it was the duty of the executors to transfer the whole estate, including the lands in question, to the United States Trust Company; that the time allowed by the will beyond the expiration of the period of three years was only such time as might be reasonably convenient and expedient for the actual distribution to be made, and did not extend the period during which the trust for the management of the estate was to be exercised; that for the purpose of final distribution a further power of sale was given to the trust company empowering it to dispose of such portion of the estate as had not been disposed of by the executors within the period of three years; that therefore, at the time of the execution of the deed by the executor to the complainant, the power was not in existence; that the transfer by the executor was made to a corporation in which he was interested; that the sale was therefore voldable at the option of any person to whom an interest was devised by the testator in such real estate, excepting only the persons who acquiesced and participated in the sale; that the power was not properly exercised, in that the sale was not partly for cash and partly for credit, but was for shares of stock in a corporation; and that all these facts show that the title is either bad or in such a state of doubt and uncertainty as to be unmarketable. In short, the objections are: (1) That, when the conveyance was made by the executor to the complainant corporation, his power of sale had expired; (2) that the "sale," so-called, was not made in accordance with the power, but in direct violation thereof, being neither for cash nor on credit; and (3) that, if it could be held to be a sale, it is voidable at the instance of any interested person who has not acquiesced therein.

There is a long line of cases in our state which hold: That a purchaser will not be compelled, in a suit for specific performance,

full age, for the purpose of aiding the execu- to take a title which is not free from a reasonable doubt; that a contract to purchase the same under those circumstances will not be enforced; and that, if the title presents a really debatable question, specific performance will not be decreed. These propositions hardly need the citation of authorities. Those on the defendant's brief are sufficient without going farther. The difficulties in this case lie upon the surface. I do not think that any careful professional man would feel himself competent to advise offhand that the power of sale was in existence six years or thereabouts after the death of Mr. Page, or that it was competent for the executor to make conveyance of all the testator's lands, or any part thereof, in consideration of the issue to him of stock in a land company, in the face of the requirement that the executor's sales shall be for cash or on credit.

I therefore am of opinion that the title, while it may turn out to be good in an action of ejectment, is not such a title as should be forced upon the defendant, and I will advise an order that the bill be stricken from the files.

(75 N. J. E. 602)

GILLEN v. HADLEY et al.

(Court of Chancery of New Jersey. 1908.)

1. WILLS (§ 699*) - CONSTRUCTION - PREMA-TURE SUIT.

Where a will created a trust to pay two annuities, and for other purposes, and it ap-peared that both of the annuities would expire within the limitation of the rule against perpetuities, a bill to construe the will, in order that the court should declare that the vesting of the residuary estate was delayed beyond the time prescribed by the rule against perpetuities brought during the life of the annuitants, was

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 699.*]

2. EQUITY (§ 41*)—RETENTION OF JUBISDICTION—DENIAL OF RELIEF DEMANDED.

Where a bill to construe a will and de-clare a trust invalid as infringing the rule against perpetuities also demanded an accounting, it was sustainable for the purpose of ob-taining an accounting, though it was prema-ture in so far as it sought to avoid the trust.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 116; Dec. Dig. § 41.*]

8. COURTS (§ 475*) — JURISDICTION — COURT FIRST OBTAINING JURISDICTION.

Where a bill was filed for an accounting by trustees in the Chancery Court several days before proceedings for an accounting were instituted on behalf of the trustees in the Prerogative Court, where the will was probated, the Chance y Court, having first obtained jurisdiction, would retain it for purposes of an accounting.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1234; Dec. Dig. § 475.*]

Suit by Jane E. Gillen against Mary E. Hadley and others. Jurisdiction retained for the purpose of an accounting, and other relief denied.

See, also, 73 Atl. 849.

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

complainant. Francis Child, for Margaretta W. Gillen. H. V. M. Dennis, for Mary E. Hadley and others. Frederick T. Johnson, for infant defendants, Henry P. Simmons Hadley and others. William J. Morrison, for Henrietta F. Simmons.

HOWELL, V. C. Henry P. Simmons, late of the city of Passaic, died on June 16, 1896, leaving a will, which is the subject-matter of this controversy. He left four children, Mrs. Gillen, the complainant, Mrs. Howe, who has since died, and the defendants, Mrs. Hadley and Miss Henrietta P. Simmons. The will makes provision for all the children and disposes of all the testator's property. The bill is filed primarily for the purpose of having this court declare that the vesting of the residuary estate under the will is delayed for so long a period as to be void for remoteness; or, in other words, that the provisions of the will in relation to the disposition of the residuary estate are void, because they violate the rule against perpetuities.

This question was argued fully and with distinguished ability by the counsel who appeared in the case; but, notwithstanding their earnest efforts to obtain a decision on this main question, I find that a preliminary question presents itself, which, it appears to me, has already been disposed of by the Court of Errors and Appeals in such a way as to preclude me from considering at present the validity of the devise. Several years ago Miss Henrietta Simmons, one of the defendants in this suit, brought an action of ejectment against Mrs. Hadley and her husband, who are the trustees under the will and as such hold the legal title to and are in possession of the residuary estate; Miss Simmons claiming, as the complainant here now claims, that the disposition of the residuary estate was void for the reason that it violated the rule against perpetuities. The case is reported under the name of Simmons v. Hadley, 63 N. J. Law, 227, 43 Atl. 661. In the judgment delivered by Chancellor Magie there is a discussion and a settlement of the preliminary question which I have referred to.

The tenth paragraph of the will makes the "The share of the net income from my said estate so set apart from time to time as aforesaid for the benefit of my daughter, Jane Elizabeth Gillen, shall be by my said trustees paid out from time to time, at their discretion, for the comfortable support and maintenance of my said daughter, and of her daughter, Margaretta Westervelt Gillen, during the widowhood of my said daughter, Jane Elizabeth Gillen; upon the remarriage or decease of my said daughter. Jane Elizabeth Gillen, said share of the net income of my estate shall be by said trustees paid out relief.

Sherrered Depue and Joseph H. Brinton, for from time to time, at their discretion, for the comfortable support and maintenance of my said granddaughter Margaretta, until she shall have arrived at the age of twenty-five years, or so soon thereafter as her mother shall have remarried or deceased, my said trustees shall pay over and convey," etc. The eleventh paragraph makes the following provision for the daughter Henrietta: "The share of my estate so set apart as aforesaid for the benefit of my daughter Henrietta, shall be paid out by my said trustees for the comfortable support and maintenance of my said daughter for and during her natural life." These provisions are referred to in Chancellor Magie's judgment as follows: "The trustees are to dispose of the income set apart for Mrs. Gillen from time to time for her support and maintenance and for the support and maintenance of the plaintiff [Henrietta P. Simmons, one of the defendants in this suit] for her life." It was held there that it was the design of the testator to withhold from the plaintiff in that action the legal title to and possession of the general residuary estate, through the instrumentality of an active trust which contemplated a payment of the two annuities above mentioned, both of which, by the terms of the will, are to expire within the limitation of the rule against perpetuities, and that the trustees took the entire residuary estate as long as they were required to pay the two annuities.

The two annuitants are still living, one is the complainant in this suit, the other, a defendant, and, in view of the interpretation given to the will by the Court of Errors and Appeals, I feel bound to say that the suit has been prematurely brought. I do not see how the question presented by the bill can be raised and decided during the lifetime of Mrs. Gillen or Miss Simmons. Ordinarily a decree on conclusions of this nature would be a decree dismissing the bill; but it has already been said by Vice Chancellor Pitney in this case (Gillen v. Hadley, 72 N. J. Eq. 505, 66 Atl. 1087) that the bill has a purpose altogether independent of that touching the construction of the will and the ascertainment of the legality of the trust, and that is, for the purpose of obtaining an accounting. Tt does appear from his opinion that proceedings are pending in the Prerogative Court, following direction in regard to Mrs. Gillen: on behalf of the trustees, to have their accounts stated and passed, and while the Prerogative Court, which was the court in which the will was probated, is a proper jurisdiction for entertaining the accounting, yet seven days before the accounting proceedings were begun in that court, the bill in this case was filed, so that this court obtained jurisdiction of that portion of the subject-matter of the bill prior to the filing of the account in the Prerogative Court.

> This court will therefore retain its jurisdiction over the accounting and deny all other

(75 N. J. E. 602)

GILLEN v. HADLEY et al.

(Court of Errors and Appeals of New Jersey. April 10, 1909.)

WILLS (§ 690*)—Construction—Premature Bill.

A will devised the residuary estate to trustees as long as they were required to pay a specific annuity to S., which was to continue until the net income from the general trust estate should amount to \$1,800 per annum, and to pay another annuity to G. until she attained majority. Held, that where a bill to construe the will and obtain a decree that the trust was invalid, as infringing the rule against perpetuities, did not show that the annuities had terminated, it was premature.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1677; Dec. Dig. § 699.*]

Appeal from Court of Chancery.

Action by Jane E. Gillen against Mary E. Hadley and others. Judgment (73 Atl. 847) for complainant for less than the relief demanded, and she appeals. Affirmed.

See, also, 72 N. J. Eq. 505, 66 Atl. 1087.

Lindabury, Depue & Faulks, for appellant. Francis Child and William J. Monson, Jr., for respondents,

PER CURIAM. The argument in this case was limited by the court to the question discussed by the vice chancellor, whether the bill was prematurely filed. The vice chancellor thought that the question presented by the bill could not be raised and decided during the lifetime of Mrs. Gillen or Miss Simmons, and relied upon our decision in Simmons v. Hadley, 63 N. J. Law, 227, 43 Atl. 661. We think he attributed too far-reaching an effect to that decision. What we held was that the trustees took the entire residuary estate as long as they were required to pay the specific annuity of \$400 to Miss Simmons and \$300 to Mrs. Gillen. The annuity to the latter has ceased because of her majority. The annuity to the former was to continue until the net income from the general trust estate should amount to \$1,600 per year.

It is said that time has arrived; but the pleadings and proofs fail to establish the fact. The answer of Mr. and Mrs. Hadley admits the fact, as does the answer of the guardians ad litem of the infant defendants. while the answer of Miss Simmons denies all knowledge on the subject. The proof is that it depends upon the method of stating the account with reference to taxes and assessments whether the net income of the trust estate amounts to the prescribed sum. The fact that for a time the trustees treated the income as amounting to \$1,600 a year is not sufficient to establish that the net income of the general trust estate after the payment of debts, incumbrances, taxes, and other expenses, actually amounted to that sum, for the trustees may have erred in their method of treating the income. In this state of the

pleadings and proofs, we cannot now decide the main question that was argued in the briefs. If the income is less than \$1.600, the case is governed by our former decision. If more, we should have to determine whether the other trusts are of such a character that we ought not now to pass upon their validity or the validity of the estates in remainder.

The vice chancellor was therefore quite right in advising a decree that the bill was prematurely filed. It is possible that the defect in the proofs can be supplied so as to present the question left undecided in Simmons v. Hadley.

The decree must be affirmed, and the record remitted to the Court of Chancery for such further proceedings as may be agreeable to equity and in accordance with the practice of the court.

(76 N. J. E. 237)

In re HANNAH.

(Court of Chancery of New Jersey. June 28, 1909.)

1. INSANE PERSONS (§ 25*) - INQUISITION -

TRAVERSE—STATUTES.

Since the statute of Edward III, conferring a right to traverse a lunary inquisition, has never become a part of the law of New Jersey, such traverse will only be allowed in the exercise of judicial discretion.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 32; Dec. Dig. § 25.*]

2. Insane Persons (§ 10*)—Inquisition—Intervention by Children.

The son of the subject of a lunacy inquisition has an actual bona fide interest therein entitling him to intervene to protect the parent.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 18; Dec. Dig. § 10.*]

8. Insane Persons (§ 25*) — Inquisition — Thaverse.

A traverse of a lunacy inquisition is only available on an allegation that lunacy has been untruly found and cannot be availed of so as to obtain the release of a lunatic on the ground that he has recovered sanity.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 32; Dec. Dig. § 25.*]

4. INSANE PERSONS (§ 51°)—RECOVERY—LIB-ERATION.

Under Act April 2, 1898 (P. L. pp. 220, 221), as amended by Act June 12, 1906 (P. L. pp. 679, 681), providing that insane persons shall be confined until restored to reason or removed or discharged according to law, the authorities in charge of an insane asylum should release a person committed from confinement on his restoration to reason.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 83: Dec. Dig. § 51.*]

5. Habeas Corpus (\$ 28*)—Discharge of Insane Person—Restoration to Reason.

Where a person committed to an insane asylum is restored to reason, and the authorities refuse to discharge him, he may be enlarged on habeas corpus sued out of the Chancery or common-law court under Act April 2, 1898 (P. L. p. 231).

[Ed. Note,—For other cases, see Habeas Corpus, Cent. Dig. § 18; Dec. Dig. § 26.*]

Application by Norman H. Hannah for leave to traverse an inquisition de lunatico.

Application denied.

John W. Westcott, for the motion.

WALKER, V. C. On October 17, 1908, a commission in the nature of a writ de lunatico inquirendo was issued out of this court to inquire into the lunacy of Percival A. Han-'nah of the county of Salem. The inquisition was taken on November 2d and returned on November 7, 1908; the subject, Percival A. Hannah, being found to be a lunatic and of unsound mind, and that he did not enjoy lucid intervals, so that he was not capable of the government of himself, his lands, tenements, goods, and chattels, and that he had been in the same state of lunacy for the space of one month then last past and upwards. On December 15, 1908, a decree was made confirming the proceedings and ordering the transmission of the record to the orphans' court of the county of Salem. And now, June, 1909, Norman H. Hannah, of Philadelphia, in the state of Pennsylvania, a son of Percival A. Hannah, the lunatic, petitions and shows that his father has since been and still is confined in the Cumberland county insane asylum, and avers that his lunacy was acute, and that he has now so far recovered that his mental faculties are in healthy and normal condition, and his physical state such as to enable him to attend to his affairs, and he prays that his father may have leave to traverse the inquisition, or that an issue may be awarded to try the fact of his lunacy.

By the common law no traverse of the inquisition was allowed, but right to traverse was first granted by statute in the time of Edward III. Shelford on Lunacy, 113. The statute of Edward never has become a part of the law of this state. Lindsley's Case, 46 N. J. Eq. 358, 364, 19 Atl. 726. With us a traverse will be allowed only upon the exercise of sound judicial discretion. Id. By the English practice a lunatic might traverse the inquisition either in person or with the Chancellor's permission by attorney. Shelford, 118. And where the lunatic was confined in prison for debt, and a petition to traverse had been presented, the Lord Chancellor ordered a habeas corpus to bring the lunatic before the Chancellor at the sitting of the court two days afterwards. Id. And the party may apply either in person to the Chancellor to be inspected or his friends may sue out a writ returnable in Chancery for that purpose. Id., 119. In the Matter of Heli, a Lunatic. 3 Atk. 635, Lord Chancellor Hardwicke had before him the question whether a person could traverse an inquisition of lunacy without bringing the lunatic in propria persona before the court, and he observed that as to an inquisition de idiota the subject may in person or by his friends come into Chancery and show the matter and pray that he may

upon examination he be found no idiot, then the inquisition shall be taken as void. He held that the same practice obtained with reference to lunacy. In Covenhowen's Case, 1 N. J. Eq. 19, Chancellor Vroom said, at page 21: "It is clear that a stranger has no right to interfere in a proceeding of this nature. He can neither sue out a commission, nor can he make himself a party to it by any application he may make to this court. I take it to be equally clear that when a person has actual interests either equitable or legal, which are affected by the inquisition, he may apply to this court for relief." The Chancellor was dealing with the case of one who had acted as attorney in fact for the lunatic, and who alleged that by reason of the finding of the jury he was greatly endangered in the matters transacted by him as attorney. The Chancellor considered that the attorney's petition should be dismissed, but remarked, at page 23: "Taking all cases together, it is fairly to be inferred, as I think, that applications on the part of third persons, in matters of this nature, are not to be encouraged, yet that they will be listened to and granted when actual bona fide interests and rights are endangered."

The petitioner for this traverse is certainly a stranger to the proceedings; but, as the son of the subject of the inquisition he has an actual bona fide interest, filial and sentimental, rather than substantial, though it may be, to have the question of his father's lunacy tried out. It would be an anomaly, indeed, if children could not intervene to protect parents declared to be lunatics in these proceedings on inquisition; but, assuming the verity of the allegations in the petition under consideration, still the subject of the inquest is not entitled to traverse the inquisition. That remedy is available only on an allegation that lunacy has been untruly found. Shelford, 113, 114. Where a party is aggrieved by the finding of an inquisition of lunacy. the proper procedure is by a direct appeal to the court by means of a traverse. Ency. Pl. & Pr. vol. 10, p. 1202. As the petition does not deny that lunacy was properly found. but, on the contrary, admits the insanity of the subject at the time of office found by the assertion that the lunacy was acute and that the subject has now recovered, no case for a traverse is presented.

on this application it is not shown whether inspected or his friends may sue out a writ returnable in Chancery for that purpose. Id., 119. In the Matter of Heli, a Lunatic, 3 Atk. 635, Lord Chancellor Hardwicke had before him the question whether a person could traverse an inquisition of lunacy without bringing the lunatic in propria persona before the court, and he observed that as to an inquisition de idiota the subject may in person or by his friends come into Chancery and show the matter and pray that he may be examined before the Chancellor, and, if

Ellis (N. J. Ch.) 62 Atl. 702. If, as alleged to operate his mill, and has recently raised in the petition, the subject has now recovered from his lunacy, he is entitled to be liberated under the statute. Our act concerning the commitment of insane persons to hospitals provides that such persons shall be confined therein until restored to reason or removed or discharged according to law. P. L. 1898. p. 220, bottom of page 221, amended P. L. 1906, pp. 679, 681.

If Mr. Hannah has been restored to reason, and the authorities of the institution in which he is confined refuse to discharge him, he may be enlarged on habeas corpus, and the proceedings may be had before the judge of a common-law court, or this court. P. L. 1898, p. 231; In re Lee (N. J. Ch.) 55 Atl. 107.

Unless the petitioner chooses to pursue the remedy by habeas corpus, an application to supersede the inquisition upon the ground of the restoration to sanity of the subject of the inquest will be entertained.

The application for a traverse must be denied.

(72 N. J. E. 297)

DEFIANCE FRUIT CO. v. FOX. (Court of Chancery of New Jersey. Nov. 22, 1906.)

1. WATERS AND WATER COURSES (§ 177*)—FLOWAGE—INJUNCTION.

The bill averred that defendant maintained a milldam, which caused backwater to over-flow complainant's cranberry bogs. The answer The answer denied that the dam occasioned the overflow of complainant's land, and also set up a prescriptive right to maintain the dam as it was. Held, that the Court of Chancery is without jurisdiction to try these issues.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 260; Dec. Dig. § 177.*]

2. RETENTION OF BILL.

The bill is retained to enable complainant to establish its right at law because the answer failed to deny the jurisdiction of the court, and the bill sought mandatory relief which could be appropriately granted after complainant's right at law should be established.

(Syllabus by the Court.)

Bill by the Defiance Fruit Company against Thomas C. Fox. Hearing continued.

The bill in this cause is filed to procure an injunction to restrain defendant from backing water, by means of a dam, upon complainant's lands, and to compel defendant to remove the dam. The bill alleges: That complainant is the owner of land on either side of an ancient water course called "Scotland branch"; that complainant's land, adjacent to the water course, is in use as a cultivated cranberry bog, which requires the use of the stream in its natural condition for drainage; that defendant has for a great many years maintained a dam across the water course at a point below complainant's land for the the level of the pond formed by the same so that the water backs up and overflows complainant's land and cranberry bogs, causing complainant irreparable injury; and that defendant threatens to raise the water even higher.

The answer denies any knowledge as to complainant's ownership of the land in question, and denies that defendant has at any time raised the level of the water so that it backs up to complainant's land or injures it or the cranberry bogs, and denies any threats or intention upon defendant's part to raise the water higher, and avers that any excess of water on complainant's land is caused by improper discharge of water from a milldam on the same stream above complainant's land, and also by clogging of the channel of the stream at and below complainant's lands. The answer further avers that the dam of defendant and the waters held by the dam have been maintained by defendant as they now are for more than 20 years continuously next preceding the filing of the bill.

George J. Bergen and John W. Westcott. for complainant. Henry S. Alvord, for defendant.

LEAMING, V. C. (after stating the facts as above). This cause coming on for final hearing, I have, on my own motion, declined to proceed further until complainant shall have established his rights at law.

It is, in this state, well settled that this court will not adjudicate controversies of this class unless defendant's misconduct shall be admitted or shall have been established at law against him. The present case is essentially similar to Outcalt v. George W. Helme Co., 42 N. J. Eq. 665, 4 Atl. 669, 9 Atl. 683. The complainant's right to relief is not admitted, and cannot be made clear until the defendant's averments are overthrown, and there is in this case no other circumstance to warrant the interposition of a court of equity before the right is established at law. Complainant relies upon Carlisle v. Cooper, 21 N. J. Eq. 576. In that case the legal right of complainant was admitted, and the object of the bill was to ascertain the extent of the right and to protect it in a manner not attainable by legal procedure.

There is in the precent case, however, one element of which this court may take cog-I refer to the allegation of the nizance. bill that defendant has threatened to raise the water higher than it now is or has been. The answer denies such threat, and disclaims such purpose, and makes no claim of right to raise the water higher than its present level. The issues as presented may be said to admit the right of complainant to protection against a higher level of the water. If therepurpose of obtaining water power with which | fore complainant desires to proceed to estab-

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the date of the filing of the bill intended to raise the level of the water to the injury of complainant, the cause may proceed to hearing at once on that issue alone; otherwise the cause will be held in its present condition until complainant shall have had a reasonable time to establish its right at law.

I shall hold the cause and not dismiss the bill for the reason that the answer in no way denies the jurisdiction of this court as to the matters in which I hold this court is without jurisdiction, and also because one object of the bill is to secure affirmative relief to remove the obstruction, a relief which can be appropriately adjusted in this cause should complainant succeed in the establishment of its right at law. See Todd v. Staats, 60 N. J. Eq. 507, 46 Atl. 645.

(76 N. J. E. 57)

MAYOR, ETC., OF BOROUGH OF SOUTH AMBOY et al. v. PENNSYLVANIA R. CO. et al.

(Court of Chancery of New Jersey. June 1, 1909.)

1. RAILBOADS (§ 95*)—CROSSINGS—IMPROVE-MENT.

Where a railroad company was required to maintain a proper passageway under its tracks at a crossing, a bill to compel the railroad company to enlarge such passage to provide for increased traffic, etc., must be regarded as a bill not to abate a nuisance in a public highway or for the determination of easements, but as only invoking the chancery jurisdiction conferred by General Railroad Act (P. L. 1903, p. 660) \$ 29, providing that, when a railroad shall not properly construct and maintain crossings of highways by its railroad tracks as required by law the township or municipality may proceed law, the township or municipality may proceed in equity to compel specific performance of the duties imposed by law on the company in that respect, etc.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 281; Dec. Dig. § 95.*]

2. HIGHWAYS (§ 14*)-WIDTH-USER.

The extent of user ordinarily determines the minimum width of a highway; the extent of user not being limited, however, to the track formed by the wheels of vehicles.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 21; Dec. Dig. § 14.*]

8. HIGHWAYS (\$ 109*)-EXTENT OF USE.

Where the public acquires a right of travel over the land of another, the public easement includes the use of such adjacent lands as may be needed for ordinary repairs and improve-

[Ed. Note.—For other cases, see] Cent. Dig. § 336; Dec. Dig. § 109.*] Highways,

4. RAILROADS (§ 94*)-"CROSSING."

In order that a railroad "crossing" shall exist, the railroad and the highway must intersect each other at some degree, or at least one must be superimposed on the other.

[Ed. Note.—For other cases, secent. Dig. § 266; Dec. Dig. § 94.* see Railroads,

For other definitions, see Words and Phrases, vol. 2, pp. 1763, 1764; vol. 8, p. 7624.]

lish the fact that defendant threatened and at | 5. Railboads (§ 95*)—Crossings — Extent — PASSAGE.

The charter of a railroad company (P. L. 1829-30, p. 88, § 15) required it to construct and keep in repair good and sufficient bridges or passages over the railroad or roads where any or passages over the railroad or roads where any public or other road shall cross the same, so that the passage of carriages, horses, and cattle on the roads shall not be prevented thereby, etc. General Railroad Act (P. L. 1903, p. 659), \$ 26, makes it the duty of every railroad company to construct and keep in repair sufficient passages over, under, and across the road's right of way so that public travel shall not be impeded, etc., provided that section shall not enlarge the duty imposed by charter on any railroad incorporated prior to 1873. *Held*, that section 26 did not enlarge the charter duties of the railroad company under which it was not required to construct an underneath crossing to the full width of the street, but was only required to construct a "passage" sufficiently large for the accom-modation of the existing needs of the public.

[Ed. Note.—For other cases, see Cent. Dig. § 276; Dec. Dig. § 95.*] see Railroads,

RAILBOADS (\$ 93*)-HIGHWAY CROSSINGS-

POLICE POWER.

The Legislature, in the exercise of police power, may increase the burdens on railway companies in respect to highway crossings.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 261; Dec. Dig. § 93.*]

7. RAILEOADS (\$ 95*)—CROSSINGS—ENLARGE-

Where a railroad was not constructed prior to April 21, 1873, and its charter required it to construct and keep in repair sufficient bridges or passages over its railroad where any public or other road shall cross the same, the Chancery Court, in a statutory action authorized by Railroad Law (P. L. 1903, p. 600) \$ 29, had power to compel the company to construct a good and sufficient passage under its road for the accommodation of travel on a street with which the road had provided an inadequate undercrossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 281; Dec. Dig. § 95.*]

8. RAILROADS (§ 95*)—CROSSINGS—"OVER."

Where a railroad's charter required it to construct good and sufficient bridges or passages "over" its railroad or roads where any public highway shall cross the same, the word "over" was used in its ordinary sense to mean "above."

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \$ 279; Dec. Dig. \$ 95.*

For other definitions, see Words and Phrases, vol. 6, pp. 5123, 5124.]

9. Railboads (§ 95*)—Undercrossing—Main-TENANCE.

Where a railroad company was required to construct and maintain an underpassage where a street crossed its right of way for a distance of 265 feet covered by 17 tracks, the railroad company was required to build and maintain a passage 33 feet wide and light the same either by suitable openings or artificial light, to pave the same to conform to the street, and to keep it properly drained.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 276; Dec. Dig. § 95.*]

10. Railroads (§ 95*) — Crossings — Construction—Notice.

Notice to a railroad company to construct and repair an underpassage or crossing is not a condition to the maintenance of a suit to compel specific performance of the railroad's duty to do so under Railroad Law (P. L. 1903, p. 660) § 29, authorizing the township or municipality by suit in equity to compel specific performance of

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the duties imposed on the railroad company with reference thereto by law.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 281; Dec. Dig. § 95.*]

11. RAILBOADS (§ 95°) — CROSSINGS — CON-STRUCTION—PARTIES.

Under Railroad Law (P. L. 1903, p. 660) \$
29, authorizing the township or municipality to proceed in equity to compel specific performance of a railroad company's duty to construct and maintain proper crossings, the county was neither an improper nor unnecessary party complainant to a suit by the common council of a borough for such relief.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 281; Dec. Dig. § 95.*]

Suit by the Mayor and Common Council of the Borough of South Amboy and the Board of Chosen Freeholders of the County of Middlesex against the Pennsylvania Railroad Company and the United New Jersey Railroad & Canal Company. Decree for complainants.

Frederick M. P. Pearse and George S. Silzer, for complainants. Alan H. Strong, for defendants.

STEVENSON, V. C. The object of the bill is to effect a change of conditions of inconvenience and danger which are alleged to exist in the borough of South Amboy at that part of the public highway known as "Ridge-field avenue," where the railroad of the defendants crosses the same. The bill purports to exhibit the statutory equitable action to compel the specific performance of the duties imposed by law upon the defendants with respect to this crossing provided by section 29 of the general railroad act of 1903 (Laws 1903, p. 660).

The important physical facts which constitute the grievances which the complainants assert on behalf of the traveling public are as follows: The defendant the Pennsylvania Railroad Company, which is operating the railroad constructed under the charter of the Camden & Amboy Company, and its predecessors in title and possession, have gradually multiplied parallel tracks extending across Ridgefield avenue until there are 17 in number, and the section of the highway covered over by these tracks has come to measure 265 feet. The Camden & Amboy charter was passed in the year 1830 (Laws 1829-30, p. 83), so that the first track must have been constructed at some time after that date. For a period following this first construction, the proofs show that a passageway over the railroad was made and maintained by the operating company, which passageway was sufficiently wide to enable two vehicles going in opposite directions to pass each other at every point. At a later period -whether after raising the grade of the track of the railway company or not does not directly appear—the highway was passed through the embankment of the company and under the rails of its track.

company thereupon, at first perhaps by means of timber, and soon afterwards at any rate by means of stone walls or abutments, carried its rails over the highway. The passageway thus provided for the public seems to have been reasonably sufficient for all the purposes of travel during that early period. I do not think that it is necessary to go back of this condition, which was established and apparently accepted by the traveling public about 50 years ago or more. The stone walls were 14 feet apart and perhaps 25 or 80 feet in length. They encroached upon the highway to an extent hereinafter considered. The space between the rails was not planked over. There is no indication that the passageway was inconvenient from lack of light or adequate drainage. The character of the adjacent lands and the infrequent use of the highway probably made the passageway amply sufficient for all the purposes of travel in that day.

One ancient witness testified that vehicles did not undertake to pass each other between these walls, but that the driver of a vehicle could readily look ahead through the passageway, and if two vehicles happened to meet at the passageway, which no doubt was an infrequent occurrence, one would wait for the other. From the condition of reasonable convenience and safety above described, a steady change in the direction of inconvenience and danger has been caused by the increase of travel on the road and by the operations of the railway company in widening its embankment and adding line after line of parallel tracks. The stone walls have been extended in order to sustain these lines of rails. When the walls had attained a considerable distance, it appears to have become evident to the operators of the railway that some provision must be made for permitting vehicles to pass each other in what had become a tunnel. The railway company had not only extended the walls, but had laid planking between the rails so that the highway passed through a rectangular tube of which the bottom apparently was the roadbed, the sides were the parallel stone walls, and the top consisted of the girders upon which the rails were laid and the planking which closed the intervening space. A turnout therefore was constructed with a row of pillars or supports in the center; the stone walls being made to recede from each other in a curved line. The stone walls, however, at the end of the turnout were brought together to about the same distance from each other as that which separated them at the start, viz., about 14 feet. When the last tracks at the extreme southeasterly side of the right of way of the railroad company were laid, it seemed to be recognized by the operators of the railroad that an indefinite extension of this huge dark pipe through The railway which the highway ran would not be advis-

eFor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

able, and, accordingly, the side walls were made to recede, forming a flare. Along one side of the entire passageway runs a sidewalk 2 feet and 5 inches wide, leaving only 11 feet and 7 inches for the roadway for vehicles.

became charged with all the duties of the Camden & Amboy Company under its charter, and that by virtue of the lease of the United Railroad & Canal Company to the other defendant, the Pennsylvania Railroad vehicles.

The grade of the highway when the railroad was constructed across it ascended toward the east from a point at or near the location of the first track or tracks. As the tracks were multiplied, and the passageway or tunnel under them was extended toward the east, the grade of the highway was changed presumably because of the necessity for maintaining all the railroad tracks on substantially one plane or grade. The result was to lower the grade of the highway at least for a considerable distance under some and probably many of the more easterly tracks, and to make the assent up a hill from the easterly end of the crossing more steep. There is direct testimony to this ef-When the railroad track or tracks fect. were first carried over the highway, it may be that the natural ancient grade of the highway was not in any way changed. It may also be that the girders or other supports upon which the rails were laid were high enough above the grade of the highway to afford sufficient headway for all sorts of vehicles which were customarily used in that locality. However this may be, the evidence, I think, establishes beyond all question that under the conditions which now exist, and which may have been caused by the construction of these parallel railway tracks in recent times, the highway now has insufficient headway for the convenient passage of the higher kinds of vehicles. It is unnecessary more particularly to describe the conditions at this crossing of the defendant's railway over Ridgefield avenue as they exist to-day. These conditions create a constant inconvenience and danger to the public, as has been amply proved. The passageway is so dark that the borough of South Amboy has assumed the burden of lighting the same with artificial lights. In times of heavy rains large quantities of water and sand are carried down into one of the open ends of the tunnel and render for a time the roadway impassable; there being apparently no provision for lateral drainage through the walls. After the water has sunk into the soil, the sand remains obstructing the highway, and the public authorities are put to expense in removing the same.

The theory of the bill is that the duty of changing these inconvenient and dangerous conditions is imposed by law upon the defendant railway corporation, and that the Court of Chancery in the exercise of the jurisdiction created by section 29 of the general railroad act can compel the specific performance of this duty. It is admitted that, by virtue of the consolidation which created the defendant the United New Jersey Railroad & Canal Company, that company

Camden & Amboy Company under its charter, and that by virtue of the lease of the United Railroad & Canal Company to the other defendant, the Pennsylvania Railroad Company, which lease was ratified by the Legislature of New Jersey (Laws 1873, p. 1298), the duties imposed on the United New Jersey Railroad & Canal Company with reference to the crossing of highways were charged upon the Pennsylvania Railroad Company. The lease which was thus ratified has not been put in evidence, but neither the answer nor the proofs show that the duties of the lessor company with respect to the crossing of Ridgefield avenue were transferred to the lessee company so as to relieve the lessor company therefrom. Under the pleadings and proofs, the two defendants must be regarded as charged with all the duties with respect to this crossing which would be imposed upon the Camden & Amboy Company if that corporation were now operating this road under its charter.

The bill in this case in my opinion must be regarded as invoking only the jurisdiction conferred upon the Court of Chancery by section 29 of the general railroad act. It is not a bill to have conflicting easements regulated, or to have a nuisance in a public highway abated by an injunction. As the bill is framed, and as the case has been tried, the only proper decree in favor of the complainant must be a decree adjudging that the defendants have "not properly constructed and maintained" the "crossing" above described, and directing the "specific performance of the duties imposed by law" upon the defendants "with respect to the construction, maintenance, and repair" of said "crossing." Incidentally what is now a nuisance may be removed, and the use of land subjected to conflicting easements may be in a measure regulated. A bill to abate a nuisance might accomplish its purpose and yet leave the most important duties of the defendants with respect to the highway crossing entirely undefined and unenforced. A bill to regulate conflicting easements inight practically create new duties and exhibit a radically different cause of action from that which is vested in a township or municipality by section 29 of the general railroad act. I think therefore that we may disregard the plausible arguments of counsel for the complainants based upon the assumption that in this case the Court of Chancery may exercise its jurisdiction relating to nuisances or its jurisdiction to regulate under certain conditions the use of conflicting easements. The bill of complaint most amply exhibits the statutory action created by the above-cited statute, and that statutory action affords a complete remedy for all the grievances set forth in the bill.

that, by virtue of the consolidation which created the defendant the United New Jersey lates to the nature and legal status of this Railroad & Canai Company, that company public highway known as "Ridgefield Ave-

nue." construction of the first track of the Camden & Amboy Railroad Company this highway existed leading from South Amboy in a westerly direction through a sparsely settled territory, and terminating at a certain dock or docks on the Raritan river. The road now leads to a bridge which has recently been erected across the river and forms a direct line of communication between Perth Amboy and South Amboy. Many buildings have been erected on the westerly side of the railway where formerly there were open fields and uninclosed lands. The volume of travel over Ridgefield avenue in consequence of these changes and improvements has very greatly increased. An effort was made to show that a road was laid out in 1866 which coincided with Ridgefield avenue at this railway crossing; but I think the proof entirely failed. We have to deal with the highway as it existed by user or presumed dedication when the railroad tracks were constructed over it.

A large amount of testimony has been taken with a view to establishing the width of Ridgefield avenue. Counsel for complainants argue that the law establishes a presumption in the case of these ancient roads that they were laid out by virtue of some former statute, and therefore must be deemed to be of the statutory width. The case cited to sustain this view is Ward v. Folly, 5 N. J. Law, 566, decided by the Supreme Court through Mr. Justice Kirkpatrick in This case apparently has only been cited once, and then in a dissenting opinion filed by Mr. Justice Valentine in Vantilburgh v. Shann, 24 N. J. Law, 740, 748 (1853). The statutes regulating the laying out of roads are then cited under which Ridgefield avenue might have been anciently laid out, and the insistment is made that Ridgefield avenue must be deemed to be a laid road "not more than four nor less than two rods wide." My impression is that the peculiar doctrine laid down in Ward v. Folly, which would seem to radically alter our law in regard to the origin of highways in user for more than 20 years, has been ignored, if not practically overruled, in some reported cases, and has been utterly disregarded in large numbers of civil and criminal cases tried at the circuits. Counsel for the defendants points out that Chief Justice Kirkpatrick based his decision upon the ground that the road in question before him was traced back to a time prior to the year 1760, when no road books were required by law to be kept in the county clerk's offices. It is argued that if the doctrine of Ward v. Folly is still sound law in New Jersey, it should be strictly confined to cases where the highway is shown to have been in existence at a time when no record was required by law to be kept of the proceedings by which it was laid. There is force I think in this argument. Certainly in this

The proofs show that prior to the been in existence until many years after 1760. I am not obliged under the view that I take of this present case to ascertain and establish anything more than the minimum width of Ridgefield avenue at this place of crossing. It is safer, it seems to me, to apply to the ascertainment of the minimum width of Ridgefield avenue the rule which has generally been recognized in England and throughout the United States according to which the extent of the user determines the width. 22 Am. & Eng. Ency. (2d Ed.) p. 1224; Scheimer v. Price, 65 Mich. 638, 32 N. W. 873; Talmadge v. Huntting, 29 N. Y. 447; People v. Judges, etc., 24 Wend. (N. Y.) 491; Morse v. Ranno, 32 Vt. 600, 607; Savings Bank v. Stockwell, 84 Mich. 586, 48 N. W. 174, 22 Am. St. Rep. 708; Harlow v. Humiston, 6 Cow. (N. Y.) 189; Marchand v. Town of Maple Grove, 48 Minn. 271, 51 N. W. 606; Davis v. City of Clinton, 58 Iowa, 389, 10 N. W. 768.

The authorities agree that fences and fence lines often determine the width of a highway; but there is no proof in this case of the existence of fences defining the limits of Ridgefield avenue at this crossing place when the railroad was constructed over 60 years ago. The great weight of authority is opposed to the notion that the beaten track formed by the wheels of vehicles indicates the extent of the user in the case of these old country roads often called "drift roads," which run through rough and unfenced lands. Vehicles pass over these roads sometimes at very long intervals. They seldom meet; but, when they do meet, they may meet anywhere. The use of the road necessarily involves the passing of vehicles by each other, and the necessity for such passage may occur at any point. See Hannum v. Inhabitants of Belchertown, 19 Pick. (Mass.) 311, 312. When the public acquire such a right of travel, and the landowners submit to the enjoyment of such right, the easement has been held to include the use of "such adjacent lands as may be needed for ordinary repairs and improvements." Marchand v. Town of Maple Grove, 48 Minn. 271, 51 N. W. 606 (1892). The owners of lands who permit a highway to be established two or three miles or more in length must be presumed to know that at any time a change of conditions may occur, such as actually happened in this case, which will increase the use of the highway and multiply the number of vehicles passing hourly or daily over the same a hundredfold or more. The requirements for keeping the roadbed of Ridgefield avenue in proper condition for use to-day by the carriages and heavy automobiles and large furniture vans which now travel over it may be very different from the requirements of travel over the same highway 75 years ago, when the passage of two or three wagons per day may have measured the average use. Macadamizing the surface of the road may involve building it up and draining it by means of side ditches. The case Ridgefield avenue was not shown to have use of sufficient land on the side of the track

for the purposes indicated, it seem to me, is; plainly within the public easement acquired by dedication or user.

Without undertaking to discuss the mass of testimony given by ancient witnesses and presented by documents, I have reached the conclusion that Ridgefield avenue at this place of crossing must be deemed to have been in existence when the railroad was built with a width of at least two rods. It happens by accident that a consideration of the space necessary for two large loaded vehicles to conveniently pass each other with sufficient space on each side of the roadbed to secure its maintenance in good condition has led me to just about this figure, 33 feet. The finding therefore has the very great advantage of being in accordance with the argument of counsel for the complainant based upon the doctrine of Ward v. Folly, and also of being sustained by some of the authorities which support a presumption that a road whose origin is in user or dedication has the "usual width" of the roads in the same locality. Hull v. Richmond, 2 Woodb. & M. 337, Fed. Cas. No. 6.861; Furniss v. Furniss, 29 Pa. 15. It may be that a close examination of the testimony would give support to the theory that Ridgefield avenue was established by user of a greater width than 33 feet on the easterly side of the original railroad track where the parallel lines of the track were constructed after the year 1885. This matter, however, may be left precisely as I have left the question of the applicability of the rule laid down in Ward v. Folly. The whole of the highway or the easterly portion of it may in fact be found to have a width or 49% feet or of 50 feet, both of which dimensions have been referred to in the argument without affecting the character of the decree to be made in this case for a reason which will hereafter appear.

2. The next question involves the ascertainment of the duties which the defendants owe to the public, "with respect to the construction, maintenance, and repair" of this crossing.

Counsel for the respective parties in this case agree that the doctrine laid down by Chancellor McGill, I think by way of dictum when the case is carefully analyzed, in the case of Raritan Township v. Port Reading Co., 49 N. J. Eq. 11, 23 Atl. 127, applies to this case, and that the result is that, when the width of the highway has been ascertained, the defendants must span this entire width so as to leave the same entirely unobstructed. The view so expressed by Chancellor McGill cannot, I think, be deemed to have received support in the reference to it made by Mr. Chief Justice Gummere in the case of Borough of Metuchen v. Pennsylvania R. R. Co. (N. J.) 69 Atl. 465. It certainly is a somewhat strange result of our law if, in case of the crossing at Metuchen, the Pennsylvania Railroad Company, in case they had

would have been obliged to span the entire highway, which was 66 feet wide; whereas, by keeping their rails a little lower and lowering the grade of the highway a span of 45 feet was deemed adequate. If a railway crosses a highway in a deep cut 50 feet below the original level of the ground where the highway runs, the construction and maintenance of a bridge across the cut only half the width of the highway may be deemed a full performance of the statutory duty imposed upon the railway company. A railway which runs through a mountain in a tunnel does not "cross" the public roads which lie on the surface of the mountain a quarter of a mile perhaps above the railway tracks. In order to a case of "crossing," it seems to me, the two things, the highway and the railroad, must intersect each other in some degree, or at least one must be superimposed upon the other. In the present case the overlapping or intersection of the highway and the railroad is established beyond all doubt. The original public easement of travel over the surface of the road, as the road lay even after the first two railroad tracks had been constructed across it, has been interfered with and to a large extent destroyed by the removal of earth and the consequent lowering of the grade of the road as track after track was constructed above and across it. If there was sufficient headway for the purposes of travel 50 or 75 years ago, the proofs show that such is not the case to-day; that a large and high vehicle is liable to find a passage through the tunnel impossible. The natural drainage of the highway has been cut off by the extension of these apparently solid stone walls, while changes in the formation of the ground at and near the easterly end of the tunnel necessarily caused large quantities of water and sand at times to pass into the tunnel and obstruct the same. suitable pavement for the roadbed which is reasonably necessary for the purposes of modern travel has not been supplied. Automobiles and other heavy vehicles are left to struggle their way through the loose soil of the natural roadbed precisely as a farm wagon must have done several generations ago. The light necessary to the convenient use of the highway has been cut off by this extraordinary extension of walls and the tracks, girders, and planking extending from one wall to the other.

We are not therefore dealing with a case the facts of which bring it within the operation of the rule laid down by Chancellor Mc-Gill in the Port Reading Case. We have in hand a case which in my judgment in every essential feature is precisely the same as the Metuchen Case. The defendants have not built and do not maintain their railroad over Ridgefield avenue "so high above the level thereof as not to interfere with the public travel thereon." 69 Atl. 466. They are maintaining their railroad so as to make Ridgebuilt their embankment a few feet higher, field avenue cross the same—so as to make

railroad and road "cross" each other. They have thus taken a large part of what the public enjoyed in the exercise of the public easement of travel over Ridgefield avenue, and hence the statutory duty rests upon them to provide a good and sufficient "passage" as a substitute for what they have taken. The area occupied by the railroad, i. e., the structure, intersects the area which is subjected to the public easement of travel over Ridgefield avenue. What the defendants are obliged to provide is not a clear span over the whole of this highway which they are crossing, but the substitute provided by law. In other words, Ridgefield avenue does not exist under these railway tracks. What exists under the tracks is a "passage" which the defendants have undertaken to supply in performance of their statutory duty, and this passage is not, in respect of the characteristics above indicated, such a good and sufficient passage as the defendants are by law required to construct and maintain.

Counsel for the respective parties agree that the only statute which prescribes the duties of the defendants which this suit is brought to specifically enforce is section 15 of the charter of the Camden & Amboy Railway Company, which is as follows: "That it shall be the duty of the said company to construct and keep in repair good and sufficient bridges or passages over the said railroad or roads where any public or other road shall cross the same; so that the passage of carriages, horses and cattle on said roads shall not be prevented thereby, and also where the said road shall intersect the farm or lands of any individual to provide and keep in repair suitable wagonways so that the owners and others may pass over the same." Laws 1829-30, p. 88, \$ 15. In my opinion section 26 of the general railroad act of 1903 also is applicable to this crossing and imposes duties with respect to it upon the defendants. This section reads as follows: "It shall be the duty, of every railroad company owning, leasing, or controlling any right of way for a railroad within this state, to construct and keep in repair good and sufficient bridges and passages over, under and across the railroad or right of way where any public or other road. street or avenue now or hereafter laid, shall cross the same, so that public travel on the said road shall not be impeded thereby, and said bridges and passages shall be of such width and character as shall be suitable to the locality in which the same are situated; and also where said railroad shall intersect any farm or land of any individual, to provide and keep in repair suitable and convenient wagonways over, under and across said railroad, and to construct and maintain suitable and proper cattle guards at all road crossings; provided, that this section shall not enlarge the duty imposed by its charter

ed before the second day of April, eighteen hundred and seventy-three."

It is settled law, I think, that it is competent for the Legislature in the exercise of the police power of the state to increase the burdens upon railway companies in respect to highway crossings. Morris & E., R. R. Co. v. Orange, 68 N. J. Law, 252, 43 Atl. 730, 47 Atl. 363; Cooley's Const. Lim. (6th Ed.) p. 714, and cases cited; 22 Am. & Eng. Ency. (2d Ed.) 933, 934; 6 Am. & Eng. Ency. (2d Ed.) 364. The law, however, contains in the proviso a limitation which counsel for the defendants claims makes the whole section inapplicable to this particular crossing. cannot adopt this view. In the first place, section 26 does not in my opinion in the slightest degree "enlarge" the duties imposed upon the defendants by the charter of the Camden & Amboy Railroad Company. The mandate that the bridge or passage "shall be of such width and character as shall be suitable to the locality in which the same are situated" seems to be an accurate definition of the duty in respect of bridges and passages prescribed by section 15 of the Camden & Amboy charter. If such were not the case, however, the result would not be to render the whole section inapplicable to this case, but merely to save the defendants from being compelled to construct and keep in repair a more expensive passage under the new law than the one which they would be obliged to construct and keep in repair under the old law. It certainly is no enlargement of the duties of the defendants to give them an option which they have under this new law to provide a good and sufficient passage for Ridgefield avenue either under, over, or across their railroad; whereas, under the Camden & Amboy charter, as counsel for the defendants most strenuously insists, the duty of the defendants is to maintain a suitable passage for Ridgefield avenue over this enormous barrier which the defendants have constructed and occupy with their tracks. Without undertaking to express any final opinion upon the matter, it seems to be apparent that the performance of the duty of the defendants under section 15 of the Camden & Amboy charter might require them to erect and maintain a lofty viaduct 30 or 40 feet above the level of the ground on either side of the defendants' embankment and extending with suitable approaches for a distance of perhaps 500 or 600 feet so as to span the entire 17 tracks with the embankment upon which they are laid. The indications from the present volume of travel along Ridgefield avenue and the character of the defendants' use of its 17 tracks are that a grade crossing would be inadequate for reasons not only of convenience, but safety.

able and proper cattle guards at all road crossings; provided, that this section shall provise of section 26 very strictly, which not enlarge the duty imposed by its charter upon any railroad company incorporated by acter of this legislation, it seems clear that special act and whose railroad was construct—the railroad in its entirety was not "con-

structed before the 2nd day of April, 1873." | On the contrary, by far the greater part of this obstruction to travel-this "crossing" of Ridgefield avenue—was effected by the defendants when they multiplied their tracks for the purposes of their coal dumps about the year 1885 and thereafter. It is evident that it is impracticable to treat differently the portion of this immense barrier which was constructed prior to 1873 from the portion which was built after that date. There cannot be a passage under one portion and over the other. Surely it cannot be seriously argued that section 26 enlarges the duty imposed upon the defendants with respect to the maintenance of a suitable passage at the Ridgefield avenue crossing when it gives them an option to construct such passage under their railroad if they should deem it more convenient and less expensive to provide such passage, rather than the one over their railroad prescribed by their charter. Now, the defendants having, as their counsel argues, without warrant of law, provided a passage under their railroad in lieu of the passage over their railroad which their charter prescribed, have gone on for years maintaining this passage under their railroad after it had been legalized-after the new statute had given them the option to construct and maintain this very thing in discharge of their duty. It seems to me that the true conclusion is that this court has full power in the statutory action prescribed by section 29 to compel the defendants to construct a good and sufficient passage under their railroad for the accommodation of travel on Ridgefield avenue for reasons above indicated, viz.: (1) Because the railroad which makes the obstruction was not constructed before April 2, 1873; and (2) because the passage which the decree in this case will prescribe does not "enlarge" the duty imposed upon the defendants by section 15 of the Camden & Amboy charter. If there is any possible error in the view above set forth, the fact still remains that the defendants, having full power to elect which of two kinds of passages they would construct and keep in repair at the Ridgefield avenue crossing, have for years elected to maintain in the discharge of that duty a passage under their tracks. could not elect to maintain any passage under, over, or across their railroad which was not "good and sufficient" within the meaning of their charter. The decree in this case will merely carry out what must be presumed to have been the election of the defendants and compel the defendants to perform specifically the very duty which they have elected to assume and discharge.

It must, I think, be conceded that counsel for the defendants is correct in his insistment that section 15 of the Camden & Amboy charter can be satisfied only by the maintenance of a passage for Ridgefield avenue over the railroad tracks so as to have

way track or at some convenient distance above it. The dictionaries, the decided cases, and the verbiage of all the railroad charters and railroad laws which have been passed in New Jersey sustain this conclusion. The word "over," when used to describe or define the relation in space of one object to another, seems to have a definite meaning. New Eng. Dic. vol. 7, p. 285; Commonwealth v. Warwick, 185 Pa. 623, 40 Atl. 93; Central Vt. Co. v. Royalton, 58 Vt. 234, 4 Atl. 868; Ill. Cen. R. R. Co. v. Chicago, 141 Ill. 586, 589, 599, 30 N. E. 1044, 17 L. R. A. 530; Newburyport Turn. Co. v. Eastern R. R. Co., 23 Pick. (Mass.) 326, 328; Boston & Me. R. R. Co. v. City of Lawrence, 2 Allen (Mass.) 107, 109. The Camden & Amboy charter was the first railroad charter passed in New Jersey, and the only models in this state which the draftsmen of the act had before them were the charters of canal companies, where provision was made for bridges, and where no underground passages for highways were taken into consideration for manifest reasons. The charters of the West Jersey Railroad & Transportation Company passed the next year after the Camden & Amboy charter (Laws 1830-31, p. 100, § 14) and of the Delaware & Jobstown Rail or Macadamized Road Company passed in 1833 (Laws 1832-33, p. 80, \$ 10), and the supplement to the Camden & Amboy charter passed in 1835 (Laws 1834-35, p. 58, § 2), seem to exhibit the only other instances in which the word "over" alone is used in the section which deals with passages and bridges for highways. The attention of railroad men must have been very soon called to the fact that oftentimes it was more convenient for the railroad company and for the traveling public to have the passage for the highway constructed through an embankment and underneath the railway tracks. Accordingly, while section 15 of the Camden & Amboy charter was copied over and over again, instead of the word "over" we find the words "under and over," and "under or over," and in the general railroad act above quoted the phraseology is "over, under and across." the ingenious argument of counsel for the defendants should be accepted, and the bill of complaint in this case should be dismissed, it would seem that a very extraordinary and disastrous consequence to the defendants might thereupon follow. They might be obliged to span the entire highway for the full width at every point which it might be found to have at such a height as to leave the entire easement of travel absolutely unaffected, and thus eliminate the "crossing" or to erect and maintain at great expense the enormous viaduct above referred to.

3. We now reach the question what, at the present day, with the present requirements of public travel along Ridgia eld avenue in view, must be the characteristics of a passage under the defendant's railroad the roadbed on the same grade as the rail- which can be deemed "good and sufficient"

so that public travel shall not be prevented | from extraordinary artificial conditions thus or impeded. It is hardly necessary to point out that no distinction for the purposes of this case can be drawn between the preventing and impeding of travel. This lofty bank on which these 17 tracks are constructed absolutely shuts off all travel until a passage of some kind is supplied. It is also unnecessary to speculate as to whether a passage could be deemed good and sufficient which would carry this tide of travel over these 17 tracks upon the same grade. may be presumed that the defendants will not urge that the decree should compel the substitution of the sort of a viaduct above described for any passage under the tracks which the decree could prescribe.

The following are the characteristics of the passage which the decree will compel the defendants to "construct and keep in repair":

(1) The walls must be separated so as to leave 33 feet in the clear. No testimony has been taken and no argument has been addressed to the court in regard to the location of the middle line of Ridgefield avenue. As the evidence stands, it will be presumed that the middle line is the middle line between the two walls. If such is not the case, or if for any reasons which have not been discussed the defendants may properly leave one wall standing and remove the other the required distance, further testimony may be taken, and the location of the passageway with reference to the center line of the highway be established before the settlement of the decree. At this point the reason for limiting the investigation of the width of Ridgefield avenue to what has been referred to as its minimum width may well be considered. The exact question before the court in this case is not how wide is Ridgefield avenue at this place of crossing? The precise question is how wide a "passage" should the defendants be obliged to provide for use in connection with Ridgefield avenue. there were grounds for questioning whether or not the defendants are spanning the entire highway so as to leave the public easement of travel unaffected, and thus avoid any "crossing" within the meaning of our statute, it would then be necessary to determine the full width of Ridgefield avenue. It seems to me, as I have already intimated, that in such a case the railroad and the highway no more cross each other than when the railroad passes through a tunuel in the solid rock half a mile below the highway. To avoid a "crossing" and intersection or overlapping of easements or rights, the entire highway, of course, must be spanned. It does not, however, follow that there is no crossing where the railroad spans the entire highway with a stone tunnel a mile long which greatly interferes with the enjoyment of the public easement of travel by cutting off the light and subjecting the

created. With such a case, however, we have nothing now to do. The point to be indicated distinctly is that, even if Ridgefield avenue was wider than 33 feet at the original place of crossing when the railroad was first built, and even if Ridgefield avenue was wider than 83 feet in 1885, in that portion where the additional tracks were then laid across it, the conclusion which I have reached is that a "passage" 33 feet wide is at present adequate as a substitute for the entire highway for use on the part of the public, whatever the width of the highway at any point may be. The Metuchen Case here is a guide, and the remarks of Chief Justice Gummere in relation to the width of the most crowded streets in New York and Philadelphia may well be referred to.

It should be borne in mind that the duty of the defendants is enlarged from month to month and year to year to meet all changes of conditions. State v. Central Railroad, 32 N. J. Law, 221. The court cannot anticipate changes which may or may not occur. The court deals with the duty of the defendants to-day. It is for the defendants to consider whether or not it would be wise and prudent while taking down this immense structure and erecting another in its place to make it somewhat wider than 33 feet, which width the court under present conditions deems adequate. The laying out of a wider highway, which may be done at any time, will raise a number of questions greatly affecting the liabilities of the defendants to the public which have not been considered in this case. The language of the Camden & Amboy charter is, "where any public or other road shall cross the same"; and the language of section 26 of the general railroad act is, "where any public or other road, street or avenue now or hereafter laid shall cross the same." Comparing this phraseology with that employed in the charter of the Morris Canal & Banking Company, some of the questions relating to the liability of the defendants in case Ridgefield avenue should be widened will at once appear. See Morris Canal Co. v. State, 24 N. J. Law, 62; Paterson & Newark Railroad Co. v. Newark, 61 N. J. Law, 80, 38 Atl. 689. There is no testimony in the cause which will enable the court to specify the height of the passage to be constructed—the headway which must be provided. Perhaps the evidence indicates that a slight increase in the headway either by the elevation of the tracks or the depression of the passage will meet all reasonable requirements. Additional testimony may be taken at the proper time in regard to this matter, if it cannot be adjusted by agreement. There probably is a customary height for such passages which will practically control this case.

(2) The defendants must provide light for their passage. They have no right to block traveling public to inconvenience and danger up the highway for 265 feet and then provide for the accommodation of the traveling public a dark tunnel. The authorities of South Amboy should be relieved from the duty which they have assumed of providing artificial light for this passage. Of course, whether the defendants provide suitable openings which sufficiently let in the daylight, or maintain artificial lights, may to some extent be left to their option. As the evidence now stands, it would seem that the only practicable way of sufficiently lighting the passage is by artificial lights of some sort. This matter, however, may be left open for further suggestions.

(3) The defendants must suitably pave this passage. The case is on all fours in this respect with the Metuchen Case, and the decision of the Court of Errors and Appeals is conclusive in regard to the matter. The defendants are required not to pave any portion of the highway, but to provide the passage which they have substituted for the highway with a suitable pavement or floor. No reason, I think, can be suggested why the passage should not be macadamized precisely as Ridgefield avenue is now macadamized.

(4) The defendants must provide for the draining of the water which flows into the passage, or by proper means prevent the water from entering the passage. Defendants must also keep the passage free from the accumulation of sand. Many of these

duties are summed up in the statement that the defendants must keep their passage in

repair.

How far the decree in this case shall exactly define and prescribe in detail the things which the defendants are required to do in the specific performance of their statutory fluty may be determined upon the settlement of the decree. It may be that a reference to a master to define accurately the improvements which the defendants are required to make will be found convenient. The defendants may desire to submit plans. If an appeal should be taken, it may be advisable to reserve the determination of details for a further hearing.

4. In addition to the matters hereinbefore considered, counsel for the defendants inter-

for the accommodation of the traveling public a dark tunnel. The authorities of South any relief to the complainants in this case, Amboy should be relieved from the duty which they have assumed of providing armoticed.

It is argued that this action under section 29 of the general railroad act cannot be maintained because no notice had been given to the defendants requiring them to construct and repair this passage or crossing. No such defense is raised in the answer, and, if it had been, it is not sustained by the correct grammatical construction of section 29, and is also excluded by the express ruling of Chancellor Magie in the case of Newark v. Eric Railroad Co., 72 N. J. Eq. 447, 68 Atl. 413.

It is also argued that the board of chosen freeholders of the county of Middlesex are misjoined as a party complainant. This objection is not raised in the answer, and, being a mere technicality not in the slightest degree affecting the administration of justice in this case, would not be entertained if it had any weight. In my opinion the joinder of the county with the borough under the circumstances of this case is not open to objection by the defendants. The county, by reason of its duties with respect to the paving of the highway, has a concurrent interest with the borough in the ascertainment and the compulsory specific performance of the defendants' duties with respect to this The decree in this case makes crossing. some things of great importance to the county authorities res adjudicata as between them, the borough, and the defendant railroad companies. While section 29 provides a new equity suit in favor of the "township or municipality" wherein the crossing in question is located, there is nothing in the statute which indicates that the suit thus to be brought is not to be governed in respect to the parties to it by the well-settled rules of equity practice and procedure.

The county of Middlesex, under these wellsettled rules, was in my judgment certainly a proper party, and perhaps even a necessary party, and plainly should be aligned as a party complainant, rather than as a party

defendant.

(76 N. J. E. 49)

BELL V. WHITE.

(Court of Chancery of New Jersey. July 19, 1909.)

1. WILLS (§ 212°) — FAMILY SETTLEMENT - CONSIDERATION.

Where the extent of a widow's claim to personal property under a will was doubtful, a family settlement, entered into by all parties in interest who are of full age without fraud, would not be set aside because of alleged inadequacy of consideration in so far as it affected one of the parties.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 519; Dec. Dig. § 212.*]

2. TRUSTS (\$ 159*)—FOREIGN TRUSTEE.

A trustee named in a will was not disqualified to act because it was a foreign corporation.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 206; Dec. Dig. § 159.5]

Suit by Charles J. Bell against Susan Bird White for construction of a will and settlement agreement. Decree for complainant.

George Gilbert and Gilbert Collins, for complainant. Robert J. Bain, for Emily White Sandford and others. Carl M. Herbert, for J. Paul White.

STEVENS, V. C. My difficulty in this case has been to understand what there is to decide. The questions propounded seem to be concluded by the agreement entered into. The case comes up for hearing on bill and The answers admit the allegations of the bill, and this is as true of the answer of J. Paul White as it is of the other answers. It appears that John H. White died on December 10, 1907, leaving a will by which he bequeathed considerable personalty to his wife and children. The will is in some respects difficult to construe; and the widow and children-all of age-for the purpose of facilitating a settlement of the estate, joined in an agreement, dated March 24, 1908, by which they undertook to divide the property on the basis of what they doubtless considered to be the real meaning of the testator. This agreement they reaffirmed with some modifications, grounded on the condition of the property and the extent to which it was liable for testator's debts, by a supplemental agreement dated April 15, 1909. The administrator with the will annexed followed up this agreement, to which he is a party, by filing a bill on April 26th and answers were filed on May 1st. The proceeding appears to be entirely amicable.

By his will testator gave the income arising from 500 shares of Mergenthaler linotype stock to his wife, and provided that the said stock, or any portion of it, remaining after her death was to revert to the estate for final distribution. The question arising on this bequest was whether the wife took a life estate or took absolutely. A gift of income, with-

out limitation as to continuance, is a gift of principal. Does the provision providing for a reverter of the stock or what remains of it after the wife's death cut down her interest to a life interest, or is it without effect? Under the case of Rodenfels v. Schumann, 45 N. J. Eq. 883, 17 Atl. 688, the question is at least doubtful. There are some expressions in the will that may be thought to favor the one construction, and other expressions that may be thought to sustain the other. Such being the situation, the parties came together, and agreed that the wife should have a life interest merely, and that three of the children-Emily, Elizabeth and Edwardshould take the remainder. It is said by the counsel of J. Paul White that this disposition is detrimental to Paul, the other child. So it may be (though even this is not free from doubt) if the widow took only a life estate. But Paul is of age, and signed both the original and the supplemental agreements, and does not object to either of them by his answer. There is no pretense that he has been the victim of fraud or dominating influence, and by the second agreement at least he undoubtedly secured an advantage. His legacy of other stock of the same company was not reduced in amount, as were the legacies of the other children, because of the necessity of selling a part to pay debts. In this situation the remarks of Sir John Leach in Naylor v. Winch, 1 Sim. & Stu. 565, appear to be exactly in point. Speaking of a similar situation-viz., that of a will construed by a subsequent agreement—he says: "Where a compromise of a doubtful claim is entered into fairly, and with due deliberation and upon consideration, a court of justice cannot inquire into the supposed adequacy or inadequacy of the consideration. Where is it to find a scale for determining the true measure of adequacy? If a court is in such a case to be governed by its judicial opinion upon the rights of the parties, then to him who by that opinion is held to be entitled to the whole property no consideration can be really adequate which is less than the whole, and no compromise can ever bind the successful claimant. It is for this reason, and because I consider it to be wholly immaterial for the purpose of leciding upon the validity of the deed of compromise, that I do not give any opinion upon the arguments by which the counsel for the plaintiff assert her claim. * * It is enough to support this deed that there was a doubtful question, and a compromise fairly and deliberately made upon consideration, and the actual rights of the parties (i. e., under the will), whatever they might be, cannot affect the question."

Family settlements, fairly obtained, are always regarded with favor. Stapilton v. Stapilton, 2 Lead. Cas. in Eq. 920; Hewitt v. Crane, 2 Hals. Ch. 171, 631. This disposes

[•]For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

& Trust Company, although it is a corporation of another state, may not act as trustee; the testator having named it as such. Perry on Trusts, §§ 42, 55; Meinertzhagen v. Davis, 1 Coll. C. C., 335. The question of its ability to take an oath is not involved.

As to the fifth question, there can be no doubt that the will, in directing the trustee to hold the residuary estate for seven years from testator's death, and to hold the legacies to Paul until the happening of one or the other of the contingencies named therein, does not violate the rule against perpetuities. Siedler v. Syms, 56 N. J. Eq. 275, 38 Atl. 424.

Whether, as a matter of discretion, the trustee, being a foreign corporation, should be required to give security has not been discussed.

(76 N. J. E. 126)

HAGEMAN v. BROWN et al.

(Court of Chancery of New Jersey. May 26, 1909.)

1. EQUITY (§ 183*)—PLEADING—BILL.
Complainant in equity must allege with
particularity every material fact which it is necssary for him to prove to establish his right to the relief prayed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 313; Dec. Dig. § 133.*]

2. EQUITY (§ 133*)—BILL—FRAUD.

Where complainant seeks equitable relief on the ground of fraud, his bill must state the facts constituting the fraud, so that the person against whom relief is sought may have full opportunity to deny or explain the facts charged, and disprove them.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 313; Dec. Dig. § 133.*]

8. Fraudulent Conveyances (\$ 266*)—Suit

TO VACATE—ANSWER.
Where a creditor's bill sought to reach cer-Where a creditor's bill sought to reach certain money belonging to defendant alleged to have been secretly hidden in real estate purchased in the name of another in a specified manner, with a fraudulent purpose of placing it beyond the reach of creditors and preserving it for defendant's use by means of a secret trust, the manner in which the bill charged that the fraud was accomplished was a material part of complainant's cause of action, which defend of complainant's cause of action, which defend-ant was required to specifically answer with fullness and particularity.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 782; Dec. Dig. § 266.*1

4. Fraudulent Conveyances (\$ 266*)—Suit

That a bill to reach property held for defendant under an alleged secret trust was not a bill for discovery and contained no interrogatories, would not exempt defendant from answering fully and specifically all the material averments of the charging part of the bill.

[Ed. Note.—For other cases, see Frauduler Conveyances, Cent. Dig. § 782; Dec. Dig. 266.*] see Fraudulent

of the first, second, and third questions propounded by the bill.

As to the fourth question there seems to be no legal reason why the American Security to deprive the defendant of his right to have the answer treated as evidence in his favor.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 618; Dec. Dig. § 316.*]

6. Equity (§ 342*) — Pleadings — Answer Without Oath—Admission.

Defendant in equity is bound by admissions in his answer without oath.

[Ed. Note.-For other cases, see Equity, Cent. Dig. \$ 706; Dec. Dig. \$ 342.*]

Suit by Aaron T. Hageman against Charles G. Brown and another. On exceptions to the answer of defendant Charles G. Brown. Sustained.

See, also, 72 Atl. 438.

The purpose of the bill in this suit is to procure a decree declaring the equitable title to certain real estate to be vested in defendant Charles G. Brown, the legal title to which now stands in the name of his daughter Roberta Brown, to the end that the real estate may be subjected to the lien of a certain judgment held by complainant against defendant Charles G. Brown. The bill charges that Roberta Brown, the daughter who holds the legal title, has no beneficial interest in the premises, but holds the same in trust for her father, with the intent and purpose of defrauding complainant and other creditors of the father, and preventing them from collecting their claims against the father, and charges that the consideration for the conveyance to the daughter moved from the father, and not from the daughter. In amplification of this general charge of fraud the bill specifically sets forth the manner in which the legal title to the property was placed in the name of the daughter. The specific averment is that defendant Charles G. Brown made an agreement with one Mary A. Moffett, the former owner of the property, whereby he agreed to purchase the property for a certain amount, and that in the performance of that agreement he paid to the vendor the purchase price so agreed upon, and caused the deed to be made to his daughter Roberta. The specific averment is also made that of the money so paid a certain specified amount was money due to him from one Alfred S. Brown, which money was paid by Alfred S. Brown to the vendor at the request of, and for and on account of, defendant Charles G. Brown as a part of the said purchase price, and that a certain further part of the purchase price was paid to the vendor by the said Alfred S. Brown as a loan to defendant Charles G. Brown, and that the repayment of the latter amount was secured to Alfred S. Brown by a mortgage on the premises executed by the daughter Roberta at the request of her father. The answer filed by defendant Charles G. Brown states

[•]For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that the agreement for the purchase of the ing it beyond the reach of creditors and preproperty was made by him as agent and attorney in fact for his daughter, at her request, and for her benefit, and that she is the sole owner of the legal and equitable title.

The answer also contains the following de-

"This defendant denies that the consideration moved from the said defendant Charles G. Brown to the said Mary A. Moffett as alleged in the bill of complaint filed in this cause." "This defendant denies that the title to said described premises in said bill of complaint filed in this cause was put in the name of Roberta Brown at his request, for the purpose of defrauding his creditors and hindering and defrauding them in the collection of their just claims against him." defendant denies that the said Roberta Brown holds the title of said premises described in said bill in trust for him, or that he has any beneficial interest in the premises whatever as alleged in said bill of complaint filed in this cause."

Complainant has excepted to the sufficiency of the answer by reason of its failure to answer in detail the specific averments of the bill above set forth touching the manner in which the purchase price of the property was raised and paid.

Defendant insists that he is excused from answering specifically the detailed averments of the bill touching the manner in which the purchase price of the property was raised and paid, and is privileged to answer generally to the effect that the consideration did not move from him, because these specific averments of the bill are matters of evidence, because the bill is not a bill for discovery, and contains no interrogatories, and because the bill asks for an answer without oath.

Paul Q. Oliver, for complainant. George Ball, for defendants.

LEAMING, V. C. (after stating the facts as above). I am convinced that the exceptions to the answer must be sustained.

1. There are probably few rules of equity pleading more firmly established than the requirement that every material fact which it is necessary for a complainant to prove to establish his right to the relief he asks must be alleged in the premises of his bill, with fullness and particularity, and that a suitor who seeks relief on the ground of fraud must state the facts which constitute the fraud, so that the person against whom relief is sought may be afforded a full opportunity to deny or explain the facts charged, and also to disprove them. Smith's Adm'r v. Wood, 42 N. J. Eq. 563, 566, 7 Atl. 881. This bill, in effect, seeks to reach certain money belonging to defendant, which money has been by defendant secretly hidden in certain real estate, in the manner specifically set forth in

serving it for his own use by means of a secret trust. The manner in which the bill states that this was secretly accomplished forms a part of the alleged fraudulent transaction; the averment being, in effect, that a third party paid the money, but that the money so paid was in fact money which the third party owed to defendant. The facts so stated are specific and definite facts which are material to complainant's case. In this view it seems clear that defendant cannot be excused from specifically answering these detailed averments of material facts under the claim that they are evidentiary in their nature. I regard the general averments contained in the bill to the effect that the consideration moved from defendant, which averment defendant has answered by a general denial, as more nearly a general statement of a conclusion of law than a specific statement of concrete facts. Had the averments in question been added to the present bill in the form of interrogatories, I think the necessity of specific answers to the interrogatories would not be questioned.

2. The fact that the bill is not a bill for discovery, and contains no interrogatories, will not exempt defendant from answering fully and specifically the material averments of the stating part of the bill. The rule as stated by Judge Story is as follows:

"One of the principal ends of an answer upon the part of the defendant is to supply proof of the matter necessary to support the case of the plaintiff; and it is therefore required of the defendant either to admit or to deny all the facts set forth in the bill, with their attending circumstances, or to deny having any knowledge or information on the subject, or any recollection of it, and also to declare himself unable to form any belief concerning it. And this he ought to do fully and explicitly, even though no special interrogatories should follow the bill. But, as experience has proved, that the substance of the matters charged in the bill may frequently be evaded by answering according to the letter only, it has become a practice to add to the general requisition that the defendant should answer the contents of the bill, a repetition, by way of interrogatory, of the matters most essential to be answered, adding to the inquiry after each fact an inquiry of the several circumstances which may be attendant upon it, and the variations to which it may be subjected, with a view to prevent evasion, and compel a full answer." Story's Eq. Pl. § 35. This privilege of adding special interrogatories to a bill has not, so far as I am aware, except where controlled by court rules, been given the effect to absolve, in any manner, a defendant from the primary duty of answering all of the material averments of the bill. The bill in this case prays that defendants "may, without oath, full, true, the bill, with the fraudulent purpose of plac- and perfect answer make to each and every

fully and particularly as if the same were here again repeated, and they thereto particularly interrogated." I understand the rule in this state to be substantially as stated in Methodist Episcopal Church v. Jaques, 1 Johns. Ch. (N. Y.) 65, as follows:

"I apprehend the rule on this subject to be that it is sufficient to make this general requisition on the defendant to answer the contents of the bill, and that the interrogating part of the bill, by a repetition of the several matters, is not necessary. The defendant is bound to deny or admit all the facts stated in the bill, with all their material circumstances, without special interrogatories for that purpose. Mit'f. 44; Cooper's Pl. 11, 12. They are only useful to probe more effectually the conscience of the party, and to prevent evasion or omission as to circumstances which may be deemed important; but it is no excuse for the defendant, in avoiding to answer fully to the subject-matter of the bill, that there were no special interrogatories applicable to the case."

3. The foregoing is equally true where the bill prays for an answer without oath. The object of a complainant in waiving oath is merely to deprive the defendant of the ad- ceptions to the answer.

of the matters and things above set forth, as | vantage of his answer as evidence for himself. A defendant is bound by his admissions in his answer without oath. In Reed v. Cumberland Insurance Company, 36 N. J. Eq. 393, Chancellor Runyon says:

> "He [complainant] has a right to the defendant's answer on every material point, though he waives oath. For he is spared the necessity of proof as to all matters admitted by the defendant. The latter is bound by his admissions in the answer, though put in without oath."

> My conclusion is that the bill entitles complainant to a specific answer as to whether, at the time of the conveyance from Mary A. Moffett to Roberta Brown, Alfred S. Brown owed defendant Charles G. Brown certain money, and paid the money so owing to Mary A. Moffett on account of the purchase price of the property in question for or on account of, and at the request of, defendant Charles G. Brown, and as to whether the remaining portion of the purchase price referred to in the bill was paid to Mary A. Moffett by Alfred S. Brown as a loan to defendant Charles G. Brown, or for or on account of, or at the request of, defendant Charles G. Brown.

> I will advise a decree sustaining the ex-

LANDON v. HUNT.

(Supreme Court of Vermont. Lamoille. Aug. 4, 1909.)

1. SET-OFF AND COUNTERCLAIM (§ 52*)-JECT-MATTER-ASSIGNED CLAIMS-NOTICE OF Absignment

Though defendant was entitled to receive for a certain time the milk money from cows leased by him to W. under an agreement to that effect, he could not set off money paid by plaintiff to W. for milk without notice of the agree-

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Dec. Dig. § 52.*]

2 Set-Off and Counterclaim (§ 24*)—Sub-ject-Matter—Assigned Claims.

Where, under a lease of cows by defendant to W., defendant was to have the milk money until he received a certain sum per cow, he was not entitled to set off money paid W. by plaintiff for milk, without proof that W. was still indebted to him.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Dec. Dig. § 24.*]

3. APPEAL AND ERROR (\$ 273°)-EXCEPTIONS -SUFFICIENCY.

An exception to "the finding of facts and to the judgment" is too general to be available. [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1620–1630, 1764; Dec. Dig. § 273.*]

4. Appeal and Erbor (§ 522*)—Record-Evi-DENCE.

Excerpts from the testimony, certified to by the reporter, but not made a part of the excep tions by reference or otherwise, may not be used in testing a finding.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 522.*]

Exceptions from Lamoille County Court Eleazer L. Waterman, Judge.

Assumpsit by O. B. Landon against B. A. Hunt. Judgment for plaintiff, and defendant excepted. Affirmed.

Argued before ROWELL, C. J., and MUN-SON, WATSON, HASELTON, and POW-ERS. JJ.

W. E. Tracy, for plaintiff. B. A. Hunt, for defendant.

POWERS, J. This judgment will have to stand unless error is found in the disallowance of an item of \$85 on the defendant's specification in offset. In the year 1900 the defendant leased a farm, together with 20 cows, to a man named Walker. The lease was verbal, and it was understood between Walker and the defendant that the latter should have the milk money until he had received the sum of \$16 per cow. Walker sold the milk to the plaintiff, who paid him for it by crediting it on his store account, until he received notice of the arrangement above noted, after which he credited all the milk to the defendant. The amount so credited to Walker was \$85, and this is the disputed The issue was tried by the court, and the findings state that there was no evidence tending to show whether Walker was or was not indebted to the defendant.

In these circumstances the item was properly disallowed. The defendant's right to the milk money either depended upon an assignment thereof which would not be good against the plaintiff until he had notice of it, or upon a lien thereon as security for the amount specified, which would not be good against the plaintiff after the requirements of the lease had been satisfied. In other words, without proof of a debt from Walker to the defendant, there is nothing for a lien to stand as security for. Mann v. Haley, 79 Vt. 66, 64 Atl. 449.

The defendant attempts to challenge the finding that there was no evidence of a debt from Walker to the defendant. He makes this attempt under an exception thus stated in the bill: "The defendant excepted to the finding of facts and to the judgment." Such an exception is too general to be available. The particular finding should have been pointed out, and the particular fault therein should have been specified. Besides, even if we were to treat the exception as sufficient, the transcript is not referred to, so there is nothing before us by which we can test the finding. To be sure we are supplied with what are apparently excerpts from the testimony, certified to by the reporter, but these are not made a part of the exceptions by reference or otherwise, so their use is unwarranted. Sargeant v. Leland. 2 Vt. 277; Wheelock v. Sears, 19 Vt. 559; Child v. Pinney, 81 Vt. 314, 70 Atl. 586; Royce v. Carpenter, 80 Vt. 37, 66 Atl. 888. Judgment affirmed.

(105 Me. 147)

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ABBOTT v. CITY OF ROCKLAND. (Supreme Judicial Court of Maine. Feb. 18, 1909.)

1. MUNICIPAL CORPORATIONS (§ 788*)—INJURIES ON HIGHWAY—NOTICE OF DEFECT.
Rev. St. c. 28, § 76, imposes, as a condition
precedent to the right of a traveler to recover
for injuries received upon a highway, proof on
his part that "the municipal officers or road
commissioners of such town or any person

* * * * authorized by any municipal officer or commissioners of such town or any person

* * authorized by any municipal officer, or
road commissioner of such town, to act as a
substitute for either of them, had twenty-four
hours' actual notice of the defect or want of
repair."

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1641-1643; Dec. Dig. § 788.*]

2. MUNICIPAL CORPORATIONS (§ 791*)—INJU-RIES ON HIGHWAY—NOTICE OF DEFECT. The 24 hours' notice required by Rev. St. c. 23, § 76, must be actual notice, not constructive, and it must be of the identical defect which caused the injury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1647; Dec. Dig. § 791.*]

3. MUNICIPAL CORPORATIONS (§ 818*)-INJU-BIES ON HIGHWAY-NOTICE OF DEFECT-EVI-DENCE.

The 24 hours' actual notice required by Rev. St. c. 23, § 76, may be proved by direct or

•For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1997 to date, & Reporter Indexes

circumstantial evidence and may be established a by all grades of competent evidence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1729; Dec. Dig. § 818.*]

4. MUNICIPAL CORPOBATIONS (§ 790*)—INJURIES ON HIGHWAY—NOTICE TO POLICE—SUF-

Where the plaintiff sought to recover damages for a personal injury received by reason of an alleged defective sidewalk in the defendant city, and in relation to the 24 hours' actual no-tice of the defect proof that such notice was given to a police officer, coupled with evidence that such complaints were ordinarily made to the police department, and that the police officers were in the habit of reporting them to the street commissioner, held not to be sufficient evidence to meet the statute requirement.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1645, 1646; Dec. Dig. § 790.*]

5. MUNICIPAL CORPOBATIONS (§ 790*)—INJU-RIES ON HIGHWAY—NOTICE TO POLICE—SUF-

Where it was no part of the official duty of police officers to receive complaints about highway defects and report them to the road commissioners, held, that there was no such official duty or responsibility resting upon such officers as would give rise to a presumption that such a notice given to them was by them com-municated to the road commissioner.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1645, 1646; Dec. Dig. § 790.*]

(Official.)

Exceptions from Supreme Judicial Court, Knox County.

Action by Julia E. Abbott against the City of Rockland. A nonsuit was ordered, and plaintiff excepts. Exceptions overruled.

Special action on the case to recover damages for personal injuries sustained by reason of an alleged defect in the sidewalk on Lovejoy street in the defendant city. Plea, the general issue. Tried at the January term, 1908, Supreme Judicial Court, Knox County. At the conclusion of the plaintiff's evidence, and on motion of the defendant city, the presiding justice ordered a nonsuit on the ground that the plaintiff had failed to introduce sufficient evidence to entitle her to to go to the jury on the question as to whether the proper officials of the defendant city, under the statute (Rev. St. c. 23, § 76), had 24 hours' actual notice of the defect, and to this ruling the plaintiff excepted.

The case is stated in the opinion.

Argued before EMERY, C. J., and WHITE-HOUSE, SAVAGE, CORNISH, and BIRD, JJ.

C. M. Walker and Arthur S. Littlefield, for plaintiff. Philip Howard, for defendant.

CORNISH, J. Section 76 of chapter 23 of the Revised Statutes imposes, as a condition precedent to the right of a traveler to recover for injuries received upon a highway, proof on his part that "the municipal of- to the policeman, and also that it was of the

ficers or road commissioners of such town or any person authorized by * * any municipal officer, or road commissioner of such town, to act as a substitute for either of them, had twenty-four hours' actual notice of the defect or want of repair." Prior to the passage of chapter 206, p. 153, of the Public Laws of 1877, all that was required' was reasonable notice to the town, which was held to be such notice as gave the town officers, or some of the inhabitants, information of the actual condition of the road. The amendment of 1877 prescribed a more definite requirement respecting notice and imposed a more rigorous limitation upon the traveler's right to recover. One of the officers named must now receive 24 hours' actual, not constructive, notice, and it must be of the identical defect which caused the injury. Such actual notice may be proved by direct or circumstantial evidence; that is, by information of the existing facts conveyed to the party to be notified, or by circumstances showing personal knowledge on his part. Being a conclusion of fact, it may be established by all grades of competent evidence; but established it must be before the injured party can maintain his action. These general principles, thus briefly stated, are more fully considered in: Smyth v. Bangor, 72 Me. 249; Rogers v. Shirley, 74 Me. 144; Hurley v. Bowdoinham, 88 Me. 293, 34 Atl. 72; Littlefield v. Webster, 90 Me. 213, 38 Atl. 141; Ham v. Lewiston, 94 Me. 265, 47 Atl. 548.

The injury to the plaintiff for which this suit is brought was caused by a defect in a sidewalk on Lovejoy street in the defendant city, October 10, 1905. As proof of actual notice to the street commissioner, the plaintiff relied upon the testimony of John Reardon, supplemented by an alleged custom in the police department. Reardon, a boy 14 years of age, testified: That a few days prior to the accident he noticed a bad place in the sidewalk at the point in question, which he describes as "a piece that had rotted off the stringer, and it left quite a hole there, so you could get your foot right in it." That, acting under instructions from his father, he called at the police station on his way to school, and "notified the police to fix it." That he thinks he saw Policeman Post there and told him that the hole "was pretty bad" and "needed fixing." The evidence showed that at that hour in the morning either the city marshal or Post should be on duty. The jury might therefore be justified in inferring that Reardon notified Post as he said. Here ends the direct testimony on this point. notified no one except Post, and there is no evidence that Post or any one else ever notified the street commissioner.

Assuming therefore that notice was given

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

actual defect which caused the injury, which is by no means free from doubt, it stopped short of reaching any party required by statute to be notified. The plaintiff seeks to prove the notice by two steps: First, by the boy to the police; and, second, by the police to the road commissioner. The first is made out, the second falls. The city marshal and Post both testified that they had no recollection of receiving the complaint from Reardon, nor of communicating it to the road commissioner, and the road commissioner himself was not called as a witness. Direct testimony on this point is therefore lacking.

To fill the gap the plaintiff relies upon an alleged custom in the police department to receive complaints about highway defects and report them to the road commissioner, and invokes the rule that a public officer is presumed to have performed his official duty. This is undoubtedly a legal presumption in some cases, but it has no application here, for the element of official duty is lacking. The city marshal testified that the police received a great many such complaints and under his instructions made a practice of notifying the commissioner as soon as possible.

But it was no part of their official duty to receive and report such complaints to the commissioner. No statute or ordinance required it. No record of such complaints was kept. Doubtless it was done in many cases in the interest of the municipality, the same as similar complaints to the city clerk or chief engineer of the fire department might be transmitted to the proper authority; but there was no such official duty or responsibility resting upon these officers as would give rise to a presumption that a notice given to them was by them communicated to the commissioner.

The cases cited by the plaintiff are not in

In Welch v. Portland, 77 Me. 384, the presumption invoked was that the street commissioner himself did his duty by going or sending at once to find and repair a reported defect. This was within the strict line of his official duty. So it might be presumed that a police officer proceeded at once to take measures to quell a riot reported to him, because that was within his official sphere. When out of that sphere any such presumption does not obtain, and there are no presumptions affecting the probability of the action of a street commissioner in the police department nor of a police officer in the street department, in the absence of evidence showing their duties in those departments.

In Twogood v. N. Y., 102 N. Y. 216, 6 N. E. 275, actual notice was not required. If the defective condition of the street had existed for such a length of time that its ex-

istence ought to have been known to the public authorities, it was sufficient. The court therefore held that an instruction to the jury that written reports of the condition of snow and ice made by a police officer to his superior in the usual course of his duty, which reports were customarily transmitted to the corporation attorney, did not constitute a notice to the city, was erroneous, as taking from the jury the question whether this condition had existed for such a length of time that actual notice ought to be imputed. The Maine statute allows no such imputation of actual notice.

In Jollet v. Looney, 159 Ill. 471, 42 N. E. 855, the required notice could be either express or implied, and the court held that where, with knowledge and approval of the superintendent of streets, a book was kept at the police station, in which policemen were directed to note defects in sidewalks, and the superintendent was accustomed to resort to these reports for information, in case of knowledge of a defect by a policeman for a sufficient length of time, in the exercise of reasonable care, to report and repair it, the city will be chargeable with notice of the defect.

Such a decision has no bearing upon the case at bar, where actual notice must be proved.

Finally, the plaintiff claims that the fact that the city repaired the defect the next morning after the accident, and, so far as the evidence shows, without knowing of the injury, adds strength to the theory that the commissioner had received notice of the condition through the channel of the police. This rests upon assumption and not upon evidence. The burden is upon the plaintiff to prove that the commissioner did receive the notice, not on the defendant to prove that he did not receive it.

Taking all the evidence in the case and giving it the full effect which a jury would be authorized to give, it is clear that the plaintiff failed to introduce sufficient to bridge the chasm between the police and the street commissioner, or to entitle her to go to the jury on this question of actual notice. The nonsuit was properly ordered.

Exceptions overruled.

Nonsuit to stand.

(105 Me. 152)

MATSON v. MATSON.

(Supreme Judicial Court of Maine. Feb. 18, 1900.)

Assault and Battery (§ 40*)—Damages—Excessive.

Where the plaintiff recovered a verdict for \$1,000 as damages alleged to have been suffered by reason of an assault and battery committed upon him by the defendant, held: (1) That the defendant was properly found guilty of assault and battery, but that the damages awarded were excessive; (2) that the compensation

which the jury must have given the plaintiff for his mental pain and suffering, his wounded pride and self-respect, considering his record and standing in the community, was exorbitant; (3) that there was no justification for large punitive damages; (4) that the verdict be set aside, unless the plaintiff remit all of the same above \$300.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 55; Dec. Dig. § 40.*] (Official.)

On Motion from Superior Court, Cumberland County.

Action by Louis Matson against Harris Matson. Verdict for plaintiff, and defendant moves to set the same aside. Motion granted, unless remittitur be made.

Civil action, brought in the superior court, Cumberland county, to recover damages for an assault and battery alleged to have been committed by the defendant upon the plaintiff. Plea, the general issue. Verdict for plaintiff for \$1,000. The defendant then filed a general motion to have the verdict set aside.

The case is stated in the opinion.

Argued before EMERY, C. J., and WHITE-HOUSE, SAVAGE, PEABODY, SPEAR, and BIRD, JJ.

M. P. Frank, for plaintiff. J. E. F. Connolly, B. T. Whitehouse, and J. A. Connellan, for defendant.

WHITEHOUSE, J. The plaintiff recovered a verdict of \$1,000 for damages alleged to have been suffered by reason of an assault and battery committed upon him by the defendant on the 2d day of July, 1907, and the defendant moves to have it set aside as against the evidence and because the damages are excessive.

The parties are brothers, and were copartners carrying on the business of brewing and selling hop beer from 1898 to 1902, when the partnership was dissolved, and thereafter each continued to carry on the same business in a separate building, with resulting competition and hostility between them. In October, 1906, some eight months prior to the assault in question, the plaintiff acquired title to the building occupied by the defendant, and took an assignment of the lessor's interest in a certain lease of the same, subject to the defendant's right of occupancy for an unexpired term of three years under the lease. And the plaintiff says that on the 2d day of July, 1907, in the exercise of his right to enter the building "to view and make improvements," he started to go through the open door of the store where his brother was. and he thus describes the assault which followed:

"I had no more than got inside when he came over and with his left hand grabbed ruled; otherwise, the verdict me here (indicating) and hit me with his aside and a new trial granted.

right hand, open hand, and almost knocked me down. I saved myself with my hands, and he shoved me against the wall there, and the corner there, right near the door. And he called me names. * * * He held me there so I couldn't breathe very well, and left marks on my throat, and tore my collar. * * My collar was torn and dirty where he put his hands on it. * * I didn't eat any dinner that day. Q. Do you mean by that the injuries you received to your throat prevented your eating dinner? A. I don't know that it prevented my eating; but I felt so bad over it—felt bad about the assault, the insult—that I didn't eat that time."

The defendant denies that the plaintiff came into the store to take a view with reference to improvements, and says that it is utterly improbable that he was contemplating improvements for the defendant's benefit, knowing that the lease had three years more to run. The defendant declares the truth to be that the plaintiff's brewing was unsuccessful, and his beer unsalable, and that his real purpose in coming to his store was to learn the secret process of the defendant's brewing, and the defendant denies that he inflicted any injury upon him whatever, or used any more force than was necessary to prevent him from going into his brewing room.

The plaintiff, as owner of the premises, undoubtedly had a legal right to enter the building for the purpose of examining its condition with a view to changes and improvements; and, while the sincerity of his claim that he did in fact enter for that purpose is open to serious question, the defendant's contention, on the other hand, that the plaintiff entered for the purpose of stealing his formula for brewing beer, rests upon suspicion and not evidence. It is therefore the opinion of the court that the defendant was properly found guilty of assault and battery; but the damages awarded by the jury are manifestly excessive. The plaintiff does not claim that he suffered any serious consequences from the assault. He says he had no appetite for his dinner on the day it occurred, and his throat felt "kind of sore. enough so he could notice it." It is in evidence that he had been convicted of violating the statute against the sale of intoxicating liquors, and paid a fine of \$100 and costs. The compensation which the jury must have given for his mental pain and suffering, his wounded pride and self-respect, considering his record and standing in the community, was exorbitant. Nor is there any justification for large punitive damages.

The conclusion is that, if the plaintiff will remit all of the verdict above \$300 within 30 days from the filing of the certificate with the clerk of the court, the motion is overruled; otherwise, the verdict is to be set aside and a new trial granted.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(75 N. J. E. 616)

KUNZ et al. v. MASON et al.

(Court of E rors and Appeals of New Jersey. June 14, 1909.)

1. Evidence (§ 271*)—Declarations of Par-

In a suit to reform a contract for the sale \$65,000 to \$55,000 for alleged mistake, complainant's declaration to others, after the contract was made, and before any controversy arose, that she paid only \$55,000 for the property, was inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1075; Dec. Dig. § 271.*]

2 PRINCIPAL AND AGENT (§ 69*)-ACTS OF

Agent—Misconduct.

An agent of an owner of real estate, authorized to sell the same for a specified price, may not lawfully, after obtaining a purchaser at a higher price, take title in his own name, or in the name of another, using the purchaser's money to complete the purchase, and appropriate the difference to his own use.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 130-141; Dec. Dig. § 69.*]

8. Reformation of Instruments (\$ 45*)-

FRAUD-EVIDENCE.

Evidence held to show that defendant had Evidence Reis to show that detendant had purchased the property in controversy from a trust company for \$55,000 before he knew that complainant desired to purchase the same, and that in selling the property to complainant for \$65,000 he acted for his own benefit, and not fraudulently as agent of the trust company, authorising referentiation of the company authorising referentiation of the company authorising referentiation of the company authorising referentiation. thorizing reformation of the contract for fraud.

[Ed. Note.—For other cases, see Reformation of Instruments, Dec. Dig. § 45.*]

4. REFORMATION OF INSTRUMENTS (\$ 82*) -LACHES.

Where, though complainant ascertained an alleged mistake in the consideration of a contract for the sale of real estate in 1904, and requested her husband to see the vendor concerning it, she took no steps to have the mis-take rectified for two years, her right to equitable relief was barred by laches.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 119-121; Dec.

Dig. § 32.*]

Appeal from Court of Chancery.

Suit by Elizabeth K. Kunz and another against James H. Mason and others to reform a contract for the sale of real estate and for an accounting. From a decree granting an accounting and denying reformation, complainants appeal. Affirmed.

The following is the oral opinion of the Chancery Court (LEAMING, V. C., orally):

"I am not inclined to take this case under advisement. It is chiefly a question of fact. The testimony never will be so accurately impressed on my memory as it is now at the close of the trial.

"The agreement which complainants seek to reform is a remarkable one. In it the defendant Mr. Mason agreed to convey to the complainants a property which, according to one side, was to be conveyed for \$65,000, and, according to the other side, was agreed to be conveyed for \$55,000 when the purchaser admittedly had but \$1,000 to pay in cash on account of the purchase price, and or \$17,000 mortgage already existing on the

the agreement itself contemplated only a payment of \$500 as to the second installment four months from the date of the agreement, and the property was a large hotel, already furnished, of which the purchaser was to take immediate possession and begin business. The agreement, under the conditions which are shown, clearly contemplated that the purchasers should make out of the business the money which was to enable them to pay the purchase price and the fixed charges in connection with the hotel, consisting of interest on the mortgages, taxes, water rents, insurance, etc. To that end the payments named in the agreement are arranged to fall due during the summer seasons and at no other time. I say this is a remarkable agreement, because I think it is probably the first instance in my experience where a property of so much value has been conveyed for so little cash down. The agreement is peculiar in another aspect, and that is the manner in which its terms are stated. At first I was very uncertain as to the meaning of the agreement: but a more careful reading satisfled me that there can be no doubt as to that. To my mind it clearly contemplates that the purchaser shall pay all of the fixed charges, such as taxes, water rents, interest on the mortgages, insurance, and whatever other items there are of that nature, and that during the first year she shall pay an aggregate amount at least of \$8,000, and that whatever portion of the \$8,000 so paid is above the expenditures necessary for the fixed charges shall be credited on the purchase price. During the second year she shall pay at least \$10.500, and in making that expenditure she shall apply it first to the fixed charges already referred to, and the balance of that amount shall be credited, at the times named, on the purchase price; and during the years succeeding the second year the same course shall be taken. Assuming that the fixed charges were believed by the parties at the time to be about that indicated by the pencil memorandum, it is apparent that they contemplated that it would take about four years to discharge the agreement, assuming \$20,000 or \$21,000 to have been the amount of cash to have been paid in the aggregate.

"It is contended on the part of the complainants that they are entitled to the reformation of the agreement because of the fact that the real bargain that was made was that the amount of cash to be paid should be \$10,000, instead of the amount named in the agreement. In other words, that the purchase price of the property was \$55,000, instead of \$65,000; \$28,000 of that amount being represented by a first mortgage already existing on the property, \$16,000 being represented by the amount due on the second property, and the balance up to \$55,000 making the amount of cash to be paid.

"So far as complainant Mrs. Kunz is concerned, I am entirely satisfied that her testimony upon the witness stand to the effect that, when she signed this agreement, she believed the purchase price of the property was \$55,000, is true. I am not able, after listening to her testimony, to believe that she was willfully falsifying any statement which she made. She impressed me as a truthful woman and a woman who was testifying to what she believed to be the truth, and under the evidence that exists I can readily conceive that she probably did believe when that agreement was executed that she was getting that property for \$55,000. Whether she believed it at that time or not, she certainly is sincere in her statement to that effect at this time, and I am prepared to treat it as a fact that she now believes that, and that she in all human probability then believed that she was obligating herself for the payment only of the amount of \$55,000. There are so many circumstances which lead me to think that that was her belief at that time that I am practically compelled to accept it. The fact that she is a woman who cannot read and write, and was dependent on her impressions as she gathered them from what she heard, rather than what she read, alone goes far toward leading me to believe that the facts probably are that she thought she was buying a property at \$55,000. The pencil memoranda also go far to corroborate her statements. I can reach that conclusion very readily without having to resort to the testimony which I think is not competent evidence, namely, the testimony which was offered to the effect that she has stated to others at a time prior to the time that any controversy arose that she had paid \$55,000 only for the property.

"It is undoubtedly true, however, that no mistake upon the part of Mrs. Kunz touching the contents of the written agreement which she executed can entitle her to a reformation unless the mistake was a mutual mistake; that is to say, if the reformation is to be had upon the ground of mistake only, it must have been a mistake that was mutual between her and Mr. Mason, and counsel for complainant has stated that he does not now contend that the evidence supports a finding that there was a mutual mistake between the complainants and the defendants as to the consideration of the agreement in question. In other words, Mr. Mason knew that the agreement provided for \$65,000, and he did not execute an agreement which he believed called for \$55,000 only. That fact alone denies the relief of reformation upon the ground of mistake.

"It is contended, however, and with a great deal of force, that the facts of the case, as they must be ascertained by the evidence before the court, disclose fraudulent conduct upon the part of Mr. Mason, or,

if not fraudulent conduct, then they disclose conduct upon his part in which he abused the confidence which the complainants were entitled to bestow in him, and abused that confidence in such a manner that complainants are entitled to the equitable relief now sought.

"I entertain the view of the law, suggested by counsel, that if the fact is found to be that Mr. Mason was an agent of the trust company for the sale of this property, which at that time belonged to the trust company, and that agency authorized him to sell the property for \$55,000, and he, under the circumstances which existed, with the property in his hands for sale at that amount, ascertained that complainants were willing to pay \$65,000, and took their money and went down to the trust company and made the purchase in his own name, or in the name of his son-in-law in his own behalf, using the money of complainants to complete that purchase, that his conduct would be of such a nature that complainants would be entitled to be relieved to the extent of the added amount, they would be entitled to be relieved from the excess \$10,000, which is now in I think that would be an equidispute. table disposition of the case if the evidence justifies the finding of the facts stated.

"I cannot believe, however, that any person could listen to the testimony of Mr. Mason upon the witness stand and believe that the transaction was of that nature. I do not think that any one could listen to the testimony of Mr. Mason and believe that he willfully misrepresented any fact. nor do I believe that any one could listen to his testimony and help but believe that he was telling not only what he believed to be true, but also telling the literal truth, when he said he bought the property before he knew or had any dealing with the complainants in this case, and before he knew that the complainants in this case were prospective purchasers of the property. I believe Mr. Mason's testimony when he says that he bought this property for speculation. without a prospective purchaser in sight or in contemplation, and bought it with the idea that, should he fail to find a purchaser, some members of his family to whom he referred could operate the hotel to advantage. and that eventually he would make a good thing out of it. I am satisfied that he states the truth when he says that a considerable time prior to his knowledge of the existence of complainants he had made the proposition to the bank and had agreed to pay them \$55,000 for the property and considered the transaction closed. These statements on the part of Mr. Mason, I say, I am forced to believe. In corroboration of Mr. Mason's statements, the former agent of the property. an associate of Mr. Mason, was very positive in his statements. His testlmony, as far as it goes, fully corroborates Mr. Mason's statements. He says that Mr. Mason did not know, and had no means of knowing, that ne was handling this property for the trust company, and did not know through him, at least, that complainants were contemplating the purchase of this property at any time until he introduced the subject, and at that time Mr. Mason had made the purchase. The testimony of the clerk of Mr. Mason is corroborative, as far as it goes, but does not add, as I view it, very much weight. His testimony is along the line which we would anticipate from a clerk in the office engaged in routine work; but at the same time it is corroborative of the other testimony.

"I am obliged therefore to find the fact to be tnat Mr. Mason, at the time he first came in contact with or knew of the complainants, was not and had not been an agent of the trust company for the sale of this property, and that he was not guilty of any fraudulent or inequitable imposition upon the complainants in making a sale of this property to them, and that at the time he first met them he regarded himself as the owner of this property. While he was not in law the owner of the property, and, perhaps, had no papers which would have entitled him to enforce specific performance of the agreement of sale upon the part of the trust company, yet he regarded himself as the owner at that time, and in treating with the complainants, in my judgment, treated with them honestly and fairly, and owing to the very peculiar conditions which arose, and which had therefore existed, Mrs. Kunz very naturally may have made a mistake touching the amount she was agreeing to pay for the property. If the fact be that Mr. Gampher telephoned exclusively to Mr. Kunz, then Mrs. Kunz may not have become acquainted with the fact that the price was to be raised, although she was acquainted with the fact that the terms had been made extremely easy.

"The second branch of the case is, I think, equally conclusive in its character. This agreement was made in 1902, and was an agreement in writing containing upon its face the amount of the purchase price of the property, and we are asked six years later, for the first time, to reform the agreement. It is undoubtedly true that such delay may be excused; but I cannot think it can be said to be excused in this case. During the period between 1902 and 1904 the complainant Mrs. Kunz did not know, as she claims, that the agreement called for \$65,000, instead of \$55,000; but that discovery was made in 1904, and it was then her duty to act. What she did was to acquaint her husband with the fact and to ask him to see Mr. Mason, and thereafter she never ascertained whether he had seen Mr. Mason or not, notwithstanding the fact that she says she was worried about it until she was made sick over it. In failing to take some

step, or to see that some steps were effectively taken, to procure a correction of the mistake or fraud which she at that time ascertained to exist from her standpoint, I think she has denied to herself the right to equitable relief two years later, at a time when the agreement is being enforced against her. Since the time she discovered the mistake in the agreement she has been enjoying the occupancy of the property. Mr. Mason has been continuing to advance money to meet, the payments called for by the terms of the agreement, and yet during that period of two years she has not been sufficiently vigilant to even ascertain whether or not the mistake has been brought to the attention of Mr. Mason. I think such conditions must be held to operate as a bar to equitable relief. sought at so late a date. My conclusion will be that complainant is not entitled to relief. from any portion of the expressed consideration as it appears on the face of the agreement.

"Under the stipulation which counsel have made, if it is still sought to have an account taken of the amount due, a reference will be made to a person to be agreed upon to have the account stated. Have counsel made any effort to agree upon a person!

"Mr. Cole and Mr. Garrison: We will agree upon Mr. Bourgeois.

"The Vice Chancellor: Let the reference be made to Mr. George A. Bourgeols, as special master. I deny the relief prayed for in the bill so far as it is based upon the averment that the consideration was \$55,000, instead of \$65,000. I adjudicate nothing touching the amount due. That is to be ascertained.

"Mr. Clevenger: A decree will be for the specific performance of the \$65,000 contract and the order of reference to Mr. Bourgeois to state the account.

"Mr. Garrison: I won't agree to an accounting unless we can get this back this term. If they cannot do that, why I do not want to agree to it. I think Mr. Bourgeois, probably—if you will explain the situation to him, he will probably do this by next Monday.

"The Vice Chancellor: You may prepare your order in the nature of an interlocutory: order, in which it is ascertained that the agreement will not be reformed, and that the matter will be referred to Mr. Bourgeols, as a special master, to report at the earliest possible date as to the amount due under the agreement."

Wilson, Carr & Stackhouse and Clarence:
A. Batte, for appellants. Garrison & Voorhees, for respondents.

PER CURIAM. The decree appealed from will be affirmed, for the reasons stated in the opinion of LEAMING, V. C., delivered in the court below.

O'NEILL & VISCOUNT et al. v. CITY OF ELIZABETH et al. (two cases).

(Supreme Court of New Jersey. April 12, 1909.)

1. MUNICIPAL COBPORATIONS (§ 332*)—STREET IMPROVEMENTS—CONTRACTS—BIDS.

Where neither the advertisement nor specifications for bids for a street improvement required any particular kind of brick, and it did not appear that the city engineer, in informing relators that they should specify "Metropolitan" or "Mack" brick, had any authority to change the conditions imposed, the fact that relators applied unsuccessfully to get prices for "Metropolitan" and "Mack" brick was no excuse for their failure to furnish a certificate with their bid that the manufacturers authorized the bidder to guarantee an uninterrupted supply of paving material furnished within the time fixed for the completion of the contract.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 832.*]

2 MUNICIPAL CORPORATIONS (§ 331*)—STREET PAVING — CONTRACT — SPECIFICATIONS — CONDITIONS.

A condition of an advertisement for bids for street paving, requiring the bidder to furnish a certificate from the manufacturer of the brick to be used guaranteeing an uninterrupted supply within the time fixed for completing the contract, was not unreasonable, but proper.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. \$ 331.*]

Applications by O'Neill & Viscount and another against the City of Elizabeth and another to review awards of paving contracts, for which relators claimed to be the lowest bidder. Writs denied.

Argued before BERGEN, J., sitting at chambers.

Martin P. O'Connor and John R. Connolly, for prosecutors. James C. Connolly, for defendant City of Elizabeth.

BERGEN, J. A writ of certiorari is applied for to review the action of the municipal authorities of Elizabeth City in awarding to James J. Potts a contract for laying a brickpavement on Geneva street in such city. The prosecutors, O'Neill & Viscount, were bidders for the work as well as Potts; the former bidding \$15,831.89, and the latter \$15,906.70, or \$74.81 more than the bid of the prosecutors, O'Neill & Viscount. Philip E. Richter is joined as prosecutor upon the ground that he owns land on Geneva street which is liable to assessment for benefits. The specifications required, among other things, that each bidder should furnish with his bid, not only a sample of the bricks he proposed to use, but also a certificate from the manufacturers of the brick stating that the bidder was authorized in guaranteeing an uninterrupted supply of paving material furnished within the time fixed for the completion of the contract. The bid of the prosecutors was rejected because it was not accompanied by a sample of the brick, or the writ.

required certificate. I think the production of the sample was expressly waived when, as it did, the common council voted to accept the bid without the production of samples.

The excuse offered for not producing the required certificate is that the engineer of the city, in a conversation with one of the prosecutors, told him that, should he submit a bid, he should specify "Metropolitan" or "Mack" brick as the kind he could use, and that they thereupon wrote the manufacturers of that brick for prices, which they declined to give in advance of the day the bids were to be presented, advising them, however, that they would have an agent in the city on that day to give prices. affidavits of the prosecutors also show that, although they made proper efforts to do so, they were unable to find the agent prior to the time fixed for submitting the bids. It nowhere appears that any effort was made to get the certificate, which could be given without the quotation of prices. Prices were withheld to prevent competition between manufacturers, but no reason appears why they might not certify that they would furnish the bidders with an uninterrupted supply at the price they might agree upon. In addition, neither the advertisement nor specifications required this particular make of brick, and it is not shown that the city engineer had any authority to change the conditions imposed by the advertisement or specifications; but the bidders could rely upon bidding according to the requirements they contained, and, if they wished their bid to be considered, should have furnished the certificate.

It is urged that this condition is unreasonable, but I do not think so. It is of the utmost importance to a city to restore the public highway to use as soon as possible, and a requirement that a bidder shall satisfy the city to a reasonable extent that the bricks which he proposes to use can be had with sufficient regularity to allow the completion of the contract within the stipulated time is not only not unreasonable, but in my judgment proper.

No fraud is suggested. The slight difference in the bids forbids any such presumption. The discretion exercised being reasonable, I can find no reason in the affidavit submitted which would support the writ, and the allowance is therefore refused.

There is another application for a similar writ between the same parties, but a different landowner as one of the prosecutors; the purpose being to review the awarding of a like contract to pave a part of Erie street in the same city. This application is based on the same state of facts, and for the reasons given in disposing of the other case, the allocatur will also be withheld from this writ.

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(224 Pa. 489)

AMERICAN ICE CO. V. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. April 12, 1909.)

1. Negligence (§ 121*) — Presumptions and

BURDEN OF PROOF.

The general rule is that negligence is never presumed, but must be affirmatively shown.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 217, 224; Dec. Dig. § 121.*]

2. RAILBOADS (\$ 481*)—FIRES—ACTIONS—SUF-FICIENCY OF EVIDENCE.

In an action against a railroad for a fire alleged to have been set by a locomotive, where there is no direct vidence that at or near the time of the fire sparks were emitted, negligence cannot be established by proof of other acts of a similar character before and after the fire.

[Ed. Note.—For other cases, see Railroa Cent. Dig. §§ 1719-1723; Dec. Dig. § 481.*] see Railroads,

Appeal from Court of Common Pleas, Philadelphia County.

Action by the American Ice Company against the Pennsylvania Railroad Company. There was a nonsuit, and from an order refusing to take the same off, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and ELKIN,

Frank R. Savidge, for appellant. John Hampton Barnes, for appellee.

ELKIN, J. This case was very carefully considered by the trial judge and intelligently reviewed by the court in banc. It has been ably argued by learned counsel on both sides before us. We have examined the cases cited and the record presented, with the result that no error has been found upon which to base a reversal. The nonsuit was properly granted, and the refusal to take it off was not error. The fire is alleged to have been caused by sparks negligently emitted from the locomotives of the appellee company. The general rule is that negligence is never presumed. It must be affirmatively proven. There is nothing in the present case to justify a departure from this well-settled and wholesome rule. There is no direct evidence to show that the railroad company caused the fire. Not a single witness testified that he had seen any sparks negligently or otherwise emitted from locomotives of appellee at or near the time of the fire, nor was any locomotive identified as being near the building when the fire started. Indeed, there is no testimony to show how, or exactly where, the fire started, or from what cause it originated. It is all guess or conjecture.

There being no direct testimony, the learned trial judge in a spirit of fairness opened the door very wide for the introduction of circumstantial evidence, under the rule which allows reasonable latitude in the offer of proof in this class of cases. Certainly the appellant cannot complain because reasonable

latitude was not allowed in the case at bar. The latitude allowed at the trial was not only reasonable, but it was so full and wide that every opportunity was given to introduce items of testimony which to say the least were very remote. If there was any error in this respect it is not such as could be complained of by appellant. This character of testimony is admissible in aid of an inference to be drawn when it is shown that, at about the time of the burning sparks were emitted from a passing engine and fell on or near the building destroyed and might have caused the fire. But in no case in this state has it ever been held that a jury could by guess or conjecture draw an inference that the fire was started in this manner from such remote circumstances alone, when there was no evidence to show that at or near the time of the fire sparks had been emitted from the locomotives of a company charged with such negligence. In most of the cases there was direct evidence that sparks had been emitted at or immediately before the burning, and in some instances ashes or cinders from engines were found upon the burned premises. Under such circumstances the courts allowed testimony tending to show other acts of a similar character before and after the fire, for the purpose of proving negligent habit. In the case at bar the attempt is made to go one step farther by holding that not only the negligent habit may be shown by these remote circumstances, but that the negligence charged. namely, the cause of the fire itself, may be established by this kind of testimony. cases do not so hold, and we are not convinced that the rule should be so extended. Such a rule would necessarily relieve the party claiming damages from the burden of establishing by sufficient evidence the negligence charged. It would be a clear departure from settled principles, and would be an unwise extension of the rule. The evidence did not show that appellant had been habitually negligent in the equipment or management of its engines, or any of them, and that frequent fires were started in consequence. It did show that the locomotives were equipped with standard spark arresters, and were properly repaired and inspected from time There can be no recovery in this case, because appellant failed to prove what caused the fire, or that the railroad company had anything to do with starting it.

Assignments of error overruled, and judgment affirmed.

(224 Pa. 442)

KNICKERBOCKER ICE CO. v. PENNSYL-VANIA R. CO.

(Supreme Court of Pennsylvania. April 12, 1909.)

Appeal from Court of Common Pleas, Philadelphia County. Action by the Knickerbocker Ice Company against the Pennsylvania Railroad Company. There was a nonsuit, and from an order refusing to take the same off, plaintiff appeals. firmed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER and ELKIN, JJ.

Frank R. Savidge, for appellant. John Hampton Barnes, for appellee.

ELKIN, J. For the reasons stated in the opinion handed down in the case of American Ice Company v. Pennsylvania Railroad Company (No. 78, January term, 1909) 73 Atl. 873, judgment of nonsuit is affirmed.

(110 Md. 629)

STIEFF CO. OF BALTIMORE CITY V. ULLRICH et al.

(Court of Appeals of Maryland. June 80, 1909.)

1. LIFNS (\$ 16*)-LACHES.

Where a debt for which complainant claimed an equitable lien on certain real estate matured during the lifetime of the debtor and his wife, but nearly five years elapsed from the time the debtor recorded a deed conveying the prop-erty to himself and wife as tenants by the en-"tirety, contrary to his agreement, before com-plainant sued to impose a lien on the property, when both the debtor and his wife had died, complainant's right to relief was barred by

[Ed. Note.—For other cases, see Liens, Cent. Dig. \$ 14; Dec. Dig. \$ 16.*]

2. HUSBAND AND WIFE (§ 14°)—CONVEYANCE OF REAL ESTATE—TENANCY BY THE ENTIRE-TIES

Where land was conveyed to a husband and wife jointly as tenants by the entireties, the title to the entire property vested in the wife on recording the deed, subject to be devested in favor of her husband in the event of her prior death.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 71-89; Dec. Dig. § 14.*]

3. Fraudulent Conveyances (\$ 248*)—Conveyance to Wife—Limitations.

VEYANCE TO WIFE—LIMITATIONS.
Code Pub. Gen. Laws 1904, art. 45, \$ 1,
provides that no acquisition of property passing
to the wife from the husband after coverture
shall be valid, if made to her in prajudice of assert their claims within three years after the acquisition of the property by the wife, or be absolutely barred. Held, that where a husband, to define the continuous took title to continue the state of the continue took title to continue the state of the continue took title to continue the state of the continue took title to continue t to defraud his creditors, took title to certain real estate in the name of himself and wife as tenants by the entireties, but promptly recorded the deed and took no steps to conceal the same, the creditor's right to attack the transfer was barred after three years, though by its omission to examine the deed or the record it had no knowledge of the fraud until after the husband's death and the three years had expired.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 730-734; Dec. Dig.

Appeal from Circuit Court of Baltimore City: Chas. W. Henisler, Judge.

Suit by the Stieff Company of Baltimore City against John J. Ullrich and others. From a decree sustaining a demurrer to the bill, complainant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTH-INGTON, and HENRY, JJ.

Edward M. Hammond, for appellant. Frederick T. Dorton and Wm. S. Bryan, Jr., for appellees.

HENRY, J. This is an appeal from a decree of the circuit court of Baltimore city sustaining a demurrer filed by the appellees to a bill of complaint filed by the appellant and dismissing the bill.

The allegations are to the effect that a certain Henry Lauritzen died on the 5th day of June, 1908, and that his wife, Eliza Ulirich Lauritzen, died a few months thereafter, on October 11, 1908, the latter intestate and the former leaving a will, but no estate, and that neither left a child or children. On January 28, 1904, Henry Lauritzen, who was an old and trusted employé in the establishment of the appellant, applied to the company for a loan of \$2,000 for the purpose of purchasing a house and lot, stating at the time of the application that he did not desire to incumber the property which he proposed to purchase with a mortgage, but that he would take a deed for the same in his own name, so that it would remain, in the event of his death, as ample security for the repayment of the loan. At the same time he gave to the appellant a promissory note which reads as follows: "Baltimore, Jany. 28th, 1904. \$2,000. Four months after date, I promise to pay to the order of the Baltimore Sterling Silver Company two thousand dollars. It is understood that this amount is to be paid by my services to the Baltimore S. S. Co. from Value received. [Signed] time to time. Henry Lauritzen." Lauritzen purchased a house and lot on Fulton avenue, in Baltimore, the deed for which, showing a consideration of \$2,125, was executed, acknowledged, and recorded on the 19th February, 1904; but, instead of taking the deed in his own name. Lauritzen had the property conveyed to himself and wife jointly, as tenants by the entireties, and the bill alleges that it was so executed for the purpose of defrauding the appellant, and that there was no consideration moving from the wife to the husband for the same. The bill further alleges that knowledge of the manner in which the conveyance was made did not come to the knowledge of the appellant until about June 5, 1908; that from time to time Lauritzen and his wife acknowledged the existence of the indebtedness, and after the death of the husband the wife again acknowledged that the loan was made to her husband for the purpose of purchasing a home, that the money was so used, and that she would pay it, but shortly thereafter she was taken ill. and died without having done so. The administrator of Mrs. Lauritzen sold the property, with knowledge of the claim of the appellant, and, being about to distribute the proceeds of sale among the heirs of the deceased. this bill was filed to annul and set aside the

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

claim of the appellant declared a lien on the property, and to enjoin the administrator from distributing the fund until the adjustment of the claim. By agreement between the parties, filed in the cause, the claim for a lien was waived and released, and the same was transferred to the fund in the hands of the administrator, without affecting or prejudicing in any other way the rights of the respective parties.

The actual facts of this case may be as stated in the bill and as admitted by the demurrer. It does not appear altogether unreasonable that Mr. Stieff, the president of the appellant company, having entire confidence in a faithful employé, may have accommodated him with a loan of \$2,000 on the terms and conditions as above set forth, and may have reposed in the security of feeling that the property to be purchased with the money would remain as a protection to him for the repayment of the loan upon demand, or in the event of the borrower's death. Yet, even if this be true, it seems clear to us that the appellant has permitted itself to be deceived and has placed itself in a position from which a court of equity cannot rescuè it. While always ready, in a proper case, to aid the vigilant, equity will not enforce stale demands, particularly when made after the death of the parties who may be interested in contesting them. As to what will constitute laches must depend upon the circumstances of each particular case. the present case a note for \$2,000 was given as security for a loan, payable four months after date. It does not appear from anything set forth in the bill that the note was presented for payment at its maturity, or that any demand for the same was made. More than four years are allowed to roll by, during which time the appellant paid to Lauritzen a weekly salary of \$65, and, though the note in terms so provides, no deduction appears to have been made from such salary and credited on the note; and it was not until June, 1908, after the death of Lauritzen. that the appellant discovered that the deed above referred to had been taken jointly in the names of husband and wire, and sought a settlement of the claim from the wife. The debt was not that of the wife, and no verbal promise of hers could bind her to pay it. No steps were taken to have the wife bind her property for the loan. The note itself was out of date, except that the bill alleges that from time to time the maker acknowledged the indebtedness, though it does not show that such acknowledgment was made at such a time as would remove the bar of the statute. These circumstances do not commend themselves to a court of equity. They are lacking, not only in diligence, but in prudence. Added to them is the material fact that both Lauritzen and his wife, who may have known of the transaction, are dead, and covered, though there be no special circum-

sale made by the administrator, to have the can testify to the facts. During the lifetime of all the parties the debt matured, and there was no obstacle in the way of a legal enforcement of the claim. The conduct of the appellant is, we think, lacking in that degree of diligence which should call into operation the aid of equity. Preston v. Horwitz, 85 Md. 171, 36 Atl. 710; Fetter on Equity, vol. 42; Phelps, Juridical Equity, § 262 et seq.; Hadaway v. Hynson, 89 Md. 313, 43 Atl. 806.

It may be well to add, in connection with the defense of laches, that under section 1, article 45, Code Pub. Gen. Laws 1904, the appellant is barred of his right of action. The deed in this case was recorded February 19, 1904. This suit was instituted December 9, 1908, nearly five years thereafter. The section of the Code above referred to provides "that no acquisition of property passing to the wife from the husband after coverture shall be valid if the same has been made or granted to her in prejudice of the rights of his subsisting creditors, who, however, must assert their claims within three years after the acquisition of the property by the wife, or be absolutely barred, and for the purpose of asserting their rights under this section, claims of creditors of the husband not yet due and matured shall be considered as due and matured." There can be no doubt of the proposition that on the date of the recording of the deed the title to the entire property vested in the wife, subject to be divested, in the event of her prior death, in favor of her husband. A tenancy by the entireties is in the eye of the law the tenancy of one person, and each is seised of the whole. There has been no departure in Maryland from the common-law doctrine on this subject. Marburg v. Cole, 49 Md. 402, 33 Am. Rep. 266; 2 Blackstone's Commentaries, 182: 4 Kent's Commentaries, 380. Therefore, when the deed was recorded, Mrs. Lauritzen became seised of the entire estate, and if the conveyance to her was for the purpose of defrauding the appellant, as charged, or any other creditor of the husband, it should have been attacked within three years from the date of its recordation.

But it is contended by the appellant that it did not discover the fact that the deed had been given to Lauritzen and wife as tenants by the entireties until about the time of the death of the former in June, 1908, and that limitations should not begin to run until such discovery at that time. In the case of Wear v. Skinner, 46 Md. 257, 24 Am. Rep. 517, a leading one on this subject, it is said that "when a party has been injured by the fraud of another, and such fraud is concealed, or is of such character as to conceal itself, whereby the injured party remains in ignorance of it without any fault or want of diligence on his part, the bar of the statute does not begin to run until the fraud is disthere is no one, except the appellant, who stances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." The facts in this case show that the appellant who as in this case show that the appellant, who as president of a large business enterprise must be regarded as a person of intelligence, did not exercise the diligence or prudence usually observed in a transaction of such importance. He gave a check for the money, and took the note as security for the same, relying upon the promise of Lauritzen to have the deed made in his own name. There was a clear breach of confidence on the part of Lauritzen, but he took no pains to conceal it. He did not keep the deed from record. The money was loaned January 28, 1904. The deed was recorded about three weeks later, on February 19th following. Ordinary diligence on the part of the appellant would have caused him to look at the records, or have the deed submitted to him before it was recorded, to see that his interests were properly protected in the manner he desired. It seems to us a case of inexcusable neglect on his part. "The defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove. Hence the tendency of courts in recent years has been to hold the plaintiff to rigid compliance with the law, which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts." Phelps, Juridical Equity, § 265; Foster v. Railroad, 146 U. S. 88, 13 Sup. Ct. 28, 36 L. Ed. 899; 16 Cyc. 171 et seq.

We do not deem it necessary, in the view we have taken, to go into the question, raised in the brief, as to whether the note, under the circumstances, constitutes a good ground of action; but for reasons above set forth we shall affirm the decree of the lower court.

Decree affirmed, with costs.

(111 Md. 64)

GRILL v. O'DELL

(Court of Appeals of Maryland. June 29, 1909.)

1. EXECUTORS AND ADMINISTRATORS (§ 32*)-LETTERS-REVOCATION-STATUTES.

Code Pub. Gen. Laws 1904, art. 93, \$ 67, provides that, where the validity of a will is contested, letters of administration pending the contest may be granted to the person named as executor, or to the person to whom the largest portion of the personal estate may be bequeathed, or to the person who would be entitled to letters in case of intestacy. *Held*, that such section was applicable only to cases where a caveat was filed before the will was admitted to probate and letters granted, and did not authorize the revocation of letters granted after probate on the subsequent filing of the caveat and the appointment of the caveator as administrator pendente lite on her mere assertion that she did not believe she could have justice done her.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 32.*]

to probate after letters testamentary have been granted to the executor, it is the executor's duty to defend the will.

[Ed. Note.—For other cases, see and Administrators, Dec. Dig. § 81.*]

EXECUTORS AND ADMINISTRATORS (§ 32*) -LETTERS-REVOCATION.

Letters testamentary after probate will not be revoked on the filing of a caveat pending the controversy, except for legal and sufficient cause satisfactorily shown.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 32.*]

4. EXECUTORS AND ADMINISTRATORS (§ 32*) -

LETTERS—REVOCATION—Issues.

Where petitions for the revocation of letters testamentary and the appointment of the caveator as administrator pendente lite did not pray that the probate be revoked, an order granting such petition could not be sustained on the theory that the probate decree was invalid for want of proper notice to the persons beneficially interested.

[Ed. Note.—For other cases, see and Administrators, Dec. Dig. § 32.*]

APPEAL AND ERROR (§ 911*) — PRESUMP-TIONS—JUBISDICTIONAL MATTERS.

On appeal from an order revocation diministrator pending determination of the caveat, it will be presumed, in the absence of proof to the contrary, that the orphans' court, in admit-ting the will to probate, properly decided all jurisdictional matters, including the fact that reasonable notice of the hearing of the application for probate had been given.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 911.*]

Appeal from Orphans' Court, Baltimore County; Melchor Hoshall, O. Clinton Tracey, and H. Seymour Piersol, Judges.

Petition by Lillie R. O'Dell for the revocation of letters testamentary issued to John H. Grill, as executor of the estate of Annie E. Ruby, deceased, and for the grant of letters of administration pending determination of a caveat to set aside probate of the will to petitioner. From an order granting such petition, the executor appeals. Reversed.

Argued before BOYD, C. J., and PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and THOMAS, JJ.

Thomas G. Hayes and Osborne I. Yellott. for appellant. Z. Howard Isaac, for appel-

THOMAS, J. Mrs. Annie E. Ruby, of Baltimore county, died on the 4th day of February, 1909, leaving a last will and testament, which was admitted to probate in the orphans' court of Baltimore county on the 10th day of February, and on the same day letters testamentary were granted to John H. Grill, the executor named therein. The executor filed his bond, which was approved by the court, and the court then passed orders directing notice to be given to creditors, and appointing appraisers, and on the 3d of March an inventory of personal property,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to the amount of \$296, of cash in the house is clear. It provides as follows: "In all to the amount of \$10, and of cash in bank to the amount of \$14,000 was filed. On the 23d of February the appellee, Lillie R. O'Dell filed in the orphans' court a caveat to said will, and on the same day a petition to have the letters testamentary granted to John H. Grill revoked and letters of administration pendente lite granted. On the 2d of March the appellee filed a supplemental petition, alleging, among other things, that she was the only surviving child of the deceased, etc., and praying that the letters testamentary granted to the executor named in the will be revoked, and that letters of administration pendente lite be granted her, etc.; and the court passed an order requiring the executor to answer said petitions for the revocation of his letters on or before the 9th of March, and setting the matter down for hearing on the 11th of March. The executor having answered the caveat on the 9th of March, issues were framed and sent by an order of the orphans' court to the circuit court for Baltimore county for trial. At the hearing of the petitions for a revocation of the letters testamentary, evidence was produced by the petitioner and executor. On the 16th of March the beneficiaries under the will filed their assent to the petition of the appellee. and on the same day the orphans' court passed the order, from which this appeal is taken, revoking the letters granted to the appellant, and granting letters of administration pendente lite to the appellee.

It is not necessary to set out in this opinion either of the petitions or the evidence produced at the hearing. It is sufficient to say that the only ground assigned in the petitions for the revocation of the letters was that the alleged will is not the last will and testament of the deceased. It is not alleged, nor was there any evidence to show, that John H. Grill, the appellant and executor named in the will, was incompetent, or for any reason was not a proper person to administer. George E. O'Dell, the husband of the appellee, and only witness produced, when asked to state the "reasons" for filing the petitions, said: "Well, in the first place, my wife thinks she is capable of attending to her own affairs and her own business: second, she does not think she can have justice done her by having Mr. Grill acting as administrator. * * * She wanted to have these matters in her-to attend to them herself." In passing the order of the 16th of March, the orphans' court doubtless proceeded upon the theory that, a caveat having been filed, it was required or authorized by section 67, art. 93, Code Pub. Gen. Laws 1904, to revoke the letters testamentary granted before the caveat was filed, and to appoint, in its discretion, the executor named in the will or one of the other persons mentioned in that section administrator pendente lite. That that is not the proper construction of the section referred to we think

cases where the validity of a will is or shall be contested, letters of administration pending such contest may, in the discretion of the orphans' court, be granted to the person named executor or to the person to whom the largest portion of the personal estate may be bequeathed in such contested will, or to the person who would be entitled to letters of administration by law, as in cases of intestacy."

This section does not say that the orphans' court may, on the filing of a caveat, revoke letters previously granted, but was only intended to apply to cases where the caveat is filed before the will is admitted to probate and letters testamentary have been granted, or where, after probate of the will and granting of letters testamentary, the letters for some sufficient reason have been revoked. The filing of the caveat does not suspend the powers of the executor, or furnish any ground for the revocation of his letters. the case of Munuikhuysen v. Magraw, 35 Md. 280, where the caveat was filed after the will had been admitted to probate and letters testamentary had been granted, and the orphans' court appointed an administrator pendente lite, leaving the letters testamentary unrevoked and in full force, the court said: "When the will has been admitted to probate, and letters testamentary actually granted, the executors have qualified, and their letters remain unrevoked, the orphans' court have no power to appoint an administrator pendente lite," and that "the effect of the caveat and proceedings thereunder was not to revoke the probate, or to suspend the powers of the executors. These remain to await the final action of the orphans' court after the trial and verdict upon the issues." If, as said in that case, the caveat does not affect the powers of the executor, which remain the same until the final order of orphans' court after the finding upon the issues, the filing of the caveat furnishes no ground for the revocation of letters testamentary previously granted. The power of the orphans' court to revoke letters testamentary or of administration is not an arbitrary power, but can only be exercised when the facts of the case warrant it. Where letters have been irregularly and improvidently granted, or have been obtained through fraud or mistake, or the executor or administrator is incompetent, or has been guilty of misconduct in the administration of the estate, or refuses to obey an order which the court was authorized to pass, in these and similar cases his letters may be revoked: but there is no warrant in law for the revocation of letters testamentary granted to the executor named in a will upon the filing of a caveat simply because the caveator desires to administer and "does not think she can have justice done her," and the beneficiaries under the will assent. Upon the filing of a caveat to a will that has been ad-

mentary have been granted to the executor named therein, it becomes the duty of the executor to defend the will, and his letters cannot be revoked, pending the controversy, except for legal and sufficient causes satisfactorily shown. Levering v. Levering, 64 Md. 410, 2 Atl. 1; Dalrymple v. Gamble, 66 Md. 313, 7 Atl. 683, 8 Atl. 468; Carey v. Reed, 82 Md. 395, 33 Atl. 633; Snook v. Zentmyer, 90 Md. 706, 45 Atl. 1006; Jones v. Harbaugh, 93 Md. 269, 48 Atl. 827; Compton v. Barnes, 4 Gill, 55, 45 Am. Dec. 115; Townshend v. Brooke, 9 Gill, 90; Miller v. Gehr, 91 Md. 709, 47 Atl. 1032.

Counsel for the appellee insists that no proper notice was given to the relations of the deceased before the will was admitted to probate, as required by sections 336, 337, 338, art. 93, Code Pub. Gen. Laws 1904, and for that reason the will was not legally admitted to probate, and that the orphans' court was, therefore, justified in revoking the letters of the appellant. The obvious answer to this contention is, in the first place, that the petitions did not ask that the probate of the will be revoked, and this is not an appeal from the order admitting the will to probate, or from an order revoking or refusing to revoke that order, and the regularity of the court's judgment in that matter is not raised by this appeal; and, secondly, that we must assume, in the absence of proof to the contrary, that the orphans' court, in admitting the will to probate, properly decided all matters required to be decided by it, for instance, that reasonable notice had been given, etc., and there is nothing in the record in this case to show that it did not do so. Stanley v. Safe Deposit Co., 87 Md. 450, 40 Atl. 53; Stanley v. Safe Deposit Co., 88 Md. 401, 41 Atl. 790. As the record does not disclose any legalcause for revoking the letters testamentary granted to the appellant, we must reverse the order appealed from.

Order reversed, with costs, and petitions dismissed.

(111 Md. 113)

LOWE v. LOWE et al.

(Court of Appeals of Maryland. June 30, 1909.) 1. WITNESSES (§ 133*) — TRANSACTION WITH PERSON SINCE DECEASED—COMPETENCY.

On a claim by a son against his father's estate for services and support, the son is pro-hibited from testifying, by Code Pub. Gen. Laws 1904, art. 3. § 35, to prove the contract between him and his father, or concerning the conversations between them on the subject.

[Ed. Note.—For other cases, see W. Cent. Dig. § 566; Dec. Dig. § 133.*]

2. WITNESSES (§ 198*)—PRIVILEGED COMMUNI-CATIONS-ATTORNEY AND CLIENT.

Communications between attorney and client are privileged, and may not be divulged without the client's consent or waiver.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 747; Dec. Dig. § 198.*]

eFor other cases see same topic and section AUMBER in Dac. & Am. Digs. 1907 to date, & Reporter Indexes

mitted to probate, and after letters testa-[3. Work and Labor (§ 7*)—Persons in Fam-ILY RELATION.

A son may not recover for services and support rendered his father, unless there was an intention on the part of the son, when the services were rendered, to charge therefor, and an expectation on the father's part to pay therefor, thus creating an express or implied con-

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 17; Dec. Dig. § 7.*]

4. EXECUTORS AND ADMINISTRATORS (§ 221*)-

CLAIMS—SERVICES—BURDEN OF PROOF.
In order to establish a son's claim against his father's estate for services in caring for the father, the burden is on the son to show an express or implied contract to pay.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. \$ 901; Dec. Dig. § 221.*]

5. Executors and Administrators (§ 221*)-

CLAIM FOR SERVICES—EVIDENCE.
Evidence on the hearing of a claim by a son against his father's estate held insufficient to justify a finding of a contract between the father and son that the son should be paid for services rendered in caring for his father during his declining years.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 903; Dec. Dig.

Appeal from Circuit Court, Carroll County, in Equity; Wm. H. Thomas, Judge.

Claim by James E. Lowe against the estate of Nicholas Lowe, deceased, to which Alfred Lowe and others filed objections. From a judgment disallowing the claim, claimant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, WORTHINGTON, and BURKE, JJ.

David N. Henning, for appellant. Michael E. Walsh and James A. C. Bond, for appellees.

BURKE, J. Nicholas Lowe, a resident of Carroll county, died on the 1st day of April, 1905, at the age of 81 years. For 25 years preceding his death he had made his home with his son, James E. Lowe. His wife had died before he went to live with his son. He died intestate, leaving a small personal estate and about 22 acres of land. He left surviving him children, grandchildren, and greatgrandchildren, whose names and places of residence are stated in the record. On the 11th day of April, 1905, the appellant and other heirs at law of Nicholas Lowe filed a bill in the circuit court for Carroll county for the sale of real estate left by his father. for partition and division of the proceeds thereof among those entitled to receive the same. Answers were filed, and in due course a decree was passed on the 14th day of July, 1905, directing the property to be sold, and appointed the appellant one of the trustees to make the sale. The trustees sold the property for \$1,396. The sale was reported to and finally ratified by the court. Nearly a year after the sale, Andrew Dreschsler filed a creditors' bill in the cause in which the

decree had been passed, alleging that Nicholas Lowe at the time of his death was indebted to him and to other persons in large sums of money, and praying that the funds in the hands of the trustees, or so much thereof as might be necessary, be applied to the payment of so much of said indebtedness as remained unpaid. On August 5, 1907, the appellant filed in the cause the following claim:

The Estate of Nicholas Lowe, Deceased, to James E. Lowe.

For work, labor, lodging, board, goods, materials, and money done and furnished the said Nicholas Lowe in his lifetime by said James E. Lowe, at request of said Nicholas Lowe, deceased, as follows:

\$2,293 75

Objections to the allowance of this claim were interposed by all the helrs at law of Nicholas Lowe. Testimony was taken before the auditor for and against the claim. The auditor's account C filed in the cause disallowed this claim, and to this account the appellant excepted; but the lower court, after full hearing, overruled his exceptions, and by its order of August 10, 1908, finally ratified the account, and from that order James E. Lowe has brought this appeal.

There are some questions raised upon the record as to the rulings of the court upon the exceptions to testimony; but the main, and practically the only, question is this: Upon the evidence appearing in this record, ought this claim be allowed? The testimony of James E. Lowe was excepted to, and was excluded by the court below. It may be true, as argued by counsel, that it was error to have excluded his whole testimony. Under the case of Smith v. Humphreys, 104 Md. 285, 65 Atl. 57, there were some facts to which he was competent to testify; but he was not competent to prove the contract or agreement between himself and his father, and the conversations between them on that subject, and those portions of his testimony cannot be considered by us. Such testimony relates to transactions had with, or statements made by, the deceased, and in this proceeding the witness was not competent, under article 3, § 35, Code Pub. Gen. Laws 1904, to prove them.

A number of exceptions to testimony were filed by James E. Lowe. In disposing of these the court said: "The exceptions of James E. Lowe to the testimony of Elizabeth Kelbaugh, Ella Cassell, Jacob Long, Albort Kelbaugh, Ella Cassell, Jacob Long, Albort Green, and Jacob D. Leister are entirely too general, and should for that reason be

overruled. As was said in the case of Freeny v. Freeny, 80 Md. 409, 31 Atl. 304, 305: 'Every exception should clearly indicate the testimony excepted to, the ground on which the exception is based, and the name or names of the witnesses whose testimony is excepted should be set forth.' But the court. in disposing of the case, has done so without reference to any of the testimony excepted to, except the testimony of Elizabeth Kelbaugh, Ella Cassell, and Alfred Lowe to statements made by the claimant after the death of the deceased, and the testimony of A. H. Huber to statements of claimant made to him out of the presence of Mr. Hoff. It will not be necessary to pass upon the claimant's exceptions to other testimony." There was no reversible error in this ruling. The testimony of Ivan L. Hoff was not considered by the court below, and will not be by The communications between him and his client, James E. Lowe, were confidential and privileged, and, without the consent or waiver of the client, he is not permitted by the law to divulge them.

This court has been frequently called upon to consider claims of this nature. The general rule to be applied to such claims is well established. The rule stated in Bantz v. Bantz, 52 Md. 694, and consistently followed in all the cases wherein this court has had occasion to consider the question, is this: "In order to justify a claim for services being allowed against a decedent, there must have been a design at the time of the rendition to charge, and an expectation on the part of the recipient to pay, for the services. The services must have been of such a character and rendered under such circumstances as to fairly imply an understanding of payment and a promise to pay. There must have have been an express or implied understanding between the parties that a charge for the services was to be made, and to be met by payment." The burden is upon the claimant to satisfy the court of the existence of the conditions which would authorize the allowance. The presumption of law is that they were gratuitous, and this presumption must be overcome by clear and satisfactory evidence. It is stated in 21 Am. & Eng. Ency. of Law, 106, that "the general rule deducible from the authorities is that where a child, after arriving at majority, continues to reside as a member of the family with a parent, or with one who stands in the relation of a parent, or where the parent resides in the family of a child, the presumption is that no payment is expected for services rendered or support furnished by the one to the other. This presumption is not, however, conclusive, and may be overcome by proof either of an express agreement to pay or of such facts and circumstances as show satisfactorily that both parties at the time expected payment to be made. Wherever, therefore, compensation is claimed in any case by either parent or

or the like, the question whether the claim should be allowed must be determined from the particular circumstances of the case. There can be no fixed rule governing all cases alike. In the absence of any direct proof of an express contract, the question to be determined is whether it can be reasonably inferred that pecuniary compensation was in view of the parties at the time when the services were rendered or the support was furnished; and the solution of this question depends on a consideration of all the circumstances of the case."

Tested by this rule, is the evidence sufficient to support this claim? There is no satisfactory evidence in the record of any express contract on the part of Nicholas Lowe, at the time he went to live with the appellant, that he would pay for the services specified in the account. There is some testimony on this point given by Mrs. Lowe, but it is vague and indefinite. She does not say she was present when the agreement was made, and what she does say is too uncertain and equivocal to fix liability upon the deceased. Asked if her husband and Nicholas Lowe had any arrangement or contract by which he was to live with them, she said: "He come there and got his board and washing, and he was to pay for it when he could." There is a good deal of testimony by the children of the claimant tending to show acknowledgment by the deceased of his indebtedness to his son, and of repeated promises to pay, and if there were nothing in the case to discredit this evidence it might be sufficient to take the case out of the general rule and to allow a recovery upon an implied promise to pay. It is unnecessary for us to analyze or comment upon the testimony of these interested witnesses. They no doubt felt that their father should be paid, and we think they have somewhat magnified the services rendered to Mr. Lowe, and minimized very largely his contribution to the support and comfort of the

The conduct and declarations of the claim-

ant, it seems to us, are utterly inconsistent with a belief on his part that he had any legal claim against his father. It is not pretended that Nicholas Lowe agreed to pay any definite sum; nor did he ever pay anything to his son during all the years he lived with him. Neither did the claimant, who was a man dependent upon his daily labor for his livelihood, ever present him with an account of his indebtedness, and no account of any kind was ever kept against him. For four or five years the claimant farmed his father's land, had settlement with him, and paid over to his father the proceeds of his share of the crops, without any deduction on account of his claim. After his father's death, in conversation with some of the heirs about the settlement of his estate, he made no claim, but stated that he wanted nothing but his share. He became a plaintiff in the case instituted for the sale of the property for purposes of dividing the proceeds thereof among the children of the deceased, and did not file this claim until more than two years after the sale of the property, and not until after the creditors' bill had been filed. This conduct on the part of the claimant cannot be reconciled with the claim he is now making. Its only reasonable explanation is that he had no charge against his father for such services as he had rendered him, and that he had no intention of seeking payment therefor. The conclusion that he had no claim is further strengthened by his statement to Mr. Huber that there was no contract beween his father and himself, and that there was no understanding that he should be paid. We are not disposed to relax the salutary rule applicable to cases of this nature.

We have carefully considered all the evidence properly in the case, and our conclusion is that the claim of James E. Lowe is not such as can be enforced against or allowed out of the funds in the hands of the trustees, and the order appealed from will be affirmed.

Order affirmed, with costs.

(82 Vt. 327)

BARBER v. VINTON et al. (Supreme Court of Vermont. Brattleboro. Aug. 23, 1909.)

1. APPEAL AND ERROR (§ 232*)-OBJECTIONS-

SUFFICIENCY

That plaintiff's objections to the record were referred to as failures to comply with the were referred to as failures to comply with the requirements of certain sections of the Public Statutes, instead of sections of the Vermont Statutes, which was the revision in force when the proceedings were had, did not defeat his exception; the statutory provisions referred to being substantially the same, and there being no misapprehension on the part of the court or opposing counsel.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 232.*]

2. CONSTITUTIONAL LAW (§ 316*)-GUARANTY

OF REMEDIES—APPEAL.

The statute, authorizing a dissatisfied land-The statute, authorizing a dissatished land-owner to apply by petition to the county court and have thereon a rehearing in proceedings for the laying out of a public road, is a sufficient provision for appeal as against the objection that the statute is unconstitutional in failing to provide for an appeal.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 938; Dec. Dig. § 316.*]

8. HIGHWAYS (§ 54*)—PROCEEDINGS TO LAY OUT—NOTICE—RECORD.

The recital, in the record of proceedings establishing a highway, that the action of the selectmen was taken "after due hearing" on the question of public convenience, was insufficient to show the landowner had notice. to show the landowner had notice.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 171; Dec. Dig. § 54.*]

4. HIGHWAYS (§ 54*)—PROCEEDINGS TO LAY OUT—NOTICE ON QUESTION OF NECESSITY— PRESUMPTIONS.

Notice to the landowners of the hearing on the question of necessity cannot be pre-sumed in proceedings for the laying out of high-WAVS.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 171; Dec. Dig. § 54.*]

5. HIGHWAYS (§ 54*)—PROCEEDINGS TO LAY OUT—NOTICE—EVIDENCE.

Under the statute providing that the select-men shall return the original petition for the laying out of a highway with a report of their doings thereon and of the manner of notifying the parties, with the survey of the road, to the town clerk's office, to be kept on file therein, and that their order laying out the road and the survey shall be recorded, notice to the parties of a hearing on the question of necessity can-not be shown by extrinsic evidence.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 171; Dec. Dig. § 54.*]

6. WORDS AND PHEASES—"WAIVER."

A "waiver" is an intentional relinquishment of a known right; its essence being voluntary choice, and not mere negligence. The intention need not be expressed, but must be evidenced by conduct of an unequivocal char-acter, and the party must have acted with knowledge of all material facts affecting his rights.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7375-7381, 7831, 7832.] 7. HIGHWAYS (§ 31°)—PROCEEDINGS TO LAY OUT—NOTICE—WAIVER—EVIDENCE.

OUT-NOTICE-WAIVER-EVIDENCE.
That a landowner appeared at a subsequent hearing on the question of damages did not of itself show a waiver of the notice of hearing on the question of necessity.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 70; Dec. Dig. § 31.*]

Exceptions from Windham County Court; George M. Powers, Judge.

Action of trespass quare clausum fregit by Frank Barber against W. H. Vinton and others. Verdict for defendants and plaintiff excepted. Reversed and remanded.

Plaintiff acquired title to the premises described in the declaration by a decree of foreclosure of two mortgages that were duly assigned to him by Catherine Sears, the legal owner thereof. The trespasses complained of were committed after said decree became absolute, and consisted of entering the premises and thereon surveying and laying out certain roads. It appeared that defendants William H. Vinton, Warren Walker, and E. H. Putnam were the selectmen of the town of Brattleboro at the time of the alleged trespasses, and that the other defendant was employed by them to build said roads. The defendants justified under a certified copy of the record of a petition to them as such selectmen to lay out said roads and their doings thereunder, which petition was presented to and acted upon by them while said mortgages were owned by said Catherine Sears. Said record was received in evidence subject to plaintiff's objections, as stated in the opinion, and subject to his exception. Subject to plaintiff's objection and exception, defendants Vinton and Putnam were permitted to testify: That they gave said Catherine Sears seasonable notice of the petition asking to have the roads in question laid out, and that they would pass on the matter of the laying out of said roads, by mailing to her a postpaid letter with a designated address; that she did not appear at that hearing, which was before the trespasses complained of and while she owned said mortgage; that later they in like manner gave her notice that they had laid out the roads and would determine the amount of damages at a designated day and hour, which also was before the trespasses complained of, and while she owned said mortgages; that she appeared at this last hearing, but said nothing about having received notice of the former hearing.

Argued before ROWELL, C. J., and MUN-SON, WATSON, and HASELTON, JJ.

Herbert G. & Frank E. Barber and Chase & Daley, for plaintiff. A. F. Schwenk and Hermon E. Eddy, for defendants.

MUNSON, J. This suit is brought in the right of Catherine Sears, who held a mortgage of the premises entered by the defendants. The record of the proceedings establishing the highway recites that the action of the selectmen was taken "after due hearing" on the question of public convenience, and that a hearing as to land damages was afterwards had. The record contains nothing further bearing upon the question of notice. A certified copy of the record was received in evidence against the plaintiff's objection that it failed to show that Catherine Sears had notice of the proceedings. The defendants were afterwards permitted to show by parol evidence that the selectmen notified Mrs. Sears of the hearing on the petition, and of the subsequent hearing on the matter of damages, by the mailing of letters properly addressed, and that she appeared at the latter hearing. This evidence was objected to on the ground that the record was conclusive and could not be varied or enlarged by parol. The court directed a verdict for the defendants.

The plaintiff's objections to the record were specifically pointed out, but were spoken of as fallures to comply with the requirements of certain sections of the Public Statutes, instead of sections of the Vermont Statutes, which was the revision in force when the proceedings were had. This inaccuracy cannot defeat the exception. The statutory provisions referred to were substantially, if not entirely, the same in the two revisions, and the substance of each objection was so presented as to leave no room for misapprehension on the part of court or opposing counsel. See Stowe v. Stowe, 70 Vt. 609, 41 Atl. 1024.

The plaintiff claims that the proceedings relied upon by the defendants afford them no protection because the statute which purports to authorize them is unconstitutional, in that it fails to provide for an appeal to a disinterested tribunal; but the statute authorizes a dissatisfied landowner to apply by petition to the county court and have thereon a rehearing of all the questions involved, and this has recently been held to be a sufficient provision by way of appeal to meet the objection now urged by the plaintiff. V. S. 3314, 3315; P. S. 3835, 3836; Burlington v. Central Vt. R. R. Co., 82 Vt. 5, 71 Atl. 826.

The defendants tacitly concede that notice of the hearing on the question of necessity or convenience is essential to jurisdiction, and that Mrs. Sears' interest as mortgagee entitled her to notice, but they contend: That the fact of notice is covered by the recital of "due hearing"; that, if there is any deficiency in this respect it is made good by the presumption of regularity; that, if notice did not otherwise appear, it was properly shown by parol evidence; and that, in any event, Mrs. Sears' appearance at the hearing on the question of damages without questioning the prior proceeding was a waiver of the omission. The defendants cite Robinson v. Winch, 66 Vt. 110, 28 Atl. 884, in support of their contention that the selectmen's recital of a "due hearing" shows a hearing had on notice to Mrs. Sears. In the case cited the selectmen laid a highway over the plaintiff's land, and the record showed that they heard "all parties interested, as the law requires." This was considered a sufficient ings of the selectmen thereon, stating the

showing that the plaintiff was heard on the question of taking. The court evidently went upon the ground that there could be no question in the mind of any one but that the plaintiff was an interested person; and in this view the recital was a direct assertion that the plaintiff was heard, and, if he was heard, it was needless to inquire regarding notice. But the recitals in the two cases are not coextensive. A statement that all persons interested were heard covers the requirements of a sufficient hearing, while a mere recital of "due hearing" gives no indication of what the trier considered essential to a due hearing. We think it must be held that the record fails to show that Mrs. Sears had notice.

But the defendants insist that this matter is covered by the presumption of regularity, and cite several of our cases in support of their contention, beginning with Corliss v. Corliss, 8 Vt. 373. The controversy in that case involved the validity of proceedings had in setting out the plaintiff's dower from lands which her husband held in common with the defendant. The statute provided that notice of an application for the severance of the estates should be given to all persons interested before the order therefor should issue, and that the committee appointed to make the division should notify all persons interested to be present if they saw cause. The defendant was not notified of the application before the issuance of the order, but was notified by the committee to be present at their proceedings and did not attend. The court considered that the provision for the preliminary notice could not be treated as directory, but held that the notice afterwards given made the defendant so far a party to the proceeding that he had a right to attend the committee while the division was being made, and an opportunity to contest their report, and a right to appeal from the court's acceptance thereof, and that his neglect to avail himself of these rights was a waiver of the prior defect. This case has sometimes been cited as authority for propositions not covered by the decision. In Sparhawk v. Buell's Adm'r, 9 Vt. 41, 77, in passing upon a claim that the probate decree in question was not upon such notice as the statute required, it was said that the court had held in the Corliss Case that decrees of the probate court would be presumed to have been made upon proper notice and formal proceedings, although they did not appear of record, and that parol proof could not be received to show the contrary. In Kidder v. Jennison. 21 Vt. 108, the only record was that of a survey of the road, and this was received in evidence against the plaintiff's objections that it did not show that the plaintiff received notice of the doings of the selectmen so that he could appear and claim his damages, nor show that a petition, with the doreturned to the town clerk's office. It was said, upon a citation of Corliss v. Corliss, that the court would make all reasonable presumptions in favor of judicial and analogous proceedings, and that, if a petition was necessary, the court would probably presume its existence and regularity, that the return of the petition to the clerk's office was an act subsequent to the laying of the road, and not an essential part of it, and that an omission of this duty could not affect the validity of the laying. It was thought that it could not have been intended that the omission to notify a landowner should make void the laying of the road, that it was intended as a direction to the selectmen in the performance of their duty, and perhaps to impose upon them an obligation that would afford a remedy to one aggrieved, and that any other construction would savor of unreasonable strictness. This case was cited in support of the decision in Haynes v. Lassell, 29 Vt. 157. There the selectmen had discontinued a road, and the record failed to show that there had been any notice or hearing. The court doubted whether notice to a landowner was essential, in proceedings for a discontinuance, but held that, if notice was necessary, it would be presumed that the preliminary proceedings were regular. But it was held in La Farrier v. Hardy, 66 Vt. 200, 28 Atl. 1030, after giving due consideration to Kidder v. Jennison, and held again in Lynch v. Rutland. 68 Vt. 570, 29 Atl. 1015, that notice to the landowner is necessary to give selectmen jurisdiction of the subject-matter of laying a road, and that without notice their acts are void. The facts were such that the question of presumption was not expressly disposed of in either case; but the latter opinion suggests a doubt whether a presumption of notice can ever be made in support of a proceeding of this nature before a tribunal of special and limited authority. In Kent v. Village of Enosburg Falls, 71 Vt. 255, 44 Atl. 343, where sewer assessments were annulled on appeal, it was said that in all sessions proceedings the facts which confer jurisdiction must affirmatively appear, that an exercise of jurisdiction does not imply a previous ascertainment of the facts necessary to confer it, and that nothing will be presumed in favor of the action taken.

It seems clear from this review of our cases that notice of the hearing on the question of necessity cannot be presumed. next inquiry is whether notice can be shown by extrinsic evidence. The statute provides that the selectmen shall return the original petition, with a report of their doings thereon and of the manner of notifying the parties, with the survey of the road, to the town clerk's office, to be kept on file therein, and that their order laying out the road, and the survey, shall be recorded. The

manner of notifying the parties, had been provide for an official ascertainment and preservation of all the facts essential to the validity of the proceedings and the determination of the rights of those concerned, and that the enactment will fail of its purpose if it be held that defects may be supplied by parol evidence. Sherwin v. Bugbee, 17 Vt. 337, is cited in support of this view. That was a suit in trespass, in which the defendant undertook to justify as collector of taxes, and the issue depended upon the validity of the vote raising the tax. The warning of the meeting as recorded did not give the hour at which it was to be held, and the defendant offered parol evidence to show that the hour appeared in the original warning as posted. This was excluded, and the court sustained the exclusion, saying that the record should furnish all the means for testing the validity of the proceedings. We see no ground upon which a distinction can be made in this respect between proceedings for the taking of property by taxation, and those for taking it under the right of eminent domain. See, also, Post v. Rutland Railroad Co., 80 Vt. 551, 69 Atl. 156.

It remains to inquire whether Mrs. Sears waived this defect by appearing at the subsequent hearing on the question of damages. The defendants insist that her appearance at that time without objecting to the proceedings operated as a waiver of the prior defect, and cite Brock v. Barnet, 57 Vt. 172, in support of their claim. In that case the plaintiff did not have sufficient notice of the hearing on the question of laying the highway, but he appeared at the hearing and objected to any action being taken, but made no objection regarding the notice, and it was held that the want of sufficient notice was dilatory matter and was waived by not objecting. This case would have been somewhat in point if the appearance here relied upon had been at the hearing on the petition; but it does not dispose of the question presented. This court has defined a "waiver" to be an intentional relinquishment of a known right. Boynton v. Braley, 54 Vt. 92; Donahue v. Insurance Co., 56 Vt. 374, 382; Findelsen v. Insurance Co., 57 Vt. 520; Christenson v. Carleton, 69 Vt. 91, 37 Atl. 226. The intention need not be expressed, but must be evidenced by conduct of an unequivocal character. 29 Ency. Law, 1105; N. H. Central R. R. Co. v. Johnson, 30 N. H. 390, 64 Am. Dec. 300: Cal. Southern Hotel Co. v. Callender, 94 Cal. 120, 29 Pac. 859, 28 Am. St. Rep. 99. The party must have acted with a knowledge of all the material facts affecting his right. Pence v. Langdon, 99 U. S. 578, 25 L. Ed. 420; Bennecke v. Conn. M. Life Ins. Co., 105 U. S. 355, 26 L. Ed. 990; Tone v. Columbus, 39 Ohio St. 281, 48 Am. Rep. 438. The conduct may be of a negative character; but the essence of a waiver is voluntary choice, and not mere negligence. Farlow v. Ellis, 15 Gray (Mass.) 229. The cases upon this subplaintiff insists that this was intended to ject mostly relate to matters of contract, and these present questions touching every de- | before. It is true that the matter had not scription of conduct. This case involves the effect of appearances in judicial proceedings, and requires a reference to special rules applicable thereto. It is well settled that, if a defendant who has not been served with process voluntarily submits himself to the jurisdiction of the court, he will be precluded from afterwards taking advantage of the defect. This may be done by entering a general appearance in some prescribed manner, or by taking some step in the proceeding which necessarily involves an acknowledgment of the court's jurisdiction; but a defendant may come before the court without submitting to its jurisdiction if his appearance be properly limited.

The first proceeding on a petition for the laying of a highway is an inquiry whether the public good or the necessity or convenience of individuals requires that it be laid. If the road is laid, it becomes necessary to inquire whether the landowners have suffered any damage by the appropriation of their property for this purpose, and, if they have, to fix the amount. The second hearing may be had on the same day as the first, or it may be had months later, as in this case. The hearing on a petition to the selectmen, while judicial in its nature, is not docketed in nor directed by any court, but is purely a sessions proceeding, conducted informally, and without special rules governing appearances or their effect. The record in this case is very meager. The exceptions state merely that Mrs. Sears appeared at the hearing on the question of damages, and said nothing about having received notice of the prior hearing. The selectmen's report makes no mention of her attendance or her interest. So we have no knowledge of any conduct affecting Mrs. Sears' rights, beyond what is covered by the statement that she appeared. But this statement of the exceptions does not exclude from our inquiry the matters ordinarily involved in the determination of a question of waiver. There is nothing in the law that attaches to a mere appearance in a proceeding of this character the technical consequences that follow the entry of a general appearance in regular judicial proceedings. For aught that appears, Mrs. Sears may have attended for some purpose which did not necessarily acknowledge the jurisdiction, and have done nothing that in the circumstances amounted to a waiver. The burden was on the defendants to introduce evidence, and procure a statement of it, that would show the con-

It must be remembered that the hearing at which Mrs. Sears appeared was not the one at which the road was laid, although it was a hearing in the same proceeding, and one from which she must have understood that the selectmen had undertaken to appropriate the land; but the adjudication of conyet passed beyond the reach of the selectmen, and that, if Mrs. Sears had then made her objection, they might have recalled their action and given her a hearing on the question of taking; but this cannot be made the test of her conduct, even if it was her duty to act with reference to a contingency, for she may not have known the conditions which made this course possible. We find no ground upon which it can be said as matter of law that Mrs. Sears has waived her right to object to the condemnation for want of notice.

Judgment reversed, and cause remanded.

McCARTER, Atty. Gen., v. McKELVEY et al. SAME v. HOPSON et al. SAME v. BERDAN et al.

(Supreme Court of New Jersey. Nov. 10, 1908.)

1. STATUTES (\$ 100*) — VALIDITY—"GENERAL LAW"—"SPECIAL LAW."

P. L. 1907, pp. 79, 89, 114, creating boards of fire and police commissioners, boards of finance, and boards of public works in cities having a population of not less than 100,000 nor more than 200,000, are each a "general law," and not a "special law," regulating municipal affairs. nicipal affairs.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 112; Dec. Dig. § 100.*

For other definitions, see Words and Phrases, vol. 4, pp. 3065-3071; vol. 8, pp. 7669, 7670; vol. 7, pp. 6577-6584; vol. 8, p. 7802.]

2. Officers (§ 19*) - Political Qualifica-TIONS-STATUTES.

P. L. 1907, pp. 79, 89, 114. creating boards of fire and police, fibance, and public works in certain cities, and requiring that not more than two of the four members of each board shall be members of the same political party, are not invalid as prescribing political qualifications for holding public offices.

[Ed. Note.—For other cases, s Cent. Dig. § 23; Dec. Dig. § 19.*] see Officers,

Informations in the nature of quo warranto by Robert H. McCarter, Attorney General, against Charles D. McKelvey and others, against William A. Hopson and others, and William Berdan and others. On demurrer to the informations. Sustained.

Argued June term, 1908, before GUM-MERE, C. J., and TRENCHARD and MIN-TURN, JJ.

Robert H. McCarter, Atty. Gen., in pro. per. Thomas F. McCraw, for defendants.

PER CURIAM. The informations filed by the Attorney General in the above causes attack the validity of chapters 45, 46, and 62, pp. 79, 89, 114, of the Laws of 1907, which create boards of fire and police commissioners, boards of finance, and boards of public works in cities of this state having a population of not less than 100,000 nor more than 200,000 inhabitants. The grounds upon which the attack is based are that each of these statdemnation had been made nearly three months utes is a special law regulating the internal

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

affairs of cities, and that each of them pre- ant town. The plaintiff excepted to the rulscribes political qualifications for the holding of the offices which they create.

The conclusion reached by the court is that each of these statutes is a general, not a special, law, and that the provision, contained in each of them, that not more than two of the four members of the respective boards which they create shall be members of the same political party, does not violate any constitutional right, and is valid legislation. We further are of opinion that, even if the provision referred to was invalid, that fact would not render the statute void in toto, but would only result in the expunging ·therefrom of the unconstitutional provision.

The defendants, in each of the causes, are entitled to judgment upon their respective demurrers. An opinion will be filed, during the term, stating the reasons which lead us to the conclusion which we have expressed.

(105 Me. 155)

CITY OF ROCKLAND v. INHABITANTS OF DEER ISLE.

(Supreme Judicial Court of Maine. Feb. 20, 1909.)

1. Domicile (§ 9*)-Evidence-Admissibil-

That a poll tax was assessed against person in a given town is not competent evidence that he had his home in that town at the time.

[Ed. Note.—For other cases, see Domicile, Dec. Dig. § 9.*]

2. Domicile (§ 9*) - Intent-Evidence-Ad-MISSIBILITY.

That a person voluntarily paid a poll tax demanded of him by the tax collector of a given town is competent evidence that he had his home in that town at the time of the supposed sessment, even though such tax was not in fact assessed against him.

[Ed. Note.—For other cases, see Domicile, Dec. Dig. § 9.*]

8. Domicile (§ 11*)-Evidence-Weight and SUFFICIENCY.

A libel for divorce, signed by the libel-ant's own hand, was in evidence, and the jury were instructed that, in determining where the libelant had his home at the date of the libel, they might consider the statement in the libel as to his residence. *Held*, that the party main-taining that the libelant's residence was not as stated in the libel had no ground for excep-

[Ed. Note.—For other cases, see Domicile, Dec. Dig. § 11.*]

(Official.)

Exceptions from Supreme Judicial Court, Knox County.

Assumpsit by the City of Rockland against the Inhabitants of Deer Isle. Verdict for defendant, and plaintiff excepts. Exceptions overruled.

Action of assumpsit to recover \$409.33 for pauper supplies furnished by the plaintiff to a pauper whose pauper settlement was alleged to be in the defendant town. Plea,

ing of the presiding justice admitting certain evidence.

The points in issue are stated in the opin-

Argued before EMERY, C. J., and WHITE-HOUSE, SPEAR, CORNISH, and BIRD, JJ.

Philip Howard, for plaintiff. E. P. Spofford and Joseph E. Moore, for defendants.

EMERY, C. J. The principal issue in the case was whether, under Rev. St. c. 27, § 1, par. 6, the pauper had had "his home" in the town of Stonington for five successive years after the summer of 1896, and before August 1, 1905. The statutory home is made up of presence and intention. He was personally present in Stonington much of that time, and as evidence of his intention to make his home there the defendant town offered testimony that he had voluntarily paid poll taxes there each year from 1897 to 1905, both inclusive. This evidence was objected to upon the ground that it did not appear that the poll taxes were legally assessed. Whether they were assessed is immaterial. The payment of them was what indicated the pauper's then intention as to his home. The evidence was admissible for that purpose.

The defendant also put in evidence a libel for divorce, dated October 17, 1899, signed by the pauper with his own hand, in which libel he was described as of Stonington. The presiding justice instructed the jury that it was for them to say how much weight that evidence had towards proving the pauper's residence to have been at that time in Stonington. This instruction was sufficiently favorable to the plaintiff.

Exceptions overruled.

(111 Md. 260)

MILLS v. BALTIMORE, C. & A. RY. CO. (Court of Appeals of Maryland. June 30, 1909.)

1. CARRIEBS (§ 259*) — TRANSPORTATION OF PASSENGERS—CONNECTING CARRIERS.

In the absence of any arrangement between carriers operating connecting lines, one may not bind the other by the sale of a through ticket, as the seller under such circumstances acts as principal with reference to its own line and as agent for the connecting carrier; the responsibility of the different carriers thereunder being the same as if separate tickets had been purchased from each chased from each.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1033; Dec. Dig. § 259.*]

2. Carriers (\$ 275*)—Transportation—Pas-SENGERS-BREACH OF CONTRACT-CONNECT-ING CABRIERS-PLEADING.

Plaintiff alleged that he purchased transportation over defendant's line to C. and return, and while en route he purchased another ticket from a person whom he believed to be defendant's agent, because he was in uniform, from his first destination to W. and return; that because of the negligence of the company operthe general issue. Verdict for the defend- ating the connecting line he did not return in

[•]For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

time to catch defendant's steamer on his return trip, and suffered damage by reason thereof. There was no allegation that the train which plaintiff took on his return was scheduled to connect with the steamer, or that defendant's steamer left on the return journey before the advertised hour. Hcld, that the declaration was demurrable, under the rule that, where a passenger's route is over connecting lines of independent carriers, the first carrier discharges his duty when he delivers the passenger at the end of his own line ready to continue the transportation on the connecting line, and is not liable for the connecting carrier's failure to perform his independent contract.

[Ed. Note.—For other cases, see Carriers Cent. Dig. § 1076; Dec. Dig. § 275.*]

Appeal from Circuit Court, Wicomico County.

Action by Lafayette Mills against the Baltimore, Chesapeake & Atlantic Railway Company. From a judgment sustaining a demurrer to the declaration, plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTH-INGTON, THOMAS, and HENRY, JJ.

Elmer H. Walton and Toadvin & Bell, for appellant. Robert P. Graham, for appellee.

PEARCE, J. This is a suit brought by Lafayette Mills, the appellant, against the appellee, the Baltimore, Chesapeake & Atlantic Railway Company, a corporation engaged in the business of a common carrier between Baltimore and Ocean City, Md.; its route being by steamer from Baltimore to Claiborne, in Talbot county, and thence by rail to Ocean City. The defendant demurred to the declaration, and, the demurrer being sustained, plaintiff refused to plead over, and judgment was entered for the defendant on the demurrer.

The declaration alleged that on August 17, 1908, the defendant advertised and ran an excursion from Ocean City to Chesapeake Beach, in Calvert county, and to Washington, D. C.; that on that day the plaintiff bought at Salisbury, a station on defendant's line, a ticket from Salisbury to Chesapeake Beach and return; that, relying on the statements of the advertisement of said excursion, he bought from some person in uniform on the defendant's steamer between Claiborne and Chesapeake Beach, whom he believed to be acting as agent for the defendant, a ticket entitling him to transportation from Chesapeake Beach to Washington and return, both said tickets being good for that day only; that on reaching Chesapeake Beach he entered one of the cars of the Chesapeake Beach Railway Company, a corporation engaged in business as a common carrier over its own line between Chesapeake Beach and Washington, D. C., and was carried to Washington on said last-mentioned ticket; that on the same day, and upon the return coupon of said lastmentioned ticket, he was carried from Wash-

ington to Chesapeake Beach by the cars of the Chesapeake Beach Railway Company, but by reason of the negligence of that company he did not reach Chesapeake Beach until after 7 o'clock p. m., which was the hour advertised for the steamer to leave Chesapeake Beach on the return to Claiborne, and when he arrived the steamer had then left the wharf, though still within sight and hearing, but that the officers of the steamer would not return for him and others who held tickets similar to plaintiff's.

There can be no difficulty upon this state of facts in sustaining the ruling upon the de-The declaration expressly states that the ticket purchased at Salisbury only entitled the plaintiff to transportation to Chesapeake Beach and return from that point to Salisbury on that day, and that after making that contract of carriage, and while en route from Claiborne to Chesapeake Beach, he entered into another contract of carriage with the Chesapeake Beach Railway Company, through a person whom he believed to be an agent of the defendant, because he was in uniform, for transportation from Chesapeake Beach to Washington and return on that day, and that because of the negligence of the Chesapeake Beach Railway Company he failed to connect with the steamer of the defendant, and suffered loss and damage thereby. The declaration does not show what the statements of the advertisement were upon which he relied in purchasing the lastmentioned ticket, what were its stipulations or form, what uniform the person wore from whom the ticket was purchased, or any fact which warranted him in believing that he was an agent for defendant. All this is left to the imagination. The bare proposition is that he purchased a ticket from one corporation for transportation to one point and return, and that he purchased another ticket from another corporation for transportation from the first terminus to another point and return, and that by reason of the negligence of the latter corporation he has sustained an injury; and it is attempted to eke out this statement of a cause of action by alleging a belief merely that the person from whom he purchased the second ticket sold the same as agent of the defendant. Section 2 of article 75 of the Code of Public General Laws of 1904 declares that in all pleadings "facts only shall be stated, and not arguments or inferences"; and this rule, which is only declaratory of the common law, is founded on the necessity "of informing the opposite party of what is meant to be proved, in order to give him an opportunity to answer or tra-

But, if there had been a direct allegation that the person from whom the second ticket was purchased was a servant or agent of the defendant, it would not alter the case. The declaration alleges that this ticket was a tick-

eFor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

et issued by the Chesapeake Beach Railway Company, and it was the contract of that company, and not of the defendant company, even though sold by some one in the service of the latter. In 6 Cyc. 571, the law applicable to the facts, as gathered from the most liberal construction of the declaration, is stated thus: "In the absence of any arrangement between carriers operating connecting lines, there is no right on the part of either to bind the other by the sale of a ticket for through transportation over the two lines. But joint arrangements are frequently made by which tickets issued by one of such carriers are accepted by the other. The usual arrangement is that by which each of the connecting carriers sells tickets for the through transportation, acting as principal with reference to its own line and as agent for the connecting carrier in contracting for transportation over the connecting line. A ticket thus sold is not a through contract, and the rights of the purchaser and the responsibility of the different companies are the same as though separate tickets had been purchased by him from each, and each is responsible for injury suffered on its own line, and not otherwise." Of course, a carrier may contract in its own behalf for through transportation over a connecting line, and, where this clearly appears, such carrier would be liable to the ticket holder for any injury caused by the negligence of the connecting carrier. On page 584 of 6 Cyc. it is also said: "Where the passenger's route is over connecting lines of independent carriers. the first carrier discharges his duty when he delivers the passenger at the end of his own line ready to continue the transportation on the connecting line, and he will not be liable for any failure of the connecting carrier to perform his independent contract."

It is obviously the duty of travelers to inform themselves as to the train which should be taken to enable them to make necessary connections, and it was so declared in Duling v. P. W. & B. R. R. Co., 66 Md. 122, 6 Atl. 592. There is no allegation in this declaration that the train the plaintiff took was scheduled to connect with the steamer at Chesapeake Beach, or that the steamer left there before the advertised hour of 7 p. m. But there is an express averment that the train did not reach Chesapeake Beach until after 7 p. m., and, as the steamer was then not far distant from the pier, the necessary conclusion is that it did not leave before the appointed hour, and that the defendant is, therefore, not chargeable with any breach of its contract with the plaintiff. No cause of action against this defendant is shown by any or all the averments of the declaration. If any can be shown to exist, it must be against the Chesapeake Beach Railway Company. This judgment therefore must be affirmed.

Judgment affirmed, with costs to the appellee above and below.

(110 Md. 619)

KINGAN PACKING ASS'N v. LLOYD et al. (Court of Appeals of Maryland. June 29, 1909.)

 STATUTES (§ 115*)—VALIDITY—TITLE. Code Pub. Gen. Laws 1888, art. 16. § 215. relates to the enforcement of specific perform ance of contracts in equity, and section 216 and the following sections relate to the appointment of trustees by such courts, or by deeds or wills, of trustees by such courts, or by deeds or wills, to sell property, and their qualifications. Held, that the title of Acts 1906, p. 614, c. 337. entitled "An act to add an additional section to article 16 of the Code of 1888 of Public General Laws of Maryland, title 'Chancery,' subtitle 'Trustees,' to come in after section 215 and to be known as section 215a," providing for the redemption of ground rents the title to which is vested in a trustee or life tenant without power to sell etc. sufficiently described the purposer to sell etc. sufficiently described the purposer to sell etc. power to sell. etc., sufficiently described the purpose of the act, and was therefore valid.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 115.*]

2. CONSTITUTIONAL LAW (§ 309*)—DUE PROCESS OF LAW—GROUND RENTS—REDEMPTION.

Acts 1906, p. 614, c. 827, providing a proceeding in chancery for the redemption of

ground rents, where the title to the rent is vested in a trustee without power of sale, or in a life tenant with remainder over, vested or con-tingent, or in the holder of a defeasible estate tingent, or in the noiser of a defeasible estate without power of sale, etc., was not unconstitutional as depriving persons beneficially interested in the rent to be redeemed of their property without due process of law, in that it did not require that they be made parties or served with notice; they being parties by representation through the trustee, life tenant, or holder of the defeasible estate. defeasible estate.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 309.*]

3. GROUND RENTS (§ 6*)-REDEMPTION-STAT-UTES.

Acts 1906, p. 614, c. 337, providing for the redemption of ground rents, where the title is vested in a trustee without power of sale, or in a life tenant with remainder over, or in the holder of a defeasible estate without power of sale, is not limited to cases where the entire estate in the rent is held by a trustee, but applies as well to the redemption of a ground rent only an undivided portion of which is owned by a trustee. a trustee.

[Ed. Note.—For other cases, see Ground Rents, Dec. Dig. § 6.*]

4. GROUND RENTS (§ 6*)—REDEMPTION.
Where a ground lease contains no provision for the redemption of the rent reserved, it is redeemable by virtue of Acts 1888, p. 645. c. 305 (Code Pub. Gen. Laws 1904, art. 21, § 88).

[Ed. Note.—For other cases, see Ground Rents, Dec. Dig. § 6.*]

5. Constitutional Law (§ 148*) — Obliga-TION OF CONTRACTS - GROUND RENTS - RE-DEMPTION.

Acts 1906, p. 614, c. 337, authorizing a proceeding for the redemption of ground rents under certain circumstances, and providing that the costs shall be paid from the proceeds of the redemption, was not unconstitutional as impairing the obligation of the lease contract creating

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 148.*]

Appeal from Circuit Court of Baltimore City; Chas. W. Heuisler, Judge.

Suit by the Kingan Packing Association against Annie E. Lloyd and others. From a

decree dismissing the bill on demurrer, plain- | ther provided that it shall not be necessary tiff appeals. Affirmed.

Argued before BOYD, C. J., and BRIS-COE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and THOMAS, JJ.

Henry C. Kennard, for appellant. Charles McH. Howard, for appellees.

SCHMUCKER, J. This appeal raises the question of the constitutionality of chapter 337, p. 614, of the Acts of 1906. The purpose of that act is to provide a simple proceeding for the redemption of ground rents when their title is vested in trustees, or life tenants, or holders of a defeasible estate who have no power of sale.

The provisions of the act material to the present controversy are that "whenever a ground rent reserved by lease or sublease heretofore or hereafter created becomes redeemable," and the owner of the leasehold estate out of which the rent issues desires to redeem the same, "and at the time of such desired redemption the title to said rent is vested in a trustee under a will, deed or other instrument for any trust, use or purpose, but without a power of sale in such trustee, or is vested in a life tenant with remainder over, vested or contingent, or is vested in the holder of a defeasible estate, but without a power of sale in such life tenant or such holder of a defeasible estate, any court of chancery having jurisdiction in the city or county" where the land subject to the rent lies "may, upon the ex parte petition of such trustee, life tenant or holder of a defeasible estate, or upon petition of the owner of the leasehold or subleasehold who is entitled to redeem, and, after notice by service of process upon such trustee, life tenant, or holder of a defeasible estate" (or by order of publication if he be a nonresident), "order the conveyance of the . reversion or subreversion and rent or subrent in such land by such trustee or life tenant or holder of a defeasible estate to the owner of the leasehold or subleasehold interests therein, upon the payment of the sum of money for which the said rent or subrent may be redeemable, together with a due proportion of the accruing rent to the date of such payment." The act then declares that a conveyance of the rent made under such an order of court shall, when duly recorded, vest in the grantee, not only the title of the trustee, life tenant, or owner of a defeasible estate who makes the deed, but also "of all other persons who are or may be entitled to any right, title, interest or estate in and to such reversion or subreversion, rent or subrent, either at law or in equity, and whether such person or persons so entitled may have vested or contingent interests therein, or whether such persons or any of them are or are not in being at the date of such redemption," and that the grantee shall not be liable to see to the applica-

to make parties to the petition to be filed under the provisions of the act any persons "beneficially interested in the subject-matter" thereof, other than such trustee, life tenant, or holder of a defeasible estate, who . shall represent for the purposes of the proceedings upon the petition all parties interested in the subject-matter thereof. trustee, life tenant, or holder of a defeasible estate, who may be authorized in any such proceeding to convey the rent to the leaseholder and collect the redemption money, is required to give bond for the faithful discharge of his duty, unless he has been excused from doing so by the instrument creating the trust, and to account for the money to the court, which is directed to require it to be so invested as to be held in the place and stead of the redeemed reversion, and rent "so as to inure in like manner to the benefit of the persons entitled to said reversion and rent." The act also authorizes the court, under certain conditions, to appoint a trustee to execute the deed and receive the redemption money, and provides that the costs of the proceedings be paid out of the redemption money.

This act is brought to us for construction in the present case under the following circumstances: The appellant owned three contiguous lots of ground on Holliday street, in Baltimore, which were subject to ground rents created by the same lease aggregating \$120 per annum which became redeemable at a capitalization of 6 per cent., amounting to \$2,000, on the 1st day of February, 1909, under Acts 1888, p. 645, c. 395. The reversionary estate in the lots, together with the rents, belonged to A. Parlett Lloyd. The appellant notified Mr. Lloyd of his intention to exercise his right of redeeming the rents, and Mr. Lloyd accepted the notice without objection, but died before the actual redemption was made, leaving surviving him a widow and two unmarried sons, and also two sisters. By his will he gave one-third interest in his reversionary estate in the lots, with the ground rents issuing therefrom, to his wife in her own right for life. The other two-thirds, together with the remainder in one-third, he gave to his wife in trust for his two sons for their respective lives, with remainders over to their children, with contingent remainder over to the right heirs of After the probate of Mr. the testator. Lloyd's will his wife, as trustee under his will, filed in the circuit court of Baltimore city a petition under Acts 1906, p. 614, c. 337, for authority to convey to the appellant by way of redemption the interest which she held as trustee under her husband's will in the ground rents in question. Having obtained an order of court for the conveyance and given bond as required by the statute, she, as trustee and in her own right, and the two sons of the testator, offered to unite in tion of the redemption money. It is fur- a conveyance of the rents to the appellant

by way of redemption upon receipt of the reference to the Code it will be seen that secredemption money. The appellant, desiring to redeem the rents, but being in doubt as to the soundness of the title which it would get to the rents under the proposed deed, declined to accept it and filed the bill in the present case, which the appellant's brief informs us was intended to invoke the jurisdiction conferred on the court by Acts 1868. p. 475, c. 273. In the bill, after setting forth the facts stated by us, and averring its desire to redeem the rents and readiness to pay the redemption price therefor, and its inability to secure a good title thereto under the proposed deed, the appellant prayed for a decree declaring its right to redeem the rents and the appointment of a trustee to receive the redemption money and execute a deed for them. 'The widow of Mr. Lloyd, in her own right and as trustee, and his two sons, and his two sisters, as his heirs at law, and also the husband of the one sister who was married, were made defendants to the bill, and were by it alleged to be all of the parties in esse interested in the rents. The defendants demurred to the bill, and the court sustained the demurrer and dismissed the bill, whereupon the plaintiff appealed.

Without pausing to inquire whether a bill like the present one by a leaseholder for the redemption of a ground rent falls within the contemplation of Acts 1868, p. 475, c. 273, which was primarily intended to provide for the sale of land and reinvestment of the proceeds of sale upon the application of a party interested therein, because of the advantage to be derived from the change of investment, we will proceed to the consideration of the efficacy of the ex parte proceedings for the redemption of the rents taken by Mrs. Lloyd as trustee under her husband's will in pursuance of Acts 1906, p. 614, c. 337. Those proceedings are conceded to have been in conformity with the provisions of that act, and therefore the question of its constitutionality is directly presented by the record The appellant contends that the act is unconstitutional because its purpose is not sufficiently described in its title, and also because the proceeding authorized by it amounts to a taking without due process of law of the property of the persons not made parties to it who are beneficially interested in the rent to be redeemed. It is further contended that the act was intended to apply only to cases in which the entire estate in the rent was held by a trustee, and not to those where some of the parties interested in the rent held the legal title to their estate.

The question of the sufficiency of the title to the act gives us little difficulty. It is entitled "An act to add an additional section to article 16 of the Code of 1888 of Public General Laws of Maryland, title 'Chancery,' subtitle 'Trustees,' to come in after section tion 215, art. 16, relates to the enforcement by courts of equity of specific performance of contracts, and section 216 and the following sections relate to the appointment by such courts, or by deeds or wills, of trustees to sell property and their qualification. have several times said that ordinarily it is a sufficient compliance with the constitutional requirement if the title of an act states its purpose to be to add an additional section to an article of the Code and mentions the numbers of the article and section. Garrison v. Hill, 81 Md. 554, 82 Atl. 191; Himmel v. Eichengreen, 107 Md. 613, 69 Atl. 511. Bearing in mind, also, that we have repeatedly held one of the chief purposes of section 29 of article 3 of the Constitution to be that the Legislature and people of the state may be fairly advised of the real nature of pending legislation, we find that the contents of the new section added to the Code by the act not only relate to proceedings in chancery, but are immediately germane to the contents of sections 215 and 216 between which it is placed. The proceeding provided for by the act is in the nature of one for specific performance of a contract, and its purpose is accomplished through the agency of a trustee appointed by the court or named in a deed or will.

Turning, now, to a consideration of the act itself, it is to be observed that the proceeding in chancery which it authorizes is not an adversary one capable of being used for the injury or destruction of the right of the absent beneficiary. It is rather an administrative proceeding furnished by the statute for the purpose of regulating the exercise by the owner of the leasehold of his acknowledged right of redeeming the rent. Its practical operation upon the interests of those who own the rent, subject to the lessee's right of redemption, is simply to change their investment, while preserving all of their rights by fastening them upon the substituted investment. The feature of the proceeding by which the absent beneficiary or remainderman is represented by the trustee or life tenant, who is before the court, is an application of the equitable doctrine of representation, which is not infrequently utilized in chancery proceedings from considerations of expedition and convenience, and which is said in Miller's Equity, \$ 29, to have become so thoroughly ingrafted upon the general rule regulating the subject of parties in equity that it has been considered as consolidated with the rule itself. Calvert on Parties, 19, 20, 64, 74; Phelps, Jur. Eq. \$ 45; Story, Eq. Pl. § 144 et seq.

A familiar instance of statutory authority for the representation of absent persons in chancery proceedings is found in section 173 of article 16 of the Code, which provides that in all suits concerning real or personal property, where the entire estate sought to be af-215 and to be known as section 215a." By fected is vested in trustees having an immediate and unqualified power of sale, such trustees shall represent the persons beneficially interested in the trust and that such persons need not be made parties to the case. Section 90 of the same article of the Code, which originated in Acts 1785, c. 72, § 4, authorizes a court of chancery, on the ex parte application of any party in interest, to appoint a trustee to sell and convey real or personal estate devised to be sold, whenever no trustee for that purpose was named in the will making the devise, or the trustee named in the will for that purpose died or refused to act. Acts 1862, p. 177, c. 156, and Acts 1868, c. 273, extended the doctrine of representation to the class of cases therein mentioned, by providing that the parties in being interested in the property to be sold should represent all unborn parties and that the latter should be concluded by the decree. The cases of Downin v. Sprecher, 35 Md. 474, Shreve v. Shreve, 43 Md. 382, and Long v. Long, 62 Md. 33, disclose the hardship and inconvenience of dealing with the class of cases covered by the last-mentioned statutes before the date of their enactment.

A situation very closely resembling the one in which the parties to the present case found themselves upon the death of Mr. Lloyd is relieved in a simple manner by Acts 1846, c. 279, which authorizes the administrator of a person who makes a sale of real estate, and dies before conveying it or receiving the purchase money, to convey the land to the pur- chaser upon receipt of the purchase money, and further provides that the deed so made by the administrator shall convey the title of the intestate in the land as effectually as his own deed would have done. In such a case, but for the statute, it would have been necessary for the purchaser to have proceeded by a bill in equity against the heirs at law of his intestate vendor in order to procure a conveyance of the land. In fact, that statute upon its face declared that it was enacted in view of the fact that "the costs attending the making of title through courts of equity are heavy and grievous to be borne." The several statutes to which we have referred have been in force for many years, and the title to much property of great aggregate value has passed by means of proceedings conducted under their authority. only has their constitutionality never been called in question, but this court has in different cases recognized the fact that Acts 1862, c. 156, Acts 1868, c. 273, and Acts 1785, c. 72, § 4, conferred upon courts of equity power and jurisdiction, which they did not theretofore have, to effectively entertain the several proceedings therein provided for. Long v. Long, supra; Dunnington v. Evans, 79 Md. 83, 28 Atl. 1097; Downes v. Long, 79 Md. 382, 29 Atl. 827; Noble v. Birnie, 105 Mo. 80, 65 Atl. 823; Wright v. Williams, 93 Md. 66, 48 Atl. 397.

We have not thought it necessary in this

ing and operation of the constitutional prohibition of taking property without "due process of law," because we regard the doctrine of representation, in cases failing properly within its operation, as well established, whether it be regarded as an exception to the general rule that all persons interested in the object of a suit must be made parties to it or the absent persons be regarded as in court through their representative. We regard the proceeding now under consideration by us as not only within the plain letter of the act of 1906, but also within the principles on which the doctrine of representation is founded. The sons and heirs at law of Mr. Lloyd were alive and well aware of the proceeding, and were therefore bound by it under the rulings in Parr v. State, 71 Md. 235, 17 Atl. 1020, and Albert v. Hamilton, 76 Md. 304, 25 Atl. 341. Furthermore they offered to unite in the deed of the rent to the appellant. The unborn grandchildren of Mr. Lloyd, the testator, if any such should come into existence, will not have been injured, because they would take the contingent estate, given to them by the will, in the rent subject to the leaseholder's right to redeem it at any time upon the same terms upon which the appellant may now redeem it. It would be impossible to make unborn persons parties to a case otherwise than by representation. Under the bill filed in this case by the appellant the unborn parties would be bound only because of the provisions of Acts 1868, c. 273, which treats them as being represented by the presence in the case of the parties in esse interested in the case. They were as fully bound by representation through the presence of Mrs. Lloyd as trustee in the proceeding by her under the act of 1906.

We cannot concede the soundness of the appellant's contention that the act of 1906 does not apply to the redemption of a ground rent when the title to only an undivided portion of it is held by a trustee. The operation of the act is not limited in terms to cases where the entire estate in the rent is held by a trustee. The mischief which it is intended to cure exists as fully in the case of the ownership by a trustee of a part interest in such a rent as it does where the trust extends to its entire estate. It is not to be presumed that the Legislature intended by the enactment of the statute to afford a remedy for a part only of the evil at which it was aimed. The law should receive a construction which will fully accomplish the purpose Johnson v. Heald, 33 Md. of its makers. 352; Roland Park Co. v. State, 80 Md. 448. 31 Atl. 298.

The provision of the act of 1906 directing the costs of the proceeding authorized by it to be taken out of the money received for the redemption of the rent cannot be regarded as impairing the obligation of the contract made by the lease creating the rent. It does not appear from the record that the lease case to enter into a discussion of the mean-contained any contract in reference to the redemption of the rent reserved by it. The rent was redeemable by virtue of Acts 1888, c. 395 (Code Pub. Gen. Laws 1904, art. 21, § 88), which was in force when the lease was made. That act is silent in reference to the costs of redemptions of rents to be made under its provisions, and there is no allegation in the bill of complaint of the existence of any contract between the parties upon the subject, or of any facts from which the existence of one could be reasonably inferred. Even if the statute had contained the provision, often found in leases creating redeemable ground rents, that the deed of redemption would be made at the cost of the lessee, it could not fairly be construed as intending to impose upon him the expenses of an equity proceeding made necessary solely by the manner in which the owner of the rent had tied up its title in his will.

Being of the opinion that the deed tendered to the appellant by Mrs. Lloyd and her sons would convey to it a good title to the ground rents mentioned in the proceedings, and that therefore the demurrer to the bill of complaint was properly sustained, we will affirm the decree appealed from.

Decree affirmed, with costs.

(111 Md. 91)

MILLER v. FISHER.

(Court of Appeals of Maryland. June 30, 1909.)

1. LANDLORD AND TENANT (§ 170*)-Posses-SION-NUISANCE.

The tenant in possession is bound to keep the premises in proper condition, and he and not the landlord is responsible to a third person for injury from a nuisance on the land, unless such injuries resulted from the defective con-struction of the premises at the time they were leased, or from an incipient nuisance which only became active by the tenant's ordinary use of the property.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §\$ 685, 688; Dec. Dig. § 170.*]

2. LANDLORD AND TENANT (§ 170*)-Nuisance -LIABILITY OF LANDLORD-PLEADING.

A declaration alleging that defendant, the landlord, created, continued, and maintained a nuisance on the demised premises, and is still continuing and maintaining the same, was not demurrable-as showing that the tenant alone was responsible.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 170.*]

3. LANDLORD AND TENANT (§ 170*)-Nuisance

-NEGLIGENT REPALE. Where a landlord assumed, without obli-

gation, to repair a drain, and in doing so, negligently created a nuisance to adjoining land, the landlord was liable, though the injury did not result from original faulty construction.

[Ed. Note.-For other cases, see Landlord and Tenant, Cent. Dig. § 685; Dec. Dig. § 170.*]

Appeal from Superior Court of Baltimore City: Henry D. Harlan, Judge.

Action by Anna Fisher against Bessie Miller for a nuisance. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRIS-COE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, THOMAS, and HENRY

Geo. E. Robinson and O. Parker Baker, for appellant. Emanuel E. Ottenheimer, for appellee.

WORTHINGTON, J. The appellant and appellee in this case are the owners of adjoining properties, located on Dallas street in Baltimore city. The suit was brought by the latter against the former to recover damages for alleged injuries caused to plaintiff's property by the overflow, from alleged defective and insufficient drainage pipes of the defendant, of foul and polluted waters toward and upon the property of the plain-The material allegations of the declaration are substantially as follows: That during a period of time beginning on or about the 1st of June, 1906, and continuing to December 3, 1907, the defendant created, continued, and maintained a nuisance on her premises, and was still continuing and maintaining said nuisance, to wit, a broken, disconnected, and entirely insufficient drain and drainage pipes to properly carry off the refuse water, waste, and filth from the various portions of the defendant's property, and that refuse matter and surface water from defendant's premises were not properly confined in suitable drain pipes, but were absorbed into the earth, and permeated, passed, and flowed along and through the earth towards and in the direction of the plaintiff's property, and made their way into the yard and dwelling rooms of the plaintiff, thereby filling the houses with impure, obnoxious, and polluted water in great and continued volume, and causing the plaintiff's property to become so tainted and foul with unhealthful and impure air and gases as to render it dangerous to inhabit the houses, and further causing said property to depreciate in value. The declaration also alleged that both the defendant's and plaintiff's properties were, during the existence of the nuisance complained of, occupied by tenants, that notice had been given defendant of the existence of the nuisance and the injury sustained thereby, but that defendant failed to abate the nuisance, but negligently repaired the insufficient drains, and refused to supply sufficient drains to carry off the waters from her premises, so as to prevent injury to the plaintiff's property.

A demurrer was entered to the declaration, upon the ground that as it appeared by the declaration that the defendant's premises were occupied by tenants, and the landlord was not responsible for any defects therein, unless it was shown that such defects existed prior to the beginning of the tenancy, and that the landlord had or ought

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to have had knowledge of the same, citing | nection of the wooden trough with the gutter, Taylor on Landlord and Tenant, p. 175, where it is said by that author: "Possession of property is what determines liability. When the owner has parted with his control, the tenant has the burden of the proper keeping of the premises, and for any nuisance then found thereon the tenant is the party responsible, and not the landlord." This is undoubtedly well-established doctrine, and so recognized by this court. Smith v. Walsh, 92 Md. 518, 48 Atl. 92, 51 L. R. A. 772. But it is also true that where injuries result to a third person from the faulty or defective constructive of the premises, at the time of their rental, or because they then contain an incipient nuisance, which only becomes active by the tenant's ordinary use of the premises, the landlord is still liable notwithstanding the lease. Taylor, L. & T. § 175. In this case the allegations of the declaration are to the effect that the defendant "created, continued, and maintained a nuisance" on the demised premises, and is "still continuing and maintaining said nuisance." Such allegations were sufficient to justify the learned judge in the court below in overruling the defendant's demurrer, in so far as it was based upon the contention that the tenant alone was responsible for any injury resulting from the maintenance of a nuisance on the premises occupied by him, and no objection to the declaration based on any other ground appears to have been made thereto.

We think the lower court was also right in overruling the defendant's demurrer to the evidence, because it appears from the testimony that complaint was made to the husband of the defendant, and that he, as her agent, undertook to repair the defective drain; also that the wooden trough which he caused to be put in position to carry off the refuse and waste water was improperly connected with the gutter, so that the water escaped and soaked into the ground at that It was also shown that the grade was from defendant's lot toward that of the plaintiff, that the rear of plaintiff's premises had been overflowed with water, and that the wall of the plaintiff's house next to the defendant's lot was damp and the Here, then, was evidence to floor wet. show that, although the defendant's premises were, at the time of the injury complained of, occupied by tenants, yet the defendant's husband, as her agent, undertook to repair the drain by putting in a new trough, but did it so imperfectly as not to improve the conditions; the water still soaking into the ground by reason of the defective con-

and penetrating the earth towards the plaintiff's property.

Two principles of law governing the responsibility of a landlord for injuries caused by a nuisance maintained on his rented premises are very clearly enunciated in the case of Owings v. Jones, 9 Md. 108, where this court, speaking by Le Grand, C. J., said: (1) "That where property is demised, and at the time it is not a nuisance, and becomes so only by the act of the tenant while in possession, and injury happens during such possession, the owner is not liable." "That where the owner leases premises which are a nuisance, or must in the nature of things become so by their user, and receives rent, then, whether in or out of possession, he is liable." A third principle, equally well established, is that although a landlord, in the absence of a covenant to that effect, is ordinarily not bound to repair, yet if he assumes to do so, and performs the work so negligently as to cause an injury thereby, he is responsible. Taylor, Landlord and Tenant, § 175; McHenry v. Marr, 39 Md. 510. So that in this case, whether the injuries complained of were caused by the original faulty construction and condition of defendant's premises, which by the tenant's ordinary use of them subsequently developed the nuisance, or by the defendant's negligent and ineffectual effort to repair, in either event the defendant would be respon-

We have examined the exceptions to the testimony, and find no error in the rulings of the trial court in regard thereto. There is testimony in the record to the effect that the first floor of the dwelling house on plaintiff's premises is 18 inches lower than the yard, that the yard slopes toward the house, and that the first floor of the house has always been damp, and when it rains the water would stand on the floor in pools from the water from the roof. But this testimony was submitted to the jury in connection with that on behalf of the plaintiff, and it was for the jury to determine the cause of the injury from all the evidence, under proper instructions from the court.

We have examined the several prayers offered by the respective parties, and think the case was properly submitted to the jury by the instructions actually granted, and that there was no error in rejecting the first, fourth, sixth, and seventh prayers of the defendant.

The judgment must be affirmed. Judgment affirmed, with costs.

(111 Md. 241)

DOWNS V. STATE.

(Court of Appeals of Maryland. June 1 and 80, 1909.)

1. CRIMINAL LAW (§ 1150*) — APPEAL — REVIEW—CHANGE OF VENUE.

Under Const. 1867, art. 4, § 8, with the amendment proposed by Acts 1874, p. 530, c. 364, and adopted November 15, 1875, providing that a defendant charged with an offense not capital, to obtain a change of venue on his suggestion that he cannot have a fair and impartial trial must "make it satisfactorily appear to the court that such suggestion is true or that that trial must "make it satisfactorily appear to the court that such suggestion is true, or that there is reasonable ground for the same," the refusal of the change cannot be disturbed, in the absence of evidence that the lower court acted arbitrarily or refused to exercise its discretion.

[Ed. Note.—For other cases, see Crimin Law, Cent. Dig. § 3044; Dec. Dig. § 1150.*]

2. CRIMINAL LAW (§ 134*)—CHANGE OF VENUE—DISCRETION—EVIDENCE.

That the court abused its discretion in refusing change of venue to defendant, charged with larceny of city money, on the ground of local prejudice, is not shown by numerous clipprejudice, is not snown by numerous chappings from the newspapers, showing that great publicity was given to his supposed connection with the larceny, and a large number of affidavits, stating the belief of affiants, based in some instances on interviews with various persons, without giving what was said in the interviews, that defendant could not have a fair and impartial trial in the city country. impartial trial in the city court.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 134.*]

Worthington, J., dissenting.

Appeal from Criminal Court of Baltimore City; Thomas Ireland Elliott, Judge.

William F. Downs, against whom indictments were filed, appears from refusal of change of venue. Affirmed.

Argued before BOYD, C. J., and PEARCE, SCHMUCKER, BURKE, WORTHINGTON. and THOMAS, JJ.

Thomas C. Weeks, for appellant. Lobe Straus, Atty. Gen., for the State.

PER CURIAM. This is an appeal by William F. Downs, who is under indictment in the crimina court of Baltimore city for larceny, from the refusa, of that court to grant his petition for an order directing the record in the case to be transmitted to some other court for trial. A. it appears from the record that the petition, and evidence offered in support in it, were duly considered by the court below, and as we do not find in record in this court any evidence that that court abused the discretion vested in it by the provisions of the Constitution, the order appealed from, for reasons to be assigned in an opinion to be filed hereafter, must be affirmed.

Order affirmed, with costs.

WORTHINGTON, J., dissents.

THOMAS, J. The record in this case contains nine indictments against the appellant, lany considerable circulation; said accounts

filed at the January term of the criminal court of Baltimore city, numbered 698 to 706, inclusive, and in each indictment he is charged in the first count with the larceny of money belonging to the mayor and city council of Baltimore, and in the second count with receiving the money knowing it to have been stolen. On the 23d of April, 1909, the appellant was arraigned in each of these cases and pleaded "not guilty," and on the same day, as shown by the docket entries, filed in case No. 698 the following petition, supported by his affidavit:

"William F. Downs, the defendant in the above cause, respectfully suggests that he cannot have a fair and impartial trial in this honorable court, and accordingly prays that an order may be passed directing the record of said cause to be transmitted to some other court for trial. And the said William F. Downs further respectively shows to the court that he is advised that there is intense prejudice and bitter feeling prevailing against him throughout the city of Baltimore in connection with the charge for which he stands indicted; that in the newspapers of Baltimore city accounts have been published from time to time regarding the larceny with which the said William F. Downs is charged, and in which accounts it has been unqualifiedly and repeatedly represented that this defendant is guilty of said charge, that he has agreed to confess his guilt, and that Hon. Albert S. J. Owens, state's attorney for Baltimore city, in interviews said that he will convict Downs, as the proof is positive; that said newspaper accounts are prejudiced, sensational, and false, but that nevertheless said accounts are composed largely of public interviews, statements, editorials, and caricatures. Detectives, police, city and state officials, and any number of taxpayers of Baltimore city who are interested in the prosecution of this defendant, and who by various prejudiced assumptions and diverse comment have so affected the minds and the feelings of the people of Baltimore city generally as to cause virtually universal bias, bitterness, and enmity against this defendant throughout the said city, and to cause general prejudgment in the case of the defendant adverse to him, so as to render it impossible for him to secure a fair and impartial trial in said city, or to have testimony which may be adduced during the trial of his case weighed and passed upon in an unprejudiced, dispassionate, and just manner by any jury which may be impaneled in the city of Baltimore to determine this defendant's innocence or guilt. And in connection with the foregoing the said William F. Downs, defendant, prays respectfully to refer the court to said newspaper accounts excerpted from all newspapers of Baltimore city possessing

ant's Exhibit No. 2,' and prayed to be taken as part hereof. And as in duty bound, etc.

"Harry B. Wolf, Attorney for Defendant." With this petition the appellant also filed 17 affidavits, each stating that the affiant for the reasons assigned in the affidavit, believed that the prisoner could not obtain a fair and impartial trial in Baltimore city, and numerous clippings from the newspapers of Baltimore city. The record also shows that the court heard the petition, and argument of counsel for the appellant in support thereof, and from the remarks of the court in passing on the petition, which are set out in full in the record, it is apparent that the judge presiding fully considered the reasons assigned in the various affidavits. and the effect of the publication of the articles, etc., contained in the newspaper clippings, and refused to remove the case, because it did not satisfactorily appear that the appellant could not have a fair and impartial trial in said court. On the petition of the prisoner the record in the case was transmitted to this court for the purpose of having the action of the court below in refusing to grant a removal of the case reviewed.

The Constitution of 1851 (section 28, art. 4) provided that "in all suits or actions at law," etc., pending or thereafter instituted in any of the courts of law of the state, "the judge or judges thereof, upon suggestion in writing, if made by the state's attorney, or the prosecutor for the state, or upon suggestion in writing, supported by affidavit made by any of the parties thereto, or other proper evidence, that a fair and impartial trial cannot be had in the court where such suit or action at law, issues or petitions, or presentment and indictment is depending, shall order and direct the record," etc., "to be transmitted to the court of any adjoining county." In reference to this provision the court, in the case of Griffin v. Leslie, 20 Md. 15, said, wherever and whenever the privilege of removing a case has come under consideration, it has been construed liberally, and, quoting from an earlier case, that "all laws for the removal of causes from one venue to another were passed for the purpose of promoting the ends of justice, by geting rid of the influence of some local prejudice which might operate detrimentally to the interests or the rights of one or the other of the parties to the suit. The conditions prescribed by the Constitution and acts of assembly for the exercise of this right being complied with by the party applying for it, there is no discretion in the tribunal to which it is made to decide whether the application shall be granted or not."

By the Constitution of 1864 (section 9, art. 4) it was provided that "the judge or judges of any court of this state, except the Court

being filed herewith, and marked 'Defend-| of proceedings in any suit or action, issue or petition, presentment or indictment pending in such court, to be transmitted to some other court in the same or any adjoining circuit having jurisdiction in such cases, whenever any party to such cause, or the counsel of any party shall make it satisfactorily appear to the court that such party cannot have a fair and impartial trial in the court in which such suit or action, issue or petition, presentment or indictment is pending," etc. We do not find any case dealing directly with this provision of the Constitution of 1864, which was changed by the Constitution of 1867, adopting, so far as the feature with which we are now dealing is concerned, substantially the provision of the Constitution of 1851; but in the case of Hoyer v. Colton, 43 Md. 421, Judge Robinson, referring to the provision of the Constitution of 1867, said: "The obvious purpose of this provision was to secure to every one a fair and impartial trial, by getting rid of the influence of local feeling and prejudice; and whenever the privilege has come under consideration it has been liberally construed. State v. Dashiell, 6 Har. & J. 268; Negro Jerry v. Townshend, 2 Md. 278; Griffin v. Leslie, 20 Md. 15. However much the right thus conferred may have been or may hereafter be abused, the exercise of it has been considered so essential to the proper administration of justice as to be made the subject of constitutional provision in every Constitution adopted in this state since 1851; and in no previous Constitution has it been more securely protected than in the present Constitution. Whilst under the Constitution of 1864 it was necessary for the party making the application for removal to satisfy the court by proper evidence that fair and impartial trial could not be had in the court in which the cause was pending, the present Constitution confers the right in every case, civil or criminal, upon the mere suggestion and affidavit of the party. No discretion is vested in the court, and the only power conferred upon the Legislature is 'to make such modifications of existing laws as may be necessary to regulate and give force to this provision.' ture and extent of the power thus conferred was considered by this court in Price v. Nesbitt, 29 Md. 264, and it was held that the Legislature might enlarge but could not in any manner impair or restrain the right."

It was doubtless because of some abuse of the unqualified privilege of removal provided for in the Constitution of 1867 (see case of Cooke v. Cooke, 41 Md. 362) that the people adopted, November 15, 1875, the amendment proposed by Acts 1874, p. 530, c. 364 (Code Pub. Gen. Laws 1904, pp. 142, 143, and section 102, art. 75), by which it is provided that in all criminal cases, other than "cases of presentments or indictments for offenses which are or may be punishable by death of Appeals, shall order and direct the record * * in addition to the suggestion in

writing of either of the parties to such presentment or indictment that such party cannot have a fair and impartial trial in the court in which the same may be pending, it shall be necessary for the party making such suggestion to make it satisfactorily appear to the court that such suggestion is true, or that there is reasonable ground for the same." By this amendment the courts are again given the discretion in all criminal cases, except where the offense is punishable by death, provided for in the Constitution of 1864, and referred to by Judge Robinson in the case of Hoyer v. Colton, and in the case of Smith v. State, 44 Md. 530, where the traverser was indicted on the 9th of November, 1875, and on the 18th of December following filed a suggestion for removal from the criminal court of Baltimore city, with an affidavit that the suggestion was true, and that court after argument overruled the motion for removal, this court held that as the amendment adopted on the 15th of November, 1875, was in full force when the suggestion was filed, and he had failed to make it satisfactorily appear to the court below that his suggestion was true, etc., even if the appeal had been well taken, the court would have affirmed the action of the court below.

The nature of the duty imposed upon the courts by this provision has never been definitely determined by this court; but there are two things, we think, equally apparent: First, that the Legislature in proposing, and the people in adopting, this amendment never intended to do away with a right that had so long been secured by appropriate laws or constitutional provisions, and had been found in this state and elsewhere so essential to the proper administration of justice; second, that in order to preserve this right for cases in which its exercise is so important, and at the same time prevent abuses of the privilege, it was deemed advisable to leave it in all criminal cases, except where the offense is punishable by death, to the discretion of the courts, in whom the people of this state have always imposed great confidence, believing that it would not be denied by them to the accused in any proper case. Where, therefore, upon a suggestion for removal, it satisfactorily appears to the court that the accused cannot have a fair and impartial trial in said court, or that there is reasonable ground for the suggestion, his right to have his case removed is just as absolute as it was prior to the adoption of the amendment; but until it does so appear no such right exists. As it is now necessary to make it satisfactorily appear to the court in which the suggestion is made that the party charged in the presentment or indictment is entitled to the order for removal, and as no other tribunal can determine when it does so appear to that court, it follows as a logical conclusion that, in the absence of evidence to show that the court below acted arbitrarily

tion given it by the amendment, this court cannot say that the removal should or should not have been granted, and can only affirm the action of the lower court.

This view is in entire harmony with the construction placed upon similar provisions elsewhere. In 12 Cyc. 243, where decisions from many of the states are cited, it is said that: "An application for a change of venue in a criminal case is usually held to be addressed to the sound discretion of the court. and for this reason its refusal is not reversible error, unless it appears from the facts presented on the application that the court acted unfairly, or that there was a palpable abuse of the judicial discretion. But it has been held that, where the application for a change of venue is based upon the prejudice of the judge, he has no discretion to refuse it." In 4 Ency. P. & P. 499-502, it is stated that: "Where the lower court is vested with a discretion to grant or refuse a change of the place of trial, its action will not be revised, unless there has been an abuse of the discretion. The reason for this rule is obvious. Whether a change of venue is necessary to obtain a fair and impartial trial is not a question of law, but of fact. A judge on the spot, viewing all the circumstances, and having knowledge of persons, facts, and influences, is much better qualified than is an appellate court at a distance, with only ex parte affidavits before it, to determine the fact whether or not it is true that the defendant cannot have a fair trial by an impartial jury in the county in which he is indicted or in which the plaintiff has commenced his suit." Mr. Bishop, in speaking of the discretion of the judge, says: "The discretion, as just said, is judicial, not personal in the individual judge. The course of the courts in our states differs as to reviewing, in a higher court, a judicial discretion exercised in a lower. There are states in which the higher tribunal will rarely or never interfere in this matter of changing the venue; but the better and more common doctrine is that the decision of the lower court will be corrected in extreme cases of abuse, and in no other. Bishop's New Criminal Proc. § 72, par. 2. In the case of Commonwealth v. Allen, 135 Pa. 483, 19 Atl. 957, where the statute provided for a change of venue when it "is made to appear to the satisfaction of the court" that the grounds upon which the application is made are well founded, the court said: "In this case we are bound to presume that it did not appear to the satisfaction of the court that the defendant could not have a fair trial in Potter county. For anything the record discloses, the discretion of the learned judge was properly exercised. In any event, there was no such abuse of discretion as would justify our interference." In the case of Hauk v. State, 148 Ind. 238, 46 N. E. 127, the court said: "A change of venue in a crimand abused or rerused to exercise the discre- inal action, not punishable by death, by the provisions of section 1771, Rev. St. 1881 (section 1840, Burns' Ann. St. 1894), is left to the sound discretion of the trial court; and, under a firmly settled rule, it must affirmatively appear upon appeal that the discretion has been abused to the injury of the complaining party." See, also, State v. Smarr, 121 N. C. 669, 28 S. E. 549.

So in examining the record in this case we must do so, not with the view of deciding whether, upon the petition, affidavits, and exhibits filed in the court below, this court would have been satisfied that the appellant could not have a fair and impartial trial in the criminal court of Baltimore city, or that there was reasonable ground for the suggestion, but for the purpose of ascertaining whether there has been an abuse by that court of the discretion given it. The ground of the appellant's petition was that he was advised that there existed in Baltimore city such "an intense prejudice and bitter feeling against him," by reason of the great publicity given by the newspapers to his alleged connection with the crime with which he is charged, and the statements of public officials and taxpayers of the city interested in his prosecution, that it would be impossible to have the testimony in the case "passed upon in an unprejudiced, dispassionate, and just manner, by any jury impaneled in the city of Baltimore." As proof of the existence of such a prejudice there was filed, as we have said, 17 affidavits, in which the affiants state their belief (based in some instances upon interviews had with various persons, and the fact that the appellant was associated in the mind of the public with the commission of the offense) that the appellant could not have a fair and impartial trial in said court, and numerous clippings from the newspapers of Baltimore city, referring to the appellant and his supposed connection with the crime.

We have examined these clippings from the newspapers, and do not find in them conclusive evidence of the existence of such an intense public prejudice against the accused as would enable this court to say that the court below abused the discretion given it in refusing to grant a removal of the case. They do show that great publicity was given to the appellant's supposed connection with the larceny of the city's money; but it does not necessarily follow that by reason thereof there existed such a prejudice against the accused as to render it impossible for him to secure a fair and impartial trial in Baltimore city. Crimes of the nature of the one with which the appellant is charged naturally give rise to much newspaper and other comment; but such comment does not always arouse such a general prejudice against the accused as to render it impossible for him to secure a fair trial in the county or city where the crime is committed, and it is for the judge to whom committed, and it is for the judge to whom [Ed. Note.—For other cases, see Appeal and the suggestion is made to determine, on the Error, Cent. Dig. § 2803; Dec. Dig. § 648.*]

proofs presented to him, whether such prejudice exists. It is said in 4 Ency. P. & P. 401. that "newspaper articles denunciatory of the accused are not in themselves sufficient to evidence the existence of such prejudice as will justify a change"; and in the cases of People v. Sharp, 5 N. Y. Cr. R. 155, People v. Squire, 1 N. Y. St. Rep. 534, and State v. Smarr, 121 N. C. 669, 28 S. E. 549, where very interesting discussions of the effect of newspaper articles as tending to show the existence of prejudice against the accused may be found, a similar view is announced.

Nor do the affidavits contain such positive evidence of the existence of prejudice against the appellant as would necessarily control the action of the court below. These affidavits, as we have said, express the belief of the parties, based on interviews had with various persons, without stating what was said in such interviews, and the fact that in the mind of the public the appellant was associated with the crime committed, and, in the judgment of the court, the honest belief of the parties who made these affidavits may not have been well founded. Mr. Bishop says that: "The venue will not be changed for the mere belief of the party or his witnesses that he cannot have a fair trial in the county. Facts and circumstances must appear, satisfying the court." See, also, 12 Cyc. 246-248. And in 4 Ency. P. & P. 434, it is said that "facts must be shown from which the court can deduce the conclusion that the ground relied on for the change actually exists; and, as a rule, mere belief, opinions, or conclusions will not be sufficient to warrant the court in exercising its power, unless the information upon which the belief is founded, or the grounds upon which the opinions or conclusions are based, are sufficiently shown."

Without further prolonging this opinion, or discussing the numerous other authorities furnished through the commendable industry of counsel in their carefully prepared briefs, it follows, from what we have said, that the record does not show that the court below abused the discretion given it, and that the order refusing to remove the case must therefore be affirmed, in accordance with the per curiam order filed on June 1, 1909.

(111 Md. 21)

KOCH v. WIMBROW BROS.

(Court of Appeals of Maryland. June 29, 1909.) APPEAL AND ERROR (§ 648*) - RECORD -

NUNC PRO TUNC ORDER.

A nunc pro tunc order after appeal showing defendants' joinder of issue on certain pleas was not objectionable where there was nothing in the record showing any exception or objec-tion taken thereto at the trial, or any proceed-ing which would authorize a review thereo;; there being nothing also to show that issue in fact was not so joined.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date. & Reporter Indexes

APPEAL AND ERBOB (\$ 1057*)-EVIDENCE-PREJUDICE.

Where plaintiff called one of the defendants and procured a duplicate of the contract sued on, which was admitted in evidence on the claim that the original was lost, plaintiff was not prejudiced by the exclusion of a portion of plaintiff's deposition which gave the terms of the contract.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4194; Dec. Dig. § 1057.*]

RETOR, Cent. Dig. § 4194; Dec. Dig. § 1057.*]

8. SALES (§ 416*)—BREACH OF CONTEACT—ACTION BY BUYER—EVIDENCE.

Where, in an action for breach of a sale contract, defendant claimed that plaintiff had canceled the sale, while plaintiff insisted that defendant had not replied to plaintiff's letter, in which plaintiff asked defendant not to ship until further notice, a letter subsequently written by plaintiff's attorney, reciting that plaintiff asked defendant to delay shipment, and stating, "I have your communication to him in which you agree to do so and ship when required," was admissible to rebut plaintiff's claim that there was no answer to the letter requesting delay. was no answer to the letter requesting delay.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1171; Dec. Dig. § 416.*]

4. Sales (§ 416*)—Contract—Breach—Evi-

DENCE.

In an action for the seller's alleged breach of a contract for the sale of tomatoes at 77½ cents per dozen cans, in which defendant claimed that plaintiff had canceled the order, while plaintiff claimed that he only requested delay in delivery, to which defendant had acceded, evidence that the wholesale price of canned tomatoes at the time a part of the contract quantity was to be delivered was 70 cents, and that the price later went up to 85 cents, was admissible to show plaintiff's motive in desiring to postpone a delivery.

[Edd Note—For other cases are Sales Cont.] of a contract for the sale of tomatoes at 77%

[Ed. Note.—For other cases, s Dig. § 1171; Dec. Dig. § 416.*] see Sales, Cent.

5. EVIDENCE (§ 178*)—BEST AND SECONDARY EVIDENCE—CONTENTS OF LETTER.

Where a relevant exhibit is shown to be lost,

its contents may be proved by parol.

[Ed. Note.—For other cases, see Cent. Dig. § 582; Dec. Dig. § 178.*] see Evidence,

6. SALES (§ 175°)—EXCUSES FOR FAILURE TO DELIVER—REFURAL OF BUYER TO RECEIVE. Where plaintiff contracted for 1,000 cases of tomatoes, one car to be shipped as soon as packed and the other later, but plaintiff refused to accept and pay for the car to be shipped immediately as required, he could not thereafter require defendants to deliver the tomatoes or recover for breach of contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 435; Dec. Dig. § 175.*]

Appeal from Circuit Court, Worcester County; Chas. F. Holland, Judge.

Action by Henry Koch against Wimbrow Bros. Judgment for defendants, and plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and THOMAS, JJ.

Adial P. Barnes, for appellant. John H. Handy, for appellees.

BOYD, C. J. This is an appeal from a judgment rendered in favor of the defendants (appellees) in a suit by the appellant for an alleged breach of contract to deliver to him 1,000 cases of tomatoes, each case containing two dozen cans three pounds ing of the court in excluding from the jury

standard tomatoes. The terms of sale were "77½ c. per doz. f. o. b. Factory, 13½ c. rate of freight guaranteed to Newark, N. J., goods to be of packing of 1906; shipment in early part of canning season; Swells guaranteed to July 1, 1907, packers labels. One car to be shipped as soon as packed and the other later. Terms cash, less 11/2 c. in 10 das." The sale note is dated June 2, 1906.

There were five common counts and a special count in the declaration. To the first five counts the general issue pleas were filed, and to the sixth the general issue plea, one alleging that the plaintiff had countermanded the order, and another that the plaintiff refused to accept the goods when offered by the defendants according to the terms of the contract. The plaintiff joined issue on the other pleas, and traversed the second and the third filed to the sixth count. A note in the record shows that the defendants joined issue on them, but the appellant complains that that entry was made after the appeal was entered-under a nunc pro tunc order of the court. As there is nothing in the record showing any exception or objection to that action of the court, or any proceeding taken which would authorize us to review such action, it is unnecessary to discuss it, but we will add that in Greff v. Fickey, 30 Md. 75, it was held, where a writ of diminution had been issued for the purpose of having some alleged errors corrected, that it was "the duty of a court when satisfied, either from its own knowledge of what actually occurred in a cause or from evidence adduced, that the docket entries as made by the clerk are erroneous or incomplete, to have them corrected, so that a full, true, and perfect transcript of the whole proceedings as they actually occurred in the progress of the cause may be sent to the appellate court in obedience to the writ of diminution." In that case, as in this, the term in which the proceedings had occurred had passed, and as it was not only within the power, but the "plain duty," of the court to have the errors corrected, if satisfied there were errors in the docket entries, the appellant would have no ground for complaint, even if he had properly brought the question here for review. As this record had not yet been transmitted to this court, the correction was not made under a writ of diminution, but, as it was distinctly held in Greff v. Fickey that it could have been, of course, the appellant was not injured by it being done as it was, instead of the appellees waiting until the record came to this court and then applying for the writ. If the issue was not in fact joined, and the plaintiff was injured thereby, it should have been brought to the attention of the court by some appropriate proceeding.

The first exception was taken to the rul-

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the portion of the deposition of the plaintiff | defendant says: "Your favor received, and which gave the terms of the contract, the affidavit of the stenographer who took the deposition, and the certificate of the notary public before whom it was taken that the contract was offered in evidence and filed as an exhibit, but had been lost. Without stopping to consider the proper way to establish the contents of an exhibit filed with depositions, which is afterwards lost and not returned with the depositions, it is not perceived how the appellant was injured. The appellant called one of the appellees as a witness and a duplicate of the contract which was held by the appellees was admitted in evidence at the instance of the plaintiff, and there is nothing in the record from which we can see that the plaintiff was prejudiced by this action of the court. The contract was set out in the narr., the duplicate corresponds with it, and it was not denied by the defendants that it was the contract made by the parties. The part of the deposition which was excluded is not set out in the record, excepting by reference to it as "that part of the deposition of Mr. Koch which gave the terms of an alleged contract," which might indicate that the plaintiff had undertaken to give the terms of this written contract, but, however that may be, the contract is set out in full in the plaintiff's first prayer, which was granted, and the case was tried by both sides on the theory that that was the contract made between the parties.

A letter from Mr. Greenfield, attorney for the plaintiff, was offered by the defendant, to which "the plaintiff objected on the ground of its incompetency and irrelevancy under the issues in this cause." The court overruled the objection, and permitted it to be read and used as evidence. That ruling is presented by the second bill of exceptions, and we find no reversible error in it. The letter began by saying that the plaintiff had referred to him the communications of the defendants addressed to the plaintiff. admissible for no other reason, it was to show that he said: "I note that in one of your letters you state that he canceled the order. This my client emphatically denies. He asked you to hold off the shipment for a short time, and I have your communication to him in which you agree to do so and to ship when required. Therefore there can have been no cancellation of the order, and, if you still refuse to ship, we will hold you responsible." The plaintiff had offered in evidence a letter he had sent to the defendants, dated August 22, 1906, as follows: "Gentlemen: We have bought one thousand cases of tomatoes from you. Kindly do not ship them until we want them. We will let you know when to ship them." Also one dated September 24, 1906, which read: "Kindly ship us one car of tomatoes and oblige." He also offered a reply to that let-

in reply beg to quote you tomatoes at \$1.00 per doz.—f. o. b. Whaleyville, cash with order. Your previous order was canceled about 30 days ago when you refused to receive them, the tomatoes, according to The plaintiff had testified that he did not know of any reply to his letter to the defendants of August 22d, and on crossexamination was asked: "Have you produced all the correspondence that passed between you and the Wimbrow Bros. about this 1000 cases of tomatoes?" To this he replied: "I think so." Nutter J. Wimbrow, one of the defendants, testified that they commenced packing some time in August-"I guess we commenced may be about the 10th day of August"—that they received the letter of August 22d, the day they finished packing 500 cases, and answered it the day he received it as follows: "Your favor received, and in reply beg to say that we will hold these tomatoes for you, if you will send us a check in payment for them. We will then store them at your risk and expense, otherwise we are ready to ship them immediately according to contract." He then testified that they received a reply to that letter which they had lost and could not find, but it was in substance as follows: "That he would not send us a check in payment for these tomatoes in advance, neither would he receive them if we shipped them consigned to H. Koch & Co." An employé of the defendants also testified to having seen a letter of that purport. One of the material questions which arose in the case was as to that correspondence; the position of the plaintiff being that there was no such correspondence and no reply to his letter of August 22d. Several of the plaintiff's prayers offered relied on the failure of the defendants to reply to or disapprove of the letter of August 22d. The letter of Mr. Greenfield admits that he had a "communication," as he calls it, which was a reply to that letter, for it is not pretended that the plaintiff asked the defendants "to hold off the shipment for a short time" except through the letter. Although Mr. Greenfield's letter shows the contents of the communication to be just the opposite from what Mr. Wimbrow testified, it also shows that there was an answer to the letter of August 22d which the plaintiff denied. The letter was only objected to "on the ground of its incompetency and irrelevancy," but, for the reasons we have stated, we think it was competent and relevant. It was doubtless admitted when it was, although originally rejected. because in the meantime the defendants had offered evidence to show that Mr. Greenfield was attorney for the plaintiff in this case, when the depositions were taken in Newark,

Nor do we see any objection to the testimony of Mr. Ruark, presented by the third ter dated September 25, 1906, in which the bill of exceptions. Although he was not

ness, he was in the wholesale grocery business, dealt in tomatoes, and testified as to the market price in August-saying that 70 cents was the market price the latter part of August, and later the price went up to That evidence showed a motive 85 cents. for the plaintiff not wanting to get the tomatoes the latter part of August, and as, according to the testimony offered by him, the price had risen in October to a point beyond what he was to pay for them, the evidence of Mr. Ruark reflected upon the controversy between the parties as to what was done the latter part of August. If tomatoes were only worth 70 cents when the defendants received the letter of August 22d, it was not so likely that the defendants would agree to postpone the delivery to the plaintiff, who was to pay 77½ cents, as if they were worth the contract price or more. Business is not generally conducted in that

The fourth bill of exceptions contains the ruling as to the admissibility of the evidence of Walter Whaley, who worked for the defendants and was allowed to testify as to the contents of the letter alleged to have been received from the plaintiff in response to the reply of the defendants to the letter of August 22d. He said they had packed 500 cases of tomatoes, and, when he went to inquire about shipping them, he was shown the letter. The plaintiff objected to the testimony without the production of the letter. It had already been proven to be lost, and, of course, could not be produced. Under such circumstances, the contents of the letter were admissible.

This brings us to the last bill of exceptions, which embraces the rulings on the The plaintiff offered 13, all of which were rejected excepting the first and second, and the defendant offered 3, two of which were granted. The exception states that: "The plaintiff excepted to the ruling of the court in not granting his rejected prayers; and specially excepted to the granting of the defendant's first prayer, on the ground of the legal insufficiency of the evidence to support this prayer." We do not deem it necessary to discuss all these prayers separately. The first of the plaintiff, which was granted, went as far as the plaintiff could ask, and perhaps further than he was entitled to. After submitting to the jury to find that the defendant sold the tomatoes as set out in the contract of June 2d, it continued: "And shall further believe from the evidence that the defendants, upon their part, failed, neglected, and refused to deliver and ship to the plaintiff the said tomatoes in the manner and at the time or times stipulated in said written contract of sale, and shall also believe that the plaintiff was ready and willing to comply with the costs above and below.

conversant with the tomato-packing busi-i the terms and conditions of the said contract of sale upon his part to be performed, then the verdict of the jury must be for the plaintiff." With the defendant's first prayer, which was granted, the jury may have been sufficiently instructed to prevent being misled, but, unless it had understood that the plaintiff's prayer was qualified by the defendant's, as judging from its verdict it probably did, there was great danger of the jury ignoring the defense set up by the appellees. The plaintiff's second prayer, as granted, instructed the jury as to the measure of damages in as broad terms as he could desire, and, without passing on all of the others separately, we are of opinion that plaintiff has no cause to complain. would add that as to the fourth, fifth, and seventh specially referred to in the brief there was ample evidence, as we have seen, tending to prove not only that the plaintiff relieved the defendants of the obligation to furnish the tomatoes as contemplated by the contract, but a refusal by the plaintiff to accept the tomatoes at the time provided for in the contract. If it be true, as one of the defendants testified, that the plaintiff refused to pay for the tomatoes, if the defendants held them for him beyond the time the contract contemplated payment, and also said he would not receive them if the defendants shipped them to him, then the defendants were under no obligation to ship them, and had the right to treat the contract as abandoned by the plaintiff. A party to a contract for the sale of such goods as tomatoes has no right to refuse to accept them as provided in the contract, and then afterwards, when there is a rise in the market, demand delivery at the contract price. The testimony of the defendants tended to show that, if the plaintiff had accepted the tomatoes as the contract called for, they could have made a fair profit, but, when the plaintiff afterwards demanded them, they would have sustained considerable loss if they had furnished them. is true that the contract only provided for one car being shipped as soon as packed (which was about August 23d) and the other later, but the plaintiff could not refuse to accept and pay for the one car load, and then require the defendants to deliver the other when he saw fit to demand it. Without deeming it necessary to cite authorities, the case of Lawder Co. v. Mackie Grocery Co., 97 Md. 1, 54 Atl. 634, 62 L. R. A. 795, reflects on some of the questions involved. There was undoubtedly evidence to support the statements in the prayer of the defendants, and the questions of fact were submitted to the jury as fully as the plaintiff could ask. It follows from what we have said that the judgment must be affirmed.

Judgment affirmed, the appellant to pay

PUTTS v. PENDLETON et al.

(Court of Appeals of Maryland. June 30, 1909.) 1. Landlord and Tenant (§ 152*)—Destruction of Buildings—Covenants in Lease—Duties of Lessoe.

Where a lease for years covenanted that on destruction of the buildings the lessors would rebuild or repair with any money received from insurance held by the mortgagees if they would permit and direct the money to be so applied, which the lessors agreed "to request and do hereby so request," the covenant did not impose on the lessors any obligation to make a further request of the holders of the policies than that contained in the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 545; Dec. Dig. § 152.*]

2. LANDLORD AND TENANT (§ 152*)-DESTRUC-TION OF BUILDINGS—COVENANTS IN LEASE
—"HEREBY AGREE TO REQUEST"—"HEREBY
AGREE TO ENDEAVOR TO PERSUADE."
The words "hereby agree to request" in
such covenant were not equivalent to "hereby
agree to endeavor to persuade."

agree to endeavor to persuade.

[Ed. Note.-For other cases, see Landlord and Tenant, Cent. Dig. § 540; Dec. Dig. § 152.*]

8. Landlord and Tenant (§ 152*)—Destruc-tion of Buildings—Breach of Covenants

IN LEASE.

The lessees could not recover for breach of such covenant unless the mortgagees' failure to use the insurance money in rebuilding resulted from the lessors' failure or neglect to make such

[Ed. Note.-For other cases, see Landlord and Tenant, Cent. Dig. § 545; Dec. Dig. § 152.*]

Appeal from Superior Court of Baltimore City.

Action by John W. Putts against Elizabeth W. Pendleton and another, as trustees, etc. From a judgment sustaining a demurrer to the declaration, plaintiff appeals. Affirmed. Argued before BOYD, C. J., and PEARCE,

SCHMUCKER, BURKE, WORTHINGTON, and THOMAS, JJ.

Edgar Allan Poe, John P. Poe, and Martin G. Kenney, for appellant. R. M. Duvall and Frank Gosnell, for appellees.

BOYD, C. J. This is an action by the appellant against the appellees, who are trustees under the will of Mary J. Pendleton, for an alleged breach of a covenant in a lease from the appellees to the appellant of certain premises in the city of Baltimore. Profert of the lease was made by the appellant in his declaration, over was craved by the appellees, and a demurrer was interposed to the declaration and to each of the two counts. The demurrer was sustained, and a judgment on it was entered for the defendants for costs.

The narr. alleges, and the lease discloses, that the appellees leased to the appellant for the term of 15 years, beginning on May 1, 1897, two lots of ground, together with the buildings and improvements thereon. first was on the corner of Charles and Fayette streets, and fronted 30 feet 3 inches on

10 inches on Fayette street, being of irregular width. The second adjoins the first on Fayette street and fronts thereon 19 feet with a depth of 73 feet, more or less. The appellant agreed to pay annually during the continuance of the lease the state and city taxes and the water rent, to keep the improvements then on the property, or that might be thereafter placed thereon, insured to the amount of \$27,500 for the benefit of the appellees, their successors and assigns, and also to pay the interest as it became due upon two mortgages upon said premises from Mary Jane Pendleton to the Central Savings Bank of Baltimore, one bearing date September 5, 1891, and being for \$18,000, and the other for \$7,500, being dated January 29, It was further agreed that, in the event of the mortgages being released, the lessee was to pay to the lessors an amount of money equal to the interest on the mortgages. The taxes, water rent, insurance, and interest were to be considered as part of the rent, and, in addition thereto, the appellant was to pay the appellees \$2,328.99 each year during the lease, payable monthly. The appellant further covenanted that he would at his own expense and cost tear down the building or buildings on the first-mentioned. lot, and erect in a good workmanlike manner a four-story warehouse thereon, to cost at least \$25,000, and to connect the same with the warehouse then on the lot secondly described, both to be used for the conduct of the appellant's general merchandise business. The clause in the lease which gives rise to the controversy is as follows: "And it is further agreed by the parties hereto that should the said building to be erected as aforesaid upon the lot herein firstly described, and the building now erected upon the lot secondly described, become unfit for occupancy by fire, or unavoidable accident, not the fault of the party of the second part, his servants or agents, then, and in that event, the parties of the first part shall rebuild or reconstruct or repair said building with any money they may receive from the policies of insurance now, or that may be then on said property, provided the present or then assignees or holders of said policies shall permit and direct the money that may be received therefrom to be so used and applied, which permission and direction the said parties of the first part hereby agree to request and do hereby so request, and provided, further, that said insurance money be paid within one year from the date of such fire or unavoidable accident, and provided, further. that in the event of said insurance money not being paid under said policies within the period of one year, or of the assignees or holders of said policies not allowing or directing said money to be applied to the purposes of rebuilding the property that may be Charles street, with a depth of 118 feet and so destroyed, then, and in that event, this

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lease shall become absolutely null and void. and the parties of the first part, their successors or assigns, shall have an immediate right of re-entry upon the same. It being further understood and agreed that in the event of said property being so destroyed or rendered untenantable by fire or unavoidable accident not the fault of the said party of the second part, his agents or servants, the said party of the second part shall have the right to remove from and quit said premises upon first paying the rent proportionately and adjusting the taxes, water rent, premiums on insurance, and interest on the mortgages aforesaid (or its equivalent) to the day of fire or accident, and the rent and expenses aforesaid shall cease until the said parties of the first part may rebuild the said property as hereinbefore provided for. It is further agreed by and between the parties hereto that, upon the termination of the tenancy hereby created, the buildings now or that may be hereafter erected upon the lots of grounds herein firstly and secondly described, and all improvements thereon made by the party of the second part, shall become the property of the parties of the first part, their successors or assigns."

The declaration alleges that the plaintiff entered into possession of the premises, tore down the buildings on the lot first described. and erected a four-story warehouse at a cost of \$32,000, and connected it with the warehouse then on the other lot. It further alleges that in the great fire in Baltimore of February 7 and 8, 1904, by an explosion from dynamite lawfully brought about by direction of the municipal authorities of the city for the purpose of checking the fire all of the buildings upon the two lots were totally destroyed by fire without any fault on the part of the plaintiff or his agents; that at the time of the fire the buildings were insured by policies of insurance amounting to \$27,-500, which policies were in the joint names of the plaintiff and defendants, with an indorsement thereon making the loss thereunder payable to the Central Savings Bank of Baltimore, mortgagee; that, after the fire, the plaintiff was called on to facilitate the prompt collection of the insurance money, and he at once endorsed the policies jointly with the defendants, so as to enable the insurance money to be paid to and received by said Central Savings Bank as such mortgagee; that said money was paid to the bank within four months thereafter and it paid \$2,000 thereof to the defendants, but no part was paid to the plaintiff. The narr. also alleges that the plaintiff notified the defendants that he desired the reconstruction of the buildings without delay, and it was the duty of the defendants to inform the bank that he so desired and to request it to apply the \$25,500 of insurance money to the rebuilding within a reasonable time, but that the defendants utterly failed to so inform the bank of the plaintiff's desire, and to request it to ing of said buildings for the use and benefit of the plaintiff as lessee for his unexpired term, but, on the contrary, the defendants, - day of September, on or about the ---1904, borrowed from said bank, upon a mortgage upon said premises, \$60,000, and applied the same to the construction of a building on said lot for the use and occupation of other tenants, and leased to other tenants the said premises improved by a large new building at a large gain and profit to them, to wit, \$14,000, or thereabouts, per annum.

It will be observed that the covenant on the part of the lessors was that they "shall rebuild or reconstruct or repair said building with any money they may receive from the policies of insurance now or that may be then on said property, provided the present or then assignees or holders of said policies shall permit and direct the money that may be received therefrom to be so used and applied, which permission and direction the said parties of the first part hereby agree to request and do hereby so request." The terms of the insurance clause, presumably in the mortgages, are not stated in the narr., but the lease was evidently drawn on the theory that the holders of the policies were not required to use the proceeds from them in rebuilding, as the obligation on the part of the lessors to use "any money they may receive from the policies" was conditioned upon the holders permitting and directing the money that might be received therefrom to be so used and applied. According to the narr., the lessors did not in point of fact receive any money from the insurance, excepting the \$2,000, which, of course, could not rebuild the building, and therefore technically it might be said there was no breach for that reason; but, however that might be, they did so request by the very terms of the lease. If, then, a request from the lessors was necessary, so as to authorize the bank to so use the money, all that was required was for the appellant to show the bank the provision in the lease, for it cannot be doubted that the request so made would have justified the bank in so using the money, so far as the appellees are concerned, if it was willing and saw proper to do so. It is not alleged in the narr. that the appellant asked the appellees to make any further request, and, if it was intended by the parties to the lease that the appellees should make a request other than what they had already made in the lease itself, the appellant ought to have made some such demand on them. It is true it is alleged that he notified the defendants that he desired the reconstruction of the buildings without delay, but that was not equivalent to asking them to make an additional request of the bank that it do so. The lease made no provision for any option on the appellant's part as to the rebuilding. If the bank had determined to use the insurance money in rebuilding, he certainly could not have invest \$25,500 of said money in the rebuild- escaped liability under the lease on the fire: made a further request of the bank to so use the money, or on the ground that he did not desire it to be rebuilt. It was in no mainner dependent upon his wish on the subject, and, as the bank had the undoubted right to use the money in rebuilding under the request contained in the lease, there would have been no occasion for any further request in order to bind the appellant to continue under the lease. The appellees' formal request, made over their hands and seals, was as binding as it could well have been made, and, unless we construe the words "hereby agree to request" to be equivalent to "hereby agree to endeavor to persnade," or something to that effect, we cannot see what more they were required to If before the fire the appellees had ceased to be trustees, or had sold the property, surely they could not have been sued because they had not renewed the request. It was not intended by the expression used in the lease to require them to use their influence to have the money applied to rebuilding, but it was doubtless intended to obtain the sanction and request of the appellees to have it so invested, without which under some circumstances it could not have been done. If, for example, the mortgages were overdue when the fire occurred, it was the duty of the bank to apply the insurance money to the payment of the mortgage debt in the absence of some such request of the appellees. If the understanding was that the request would only be availing if made after a fire, then why add "and do hereby so request"? The language of the covenant indicates an intention to have the request then and there made, so as to make it binding on the successors of the appellees, as well as on them. If the theory of the plaintiff, as indicated by the narr., is correct, that the defendants were liable for any loss which the plaintiff may have sustained by reason of the buildings not being replaced, unless they made another request after the fire, he ought at least to have alleged that he did demand of them that such request be then made, for it; would be incurring a great responsibility for a mere neglect which might have so easily been avoided by a demand or even suggestion that an additional request be made. But we are of the opinion that under a proper construction of the covenant the appellees are not in default because another request was not made. The expression "hereby agree to request and do hereby so request" may be somewhat peculiar, but it is not unlike expressions which were formerly often found in leases, "do hereby agree to demise and do hereby demise," or in a contract of sale the costs above and below.

ground that the appellees had not after the of land, "do agree to sell and do hereby bargain and sell," etc.

But, if there be any doubt about that construction of the lease, we are of the opinion that it was necessary to allege that it was by reason of the failure or neglect of the appellees to make the request that the bank did not use the insurance money in rebuilding. If the bank was, in fact, unwilling to continue the loans under the existing mortgages, or to use the money in replacing the building which was destroyed, a request would have been of no avail and a failure to make it was not the cause of any loss which the appellant suffered, but it was the result of the bank's unwillingness to so use the insurance money. That being so, it was incumbent on the plaintiff to make that allegation, and to prove it if the case went to trial. No fraud on the part of the appellees nor collusion with the bank is alleged. The mere fact that in the following September the defendants borrowed \$60,000 from the bank upon a mortgage upon said premises improved by a large new building from which the sum of \$14,000 per annum was realized did not relieve the plaintiff from such allegation, or suggest bad faith on the part of the appellees. The bank might very well have declined, when it received the money in June, to reinvest the \$25,500 in any building on the premises, and yet in September might have concluded, owing to changed conditions in Baltimore after the expiration of that time from the date of the fire, to loan that sum and more. Indeed, if a building on which it loaned \$60,000 realized \$14,000 per annum as rent, it is not difficult to understand why the bank might readily make such a loan when it would not invest \$25,500 if the improvements were to be such as those on the property at the time of the fire. They were constructed to suit the business of the appellant, and, in the event of anything happening to him, might not have been suited to that of any other tenant, while from the allegations in the narr. it may be seen that a very different sort of building was erected. which was not occupied by one tenant alone but by "other tenants."

In reference to the second count, it is only necessary to say that the covenant in the lease only required the appellees to rebuild on the conditions therein set out, which we need not here repeat. They did not covenant to rebuild at all events in case of fire, but only under the circumstances stated above. So, without discussing other reasons suggested by the appellees, we are of the opinion that the demurrer was properly sustained. and the judgment must be affirmed.

Judgment affirmed, the appellant to pay

(82 Conn. \$81)

COTTER v. COTTER.

(Supreme Court of Errors of Connecticut. July 20, 1909.)

PARENT AND CHILD (§ 4*)-SUPPORT OF PAR--Compensation.

Where a son and other children lived with their parents, the earnings of all going into a common fund for the support of the household. and the father never promised to recompense the son for any contribution which he might make towards the father's support, or expected that he was to be called on to make such recompense, no implied promise to pay the same arose. [Ed. Note.—For other cases, see Parent and Child, Dec. Dig. § 4.*]

Appeal from Superior Court, New Haven

County; Joel H. Reed, Judge. Action by Maurice F. Cotter against John Cotter. Judgment for defendant, and plaintiff appeals. No error.

Verrenice Munger, for appellant. Bernard E. Lynch and Frederick M. McCarthy, for

PRENTICE, J. This is an action by a son to recover from his father amounts claimed to have been expended by the former for the support of the latter in his old age, and while the two were living together in the household which the father and his wife, both industrious and saving, had established upon their marriage many years ago, in which the plaintiff and two other boys, still members of it, had grown to maturity and earning capacity, and for the support of which the earnings of all, according to their ability from time to time, had gone into a common fund managed by the mother, now The trial court has found the deceased. facts of the situation to be such that little credit is thereby reflected upon the plaintiff, and such as to render recovery impossible when they are brought under the application of familiar legal principles. It is found that the defendant never at any time promised to recompense the plaintiff for any contribution which he may have made or should make toward the former's support, that he had no expectation that he was to be called upon to make such recompense, and the circumstances of the situation, as they are found, are such that no implied promise to do so can reasonably be implied.

"Ordinarily, where services are rendered and voluntarily accepted, the law will imply a promise upon the part of the recipient to pay for them; but where the services are rendered by members of a family, living as one household, to each other, there will be no such implication from the mere rendition and acceptance of the services. In order to recover for the services, the plaintiff must affirmatively show either that an express contract for the remuneration existed, or

a reasonable and proper expectation that there would be compensation. The reason of this exception to the ordinary rule is that the household family relationship is presumed to abound in reciprocal acts of kindness and good will, which tend to the mutual comfort and convenience of the members of the family, and are gratuitously performed; and, where that relationship appears, the ordinary implication of a promise to pay for services does not arise, because the presumption which supports such implication is nullified by the presumption that between members of a household services are gratuitously rendered." Disbrow v. Durand, 54 N. J. Law, 343, 345, 24 Atl. 545, 33 Am. St. Rep. 678. For collections of cases to the same general effect, see 29 Cyc. 1620 and 15 Am. & Eng. Ency. of Law, 1083-1085.

The fundamental purpose of this appeal, however, is to secure at our hands a different finding in important particulars, and we are asked to make desired corrections in the finding, and then to apply to the situation thus established certain principles of law. An examination of the evidence discloses that the court had ample justification for all the material portions of the facts found. As incidental to the major changes requested, we are asked to add certain details concerning which the finding is silent. These possess no importance in connection with the controlling facts as they are found, and as they must remain.

There is no error. The other Judges concurred.

(224 Pa. 519)

BLACK et al. v. BALTIMORE & O. RY. CO. (Supreme Court of Pennsylvania. April 19, 1909.)

DEATH (§ 31*)—ACTION FOR DAMAGES—PER-SONS ENTITLED TO SUE.

Where a person was injured by the negli-gence of another and brought an act of the course of the person was a read that the course of th for, but before the action was tried he died, his children cannot under Act April 15, 1851, § 19 CRILIA (P. L. 674), bring a separate action to recover therefor, as under such section two facts must exist, the death of the injured party by negligence, and there must have been no suit for damages brought by the injured party during his life, but his personal representatives are authorized under Act April 26, 1855 (P. L. 309), to prosecute the pending suit.

[Ed. Note.—For other cases, see Death, Cent., Dig. § 35; Dec. Dig. § 31.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Alexander Black and others, against the Baltimore & Ohio Railway Company. From a judgment for defendant notwithstanding the verdict, plaintiffs appeal: Affirmed.

The jury returned a verdict for plaintiffs that the circumstances under which the for \$1,925. Subsequently the court entered services were rendered were such as exhibit | judgment for defendant non obstante veredicto on the ground that the plaintiffs had no statute, and hence must be observed if a reright to discontinue the suit pending at their father's death and institute a new action for his death.

Argued before MITCHELL. C. J., and FELL, MESTREZAT, POTTER, and EL-KIN, JJ.

Ulysses S. Koons, for appellants. William B. Linn, for appellee.

MESTREZAT, J. This is an action instituted by the children of John Black, deceased, to recover damages for his death. Black was injured by one of defendant company's trains on December 27, 1906, at the Black Diamond Coal Yard in the city of Philadelphia, and died on January 7, 1907. This suit was brought January 16, 1907. On the trial of the cause it appeared by the evidence that Black had brought suit against the defendant company on January 2, 1907, to recover damages for the injuries he sustained in the same accident for which the plaintiffs now seek to recover. In the present action the jury returned a verdict in favor of the plaintiffs. Subsequently, on motion of counsel, the court entered a judgment for the defendant non obstante veredicto.

The above statement of facts shows that the plaintiffs cannot recover in this action, and that the learned court below was clearly right in entering judgment in favor of the defendant. The right to recover here depends entirely upon statutory authority. Act April 26, 1855 (P. L. 309), designates the parties entitled to recover in case of death resulting from negligence, and provides that they shall take the damages recovered in the same proportion as they would take the personal estate of the deceased in case of intestacy. The fund recovered is not liable to the creditors of the party for whose death the action is brought. The right, however, to bring the action was not conferred by the act of 1855, but by Act April 15, 1851 (P. L. 669). The eighteenth section of that act reversed the rule of the common law, provided for survivorship, and where the action had been brought by the injured party during his life permitted the substitution of his personal representatives in case of his death prior to the final disposition of the cause. This section of the act of 1851 is applicable to the facts of the case at bar. After the accident Black brought suit for the injuries which he had sustained. Five days thereafter he died, and, while the action was pending, the present suit was brought by the children of the deceased. This was a mistake. Instead of the children bringing an action, the personal representatives of Black should have been substituted as plaintiffs,

covery is to be had for Black's death.

The present action cannot be maintained under section 19 of the act of 1851 as supplemented by the act of 1855. That section of the act of 1851 created a new cause of action and conferred the right of recovery in such actions upon the widow of the deceased. or, if there was no widow, the personal representatives were authorized to bring the action. The act of 1855 changes the parties for whose benefit the action is brought, and gives to children the right to sue for the death of a parent. Before, however, an action can be brought under section 19 of the act of 1851, two facts must exist: (a) The death must have been occasioned by unlawful violence or negligence, and (b) there must have been no suit for damages brought by the party injured during his life. The existence of both of these facts is a condition precedent to the bringing of an action by children for the death of a parent. If either is absent no suit will lie. Here, as we have seen, Black himself brought an action for the injuries he sustained by the accident, and this fact deprives the plaintiffs, the children of the deceased, of the right to maintain an action under this section of the act of 1851. The statute is so plain there can be no doubt as to its interpretation. Argument is unnecessary to show what the statute clearly declares, that an action for death caused by negligence can only be brought where no suit for damages has been instituted by the party injured during his life. As the plaintiffs seek to enforce a statutory right, they can only recover by complying strictly with the statute which creates the cause of action. Black having brought an action for the injuries he sustained, no recovery can be had for his death, except by his personal representatives, who are authorized by the statute to "prosecute the suit to final judgment and satisfaction." There is no discretion in the matter. It was not open for the children to elect to bring another action and to disregard the former suit or discontinue it. They had no authority to do either.

The assignments of error are overruled, and the judgment is affirmed.

(224 Pa. 448)

MILLARD et al. v. DELAWARE, L. & W. R. CO.

(Supreme Court of Pennsylvania. 1909.) April 12,

TAXATION (§ 543*)—VOLUNTABY PAYMENT— RECOVERY—AFFIDAVIT OF DEFENSE.

The owner of the surface, who had made a coal lease of the coal underneath the land, sued and they should have prosecuted the case to final judgment and satisfaction. This is the mode of procedure pointed out by the Held, that an affidavit of defense that the taxes

see Taxation, [Ed. Note.—For other cases, see 7 Cent. Dig. § 1012; Dec. Dig. § 543.*]

Appeal from Court of Common Pleas, Lackawanna County.

Action by Stephen C. Millard and others against the Delaware, Lackawanna & Western Railroad Company. From an order discharging rule for judgment for want of a sufficient affidavit of defense, plaintiffs appeal. Affirmed.

Newcomb, J., filed the following opinion in the court below:

"The equities here are apparently with the plaintiffs; but on the question of their legal right to recover the case is close. If the exact facts were before us on a case stated, it could be determined at this time. The plaintiffs, or those whom they represent, were owners in fee of a tract of seated land in this city. Many years ago title to all the coal therein minable at an agreed standard of profit was severed by their indenture called a 'coal lease' and became vested in the defendant. The term of the lease was during such time as should be required to exhaust the coal at the stipulated rate of production. The lessee went into possession accordingly, has been in possession of the demised premises ever since, and the lease is still operative. As owner it thus became personally liable to assessment thereafter for the tax on the unmined coal to which they took title. How the taxes were assessed during the earlier years does not appear. From 1902 to 1906, inclusive, they were assessed against the lessors and paid without compulsion by the plaintiffs as their representatives. No actual notice of the assessment was brought home to defendant, nor was it requested to pay the taxes.

"The sole question, it is believed, is whether there is enough on the present showing to take the case out of the general rule as to voluntary payments. That was the only question discussed at the argument, although by a brief submitted in the meantime another one is sought to be raised by defendant. It takes the ground that the lease is capable of being construed as implying an agreement on the part of the lessors to pay the taxes, and that the continuous payment by them from the start shows such construction by the parties, thereby determining its construction by the court. This position is believed to be tenable. In the first place, it nowhere distinctly appears that the taxes were so paid from the start. In the second place, the conduct of the parties is never resorted to for such purpose except where the terms of their written contract are ambiguous. In this instance there is no ambiguity. So far as they undertook to say anything in the paper on the subject of taxes, their meaning was expressed clearly and without uncertainty. With any supposed uncertainty of intention Rep. 606.

were paid under a mistake of law and not under about things as to which they did not attempt a mistake of fact was sufficient. to have the writing speak its construction has nothing to do. It is the meaning of the terms employed, not those omitted, which, if uncertain, may be inferred from the conduct of the parties to the writing.

"But, while the defendant's contention in this particular is not well founded, it suggests the crucial point in this case as it is now presented. The plaintiffs aver payment by mistake of that which defendant by right ought to have paid, and thus invoke the equitable principle of unjust enrichment. averments are that the taxes on the coal estate were assessed against the lessors by mistake of the taxing officers, and by them paid on the mistaken assumption that the assessment was on such estate as they still had in the demised premises. Upon this it is urged that the payment cannot be regarded as intrusive because it is presumed to have been in relief of plaintiffs' interest, an estate in the nature of a reversion after the exhaustion of all veins minable at the standard of profit defined in the lease. Other than the assertion in the first affidavit of defense that the payment was in conformity with the terms of the lease, the averment of mistake is only formally denied. As this is an essential averment, it may be questioned whether it is fairly controverted by a mere naked denial amounting to no more than the affiant's conclusion. Be that as it may, when it is considered that, so far as concerns the legal liability to assessment, the status of the parties was fixed by the character of the lease, together with the subject-matter of the payments, the quantity of the coal, and the amount of the taxes as assessed from year to year, coupled with plaintiffs' failure to make demand on the defendant, or seek to have the assessment transferred, the question inevitably arises: 'Was not the mistake merely one of law?' In other words, on the whole case as now presented, the plaintiffs fail to make it clear that the payments were made otherwise than in ignorance of the effect of the lease as fixing the defendant's liability. So, while it is apparent that there was no stipulation, either expressed or implied, on the part of the lessors to pay these taxes, it is doubtful whether they did not pay them because they assumed they were legally liable in the absence of an agreement to the contrary. If that be so, the mistake involved would be one of law and not of fact. I do not understand that a mere mistake as to a legal right or liability where one has knowledge or means of knowledge of the facts will make such payment involuntary or warrant a recovery, even though it be against conscience for the defendant to retain this benefit. Keener on Quasi Contracts, 85-112; Real Estate Sav. Inst. v. Linder et ux., 74 Pa. 871; Gould v. McFall, 118 Pa. 455, 12 Atl. 336, 4 Am. St.

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"The learned counsel for the plaintiffs re- | fendants, and complainants appeal. lies upon the doctrine of Iron City Tool Works v. Long & Co., 4 Sadler, 57, 7 Atl. 82, and kindred cases; but their mistake was none of fact and was so found by a jury. In Hogg v. Longstreth, 97 Pa. 255, the taxes had been assessed against the defendant personally while in possession as owner. The land was subject to a mortgage which was afterwards foreclosed against the mortgagor and the defendant as terre-tenant. Becoming the purchaser at the foreclosure sale, plaintiff went into possession and was then compelled to pay defendant's taxes in part to prevent a sale of the land on tax liens, which had been put in judgment, and the balance to save his personal property from seizure by the tax collector. Manifestly these facts repelled any inference of a voluntary payment. So here, if the assessments had been against the defendant, and the plaintiffs had paid the taxes to prevent a sale after defendant's refusal to pay, a different question would be presented; but, having paid the taxes repeatedly without compulsion or question as to who ought to pay them, the plaintiffs' right to recover as for an involuntary payment is not free from doubt on this motion. To doubt in such case is to decide in favor of its submission to a jury.

"The rule for judgment is discharged." Argued before FELL, BROWN, POTTER, ELKIN, and STEWART, JJ.

John S. Harding and W. J. Torrey, for appellants. Everett Warren and D. R. Reese, for appellee.

PER CURIAM. The order discharging the rule for judgment is fully sustained by the reasons stated in the opinion of the learned judge of the common pleas, and it is now affirmed.

(224 Pa. 496)

GOOD et al. v. QUEEN'S RUN FIRE BRICK CO. et al.

(Supreme Court of Pennsylvania. 1909.) April 19,

RAILBOADS (\$ 79*)-TRACKS ON STREET-RE-LIEF TO ABUTTING OWNER-LACHES.

A brick company laid a private siding on a street with the consent of the city and all the abutting owners except plaintiff, who refused to sign a permission for it to do so; but plaintiff permitted the operation of the siding for 10 years, when an additional track was laid and the plant remodeled at great expense, and for five years thereafter did not object to the tracks. Held, that plaintiff was guilty of laches, barring injunctive relief.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 192; Dec. Dig. § 79.*]

Appeal from Court of Common Pleas. Clinton County.

Bill for an injunction by Kate A. Good

firmed.

The following is the opinion of Hall, P. J. of the court below:

"The plaintiffs' bill in this case was filed November 11, 1905. The allegations contained in the bill which they have endeavored to sustain by the testimony are, briefly, as follows: Kate A. Good has been, since the year 1876, the owner in fee of two certain lots of ground situate on Water street, in the city of Lock Haven, upon which she resided, together with her husband and family, in a large three-story brick dwelling house which was erected thereon at the time of the purchase of said lots in 1876. There was also a brick stable erected on the premises at that time. The dwelling house was remodeled, enlarged, and furnished in modern style with suitable furniture in the year 1900, at which time the plaintiffs built another stable on another lot in the rear of those on which the dwelling house is located. The dwelling house is situated in the most beautiful and attractive part of the city, and until the occurrences complained of was a very desirable location for residential purposes. The family consists of herself, her husband, and four children, all adults. They keep horses and carriages for their convenience, pleasure, and business. Water street, on the northerly side of the plaintiffs' property, is a public highway, extending on its northerly side to the bank of the West branch of the Susquehanna river, which is also a public highway. The street is now about 50 feet in width. About the year 1887 the Queen's Run Fire Brick Company, a corporation, one of the above-named defendants, erected a large fire brick plant between Water street and the river. extending to a point about 500 feet east of the plaintiffs' residence, and without permission of the plaintiffs it entered upon Water street in front of their residence and cut down certain trees which were not only ornamental but useful in protecting the bank from floods and the premises of the plaintiffs from ice and drift. It constructed a railroad of standard gauge, with cross-ties eight feet long and with ballast and rails upon Water street along the entire front of the plaintiffs' premises, eastwardly therefrom to the brick company's plant and westwardly therefrom to the Philadelphia & Erie Railroad, thereby appropriating part of the street fronting on the plaintiffs' property, preventing the use thereof by the plaintiffs and by the public and diverting it from the purpose for which it was intended. The Pennsylvania Railroad Company; a public corporation, commenced running its locomotives and cars on the said railroad for the and others against the Queen's Run Fire purpose of hauling coal to, and the manu-Brick Company and another. Decree for de- factured product from, the said fire brick

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plant, and has been running its trains on from the walls, and clocks so affected and said railroad until the present time.

"The fire brick company has a large tract of land on the north side of the Susquehanna river, from which it obtains its fire clay used in its manufactory, and for some time after the construction of this plant it transported this clay from its mines to the river by cars, and then took it by boats on the waters of said river to its said plant; but about the year 1900 it ceased to transport its clay in this manner and since that time has been transporting the same over the Philadelphia & Erie Railroad to its intersection with the brick company's railroad above mentioned, and then over the railroad of the brick company to its plant. At this time the brick company built an additional track at the eastern end of its railroad which was elevated about 18 or 20 feet above the surface of the ground on trestles in order that the clay might be carried by cars over this trestle into the works. This elevation made a very heavy grade a short distance east of plaintiffs' premises. An average of about one train a day would run over the brick company's railroad up until the time when it began transporting its clay in this manner; but the transportation of the clay made additional trains necessary, and since the year 1900 the said plant has been very much enlarged and its capacity greatly increased, so that the number of trains per day has increased, and they are much heavier than they formerly were, and, in order to handle the cars up the steep grade at the eastern end of said railroad to the top of the trestle, more power is required than formerly, and, in the effort made in front of the plaintiffs' premises to gain the necessary momentum to run up the incline, great noise is made and great volumes of smoke are emitted from the engines. There is also a great deal of switching and shoving of trains in front of the plaintiffs' premises. The brick company's railroad is situated 23 feet from the curb in front of plaintiffs' front door and within 191/2 feet of the curb line at the western end of their lots, thus rendering the street difficult of passage and making it impossible to turn vehicles in the street. The running of the trains frightens the horses of the plaintiffs and those of visitors at their house, so that it is dangerous and frequently impossible to drive in front of the house. Horses have been frightened and broken loose and ran away there, so that the tying of horses in front of the plaintiffs' premises has necessarily been abandoned. The large and heavy trains running with the power necessary to enable them to arise to and upon the said trestle, the shoving of engines, and switching of cars shake the ground and jar the plaintiffs' house to such an extent that windows have been broken, foundation walls impaired, plastering and brickwork cracked, pictures and bric-a-brac shaken such increased capacity, but stood by and per-

injured that they will not keep time. The smoke, dust, and soot from the locomotives enter the plaintiffs' house and damage its walls and ceilings, furniture, clothing, and carpets therein, and when the wind is from the east no clothes can be hung out to dry without being solled by the soot from the locomotives. The operation of the railroad renders the plaintiffs' property less desirable as a residence, increases the danger to the occupants of the house and to the property, greatly to the injury of the plaintiffs, and their property is consequently impaired and depreciated in value.

"The plaintiffs ask the court, by reason of these injuries complained of: First, to epjoin the Pennsylvania Railroad Company from running its locomotives and trains upon the railroad of the said brick company. Second, to compel the Queen's Run Fire Brick Company to remove its said railroad and to restore Water street to the same condition, so far as is possible, that it was in before the construction of said railroad. As to their third request, the allegations upon which it is founded have been abandoned, as we understand it, as no testimony was taken to support them. It may therefore be disregarded. Fourth, that the defendants be compelled to make compensation to the plaintiffs for all damages suffered by reason of the matters complained of. And, fifth, for general relief. To this bill the Queen's Run Fire Brick Company filed its answer, setting up, among other things: That, at the time of the erection of their plant in 1887 and the construction of their railroad on Water street, the plaintiffs' residence consisted of a very ordinary dwelling house and small stable on the same lot; both being of an unpretentious character. That the plaintiffs at that time made no objection or protest against the erection and establishment of the plant and the railroad connected therewith, but, with full knowledge of the same, stood by and permitted it to invest large sums of money in its said plant and acquiesced therein for a long time. That the plaintiffs enlarged and remodeled their residence in the year 1900, at which time the brick plant was in active operation, under conditions not as favorable for surrounding properties as they exist at present. That it has invested \$250,000 in its plant and employs continuously about 250 laborers; its monthly pay roll amounting to \$9,000. That its manufacture of brick is conducted on the most approved plan and by the best of modern machinery and methods. In 1903 it remodeled its plant, placing all machinery on heavy concrete foundations, and otherwise went to a large expense to make the operation of the machinery noiseless and free from vibration, which result was obtained. That at this time also the plaintiffs were fully aware that the plant was being remodeled in mitted large sums of money to be expended | for this purpose. That only one train goes into the plant in the morning between 7 and 8 o'clock and remains there on an average about 15 minutes, and another train goes into the plant during the afternoon and remains a period of about 30 minutes, and that these two trains are the only ones going in and out of the plant each day. That the change in the method of transportation of their clay from water to rail was rendered necessary by lack of water in the river on which to float their boats and flats, and that the change from water to rail is at an increased expense. That they are the largest industry in the city of Lock Haven and pay taxes to the city and county amounting to over \$1,400 a year. That all of their employes live in Lock Haven, or its immediate vicinity, and that if the prayer of the bill is granted it will be necessary for it to close down its plant and to remove the same from the city of Lock Haven, thereby entailing irreparable loss and damage, not only to the brick company, but to the city, resulting in the loss of employment to a large number of men, and greatly depreciating the general business of the town and the value of the property The Pennsylvania Railroad Company also filed an answer denying that it was interested in or had anything to do with the locating and constructing of the said railroad, or that it was ever interested in it elther as owner, lessee, or otherwise, or ever controlled or had the right to control the maintaining and operating thereof, but so far as it knows said railroad was constructed, maintained, and operated by the fire brick company separately and solely for the uses and purposes of its lawful business; that it only ran its locomotives and cars over said railroad as requested and required to do so by the said fire brick company to transport its material and manufactured product to and from its plant.

"It appears from the testimony that, at the time the brick company built its railroad upon Water street, it had been granted the right to do so by an ordinance of the city council, and that permission had also been granted to it by all the property owners on Water street, with the exception of the plaintiffs in this case, who had refused to sign permission for this purpose. Beyond that fact it does not appear that the plaintiffs ever made any other complaint until they brought this suit, which was instituted 18 years after the building of the railroad and 5 years after the construction of the incline, which the testimony shows to have been the occasion of most of the damages which have been proved. The facts alleged in the answer filed by the Queen's Run Fire Brick Company and by the Pennsylvania Railroad Company, to which allusion is made above, are substantially sustained by the evidence, and conceding for the purpose of argument

bill, to which reference is above made, have also been proven, the first question to be decided is whether, under such a state of facts, a proper case has been made out for the intervention of a court of equity. may be conceded that the city of Lock Haven could not grant to the Queen's Run Fire Brick Company a legal right to build and operate its siding on Water street, and that, if the plaintiffs had promptly made application to this court for an injunction to prevent such occupation of the street in front of their premises without their permission, it would have been granted.

"Have their laches been such as to estop them from making such an application? The common-law maxim that wherever there is a right there is a remedy has never been adopted by courts of equity. It is a well-recognized principle that one may sleep upon his right until he lose it, and courts of equity will withhold their relief from those who have delayed the assertion of their claims for an unreasonable length of time. Bower's Appeal, 125 Pa. 175, 17 Atl. 254, 11 Am. St. Rep. 882; Willard v. Wood, 164 U. S. 502, 17 Sup. Ct. 176, 41 L. Ed. 531; Lansdale v. Smith, 106 U. S. 391, 1 Sup. Ct. 350, 27 L. Ed. 219; Sullivan v. Railroad Company, 94 U. S. 806, 24 L. Ed. 324; Speidel v. Henrici, 120 U. S. 377, 7 Sup. Ct. 610, 30 L. Ed. 718; Badger v. Badger, 69 U. S. 87, 17 L. Ed. 836. The defense of laches may be enforced in proper cases wherein the facts appearing call for it, whether they arise upon the bill and pleadings or upon the whole case as presented by the evidence. The court will often take notice of it, even though the objection is not made by the parties. Beach's Modern Eq. Prac. § 258. In the case of Bruner v. Finley, 187 Pa. 389, 41 Atl. 334, the court held that a delay of 15 years on the part of the plaintiff in setting up a claim is gross laches, which properly defeats any right of recovery. In the case of Becker v. Railway Co., 188 Pa. 484, 41 Atl. 612, s. c. 195 Pa. 502, 46 Atl. 1096, where a landowner promptly filed a bill in equity against a railway company to prevent the construction of its railway upon the turnpike road abutting on his property, but made no motion for a preliminary injunction until the road had been built and was in full operation, and took no further steps in the case for two years and a half, and it appeared that the injury to the complainant was slight and might be readily compensated in damages, it was held that injunction would not be awarded because of the great inconvenience to the public and the serious loss it would inflict upon the company. To the same effect are the cases of Heilman v. Ry. Co., 180 Pa. 627, 87 Atl. 119, s. c. 175 Pa. 188, 34 Atl. 647, and Hinnershitz v. Traction Co., 206 Pa. 91, 55 Atl. 841. The latter case decides that, where a railroad is projected over a public that all of the allegations in the plaintiffs' | road without legal authority, and the abut-

ting property owners had notice of it and failed to make prompt objection thereto, they are charged with constructive consent, and equity will not interpose for their relief after a portion of the track has been constructed; the plaintiffs being barred by their laches from relief in equity. In the case at bar the counsel for the defendant contends that the municipality had the right to authorize the building of the siding under the authority of Chicago Dock & Canal Company v. Garrity, 115 Ill. 155, 3 N. E. 448, People v. Blocki, 203 Ill. 863, 67 N. E. 809, and Clarke v. Blackmar, 47 N. Y. 150. While we cannot regard the reasoning in those cases as sound, it is not necessary to decid this question under our view of the present case. The cases cited above from our own appellate courts to our mind conclusively control the present case. It has never been held that an injunction is a matter of right. It will not issue when, upon a broad consideration of the situation of all parties in interest. good conscience does not require it, nor where the benefit to the complainant is entirely disproportionate to the injury to the respondent. In Dilworth's Appeal, 91 Pa. 247, the court said: 'It often becomes a grave question whether so great an injury would not be done to the community by enjoining the business that the complaining party should be left to his remedy at law.' An injunction will not be awarded where the benefit to the complainant is entirely disproportionate to the injury to the respondent, even though the complainant may have a right to damages at law (Becker v. Railway Co., 188 Pa. 484, 41 Atl. 612), nor where it will indict greater injury than it will prevent. In such case the injured party will be left to his remedy at law. Robb v. Carnegie. 145 Pa. 324, 22 Atl. 649, 14 L. R. A. 329. 27 Am. St. Rep. 694. Assuming, in the present case, that the defendant occupied the street in front of the plaintiffs' premises without legal authority, and that by reason thereof the plaintiffs have suffered all of the damages alleged in their pleadings or shown by their testimony, we are of the opinion that the damages are of such character that they may be fully compensated in an action at law, and that the delay of the plaintiffs in bringing this action convicts them of such laches as to defeat their right to apply for relief in equity. As was said in the case of Orne v. Fridenberg, 143 Pa. 487, 22 Atl. 832, 24 Am. St. Rep. 567: 'A chancellor does not interfere by way of mandatory injunction, even though the injury be clearly established, when there has been long-continued delay in asserting the right, and the remedy exists at law.'

"The bill is therefore dismissed, at the costs of the plaintiffs."

Argued before MITCHELL, C. J., and MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

W. C. Kress, for appellants. T. C. Hipple, for appellee Pennsylvania R. Co. H. T. Hall and Seth T. McCormick, for other appellee.

MESTREZAT, J. The exhaustive opinion filed by the learned judge of the court below sufficiently vindicates his conclusions both of fact and of law. He has correctly found the facts from the evidence, and his conclusions of law are amply supported by the numerous authorities he cites. The decree therefore may well be affirmed on his opinion.

In concluding the opinion, the court correctly says: "Assuming, in the present case, that the defendant occupied the street in front of the plaintiffs' premises without legal authority, and that by reason thereof the plaintiffs have suffered all of the damages alleged in their pleadings or shown by their testimony, we are of the opinion that the damages are of such character that they may be fully compensated in an action at law, and that the delay of the plaintiffs in bringing this action convicts them of such laches as to defeat their right to apply for relief in equity." The facts of the case clearly warranted the chancellor in holding that the laches of the plaintiffs barred a recovery in equity, and remanded them to an action at law for any injury they may have sustained by the conduct of the defendants. The fire brick company erected its plant and began operation in 1887, and the plant has been in continuous operation ever since. The railroad siding was constructed in 1890 and has been used continuously since by the Pennsylvania Railroad Company for hauling coal to, and the manufactured product from, the fire brick plant, and since 1900 has also been used in transporting fire clay to the plant. The capacity of the brick plant is about 40,000 bricks per day, and 200 men are employed to operate it. In 1900 the fire brick company constructed an additional track on its own land at the eastern end of the railroad, which was elevated 18 or 20 feet above the surface of the ground so that the fire clay used in the plant might be carried by the cars into the works. In 1903 the company expended \$60,000 in enlarging the plant, and remodeled it so as to make the operation of the machinery noiseless and free from vibration. The plaintiffs knew that the plant was being remodeled with an increased capacity, but made no objection and did not attempt to restrain the operation of the railroad in front of their premises. So far as the evidence discloses, the plaintiffs did not object to the defendant laying its railroad in front of their premises or to the construction of the additional track until it filed this bill in November, 1905. It is true that, when the city council and the other property owners on Water street granted permission to the fire brick company to build its railroad on the street, the plaintiffs refused to give their consent; but they did , not object or make any attempt whatever, prior to filing this bill, to restrain the construction of the road. They saw the road built in front of their premises in 1890; they saw it operated for 15 years; they saw the additional track constructed in 1900; they saw the fire brick company's plant remodeled at great expense, and knew it could only be operated by use of the railroad; and these several acts were all done with the knowledge of the plaintiffs, and, so far as the record discloses, without a single word of objection by them. In addition to these facts, the plaintiffs in 1900 remodeled and enlarged their dwelling house and finished it in modern style without making any objection to the construction or operation of the fire brick company's railroad.

As pointed out in the opinion of the learned trial judge, the plaintiffs are clearly guilty of laches under all the authorities. The facts of the case clearly warranted the judge in dismissing the bill on this ground. The counsel for the plaintiffs concede that "the plaintiffs here knew their rights and stood upon them from the first." There was no deception or fraud practiced by the defendant, and the plaintiffs were cognizant of every move made by the fire brick company in the construction of the railroad in front of their premises. They knew all the facts, and, knowing their rights as they admit, it was their duty to act promptly. There is no sufficient excuse given in the bill for the failure of the plaintiffs to assert their rights at an earlier date than 1905, when they filed this bill. Neither was there anything shown upon the trial of the cause that justified the plaintiffs in delaying their objection to the construction of the railroad until they instituted these proceedings. So far as the record discloses, there is no justification whatever for the conduct of the plaintiffs in permitting, without objection, the construction of the road, its subsequent operation for so many years, and the large expenditure of money on a plant which could only be available by use of the railroad. A party guilty of such conduct cannot secure relief in a court of equity. Vigilantibus, non dormientibus, servit lex. The plaintiffs have slept upon their rights which concededly they knew, and a chancellor will not aid them to the great prejudice of another party whose equities are at least equal to those of the plaintiffs. As said in Powers's Appeal, 125 Pa. 175, 186, 17 Atl. 254, 11 Am. St. Rep. 882, the maxim of the common law, that wherever there is a right there is a remedy for its infraction, has never been adopted by courts of equity. Hence he who sleeps upon his rights may awake to find that his remedy for their enforcement in a court of equity has vanished.

The assignments of error are overruled.

and the decree is affirmed.

(224 Pa. 526) COMMONWEALTH v. SNYDER.

(Supreme Court of Pennsylvania. 1909.) April 26.

1. CRIMINAL LAW (§ 46*)-PERSONS LIABLE-EPILEPTIC.

An epileptic not shown to be insane can no more escape liability for his act while intoxicated than can one not so affected.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 46.*]

2. Criminal Law (§ 311*)-Insanity-No immediate presumption of insanity arises from epilepsy, but leaves insanity to be proved as any other defense by direct evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 742-744; Dec. Dig. § 311.*]

Criminal Law (§ 518*) — Confessions — Voluntary Character—Caution.

Defendant's pastor, at his solicitation, called upon him, and during the interview, in the presence of the officer who made the arrest, repeated what he had said to defendant in their first interview, that it would be better for him to tell the truth, adding that he, the pastor, could do more for him if he did. Before defendant had opportunity to express himself, the remant had opportuntly to express nimself, the officer interfered with the remark: "Reverend, as a detective, I wish you would not make a remark of that kind. I may be a witness against [defendant], and I can offer him no promise of any kind, and I hope you don't mention that again." After being thus cautioned, defendant made a confession. Held, that the confession was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1160, 1161; Dec. Dig. § 518.*]

4. Homicide (§ 286*)—Trial—Instructions.

On a trial for murder, points predicated on a killing as a result of sudden impulse were properly refused where defendant denied the killing, and there was no living witness, except himself, to testify to the circumstances thereof, and such circumstantial evidence as was produced warranted an inference that the shooting was deliberate.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 286.*]

5. Homicide (§ 180*) - Evidence - Admissi-BILITY-INTOXICATION.

On a trial for murder, an offer to show that defendant was intoxicated was properly overruled where there was no offer to show the degree of intoxication.

Note.—For other cases, see Homicide, [Ed. Dec. Dig. § 180.*]

6. CRIMINAL LAW (§ 1170*)-APPEAL-HARM-LESS ERROR-EXCLUSION OF EVIDENCE.

Where defendant had already testified, as had several of his witnesses, as to the number of drinks he had taken, and he himself as to the extent of his intoxication, he could not have been prejudiced by disallowance of a question asked him, when recalled to the stand, as to the amount of liquor he had drunk.

[Ed. Note.—For other cases, see Crimins Law, Cent. Dig. § 3146; Dec. Dig. § 1170.*] see Criminal

Appeal from Court of Oyer and Terminer. York County.

Henry Snyder was convicted of murder in the first degree, and he appeals. Affirmed.

Argued before FELL, BROWN, MES-TREZAT, POTTER, and STEWART, JJ.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

John A. Hoober, Allen C. Wiest, Paul O. Menges, and J. W. Gitt, Jr., for appellant. William L. Ammon, Dist. Atty., and Harvey A. Gross, Asst. Dist. Atty, for the Commonwealth.

STEWART, J. Six of the assignments of error have been abandoned. Of those remaining, eight have regard to rulings of the court on offers of evidence which in purpose and effect were substantially the same. In each instance the offer was to show that the defendant in the early years of his life was subject to frequent attacks of convulsions or spasms, which for the time being rendered him unconscious, that after his twelfth year the attacks became less frequent, much milder in form, never attended with unconsciousness, that he is still subject to these attacks in modified form, and that he suffered one as recently as the day before the crime was committed with which he is charged, this to be followed by medical expert opinion predicated on the facts proposed to be shown as to the character and frequency of these attacks, that they were epileptic seizures, and further that because of this infirmity, and the added circumstance, already appearing in the evidence, that defendant had been drinking during the afternoon and evening of the occurrence, if it was he who killed Hoover, he was at the time acting under an uncontrollable epileptic impulse during which it was impossible for him to distinguish right from wrong, and during which it was impossible for him to deliberate or consider the nature and consequence of his act. The offers as we have said were substantially the same. They differed The same puronly in matter of detail. pose, however, was not stated in connection with each. At one time it was to show insanity by way of defense; at another a condition of mind which should operate to reduce the grade of the crime. The learned trial judge rejected them all, and in this we think he was entirely right. The offers associated and combined two mental conditions which need always to be clearly distinguished where the effort is to refer an illegal act to their joint influence-insanity, and intoxication. The former excuses the act. latter at most can only mitigate its criminality. The unsoundness that excuses must be so great as to control the will of the subject and deprive him of free moral action. When this mental condition has been shown, the defense is complete and absolute, and it helps nothing to show in addition that the unfortunate subject was intoxicated as well. When the unsoundness is not of the degree which exempts from legal liability, it helps nothing to show intoxication by way of excusing. It may be a physiological fact that one effect of epilepsy is to produce a state of mind easily excited by provocation, and that

tion to a degree that would be unexpected in one not epileptic from the same amount of drink; but except as the epilepsy can be shown to have resulted in an unsoundness, which by itself would excuse an act, it cannot become a factor in determining the question of guilt or innocence. The epileptic who is not shown to be insane can no more escape liability for his acts done while intoxicated than can one not so affected. Were it otherwise, it would follow that in every case where intoxication is set up a necessary inquiry would be the susceptibility of the party to intoxicating influence; and the question of guilt would be made to depend upon peculiarity of individual temperament as affected by drink. The law knows no such doctrine. It does not divide men into classes according to temperament or intellect, judging some more favorably than others, but-it judges all alike. It follows that in ruling upon the offers which were made to show mental condition which would excuse the court could have no regard to what was therein included as showing intoxication. No more could the expert witnesses in forming their opinion. And yet the offers without the expert opinions could have served no purpose whatever. The facts proposed to be shown were to be introduced for no other purpose than to lay the foundation for such testimony based upon the concurrence of disease and intoxication. Any such opinion based on one or the other of these alone would not be within the offer. If based on intoxication alone, it would be valueless, for that in law does not excuse. It would be but little better if based on the testimony as to defendant's epilepsy, for the court would have been bound to hold that whatever the medical expert might say, the law derived no immediate presumption of insanity from the fact of epilepsy, but leaves the insanity to be proved as any other defense, not by secondary evidence, which at best this would be, but by evidence establishing the direct fact. Laros v. Commonwealth, 84 Pa. 200. In the case cited it was said with respect to similar offers of testimony: "They were all offers collateral or secondary to the proof of insanity, and were not admissible until direct evidence of the prisoner's insanity had been given. A court is not bound to hear evidence of the insanity of a man's relatives, or evidence of his proper instruction in morals and religion, or of the kind treatment of his relatives and friends, as grounds of a presumption of possible insanity, until some evidence has been given that the prisoner himself has shown signs of his own insanity. Now, when these offers were made, no evidence of his own insanity had been given. That he had at long intervals before the week of the murder suffered spasms or fits of some kind affecting him bodily is all that had been proved, but this state of mind is intensified by intoxica- no mental unsoundness has been shown.

dence was given of an affection resembling epilepsy, and a possible epileptic insanity. Indeed, the evidence of even a possible epileptic insanity was so weak it would scarcely have been substantial error to reject the evidence a second time. It must not be forgotten that according to the evidence, or even according to common observation, epilepsy is not commonly followed by insanity until after a long time from the first attack, and that the proof of epilepsy furnishes no immediate presumption of insanity." The offers of evidence in the present case were intended to raise hypothetical questions. They were all defective, some in embracing too much, others too little. We have said that what was proposed to be proved on the score of insanity was purely secondary.

The case stood thus on the evidence: The defendant, a young man who has passed his majority, was shown to have lived his entire life in the district in which he was born, and was generally acquainted throughout the community. Many of his neighbors and acquaintances had been called to testify as to his reputation for peaceableness. Not one was asked a question touching his sanity, and not a single irrational act or speech during the whole period of his life had been shown. The first and only suggestion of insanity came with the offers to show epileptic seizures to the extent indicated, and this not by physicians who had ever seen the defendant when under an attack or while recovering therefrom, but by parties without professional skill, who it is said would testify that the physician who attended the defendant when a child had pronounced the attacks epileptic in character. Not only was the evidence proposed secondary, and for that reason properly excluded, but it did not in any reasonable way tend to prove the fact alleged. These assignments of error are overruled.

The twelfth and thirteenth assignments complain of the admission of evidence showing certain confessions made by the defendant to his pastor, Dr. Stump, and others. The evidence was objected to on the ground that the confessions were made in consequence of inducement held out by Dr. Stump. It does not appear that any of the other witnesses who testified to confessions offered any inducement whatever to defendant to admit his guilt. To some of them the admissions were made days after the interview between the defendant and Dr. Stump; but it was contended that nevertheless it was not shown that the influence of the promise or inducement extended by the latter had ceased to operate. We are unable to see the force of the objection even in its application to the testimony of Dr. Stump. While what he said may have induced the defendant to break silence, it certainly was no inducement

These offers were not renewed after evi- untruthfully in regard to the fact. It was because of his office as pastor that Dr. Stump sought the first interview. When he called the second time, it was at the solicitation of the defendant. What occurred at this interview was in the presence of the officer who had made the arrest. Dr. Stump repeated what he had said to the defendant in the first interview, that it would be better for him to tell the truth, adding that he, the witness, could do more for him if he told the truth. Before the defendant had opportunity to express himself at all. White, the officer present, interfered with the remark: "Reverend, as a detective I wish you would not make a remark of that kind. I may be a witness against Henry, and I can offer him no promise of any kind, and I hope you don't mention that again." It was after being thus cautioned that defendant made the declarations in the presence of Dr. Stump and White which were offered to be shown. Later on the same declarations were made to others. To apply this rule which excludes confession made under the influence of threat or promise to a case like this would be stretching it to a most unreasonable limit. If what was said by Dr. Stump can be regarded as a promise calculated to induce a confession, certainly whatever influence it could have had in this direction must have been entirely neutralized or avoided by what the officer said in reply. If Dr. Stump's testimony was admissible, and we think it was, the testimony of the other witnesses as to the confessions, of course, stood clear of all possible objections.

The assignments 15 and 18, inclusive. charge error in answers to points submitted. These points were predicated on a killing as the result of a sudden impulse or impetuous temper, and asked instructions that the guilt in such case would be less than murder in the first degree. There was nothing in the case calling for any such instructions, however correctly the law may have been expressed in the points. The defendant had denied the killing and all knowledge of it. There was no living witness, unless himself, to testify to the circumstances under which the killing was done. Consequently there was nothing in the evidence upon which a finding that the killing was the result of sudden impulse could rest. On the other hand, such circumstantial evidence as was produced in regard to the occurrence warranted an inference that the shooting was a deliberate act, wholly consistent with the specific intent to take life. These assignments are without merit.

The ninth and tenth assignments relate to rulings of the court on offers of evidence to show that, if defendant did the killing, he was at the time of the commission of the act intoxicated. Lester Kauffman, a young man who had been in defendant's company during the afternoon and the defendant to confess guilt by speaking evening until within a very short time of

the tragedy, having testified for the com- merely supplemental to those already adducmonwealth, was recalled by the defendant in turn, and it was proposed to ask him what the defendant's condition was with respect to sobriety when he parted from him. The purpose as stated was to show defendant's intoxicated condition to rebut presumption of deliberation and premeditation. The ruling rejecting the offer was as follows: "In the form in which the offer has been made merely to prove drunkenness we regard it as inadmissible, and overrule the offer and seal an exception for the defendant. Drunkenness is no valid defense." fer being renewed, it was again rejected under the following ruling: "We understand this to be simply an offer to show that the defendant was under the influence of liquor and without any information in it as to what the degree of his intoxication may have been, and with no offer to show by this or any other witness that he was so much intoxicated that his mind was incapable to form a deliberate intent or premeditate a design to kill and carry it out. In the form in which the offer is made we reject it." These rulings were correct. Mere intoxication does not imply loss of power to form specific intent; and therefore the evidence here offered was irrelevant. Intoxication is a matter of degree. It may be so mild as to disturb normal mental action but slightly: again, it may be so deep that the subject is almost, if not entirely, without consciousness. Between these two extremes there are many degrees. The offer in this case discloses nothing as to the degree of the defendant's intoxication. The ruling of the court was based on this fact, and the reason was so clearly stated that it cannot for an instant be supposed that the learned counsel for the defendant, who have shown such zeal in their client's cause, would not have enlarged their offer to bring it within legal requirements if the evidence had been at hand to warrant it. As it stood it came far short; for, as we have said, mere intoxication without more is insufficient to overcome the presumption of deliberation and premeditation which arises in cases of this character.

We think the question asked of the defendant when recalled to the stand as to the amount of liquor he had drunk during the evening of the occurrence was not objectionable unless on the ground that it led to unnecessary repetition, and should therefore have been allowed. But the defendant could not have been prejudiced by its disallowance. He had already testified, as had several of his witnesses, as to the number of drinks he had taken: and he himself had testified fully as to the extent of his intoxication. The answer to the question would therefore have elicited no fact not already appearing in evidence; but would have been aware County.

ed and not contradicted. The remaining assignments suggest nothing that calls for dis-

A review of the whole record leaves us convinced that the case stands clear of error; that the defendant had a fair trial in all respects, with every right accorded him that he was entitled to; and that the jury was adequately and correctly instructed as to the law governing the case. The record exhibits nothing that calls for our interference with the result reached.

The judgment is affirmed; and it is ordered that the record be remitted to the court below that the judgment may be carried into execution according to law.

(224 Pa. 455)

GUSTINE V. WESTENBERGER.

(Supreme Court of Pennsylvania. April 19. 1909.)

1. MOBTGAGES (\$ 74*)—FORGERY—SUFFICIEN-CY OF EVIDENCE.

Where, on an issue of forgery of the mort-gage in scire facias sur mortgage, defendant de-nied that he had executed it, and the notary before whom it was acknowledged was unable to identify defendant as the person who had acknowledged it before him, and other wit-nesses stated that they saw the mortgage signed, and that defendant was not the one who had executed it, and defendant's wife admitted signed, and that derendant was not the one who had executed it. and defendant's wife admitted that she had induced her brother to personate her husband in executing the mortgage, the court could not have instructed that the notary's certificate of acknowledgment was sufficient and strong evidence of the genuineness of the mortgage; and it was not error to decline

to do so.
[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 74.*]

2. Witnesses (§ 37*)—Forgery—Admissibit-

2. WITNESSES (§ 37°)—FORGERY—ADMISSIBIL-ITT OF EVIDENCE.

On an issue in scire facias sur mortgage of the forgery of the mortgage, objection was properly sustained to a question asked defend-ant if a prior mortgage had not been paid out of the proceeds of the mortgage in question, without first showing that defendant had some knowledge of the transactions as to which in-quiry was made.

[Ed. Note.—For other cases, see W. Cent. Dig. § 80-87; Dec. Dig. § 37.*]

3. HUSBAND AND WIFE (§ 102*)—LIABILITY OF HUSBAND FOR ACTS OF WIFE—DEFEN-

Judgment cannot be given for plaintiff in an action to foreclose a mortgage of a hus-band's property, the forgery of which has been procured by his wife, upon the theory that a husband is liable for the torts of his wife.

Ed. Note.-For other cases, see Husband and Wife, Dec. Dig. \$ 102.*]

4. HUSBAND AND WIFE (\$ 102*)—LIABILITY FOR TORTS OF WIFE.

Under Act June 8, 1893 (P. L. 344), permitting a married woman to be sued as if unmarried, she, and not her husband, is liable in damages for her torts.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 102.*]

Appeal from Court of Common Pleas, Del-

Action by Eva I. Gustine against John A. M. Westenberger. Judgment for defendant, and plaintiff appeals. Affirmed.

At the trial when the defendant was on the stand he was asked this question in relation to a prior mortgage on the property: "Q. Was not that mortgage held by the Home Building & Loan Association paid off out of the proceeds of this very mortgage in suit? (Objected to.) The Court: The objection to that question is sustained with leave to the plaintiff to make the same inquiry when some knowledge of this mortgage or of its payment is traced to him. With leave to the plaintiff to renew the offer when some knowledge of the transactions inquired of are traced to the witness by his examination of him or other evidence. My thought is this: That it is necessary to the plaintiff's case to establish to the satisfaction of the jury that this mortgage was executed by the defendant or was executed with his previous authority or subsequent ratification, and so far as ratification is concerned there can be no ratification without knowledge, the court holding that the preliminary requisite of ratification. Some evidence must be established before the question ruled out can be inquired of." Similar questions were also rejected.

Plaintiff presented the following points:

"(1) The execution and acknowledgment of the mortgage in suit evidenced by the official notarial certificate and the subsequent recording of the mortgage is sufficient and strong evidence of the genuineness of the mortgage. and entitles the plaintiff to a verdict in her favor unless overcome by convincing countervailing evidence which satisfies the jury to the contrary. Answer: The court is unable to say that the certificate of the notary public is sufficient and strong evidence of the genuineness of the mortgage. The law makes it evidence. It is technically evidence. But you will see that, if the facts certified to in the certificate are successfully attacked by testimony, why, not only the evidence of the certificate is not sufficient and not strong, but, if the evidence in your judgment attacks it, overwhelms it with defeat, why, of course, it is no evidence; you will not be governed by it at all.

"(2, not read to jury) In the consideration of the evidence upon the question of the execution of the paper if the jury do not believe the statement of the witness, John Westenberger, that the execution was not authorized by him, and also that he was not a party to the perpetration of a fraud upon the plaintiff by deceiving her into a belief in the genuineness of the mortgage, they may disbelieve his defense and find a verdict for the plaintiff. Answer: Refused.

"(3, not read to jury) If under all the evidence in the case the fraud in the case was that of defendant's wife, the husband would in law be answerable for this to the plaintiff as for his own fraud, and the verdict should be for the plaintiff. Answer: Refused.

"(4) The proofs offered by the plaintiff are sufficient in the first instance to entitle her to a verdict, and under all the evidence the jury may find a verdict in her favor. Answer: That can't be affirmed just as it is written. The law is that the certificate of the notary public is written prima facle evidence, and if there were no other proofs in the case that certificate would prevail, and in that sense the certificate of the notary public is sufficient, but if, as I said before, it is to your satisfaction shown that the certificate is not true, why, of course, the facts found in the certificate are not the facts you would find by your verdict.

"(5) Under all the evidence the jury may find a verdict in her favor. Answer: Well, it is proper to say that in the judgment of the court, by which you are not bound at all, the weight of the evidence is against this certificate, and I do not hesitate to say so, at the same time saying that you are not bound by the view that the court takes of the weight of the evidence."

Argued before FELL, BROWN, MESTRE-ZAT, ELKIN, and STEWART, JJ.

O. B. Dickinson and Edward P. Bliss, for appellant. G. Herbert Jenkins and William Taylor, for appellee.

BROWN, J. The defense in this case was that the mortgage was a forgery, and, under evidence that could not fairly have led to any other conclusion, the jury so found. On this appeal the chief complaint of the appellant is that the judge failed in his charge to give due weight to the notary's certificate of acknowledgment. The mortgage was offered in evidence with no other proof of its execution than this certificate. It was admitted by the court as the duly executed act and deed of the appellee, and, but for the defense that followed, judgment would have been directed for the appellant. The case, as presented to the jury under uncontradicted evidence, showed that the mortgage had been executed and acknowledged by one who had personated the appellee. Called as a witness in his own behalf, the latter testified that he had not executed it, had never appeared before the notary public, and that the first time he saw it was when the case was called for trial at a previous term of court. His wife, properly designated by the trial judge as a bad woman, had induced her brother to personate her husband in executing the mortgage and acknowledging it before the notary. That officer, who was one of the witnesses to the execution of the mortgage, was unable to identify the appellee as the man who had signed and acknowledged it before him. Albert W. James, the other witness to the execution of it, accompanied the man who signed it to the notary's office, and testified positively that the appellee was not the one who had signed and acknowledged it in his presence. Another witness, Albert James, the real estate agent to whom application was made for the

appellee was not the man who had executed the mortgage in his office. Samuel Bunting, who finally negotiated the loan and saw the mortgage signed, testified in the same positive manner that the appellee was not the person who executed it. The admission of the wife of the appellee on the trial was that she needed money and asked her brother to go to the office of Mr. James and personate her husband in the execution of the mortgage, believing that she would be able to repay the loan herself. Under this state of facts the court could not have instructed the jury to give to the certificate of the notary the weight which counsel for appellant insists should have been attached to it. Michener and Wife v. Cavender, 38 Pa. 334, 80 Am. Dec. 486; Reineman v. Moon, 12 Pittsb. Leg. J. (N. S.) 167; Smith, Executrix, v. Markland et al., 223 Pa. 600, 72 Atl. 1047. The case is not one of a certificate of a notary before whom the real mortgagor actually appeared, and an effort is made to contradict that to which the officer certifies. If it were, some of the many cases cited might apply.

The excluded offers of the plaintiff which are the subjects of the eleventh, twelfth, and thirteenth assignments of error were properly overruled, for the reason given by the court in sustaining the objections to them. As to the third and last position of the appellant, that she ought to recover because the appellee is answerable for the torts of his wife, we need only say we know of no rule of law that ever permitted a husband's property to be taken from him on a deed forged by his wife, or the forgery of which was procured by her. Since the passage of the act of June 8, 1893 (P. L. 344), a married woman may be sued civilly in all respects and in any form of action with the same effect and results and consequences as an unmarried person, except that she may not be arrested or imprisoned for her torts. Under that act she, and not her husband, is liable in damages for her torts.

The assignments of error are all overruled, and the judgment is affirmed.

(224 Pa. 452)

In re BAEDER'S ESTATE.

(Supreme Court of Pennsylvania. April 19, 1900.)

1. Assignments (§ 54*) — Consideration – Enforcement.

An assignment by a wife of an expectancy of an interest in the income from her father-in-law's estate, contingent on her surviving her husband, in consideration of a conveyance of certain real estate and the cancellation of a debt of the husband to the assignee, cannot be sustained, where the assignee refuses to convey the real estate mentioned in the assignment.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 112; Dec. Dig. § 54.*]

loan, stated with equal positiveness that the |2. Assignments (§ 9*)—VALIDITY—CONTINappellee was not the man who had executed | GENT ESTATE.

An assignment of the expectancy of an interest in the income of the estate of the father-in-law of the assignor, contingent upon the assignor surviving her husband, is invalid.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 16; Dec. Dig. § 9.*]

3. EVIDENCE (§ 419*)—PAROL EVIDENCE—Consideration.

SIDEBATION.

A recital in an assignment of the receipt of the consideration is not conclusive.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912–1928; Dec. Dig. § 419.*]

Appeal from Orphans' Court, Montgomery County.

In the matter of the estate of Charles Baeder. From a decree sustaining exceptions to adjudication, Bertha L. Baeder appeals. Reversed.

Argued before FELL, BROWN, MESTRE-ZAT, POTTER, and STEWART, JJ.

John G. Johnson and Maurice Bower Saul, for appellant. Bernard Gilpin, for appellee.

BROWN, J. The assignment of Bertha L. Baeder, the appellant, to Howard R. Kern, is void for want of consideration. This was the first and correct view of the court below, and ought to have been adhered to on the exceptions to the adjudication. The consideration moving to the appellant in elecuting the assignment with her husband was the procuring of a conveyance to her by Kern of 12 properties in the city of Philadelphia, having a value above the incumbrances against them of \$29,200, and then follows a consideration of the husband's existing indebtedness to the assignee of \$10,000. Though the assignment acknowledges the receipt of the conveyance of the properties, such acknowledgment is not conclusive. Nichols v. Nichols, 133 Pa. 438, 19 Atl. 422; McPherran's Estate, 212 Pa. 425, 61 Atl. 954.

Under competent evidence the court found as a fact that there had been no conveyance of the properties to the appellant; but, because the assignment was to secure to Kern the payment of \$10,000 of the husband's existing indebtedness, it was held to be valid for that purpose. This was error. Even if the wife could have pledged her contingent interest in the estate of her father-in-law to secure the \$10,000 indebtedness of her husband, and an assignment for that purpose alone held by the appellee would be valid, he holds no such assignment. The one under which he claims contains a valuable consideration moving directly to the appellant; but as a matter of fact she never received it, and non constat that without the inducement so held out to her directly she would have assigned her interest in the estate merely to secure the payment of her husband's indebtedness.

Her assignment was but an expectancy of an interest in the income from her father-

efor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing her husband. If she died before him, she was to get nothing from the estate. Such an assignment is not valid at law at the time it was executed, but is merely an executory agreement, to be equitably enforced when the interest which it was intended to convey vests in the assignor. Bayler v. Commonwealth, 40 Pa. 37, 80 Am. Dec. 551; Ruple v. Bindley, 91 Pa. 296; Whelen v. Phillips, 151 Pa. 312, 25 Atl. 44. Kern is to be regarded as seeking to enforce performance of the agreement with him. He has not performed, and cannot, therefore, call for performance by the appellant.

Other questions raised need not be considered.

The assignments of error are sustained, the decree of the court below is reversed, and the adjudication is directed to be confirmed absolutely; the costs on this appeal to be paid by the appellee.

(224 Pa. 432)

SAMUEL et al. v. SOTA & AZNAR. (Supreme Court of Pennsylvania. April 12, 1909.)

1. Courts (\$ 242°)—Jurisdiction—Amount

IN CONTROVERSY.

Under Act May 5, 1899, § 4 (P. L. 249), providing that in any suit, if plaintiff recovers damages, the amount of the judgment or decree shall be proof of the amount in controversy, but, if he recovers nothing, the amount in controversy shall be determined by the amount of damages claimed, the test of jurisdiction of the Su-perior Court on appeal from the court of com-mon pleas, where plaintiff fails to recover any-thing, is the amount claimed in the declaration.

[Ed. Note.—For other cases, see Courts, Dec.

Dig. \$ 242.*]

2. Courts (§ 242*)—Appellate Jurisdiction

—AMOUNT IN CONTROVERSY.

Where the amount claimed in plaintiff's statement is under \$1,500, an appeal from an order discharging a rule for judgment for want of a sufficient affidavit of defense lies to the Superior Court, though a counterclaim is for an amount in excess of \$1.500, and its establishment would entitle defendant to a certificate for an amount in excess of \$21.500, though paintiff. an amount in excess of \$1,500, though plaintiff's claim be allowed.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 4911/2; Dec. Dig. § 242.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Frank Samuel and Silas M. Tomlinson against Sota & Aznar. From an order discharging rule for judgment for want of a sufficient affidavit of defense, plaintiffs appeal. Appeal remitted to Superior Court.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and ELKIN.

Lewis Lawrence Smith, for appellants. Stevens Heckscher, for appellees.

FELL, J. The question of jurisdiction was not raised by the appellees, but it is incum-

in-law's estate, contingent upon her surviv- | an order discharging a rule for judgment for want of a sufficient affidavit of defense. It appears from the plaintiffs' statement of claim that the action was brought to recover the sum of \$766, the amount of overpayment for iron ore bought by the plaintiffs from the defendants. The correctness of the claim made and the defendants' liability are expressly admitted in the affidavit of defense; but the defendants set up a counterclaim for \$2,379 for the breach of another contract entirely distinct from the one on which suit is brought. The validity of the counterclaim, under the facts alleged in the affidavit of defense, is the only matter in controversy, and the establishment of the claim at the trial would entitle the defendants to a certificate for an amount larger than the jurisdictional limit of the Superior Court. This does not. however, affect the question of jurisdiction.

Where the jurisdiction of the Superior Court depends upon the amount in controversy, the mode by which the amount shall be determined is fixed by section 4 of the act of May 5, 1899 (P. L. 249), which provides, inter alia, that "in any suit, distribution or proceeding in the common pleas or orphans' court, if the plaintiff or claimant recovers damages either for a tort or for a breach of contract, the amount of the judgment, decree or award shall be conclusive proof of the amount really in controversy; but if he recovers nothing, the amount really in controversy shall be determined by the amount of damages claimed in the statement of claim or declaration." The question of jurisdiction is thus fixed by the act of assembly, and the test, where the plaintiff fails to recover anything, is the amount of his claim as declared upon.

The appeal is remitted to the Superior Court

(224 Pa. 509)

In re CUMMISKY'S ESTATE. (Supreme Court of Pennsylvania. April 19, 1909.)

EXECUTORS AND ADMINISTRATORS (§ 221*) CLAIMS AGAINST ESTATE - PRESUMPTIONS AND BURDEN OF PROOF

Board and nursing bills for a series of years are prima facie presumed to be paid at stated periods, especially where the claim is presented against a decedent's estate, and such presumption would arise where decedent customarily paid her bills promptly and had ample means to pay, and claimant's condition was not such as to justify the belief that payment would have been postponed, and a claim for more than three years' board and nursing will not be allowed without satisfactory evidence to overcome the presumption.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 901, 1858-1861; Dec. Dig. § 221.*]

Appeal from Orphans' Court, Philadelphia County.

Claim by Sarah J. McEvoy against the bent upon us to notice it. The appeal is from estate of Laura E. Cummisky, deceased.

ether cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The auditing judge disallowed the claim, but the court in banc reversed him, and Maurice E. Cummisky, administrator, appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and ELKIN, JJ.

John G. Johnson, Edmund Randall, and James A. Flaherty, for appellant. Michael J. Ryan, for appellee.

MESTREZAT, J. This is a claim by Mrs. Sarah J. McEvoy on a quantum meruit for the board and nursing of Miss Laura E. Cummisky, the decedent, for 164 weeks, from October 9, 1903, to November 24, 1906, at the rate of \$10 a week. The claimant admits a credit of \$42 paid her in 1906 leaving a balance of \$1,598 payable out of the decedent's estate. Laura E. Cummisky died on November 24, 1906, intestate, unmarried, without issue and leaving certain next of kin to survive her. It appeared from the evidence that the decedent had lived at the home of Mrs. McEvoy for about three years immediately prior to her death. She had her room and took her meals with Mrs. McEvoy's family, which consisted of her husband and herself. When the decedent was sick, Mrs. McEvoy gave her the attention required by an ailing person. There was no contract or agreement between the decedent and Mrs. McEvoy by which the latter was to be paid for board and nursing. One witness testified that on a certain occasion the decedent had said to him: "I will give it [the place she lived on] to Mrs. Mc-Evoy for what she has done for me, and that will hardly pay her." Another witness testified that she knew and called on Miss Cummisky; that the latter told her she expected to end her days with Mrs. McEvoy. "She never spoke of paying, she always spoke in a roundabout way of rewarding Sarah [Mrs. McEvoy] ultimately." The decedent left a personal estate of \$13,000, and only a small debt due the attending physi-She owned certain real estate, and received an income on mortgages aggregating \$8,000 which formed part of her estate. The claimant was formerly Miss McGinnis, and for many years prior to her marriage was the servant of the decedent. After she was married, she and her husband removed to the suburbs of West Philadelphia, where the boarding and nursing for which this claim is presented were furnished the decedent. Mr. McEvoy kept a small cigar store on the first floor of his residence. The auditing judge disallowed the claim, holding that there was no competent evidence as to the value of the board or any evidence to rebut the presumption that it was paid at periodic intervals. The judge also held that the time for which the services for nursing was claimed was not accurately fixed, and that the

the witnesses above referred to, were not sufficiently connected with the claim for board and nursing to warrant the conclusion that they were meant to cover a debt incurred. The court in banc reversed the auditing judge and allowed the claim, holding that there was sufficient evidence to rebut the presumption of payment. The administrator has taken this appeal.

It is a well-established rule that the wages for domestic service are presumed to be paid at stated periods, and that when a claim for such service is presented against a decedent's estate, extending over any great length of time, the burden is upon the claimant to rebut the presumption. It, of course, is a presumption of fact which may be rebutted by competent evidence, but, until satisfactory evidence is produced, the presumption prevails, and the claim must be disallowed. The same rule is applicable in cases of boarding and nursing under circumstances such as are disclosed in this case. It is the habit and usage of people to pay their board bills as well as for services for nursing at stated periods. This is so well understood in this country that, as in the case of servants' wage's, a presumption arises that they are periodically paid. Especially does this rule obtain where a claim for boarding and nursing for years is presented against the estate of a decedent. The protection of the estates of the dead requires its rigid enforcement. The custom of paying for such service periodically being so well known, it is no hardship upon the party who renders the service, but presents no claim for it until after the lapse of years and after the party to whom the service is rendered is dead, to require the claimant to produce satisfactory evidence that the usage or custom was not followed, and that the claim has not been paid. Conceding that the decedent lived with Mrs. McEvoy during the time alleged, there was no evidence to warrant the court in finding that the claimant had not received compensation. It is not pretended that there was any express contract imposing an obligation upon Miss Cummisky to pay for the services rendered. The declarations of the decedent established no such contract, nor do they show an intention to pay for the boarding and nursing. As suggested by the auditing judge, they show nothing beyond a grateful appreciation of kindness shown by Mrs. McEvoy to the decedent. The simple anticipation by the claimant of receiving a legacy without more is not sufficient to impose liability for such services rendered a decedent. There is no evidence that the decedent ever promised Mrs. McEvoy to compensate her by a legacy.

presumption that it was paid at periodic intervals. The judge also held that the time for which the services for nursing was claimed was not accurately fixed, and that the declarations of the decedent, testified to by leged by the claimant, these services were

continuously rendered. No suggestion comes from Miss Cummisky that she intended to pay, and no demand is made by the claimant. In the absence of evidence of these facts, there is a presumption that the services were paid for at stated periods customary in the neighborhood. This presumption is strengthened when it is recalled that the decedent asked for and paid her physician's bills promptly; that she had ample means which were available to pay for the services as they were rendered; and that the apparent financial condition of the claimant and her husband, as disclosed by the evidence, was not such as to justify the belief that payment for the services would have been permitted to extend beyond the customary period for settling such claims. There is no direct evidence that Miss Cummisky did not pay for the services rendered, nor are there any facts disclosed by the testimony which would warrant the finding that the usual rule of periodic payments was not observed in this case. The decedent had available means to meet obligations of this character as they matured, and the financial condition of the claimant does not show that payment would not have been accepted or that it was not needed at the times compensation for such services are usually and ordinarily paid. Why a party of ample means should for more than three years board with and be nursed by a former servant with limited means without paying or having any demand made upon her for payment of a sum aggregating \$520 per year due for such service seems incredible; and, before such claim is awarded out of a decedent's estate, satisfactory evidence of nonpayment should be produced. We find no such evidence in this case, and consequently we are required to sustain the auditing judge in disallowing Mrs. McEvoy's claim.

The assignments of error are sustained, and the decree of the orphans' court is reversed.

(224 Pa. 434)

KELLER v. COHEN.

(Supreme Court of Pennsylvania. April 12, 1909.)

1. PAYMENT (§ 8*)—MODE OF MAKING.
It is competent for parties to contract for the payment of an obligation out of a particular fund and in a particular manner.

[Ed. Note.—For other cases, see Payment, Dec. Dig. § 8.*]

2. EVIDENCE (§ 463*)—PAROL EVIDENCE—PAY-MENT.

As between the original parties, a contemporaneous written agreement may be shown, providing for the payment of a note out of a particular fund.

[Ed. Note.—For other cases, see Eviden Cent. Dig. §§ 2141, 2142; Dec. Dig. § 463.*] see Evidence.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Joseph S. Keller against Andrew J. Cohen. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and ELKIN.

John Stokes Adams, for appellant. Albert B. Weimer, Andrew Wright Crawford, William E. Stokes, Frederick M. Leonard, and Bernard Gilpin, for appellee.

ELKIN, J. Two questions were decided when this case was here on the former appeal, namely: First, that it is competent for parties to contract for the payment of an obligation out of a particular fund and in a particular manner; and, second, that the averments of the affidavits of defense, if proven at the trial and believed by the jury. were sufficient to defeat a recovery. Keller v. Cohen, 217 Pa. 522, 66 Atl. 862. The judgment entered by the court below at that time was reversed and a procedendo awarded. The parties went to trial, and the defendant offered in evidence all of the writings set up in the affidavits of defense, which were supplemented by his own testimony explaining the transaction, identifying the writings, including the notes in suit, and showing that he had not received any profits derived from the sale of umbrella tubes. In substance and effect these were the matters averred in the affidavits of defense. The case, as we view the record, stands as follows: This court said. when the case was here before, if the facts averred be duly proven at the trial, a defense would be made out if believed by the jury. They were proven at the trial, and the verdict of the jury shows that they were believed. This should be an end of the case now. unless it was wrongly decided then, and we are not convinced that there was any error in the disposition made of it on the former appeal.

This is not the ordinary case of a suit brought on a promissory note in commercial use. This suit is between the original contracting parties, and the defense was and is that the notes sued upon were not separate transactions, evidencing independent loans on one side and an individual liability on the other, but that they were taken and given as the culminating act in the negotiations which constitute the contract between the parties. These negotiations are not proven by parol. but are evidenced by papers in writing spread upon this record. They are the letter of September 8, 1898, note of November 14, 1898, assignment of insurance policy dated November 29, 1898, indorsement of assignment as satisfactory December 1, 1898, and note of February 21, 1899. Cohen and Seymour had obtained a patent for new and useful improvements in the sticks or rods of umbrelias. which Keller thought was a valuable invention. He desired to obtain an interest in the

•For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

invention and to organize a company for the indebtedness, for the clause that he would pay manufacture of umbrella tubes, and this is it is not to be read apart from the context. what led to the negotiations above referred to, and finally resulted in whatever contract was made between the parties. Cohen needed some money, and Keller agreed to advance it to him, and in the letter of September 8, 1898, stated the conditions upon which he would advance the money, and specified the manner in which the amount advanced should be paid back to him. All the other writings followed, and, when taken together, show the intent and meaning of the parties. These papers, supplemented by the testimony of the defendant, are sufficient to sustain the verdict of the jury.

The assignments of error are technical, and go to the question of the insufficiency of the testimony to show such a connection between the papers and the parties as to constitute the contract relied on. We cannot accept this view of the situation. The subject-matter of the writings, the sequence and order of the negotiations evidenced by the papers themselves, and the testimony of the defendant, are sufficient to justify a jury in finding the facts above stated. In the letter of September 8th Keller agreed to advance money to Cohen, with the understanding, expressed in writing, that "the amount advanced to be paid back to me from the immediate proceeds of profits derived from the sale of umbrella tubes made." Keller took two notes for the money so advanced. These notes were made payable in five years, and are not interestbearing, all of which is to some extent a confirmation of the defense set up, namely, that they were to be paid in a particular manner or out of a particular fund. Cohen testified that he accepted the money and gave the notes in pursuance of the arrangement stated in the letter, and that this was the inducing cause which led him to execute the notes. The letter specified that the notes were to be paid out of profits derived from the sale of umbrella tubes, and the testimony shows that no profits accrued to Cohen. Certainly this made out a defense, under the rule stated on the former appeal and the authorities there referred to.

Assignments of error overruled, and judgment affirmed.

(224 Pa. 479)

JUDGE v. PYLE.

(Supreme Court of Pennsylvania. April 19, 1909.)

TRUSTS (§ 112*)-DECLARATION OF TRUST-IN-DIVIDUAL LIABILITY OF TRUSTEE.

A declaration of trust by a purchaser of a coal mine at a sheriff's sale, that he would operate the mine and apply the profits to the liquidation of the owner's indebtedness, and that, if insufficient to pay a certain creditor within a stipulated time, he would pay him in full.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 162; Dec. Dig. § 112.*]

Appeal from Court of Common Pleas, Lackawanna County.

Action by John J. Judge against G. A. Pyle. From an order discharging rule for judgment for want of a sufficient affidavit of defense, plaintiff appeals. Affirmed.

Argued before FELL, BROWN, POTTER, ELKIN, and STEWART, JJ.

P. L. Walsh, for appellant. John F. Scragg and J. E. Brennen, for appellee.

BROWN, J. On October 4, 1907, G. A. Pyle, the appellee, purchased at sheriff's sale the personal property of W. L. Barton. On the following day he executed the paper under which the appellant claims judgment against him for \$1,700, with interest from February 10, 1908. The affidavit of defense to the claim was deemed sufficient, and from the discharge of the rule for judgment we have this appeal.

The paper executed by Pyle recites that Barton was indebted to Judge, the appellant, in the sum of \$1,700, and to other parties in amounts not named, and that the property of Barton, sold by the sheriff and purchased by Pyle, was held by him in trust for the following purposes: "That the said mine and breaker are to be operated under my management and control, work to be begun at once; that from the net monthly profits I shall pay and hold myself responsible to pay towards the liquidation of the present indebtedness the following amounts: To the wage claims held by John J. Judge, assig nee, twenty-five (25) per cent. of said profits, until the whole amount now due said John J. Judge, assignee, is fully paid; and, if the profits are not sufficient to pay the amount due said John J. Judge in four months from the date hereof, I further agree to pay in full the said amount of claim held by said John J. Judge on February 10, A. D. 1908; and twenty-five (25) per cent, of said net profits to be paid monthly towards the liquidation of the claim of Charles H. Forbach until said claim is fully paid; and twentyfive (25) per cent. of said net profits to be paid monthly towards liquidation of the claim of G. A. Pyle, until the same is fully paid; the balance of twenty-five (25) per cent. to be paid into a reserve fund for the purpose of liquidating all indebtedness now of record against said W. L. Barton, until the same is fully paid; and I do further admit and declare that the residue and remainder remaining in my hands, after all the foregoing indebtedness is fully paid, together with expenses of management, shall be paid over to said W. L. Barton," The claim of the appellant is that, under the foregoing decdid not bind the trustee personally to pay such laration, Pyle became personally indebted

eFor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to him in the sum of \$1,700 on February 10, 1908, as he had not received up to that time anything on account of his claim out of the profits of the business.

The paper executed by Pyle is, on its face, a declaration of trust; but the suit on it against him is not for the recovery of anything due by nim as trustee. It is to enforce an alleged individual liability incurred by him under the clause which provides that. if the net profits of the business conducted by him as trustee should be insufficient to pay the claim of Judge on February 10, 1908. he would pay that indebtedness. The unequivocal averment in the affidavit of defense is that, at the time the defendant executed the paper, it was understood and agreed by and between the plaintiff and himself that he was not to become individually liable from his individual property, but only as trustee from the trust funds arising and coming into his hands from the Barton Coal Company. This is not inconsistent with the whole tenor of the paper, and the single clause upon which the appellant relies is not to be read apart from the context as constituting an absolute personal obligation of Pyle. If he can prove on the trial what he sets up in his affidavit of defense, the plaintiff ought not, in equity and good conscience, to recover. The court below correctly held that, on the whole record, his right to judgment is not clear, and, under Kerr v. Culver, 209 Pa. 14, 57 Atl. 1105, the rule for it was properly discharged.

Appeal dismissed, and record remitted for further proceedings.

(224 Pa. 514)

RANKIN v. RANKIN et al.

(Supreme Court of Pennsylvania. April 19, 1909.)

1. REFERENCE (§ 99*)—FINDINGS BY MASTER—

Findings of fact by a master are entitled to the weight of a verdict, and clear error must be pointed out before the court will disturb them.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 153; Dec. Dig. § 99.*]

2. Courts (§ 104*)—Opinions—Necessity.

A court is not justified in setting aside the findings of fact of a master without assigning its reasons therefor in an opinion.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 353; Dec. Dig. § 104.*]

3. Reference (§ 99*)—Findings of Master— Presumptions.

The presumptions are all in favor of the correctness of the findings of fact of a master.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 150; Dec. Dig. § 99.*]

4. Appeal and Errob (§ 1106*)—Determination and Disposition of Cause—Remand.

On appeal from a decree of the common pleas, reversing a master without filing an opinion, the Supreme Court will remand the cause, that the court below may file an opinion assigning its reasons for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4387; Dec. Dig. § 1106.*]

Appeal from Court of Common Pleas, Philadelphia County.

Bill by Andrew Rankin against Charles C. Rankin and another. Decree for complainant and defendants appeal. Record remanded.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and ELKIN, JJ.

Joseph M. Smith and John L. Burns, for appellants.

MESTREZAT, J. This is a bill in equity for the reconveyance of real estate, and the litigation has been pending since January 1, 1903. We regret that we cannot now determine the case and finally adjudicate the rights of the parties. We are compelled to remand it for further proceedings in the court below. After the cause was at issue on the bill and answer, a master was appointed, who heard the testimony and made a report. He found the facts, stated his conclusions of law upon the facts found by him, and recommended a decree that the bill be dismissed. Exceptions were filed by the plaintiff and defendants. The court dismissed the defendants' exceptions, sustained the plaintiff's exceptions, and entered a decree granting the relief prayed for in the bill. No opinion was filed by the court, nor any reasons given for its action in reversing the master and setting aside his findings of fact and conclusions of law. This summary and irregular disposition of the case requires us to send the cause back to the common pleas, that the court may perform its duty by filing an opinion and indicating its reasons for the decree it entered.

It is a rule, universally recognized by bench and bar alike in this state, that the findings of fact by a master or an auditor will not be reversed where the evidence is such as to require its submission to a jury, unless it affirmatively appear that the officer was guilty of misconduct or that there is clear mistake or fraud. Such finding is entitled to the weight of a verdict of a jury, and clear error must be pointed out before the court will disturb it. This is a general rule, and is constantly applied and enforced. The reason for the conclusiveness of such finding is that the master or auditor sees and hears the witnesses and has an opportunity to observe their manner and appearance on the witness stand. He is, therefore, better able to judge of the weight to be given the testimony and of the credibility of the witnesses who testify in the cause than the court, which must rely solely upon the printed evidence. Hence, when a trial court reverses a master or an auditor, it is the duty of the court to file an opinion and point out wherein the officer has erred, and that the error is so manifest as to warrant the setting aside of the officer's conclusions. The

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

presumptions are all in favor of the correct-! ness of the findings of the master or auditor, and until they are shown by the trial court to be erroneous they must be sustained. This is the rule, supported alike by reason and precedent. Where a master has heard the evidence and found the facts from the evidence, the court is not justified in arbitrarily setting aside the finding without assigning reasons for its action. The parties have a right to be fully heard, and to have their cause judicially and not arbitrarily determined, and when the court reverses the findings of fact by the master, justice to the parties as well as to the master, if not to the court itself, requires the latter to point out the error which sustains its ruling. Any other course is a reflection upon the master, and denies the parties what they have a right to demand of the court. This is the rule generally observed by the common pleas throughout the commonwealth, yet we regret to say that occasionally it has been disregarded, and this court has been compelled in these instances to enforce its observance. This is done by remanding the cause after an appeal has been taken, or it can be done before the appeal has been taken by an application to the appellate court by the parties to compel the trial court to perform its duty in this respect. This latter course would save time to the litigants and procure an earlier decision of the cause.

Pittsburg's Appeal, 70 Pa. 142, was a proceeding to distribute the proceeds of a sheriff's sale. The auditor held that the sale tivested a municipal lien, and the court reversed without giving any reason for its action. Chief Justice Thompson, delivering the opinion, says (page 146): "It is only for clear error in fact or law that the finding of an auditor is to be set aside. Decisions to this effect are so numerous that I need not cite them. It would have greatly aided us if the learned judge of the district court had accompanied his judgment with his reasons. Taking the case as we have it, however, we think this another reason for reversing the decree of distribution in the case." Griffin's Appeal, 109 Pa. 150, was a bill in equity. The case was referred to a master, whose finding of fact was reversed by the court without an opinion. In reversing the court below, it was said by this court (page 154): "The court below reversed the master's finding upon one exception, without any opinion, without any review of the testimony, and without showing that the master's finding of fact was incorrect. It is to be regretted, in this and in all cases where the court reverses the master upon findings of fact without reviewing the testimony, that no opinion is filed pointing out the errors of the master in his treatment of the facts. Such an opinion, besides being required by a just regard to the rights of the parties and to the character and dignity of the proceeding, greatly simplifies the work to be performed

by this court, by directing our attention to the very points of difference between the master and the court in the conclusions respectively reached by them. In this case the court below simply said they could not agree with the master and therefore sustained the fourth exception."

Scheppers' Appeal, 125 Pa. 598, 17 Atl. 479, was the distribution of the proceeds of a sale made on a mortgage. The auditor appointed to make the distribution found the facts from conflicting evidence and recommended a decree logically proper as based upon his findings. The common pleas reversed the auditor. This court, in reversing the common pleas, said (page 605 of 125 Pa., page 479 of 17 Atl.): "The learned judge below has reversed him [the auditor] in a brief opinion, without showing, or attempting to show, that his findings of fact are erroneous. We do not feel at liberty to dispose of them in this summary manner." gan's Appeal, 125 Pa. 561, 17 Atl. 641, was a bill in equity to abate a nuisance. A master was appointed, whose findings of fact and law were set aside by a pro forma decree entered by the court without an opinion. This court, in remanding the case, requiring the trial court to place its reasons for reversing the master upon record, said (page 563 of 125 Pa., page 641 of 17 Atl.): "The findings of the master have been reversed, without an opinion or a line to indicate upon what grounds or for what reason the reversal has taken place. To reverse a master's findings without assigning any reason is simply an act of arbitrary power, and practically leaves his findings in full force. * * * It is the duty of the [trial] court to give us all the assistance it * * * These remarks apply with can. peculiar force to equity cases, where, as here, there is a master's report, and a large amount of testimony. Every such case is entitled to the careful consideration of the court of common pleas in which it is heard, and we should have the views of the learned judge who decided it upon the facts and the law. This is useful and desirable in all cases. It is absolutely essential where the master is reversed by the court. We have time and again sent cases back where a pro forma decree has been entered, and as this is the equivalent of a pro forma decree it must take the same course." Scheppers' Appeal and Morgan's Appeal were followed and approved in Williams v. Concord Cong. Church, 193 Pa. 120, 44 Atl. 272.

Furth v. Stahl, 205 Pa. 439, 55 Atl. 29, was a case of distribution in the common pleas by an auditor appointed by the court. Exceptions to the auditor's report were sustained by the court without an opinion. The present Chief Justice, in reversing the court below, said (page 441 of 205 Pa., page 29 of 55 Atl.): "It is to be regretted that the court did not file an opinion, or give reasons in any form for its decree. Where the

decision of an auditor, referee, or other officer acting in a judicial capacity is overruled by the court, justice to the court itself, as well as to the officer and the parties,
suggests that the reasons should be stated.
In the present case, to a careful and elaborate report made by the auditor, the court's
own officer, exceptions which went merely to
the result, without indicating the grounds,
were sustained. No reasons were given by
the court, and no sufficient ones are advanced by the appellee or perceived by this
court."

It is now ordered and directed that the record in this case be remanded, that the court below may file an opinion and assign its reasons for reversing the master.

(224 Pa. 482)

In re TERPPE'S ESTATE.
Appeal of LEVY.

(Supreme Court of Pennsylvania. April 19, 1909.)

WILLS (§ 827*)—CONSTRUCTION—PAYMENT OF DEBTS.

A widow, with a life estate under her husband's will, with power of appointment by will upon such terms as to her should seem best, gave her residuary estate to an adopted son of her husband, stating that it was her wish that, in accepting real estate left her by her husband, the son should continue the business as conducted thereon by her husband for at least 10 years and pay whatever incumbrances might be left against such real estate, either by reason of liens against the same or legacies given by her to be paid therefrom. Held, that the real estate left the widow by her husband was not by her will charged with the payment of her own debts. [Ed. Note.—For other cases, see Wills, Dec. Dig. § 827.*]

Appeal from Orphans' Court, Lackawanna County.

Exceptions to confirmation of sale in estate of Julia Terppe, deceased. From a decree dismissing the exceptions, R. L. Levy appeals. Reversed.

Argued before FELL, BROWN, POTTER, ELKIN, and STEWART, JJ.

R. L. Levy and Sidney L. Krauss, for appellant. John F. Scragg, Edward Merrifield, and O'Brien, Kelly & Fitzgerald, for appellee.

BROWN, J. A second reading of the will of Frederick L. Terppe is not necessary to determine what interest in his estate passed under it to his wife; for it most clearly appears that he gave her but a life estate in his real and personal property, coupled with a power of appointment to dispose of it by will, and, upon her failure to exercise that power, he devised it absolutely to his adopted son, William Frederick Terppe. He gave to his wife the use and enjoyment of all of his property and "all the income therefrom, less taxes and charges thereon, for and during the term and period of her natural life," and, "as to the

remainder and fee simple of said property," the right of disposing of it by will "to whomsoever and howsoever and upon such terms and conditions as to her shall seem best at time of making her said will." With the intention of Frederick L. Terppe thus clearly expressed, we turn to the will of his widow to ascertain from it whether she intended to blend with her own separate estate, for the payment of her debts, that portion of the appointed property which her executor sold under an order of court to the appellant. Her intention in exercising her power of appointment is to be gathered from her will, and as it there appears it must prevail.

By the second clause of the will of Julia Terppe she directs "that all legal debts owing by my estate be paid by my executors hereinafter named as soon after my decease as conveniently can be done without detriment to my estate." Then follow eight clauses containing bequests of jewelry, books, and other personal property and a legacy of \$3,000. After making these bequests the testatrix gives all the rest of her estate, real and personal, to the adopted son. By the residuary clause she clearly intended to devise to him the drug store property which belonged to her husband's estate, and which her executor sold to the appellant for the payment of her debts; for of this particular piece of property she says: "But suggesting in this connection, in the way of advisement to him, that it is my wish in accepting said real estate he shall continue to conduct the drug business as now conducted on the property left me by my late husband, Frederick L. Terppe, for and during at least the period of ten years from the date of my decease, and that during this period of time he shall pay whatever incumbrances may be left by me against the said estate, either by reason of liens against the same owing by me at the time of my death or by reason of the legacies and devises herein granted to other persons to be paid therefrom." And then follows this peremptory direction: "He shall not dispose of the said estate in any manner, but conduct it in the way of business until such debts are paid off and the property clear."

The devise of the drug store property to the adopted son is under the power of appointment in the will of the husband of the testatrix. She had but a life estate in that property, and, if she had not exercised the power of disposing of it by will, it would have gone absolutely to the adopted son. Her power to dispose of it by will was to be exercised upon such terms and conditions "as to her shall seem best at the time of making her said will." In exercising the power and devising the property she did not charge it with the payment of her debts, and it is therefore not liable for their payment. It was devised subject to the legacies in the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Ludexes

eight preceding clauses of the will, and the devisee was requested that during the period of ten years from her decease he should pay whatever incumbrances were against the estate left by her husband and the legacy given by the testatrix. A further peremptory direction was that he should not dispose of it in any manner until the property was cleared—not from her general debts, but from what has just been stated. construction of the eleventh clause of the will of the testatrix, guided by her intention as we there read it, is that she gave the residue of her own estate to Frederick William Terppe, and, exercising her power of appointment, devised the real estate of her husband to the same devisee, subject only to the payment of certain legacies and of incumbrances which she had not placed upon it. The court, therefore, was without jurisdiction to direct this property to be sold for

The assignments of error are sustained, and the decree confirming the sale is reversed; the costs on this appeal to be paid by the estate.

the payment of her debts.

(224 Pa. 544)

Pa.)

CITY OF PHILADELPHIA v. PHILADEL-PHIA RAPID TRANSIT CO.

(Supreme Court of Pennsylvania. April 26, 1909.)

CABRIERS (§ 258*)—RATES OF FARE—CONTRACT WITH CITY-CONSTRUCTION.

A contract between a street railway company and a city provided that the "present rates of fare" may be changed from time to time with consent of both parties. The "present rates of fare" were 5 cents for a continuous ride, or a sale of tickets at the rate of six for 25 cents, and free transfers at certain places, both on the cash fares and the tickets. *Held*, that the contract was not violated by a rule of the company by which transfers were issued only to persons paying a cash fare, and not to those paying fare by tickets.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1035; Dec. Dig. § 258.*]

Appeal from Court of Common Pleas, Philadelphia County.

Bill by the City of Philadelphia against the Philadelphia Rapid Transit Company. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Staake, J., in the court below, filed an opinion in which he stated the facts to be as fol-

"This is a bill in equity praying for a decree against the defendant: (1) That each ticket purchased of the defendant at the rate of six tickets for 25 cents shall have all the effect of a cash fare of 5 cents. (2) That the defendant may be required to perform its contract with the plaintiff, and accept such tickets with like effect as if fares of 5 cents each were paid by its passengers, and to issue transfers thereon in like manner for the

tances as those for which the said transfers were issued upon the payment of such tickets on and immediately after July 1, 1907, and until May 18, 1908. (3) That the rule of the defendant company, 'by virtue of which, on and after May 18, 1908, it refused to issue transfers as theretofore issued to those who had paid their fare by ticket,' and by which such transfers were issued 'only at the time a 5-cent cash fare is paid, and only when asked for by the passenger at the time of the payment of the cash fare,' and the 'orders' of the said company defendant abolishing certain transfers which had theretofore been granted, so that on, from, and after said May 18, 1908, such transfers were not issued, and passengers were and still are required to pay a second or additional fare for the ride, which theretofore had been granted for the one fare, should be decreed to be unauthorized and unlawful, and in violation of a contract of the city of Philadelphia with the defendant company dated July 1, 1907, made under the provisions of an ordinance of the councils of the city of Philadelphia, duly approved by the mayor of the said city on July 1, 1907, entitled 'An ordinance authorizing the execution of a contract between the city of Philadelphia and the Philadelphia Rapid Transit Company, affecting, fixing and regulating the duties, powers, rights and liabilities of the city and of the Philadelphia Rapid Transit Company and its subsidiary companies, and the relations and the respective interests of the contracting parties, providing for the future management and extension of the street railway system controlled by the Philadelphia Rapid Transit Company, and the final acquisition of its leaseholds and property by the city, and repealing so much of former ordinances as is inconsistent there-(4) That an injunction may issue against the defendant company enjoining the company defendant and prohibiting it from carrying out the terms of the said rules and orders and each of them. (5) That the plaintiff may have such further and different relief as may be or become necessary or proper in the premises.

"The city averred that the eighth section of the said contract provided: 'The city hereby confirms to the company and its subsidiary companies all of the consents, rights, and franchises heretofore granted to and exercised by them, and each of them, including the right of operation by the overhead trolley system, free of all terms, conditions, and regulations not herein provided for, and does further give up and surrender and agree not to exercise any rights which it may possess in respect to a repeal or resumption of any of the said rights now possessed or beretofore granted, or a taking over of any of said properties; any law, ordinance, or contract now in force or hereafter passed to the contrary same points and for the same routes and dis- notwithstanding: Provided, however, that

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the present rates of fare may be changed; from time to time, but only with the consent of both parties hereto; and provided further, that nothing in this contract contained shall be construed to limit the power of the city to make all rules and regulations, relating to the operation and management of the lines controlled by the company, necessary and proper to be made under the police power'and that 'at the time when the said contract was made there were three rates of fare of the defendant company,' viz., a cash fare of 5 cents for each passenger, a fare of 8 cents for which the passenger received what was called an exchange ticket, and for which he was entitled to ride upon a car of an intersecting line from the point of intersection, and that the company also sold through its conductors six tickets for 25 cents, each of which was good for a fare and was received as the precise equivalent of a cash fare of 5 cents. It was also averred that prior to said May 18, 1907, the company defendant issued 'transfer tickets,' which were given to passengers without extra charge to enable them to ride from certain intersections upon other lines. was contended that the refusal to issue such free transfers as issued prior to May 18, 1908, and the abolishment of many of the transfer points on and after May 18, 1908, resulted in an increase of the fare of those who theretofore had paid by ticket or had purchased exchange tickets. It was also averred that this 'increase was not made with the consent of the city of Philadelphia' and that the increase was a change of 'the present rates of fare' referred to in the proviso of the said eighth section of the contract of the company defendant with the city.

"The company defendant, while admitting in its answer that at the time of the making of the contract 'there were the three rates of fare,' as averred by the city, averred: That it is a leasing and operating company, controlling and operating '75 different lines' of 'street passenger railways, which under their various charters are entitled to charge a separate fare of not more than 5 cents for a ride over that line only.' That the rate of fare, upon all the companies they are operating, was 5 cents, and they are advised that when the words 'rates of fare' were used in the said eighth section they were used with reference to the rates established by all the various companies for a single ride, namely, 5 cents. All other rates of fare referred to by the city were averred to be in the nature of commutation rates; but it was denied 'that there was any contract or agreement or binding obligation on the part of the company to give any passenger 4 rides for 8 cents or 12 rides for 25 cents.' That the company had established numerous points at which a free transfer was given, entitling the holder to a further ride upon an intersecting line was admitted; but it denied there was any right in the holder of an exchange ticket or a package ticket to demand | Gay Gordon, for appellee.

such transfer.' It was further answered that 'by means of various acts of the Legislature, particularly the act of May 15, 1895 (P. L. 65), the defendant as an operating company was allowed to operate all lines controlled by it as a single system, laying out new routes partly over one line and partly over another.' Defendant admitted that, in order to develop its business and accommodate the public, it 'established from time to time and changed and took off and re-established transfer points,' but at no time had it agreed 'to issue transfers of this character either to the holder of an exchange ticket, who secured the same at the price of 8 cents for 2 rides, or to the holder of a 6 for a quarter ticket, who got a reduced rate for 6 rides, and not for 12 rides.' Defendant also averred that these transfers were at all times issued to passengers at the time they left the car, and not at the time they paid their fare, and it was therefore impossible for a conductor to know who had paid a full fare and who had given either an exchange ticket or a commutation ticket, and it was averred that no order had ever been made permitting or authorizing the issue of transfers to any parties except those paying the full fare, but admitted certain abuses had crept into the handling of exchange tickets, for the correction of which abuses the order complained of by the city had been made.

"The nature and character of these abuses is fully set out in the answer. The issuing and enforcement of the order of May 18, 1908, is admitted; but it is averred that the order was not in any respect a change in the orders or regulations of the company, although it did result in a change of conditions which had arisen from the said abuse of privileges made possible by the manner in which transfers were previously issued. It was denied that on May 18, 1908, any transfer points were abolished, but admitted in certain cases parties who had theretofore 'secured 4 rides for 8 cents, or 2 rides for 41/2 cents, can no longer secure 2 rides for less than 5 cents, or at the rate of 21/2 cents each.' It was admitted that the order of May 18, 1908, complained of, was made without the consent of the city of Philadelphia. It was denied that the order was an increase or change in the rate of fare, and that 'consent by the city' was necessary to make the order effective. The defendant further denied 'any intention to violate either the letter or the spirit of the contract with the city of Philadelphia."

The case was heard by the court upon bill and answer; there being no proofs submitted. The court entered a decree dismissing the bill.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, ELKIN, and STEW-ART, JJ.

J. Howard Gendell, City Sol., and James Alcorn, Asst. City Sol., for appellant. Ellis Ames Ballard, John G. Johnson, and James



STEWART, J. Prior to the organization of the Philadelphia Rapid Transit Company, here the appellee, the lines of street railways in the city of Philadelphia were owned and operated by several independent compa-With a view to unify these to the extent of bringing them under a common system and management, the Philadelphia Rapid Transit Company by lease and otherwise acquired control of all of them. This control, while it allows each company to retain its separate existence, commits to the traction company the operation, management, and regulation of each line of railway. The several companies differed both in their charter rights, and in their municipal privileges and obligations as well. To make these latter fixed, fair, and uniform, to supersede former regulations, and to define and regulate the relations thereafter to be observed between the city and the railways-so reads the agreement—the contract of July 1, 1907, was entered into between the city and the traction company. In its entirety the contract does not concern us. It is quite enough to say of it that the advantages derived thereunder are reciprocal. It is only the limitation imposed by a proviso in the contract on the right of the company to change the rates of fare that calls for consideration here. The proviso is as follows: "Provided, however, that the present rates of fare may be changed from time to time, but only with the consent of both parties hereto." At the time the contract was entered into the regular fare charged on each line for a continuous ride in the same car, irrespective of distance traveled, whether for a square or to the terminus, was 5 cents. This fare was uniform throughout the city. For reasons of its own, not that it was compelled by law or ordinance to do so, the traction company had been accustomed to offer to the public cards or slips containing six printed, detachable tickets, each entitling the holder to a single continuous ride, for 25 cents. Each ticket was regarded as the equivalent of a 5-cent fare, and secured to the holder the same privileges. In addition, the company had in force at the date of the contract a system of free transfers, which allowed one who paid a single fare, whether in cash or by ticket, to complete his ride on certain connecting roads without further charge. For reasons not necessary to discuss, the traction company has since the date of the contract discontinued such privilege when the fare is paid by ticket, and allows it only in cases where a cash fare has been paid. The bill complains that this action of the company is a change in its established rates of fare in force when the contract was entered into, inasmuch as it requires now a cash payment of 5 cents to secure the same transfer ride which before could be had on a ticket costing but 41/8 cents; and, since the change was made without the consent of the city, an injunction was asked for to restrain the company from discriminating in the way indicated.

The question thus presented is a very narrow one. The expression "rates of fare," as used in the proviso, is more or less inapt, and therefore lacks definiteness. We are not aided in its interpretation by anything elsewhere appearing in the contract. The proviso is left to speak for itself. Strictly speaking, the traction company had no established rates of fare when it entered into this contract. A rate is the measure of a thing by its ratio or relation to some fixed standard. When a certain sum is determined for a particular service, unless it is proportional and comparative according to a recognized standard, it is not a rate, but a charge. The compensation which this company was accustomed to receive for the facilities it afforded had relation to no standard. The 5-cent fare for one continuous ride was not measured by distance traveled or anything else that would suggest proportion; and the same must be said of every other fare it required. None of them was determined by ratio. It is quite evident, however, that the reference in the proviso was to the charges and fares the company was receiving at the date of the contract. It could be to nothing else.

Accepting this as the meaning, it is necessary, first, to inquire what these several charges were. We have referred to one-5 cents for a single continuous ride in the same car. Another was 8 cents for a single change from one car to another on certain intersecting lines. It is not denied that these charges fall within the meaning of the proviso. No attempt has been made to change these in any particular. It is contended that there was also a third charge, distinguishable from those mentioned, which also falls within the proviso, viz., 25 cents for six tickets when purchased together; each ticket being the equivalent of a 5-cent cash fare and entitling the holder to equal service. It must be conceded, we think, that, if this were a distinct charge within the contemplation of the parties, the change that is complained of with respect to it would be violative of the terms of the contract, since the ticket is no longer the full equivalent of a 5-cent fare, in that it will not now purchase the same facilities in the way of transfer. The question is, was it such a charge? The case turns upon the answer. The sum of 25 cents distributed upon six tickets makes the cost of each, considered separately, 4% cents. This simple statement would seem to show such a reduction in cost to the purchaser as would warrant a conclusion that the company had two charges for the same service; that is the continuous ride-one 5 cents, and another 41/6 cents.

But this method of differentiating does not express the whole truth as we need to know it for a proper determination of the question. Clearly the 4½-cent charge is not all the company exacts in the way of payment when it sells by ticket. One ticket cannot be purchased for that sum. In order to get one,

the purchaser must buy six, and pay 25 cents, before he gets any service whatever in return. It results that the company gets the benefit of this advance payment without interest: Where all the six tickets are used promptly, the advantage derived by the company in this respect may be too slight to be considered; but, as every one knows, all are not used promptly, and it is not mere speculation to say that the general average would show a very substantial benefit inuring to the company from this source, an advantage which could be very fairly regarded as the full equivalent of the amount abated. Whatever the company gains in this way is at the cost of the party purchasing, of course. These considerations would indicate that in adopting this charge for tickets the company had no intention of departing from the 5-cent standard charge for a continuous ride; but that what was intended, and all that was intended, was an equitable adjustment on the basis of a 5-cent fare for a continuous ride, which would advantage its patrons in the way of convenience without entailing loss upon, the company. If any other purpose controlled, it is not apparent what it was. The company was all the while adhering to this 5-cent charge for the general public. The ticket arrangement was one of its own devising, adopted, not because forced upon it, but at its own pleasure. If the purpose was to reduce the charge, the question at once arises, to what end?

It will hardly be contended that it was to gratify a generous impulse prompted by an overabundant income. No more can it be supposed that it was done with a view to increase the company's revenues through an enlarged traffic. The average individual would not be likely to take more rides during a month or year because of a reduction of five-sixths of a cent upon each ride. It is quite as inconceivable that its purpose was to give individuals who, without inconvenience to themselves, could spare 25 cents at any time, the advantage of a lower fare than was charged those who could conveniently spare no more than 5 cents each time they traveled. The only reasonable explanation is that in adopting the ticket system the object was to afford an additional convenience for a consideration in the way of advance payment, which would equal the amount of the abatement in the fare in dollars and cents. Indeed, we think it so evident that the purpose of the company was to adhere to the 5-cent charge as a basis that we are unable to see how the complainant, in contracting with the company with respect to the matter of its fares, could have had any reason to suppose that the ticket system introduced any other. It is only by supposing that the understanding of the parties

what the transaction on its face imports as to its meaning and purpose that we can read this ticket system into the terms of the proviso, and there is nothing in the case as presented that would give us warrant for so doing.

If, then, it is not "a rate of fare" within the meaning of the proviso, but a mere regulation for the convenience of the public, involving no change in charge—and this is our conclusion—it follows that the traction company, in restricting its application in the manner complained of, was strictly within its rights, and the concurrence of the city was not required.

The decree is affirmed, and the bill dismissed, at the costs of appellant.

(224 Pa. 523)

In re KELLER'S ESTATE.

(Supreme Court of Pennsylvania, 1909.) April 26,

EXECUTORS AND ADMINISTRATORS (\$.464*)-

EXECUTORS AND ADMINISTRATORS (§ .464*)—
ACCOUNTING—EXEMPTION FROM.

Under a will appointing testator's widow and son executors, with a direction that they should not be required to file an account, the executor of the widow, in the absence of fraud, cannot require the executors of the son to account on the ground that he had received and converted all the assets of the estate, and not paid the income to the widow for life as provided by the will, but the remedy is by an action of debt at law.

[Ed. Note.—For other cases, see and Administrators, Dec. Dig. § 464.*] see Executors

Appeal from Orphans' Court, Lackawanna County.

Petition for an account in estate of Sydenham Keller, deceased. From a decree sustaining a demurrer to the petition, Marshall Keller appeals. Affirmed.

Argued before FELL, BROWN, POTTER, ELKIN, and STEWART, JJ.

A. A. Vosburg and B. Fenton Tinkham, for appellant. James Gardner Sanderson and John P. Kelly, for appellee.

STEWART, J. The testator, Sydenham Keller, gave his entire estate to his widow for life, and at her death to his son, Horatio Seymour Keller, and appointed these two beneficiaries executors of his will. survived the testator several years, but both are now dead; the son having survived the widow a few days only. No inventory of the estate or account was ever filed by either. The executor of the widow now asks that the executors of the son be required to file an account, alleging that the son had been the acting executor, and as such had received and converted all the assets of the estate. A demurrer filed to the petition was sustained in the court below, and the appeal is from that decree.

The will contains this provision: "Neiwith respect to it was wholly different from ther of my said executors shall be required

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to enter security, and no inventory nor ap-lifetime of the widow and son, for the espraisement nor account of any estate shall be filed by them." Why shall not this direction be observed? A testator has quite as much right to direct how his estate shall be administered as he has to direct its distribution. He must be careful in either case not to interfere with the rights of creditors: but within this limitation his will is law. The parties represented by this petitioner are not creditors, but volunteers. The rights are not the same. Volunteers have only such rights as the will gives them. They take under and pursuant to the will, and as against their demands the will must prevail. The law will not be slow to interfere where the confidence a testator has reposed in his executors is being abused; and, whenever a volunteer who has an interest which gives him standing complains that executors are guilty of fraud in their office and asks that they be required to account, the court will so order if ground be shown, notwithstanding the will exempts them from the duty of accounting. The interference in such case defeats no provision in the will, for the exemption was intended to apply to faithful, not unfaithful, executors, and the only end to be accomplished by the interference is to secure honest administration of the estate in accordance with the testator's wishes. In the present case fraud is not alleged. The only averments in the petition are that the son was the acting executor, and as such he had received the assets and converted them; that for some of them he had realized a specified amount, and to the best of petitioner's knowledge and belief none of the income therefrom had ever been paid to the said Louisa Keller (widow) in her lifetime. and that it is now due her estate. There is not a suggestion of fraud in any of these averments. The son had as much right to the possession of the assets as the widow. If he took them all into possession, presumably it was with her consent and approval, since she acquiesced. If he failed to pay over to her the income, he was her debtor to that extent, and an action at law can be maintained for the recovery of the debt. is not pretended that he fraudulently withheld anything from the widow. It is manifest that the only purpose here is to put over upon the son's representatives the burden of showing affirmatively that the son in his lifetime paid to the widow the income of the estate. It is quite as manifest, we think, that it was to prevent proceedings of this kind by persons not beneficiaries under the will that the testator provided that neither of his executors should be required to account. He knew that the exemption would not prevail against the demands of creditors, and he was not providing against Excepting creditors no one could them. have asked for an accounting during the of the underlying principles upon which the

tate in its entirety belonged to them; but on death of either the heirs at law or legatees of the one dying would have an interest which in the absence of this exempting provision would give a right to demand an accounting. It was this event, sure to happen sooner or later, that testator had in contemplation when he directed that no account should be filed. No other purpose can be suggested. The citation asked for was properly refused.

The appeal is dismissed, at the costs of the appellant.

(224 Pa. 443)

In re McFADDEN'S ESTATE. Appeal of EQUITABLE TRUST CO. (Supreme Court of Pennsylvania. April 12, 1909.)

1. WILLS (§ 684*)—CONSTRUCTION—TRUST ESTATES—PRINCIPAL OR INCOME.

Under a will creating a trust in testator's residuary estate, to pay the income to his widow for life, without any provision for a sale or conversion of coal lands, royalties from coal land upon which there were no open mines at testator's death, under a coal lease made by his trustee, are to be deemed principal, and not in-

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1616; Dec. Dig. § 684.*]

2. LIFE ESTATES (§ 12*)-WORKING OR LEAS-ING MINES.

The rule that it is not waste by a life ten-ant to work an open mine to exhaustion does not include the right to lease the coal underlying an adjacent tract of undeveloped mineral lands and receive the royalty, to the exclusion of the remaindermen.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 31; Dec. Dig. § 12.*]

Appeal from Orphans' Court, Philadelphia County.

Exceptions to adjudication in estate of Charles McFadden, deceased. From a decree dismissing the exceptions, the Equitable Trust Company, trustee, appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, ELKIN, and STEW-ART, JJ.

H. B. Gill, John R. Read. and Louis B. Runk, for appellant. John G. Johnson and Maurice Bower Saul, for appellee.

ELKIN, J. The question to be determined here is whether the royalties required to be paid under the coal mining lease executed by virtue of the authority and decree of the orphans' court of Cambria county in 1908 shall be deemed income payable to the widow under the terms of the will, or shall they pass into the residuary estate as principal to be invested by the trustee, the income only of the invested sum to be paid the widow. There is no difficulty as to the application

•For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

decision of this case rests. If the coal lands ; ing of the rule. The common-law rule rested described in the lease had been sold under a decree of court at a fixed price or consideration, there can be no question but that the thing sold would be under these circumstances part of the corpus of the estate, and the amount received in payment of the thing sold would be principal. Nor is it open to doubt, under the settled rule of our cases, that a lease to mine all the coal underlying a tract of land described in the conveyance, upon the payment of certain specified royalties, amounts to and is the equivalent of a sale of the coal in place. The right to mine the coal to exhaustion is the equivalent of a grant of all the coal, and the payment for the coal mined at a certain rate per ton is the consideration price paid. If there was nothing else in the case there could be only one answer to the question here raised, and that answer is that the royalties represent the purchase price and should be treated as principal.

It is contended, however, and the learned orphans' court below took this view of the question, that the intention of the testator was to give these royalties as income to his wife, or, if the testator did not so provide, the widow as tenant for life took the royalties as income under the common-law rule followed in our state, which gives the life tenant the right to mine opened mines to exhaustion without being chargeable with waste and to enjoy the profits arising therefrom. We cannot agree that the intention of the testator, shown by the residuary clause or from the four corners of the will. justifies such a conclusion. The wife was given the income of the corpus of the residuary estate, the title to which passed under the terms of the will to the trustee. The coal lands in question were part of the corpus of the trust estate. The will did not provide for a sale or conversion of these There were no open mines on the particular lands described in the lease above referred to. Under these circumstances. how can it be said that the testator intended his wife to take as income what he held as corpus and for the sale or conversion of which he made no provision? Clearly the intention of the testator to give to his wife as income royalties not contracted for at the time of his death, and which were not then contemplated or provided for, cannot be gathered from the terms of the will itself, nor from any other source.

The settled rule that it is not waste about which remaindermen can complain for a life tenant to work an open mine to exhaustion has no application to the facts of the instructions to make the distribution in accase at bar. It is very doubtful whether the cordance with the views herein stated. Costs widow here is a life tenant within the mean- to be paid out of the trust estate.

on a very different foundation. It had its origin in a case where the testator had devised a tract of land, limited in area, on which was an open mine, to one for life, and then over to others. The question arose whether it was waste for the life tenant under these circumstances to mine, use, and sell coal from a mine opened in the lifetime of testator. It was held not to be waste and that the life tenant had the right to pursue the mine even to exhaustion. This rule found favor in our earlier cases and has become a rule of property in Pennsylvania. There is no disposition to weaken or destroy it, and it must be considered as settled law when the facts of a case justify its application. The rule, however, has its limitations, and must not be unduly and unreasonably extended. As, for instance, suppose the testator in the present case was possessed at the time of his death of a homestead farm containing 200 acres upon which there was an open mine for country use, and adjacent to the homestead he owned 10,000 acres of undeveloped mineral lands; could it be seriously contended that, because the life tenant could work the open mine on the homestead to exhaustion, this included the right to lease upon royalty the coal underlying the 10,000 acres of mineral lands and to receive the consideration paid in royalties to the exclusion of the remaindermen? No reasonable interpretation of the rule can make it applicable to such a state of facts. Such a situation was not contemplated when the rule was first announced, and it would do violence to the spirit and purpose of it to require its application under such circumstances.

In the present case there was an outstanding lease for a limited number of acres belonging to the testator at the time of his death, upon which there was a mining operation. There were at least two openings on this property, but these lands were segregated from the other lands of the testator by the lease itself, and there can be no reason in law or equity why the rule should be extended beyond the boundaries fixed by the testator himself. We hold, therefore. that there was no open mine in the lifetime of the testator on the lands included in the lease of 1908, and the rule as to the rights of a life tenant does not apply. The royalties received or to be received under the terms of this lease, are principal, and not income, and should be so regarded and treated.

Decree reversed, and record remitted, with

(76 N. H. 806)

STATE v. FORBES.

(Supreme Court of New Hampshire. Coos. June 26, 1909.)

1. INDICTMENT AND INFORMATION (§ 166*)-VENUE-PROOF-NECESSITY.

To sustain a conviction of forgery, it must appear that it was committed in the county where the offense is laid.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 528; Dec. Dig. § 166.*]

2. FORGERY (§ 47*)—QUESTIONS FOR JURY.

After prima facie proof that a forged instrument was uttered by the forger in the county where the indictment was found, it is none the less a question of fact for the jury because other evidence is introduced on which a con-trary finding might be based.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 123; Dec. Dig. § 47.*]

8. CRIMINAL LAW (§ 741*) - PROVINCE OF

COURT AND JURY.

Where there are facts in evidence, which, if unanswered, will justify men of ordinary reason and fairness in affirming the question which the state must maintain, the case is for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1713; Dec. Dig. § 741.*]

TION FOR JUEY.

Where it was conceded that accused had forged the instrument which he uttered in the jury could find that he forgety thereof was laid; the jury could find that he forged the instrument in such county, whether there was contradictory evidence or not. evidence or not.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 123; Dec. Dig. § 47.*]

Exceptions from Superior Court, Coos County; Pike, Judge.

Fred Forbes was convicted of forgery, and he brings exceptions. Overruled.

Indictment, charging that the defendant, on December 4, 1908, "did falsely make and counterfeit a certain American Express money order for the payment of money, purporting to be made and signed by one W. A. Davids, assistant agent, for the sum of \$50, • • with intent that some person should be defrauded." Trial by jury and verdict of guilty. The defendant moved for his discharge upon the ground that there was no evidence upon which it could be found that he falsely made and counterfeited the order in Coos county. The motion was denied, and he excepted. After verdict the court imposed sentence, but stayed execution pending the determination of the question of law reserved. The state's evidence tended to prove that on Wednesday or Thursday in the week ending August 15, 1908, the defendant was seen in company with one Wilhelm at the Windham Junction station of the Boston & Maine Railroad. The railroad agent at that station does business for the American Express Company, "Issuing orders, filling out freight," etc. Wilhelm bought of the agent an express order for \$1. On August 15th, after Forbes and Wilhelm had dis-

a book containing 20 blank money orders had been stolen from the office. There was evidence that the theft was committed by Forbes and Wilhelm. All orders of the American Express Company are issued in blank books of 20 or more, each bearing a serial number which has no duplicate. One of the blank orders in the stolen book bore the serial number 8-3265268. After the disappearance of Forbes from Windham Junction, he was next seen at Lancaster on September 4th. How long he had been there did not appear. While in Lancaster he went into a store and bargained for some clothing, for which he agreed to pay \$28, and offered in payment therefor an American Express money order for \$50, like the one set forth in the indictment, bearing the serial number 8-3265268, with the addition that it bore upon its back the indorsement "Paul N. Mertha. Jr." On the same day Wilhelm attempted to pass in Lancaster an American Express money order, serial number 8-3205269, which had been filled out after its disappearance from the Windham station office. Forbes was arrested in Vermont, on September 5, 1908, American Express money orders in blank, bearing serial numbers 8-3265270, 8-3265271, 8-3265272, 8-3265273, 8-3265274, 8-3265275, 8-3265276, and 8-3265277, were found in a value belonging to Forbes or Wilhelm.

J. Howard Wight, Sol., and Drew, Jordan, Shurtleff & Morris, for the State. Sullivan & Daley and Burritt H. Hinman, for defendant.

BINGHAM, J. To sustain a conviction of the crime of forgery, as in other crimes, it should appear that it was committed in the county where the offense is laid; and according to the weight of authority proof of that fact is sufficiently made out to entitle the state to go to the jury, if nothing further appears than that the person charged with the offense is shown to have uttered the forged instrument in the county where the indictment is found. Spencer v. Commonwealth, 2 Leigh (Va.) 751; State v. Poindexter, 23 W. Va. 805; State v. Morgan, 19 N. C. 348; Johnson v. State, 35 Ala. 370; Bland v. People, 3 Scam. (Ill.) 864; State v. Blanchard. 74 Iowa, 628, 38 N. W. 519; United States v. Britton, 2 Mason, 464, 469, 470, Fed. Cas. No. 14,650; Rex v. Parkes, 2 East. P. C. 992; s. c., 2 Russ. Cr. (2d Ed.) 371; 2 Leach, C. L. 898, 909. In other words, proof that the forged instrument was uttered by the forger, in the county where the indictment was found, if unanswered, is sufficient to sustain the verdict of a jury that the crime was there committed.

If this is the law (and we see no reason for thinking that it is not), it would seem appeared, the station agent discovered that that the situation would not cease to present a question of fact for the jury, and become a question of law for the court, if other evidence should be introduced upon which a contrary finding might be predicated, and that the cases above cited, to the extent that they present a contrary view, are not to be followed. It is said in those cases "that the place where an instrument is found or offered in a forged state affords prima facie evidence, or a presumption, that the instrument was forged there, unless that presumption is repelled by some other fact in the case"; and in Commonwealth v. Costley, 118 Mass. 1, 26, it is said that this is all that was decided in Commonwealth v. Parmenter, 5 Pick. (Mass.) 279, the case relied upon by the defendant. If the terms "prima facle evidence or presumption," as there employed, mean, as we understand they do, that such evidence answers the legal requirements of proof authorizing a submission of the question to the jury (King v. Hopkins, 57 N. H. 334, 359), then it does not follow that, in case countervailing proof is put in evidence, the court would be warranted in withdrawing the question from the jury; for the weight to be given the evidence is for them to pass upon, and presents no question of law, and if a verdict is rendered which is against the weight of the evidence, the injured party's remedy is to seasonably apply to the trial court to have the verdict set aside. true rule, as stated by Wigmore, is: Are there facts in evidence which, if unanswered, would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain? If there are, he has passed the judge, and may properly claim that the jury be allowed to consider his case. 4 Wig. Ev. §§ 2494, 2513.

As it is conceded that the defendant forged the order and uttered it at Lancaster, in the county of Coos, there was sufficient evidence from which it could be found that the crime of forgery was there committed; and this, irrespective of the fact whether there was or was not other evidence tending to disprove such a conclusion.

Exception overruled. All concurred.

(224 Pa. 437)

PENNOCK v. LOCUST REALTY CO. et al. (Supreme Court of Pennsylvania. April 12, 1909.)

MECHANICS' LIENS (§ 103*)-WAIVER.

Where a subcontractor agreed to furnish labor and material to a building under construction after a conveyance by the original owner to a purchaser, he is bound by the contract between the original owner and the contract of the contract o tractor, containing a waiver of liens, where it was filed of record.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 135; Dec. Dig. § 103.*]

Appeal from Court of Common Pleas. Philadelphia County.

J. Sellers Pennock, against the Locust Realty Company and others. From a judgment discharging rule for judgment for want of a sufficient affidavit of defense, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and EL-KIN, JJ.

Chas. Francis Gummey, for appellant. Preston K. Erdman and Charles L. Lockwood, for appellees.

ELKIN, J. An interesting question of practice has been suggested by the learned counsel for appellee in this case; but it is unnecessary to rest our decision on this ground, because we cannot accept as sound the position of appellant on the real question involved in this controversy.

The question here arises under the mechanic's lien act of June 4, 1901 (P. L. 431). It is whether a subcontractor, whose agreement to furnish materials and labor is made after a conveyance to a new purchaser, is bound by the contract between the original owner and the contractor, filed of record, and containing a waiver of liens. The owner, at the time the building contract was entered into, in order to protect himself against liens, caused to be inserted therein a waiver clause, and then filed this agreement in writing of record. Subsequently, and while the building was being constructed, the owner conveyed the property to the appellee, the present owner. The contention of appellant is that under these circumstances appellee cannot claim the protection of the waiver clause in the building contract. Two of our recent cases are relied on to sustain this position. They are Wyss-Thalman v. Beaver Valley Brewing Company, 216 Pa. 435, 65 Atl. 811, and Pagnacco v. Faber, 221 Pa. 326, 70 Atl. 754. This court did not intend to announce any such doctrine in these cases, nor is anything said in those opinions reasonably susceptible of the meaning now attempted to be taken from what was there written. These cases recognized the right of the contracting parties, or of subsequent parties standing in the place of the original parties, to make a new contract binding upon them, containing a covenant not to file a lien, or by failing to provide for a waiver of liens in the new contract to have waived the protection of the original contract which was superseded by the new agreement; in other words, that if either the original or subsequent contracting parties thought proper to enter into a new contract containing new terms and provisions it was within their rights so to do, and if such a contract were made the parties would be bound by its terms. No new principle was announced, and the law was neither modified nor changed by anything decided or discuss-Action by Edmund M. Pennock, trading as ed in these cases. They turned upon their

eFor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

facts and were properly decided. In the case | at bar there was no new contract. The building was erected from beginning to completion under the original contract. The rights and duties of the parties were fixed by that contract. The materials and labor were furnished under that contract. The notice as to the waiver of liens filed of record bound every one who furnished materials or labor under that contract. The mere fact that the original owner, holder of the legal or equitable title, afterwards conveyed to either the real owner, or a new purchaser, in no way affected the terms and conditions of the building contract, which remained unchanged throughout the whole period of construction. It therefore follows that no new contract was entered into in the present case, and all the terms and conditions of the old contract are in force and effect.

Order of the court below, discharging rule for judgment for want of a sufficient affidavit of defense, affirmed, at the cost of appellant.

WATSON v. McMANUS et al. (Supreme Court of Pennsylvania. April 12, 1909.)

Assignments (\$ 96*)—Rights of Assigner. Defendant, a city contractor, assigned to plaintiff all moneys due under a contract, and, notwithstanding the assignment, he recovered judgment against the city therefor. Held that, on a finding that defendant was indebted to on a finding that defendant was moreover to plaintiff for more than the amount of the judgment, a decree that the defendant should mark the judgment to the use of plaintiff was proper. [Ed. Note.—For other cases, see Assignments, Cent. Dig. § 166; Dec. Dig. § 96.*]

Appeal from Court of Common Pleas, Philadelphia County.

Bill by James V. Watson against Michael McManus and others. Decree for plaintiff, and defendants appeal. Affirmed.

See, also, 72 Atl. 1068.

The court below entered the following decree:

"(1) That the said Michael McManus, defendant herein, within five days from the date of this decree, mark to the use of James V. Watson, plaintiff herein, the judgment in the suit of Michael McManus v. City of Philadelphia, court of common pleas No. 1, of December term, 1898, No. 547.

"(2) That in default of said Michael Mc-Manus so marking said judgment to the use of said James V. Watson, as above directed, the prothonotary is hereby ordered and directed to mark said judgment to the use of said James V. Watson.

ment to the use of said James V. Watson he, the said James V. Watson, have full power and authority to enforce payment of the same; provided, nevertheless, that interest on said judgment of Michael McManus v. City of Philadelphia, court of common pleas No. 1, of December term, 1898, No. 547, is to "(3) That upon the marking of said judg-

be calculated and to run only from the date of the filing of the referee's report in said suit, namely, February 2, 1904, to the date of the awarding of the injunction against the city of Philadelphia in this suit, namely, January 15, 1907, unless otherwise ordered by the court."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Wm. M. Reese and Wm. W. Lucas, for appellants. George R. Van Dusen and John G. Johnson, for appellee.

FELL, J. The defendant, in consideration of advances made to enable him to carry out a contract with the city of Philadelphia, assigned to the plaintiff all moneys due or that might become due on the contract. Notwithstanding this assignment the defendant brought an action against the city and recovered judgment. The plaintiff procured an injunction restraining the defendant from collecting the judgment until a final decree should be entered in a proceeding in equity between the parties for the settlement of their accounts, with leave to apply to the court for a further order when the suit for an accounting should have been determined. The decree awarding an injunction was affirmed on appeal. Watson v. McManus, 221 Pa. 41, 70 Atl. 263. After a final decree had been entered in the suit for an accounting, directing McManus to pay a sum larger than the amount of the judgment against the city, the court made a further order in this proceeding directing the defendant to mark the judgment to the use of the plaintiff.

The appeal is from this order, and it presents no question that has not been finally settled in favor of the plaintiff. The subject of the controversy was the ownership of the judgment obtained against the city by the defendant, McManus. The court found that all the money due under the judgment belonged to the plaintiff by virtue of the assignment to him, and the order appealed from is supplemental to and gives effect to the decree before entered.

The order is affirmed, at the cost of the appellant.

(224 Pa. 460)

BOND V. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. April 19, 1909.)

. Railroads (§ 350*)—Accident at Grade Crossing—Evidence.

he could have seen the approaching train in the dark for a distance that would enable him to avoid it.

see Railroads, [Ed. Note.—For other cases, see Cent. Dig. § 1152; Dec. Dig. § 350.*]

2. Trial (§ 252°) — Submission of Issue-Questions to Sustain.

Where, in an action for injuries at a grade crossing, there was no evidence by plaintiff as to the speed at which the train was running, and the engineer testified that it was running at about seven miles an hour, it was error to submit to the jury the question as to whether defendant was negligent in running its train at a high rate of speed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 603; Dec. Dig. § 252.*]

Appeal from Court of Common Pleas, Chester County.

Action by Winfield S. Bond against the Pennsylvania Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Plaintiff presented this point: "(1) If the jury believe that defendant was guilty of negligence in running the freight train at the public crossing on Washington avenue, Downingtown, on the night of January 19, 1906, by not giving the proper signals, and at a high rate of speed, and that the accident was the result of such negligence, and that there was no contributory negligence on the part of the plaintiff, the verdict should be Answer: That is affor the plaintiff. firmed."

Argued before FELL, BROWN, MES-TREZAT, ELKIN, and STEWART, JJ.

William I. Schaffer and John J. Pinkerton, for appellant. Arthur T. Parke and John J. Gheen, for appellee.

BROWN, J. When this case was here before (218 Pa. 34, 66 Atl. 983) we held, in reversing the judgment for the defendant n. o. v., that it could not have been taken from the jury. On the second trial the verdict was again for the plaintiff on what the learned and careful trial judge, in his opinion refusing judgment for the defendant, said was practically the same testimony as that given by the plaintiff on the first trial. If this is so, the appeal of the defendant is to be regarded as having been taken for the purpose of rearguing the case before us. The only difference which its counsel have attempted to point out in the case as presented on the second trial is that it now appears that the plaintiff could see a distance of 200 feet in the direction from which the train was coming, and his own witnesses saw and heard it approaching. The corroborated testimony of the plaintiff is that it was dark and foggy, that there was no headlight on the engine, and that no signal of its approach was given by bell or whistle. He

direction, he did not hear the engine, adding that, if it had been daylight, he would have seen it and the accident would not have happened. On his cross-examination, after again stating that, if it had been daylight, he could have seen, he said, when pressed to state how far he could see, or did see, "Probably a couple of hundred feet," and immediately followed this with the answer that he "couldn't say exactly." Taking his testimony as a whole, the jury might fairly have understood him as not intending to say he could have seen the approaching train in the dark and foggy evening for a distance that would have enabled him to avoid it. His own witnesses do not testify that they saw it at any point east of the crossing on Washington avenue, and, though they may have heard it coming, the jury were not bound to find that he ought, therefore, to have heard it.

But for the answer to the first point submitted by the plaintiff, this judgment would have to be affirmed, because it has not been shown that the testimony of the plaintiff on the second trial was not practically the same as on the first. In the court's answer to the point the jury were permitted to find that the defendant had been negligent in running its train at a high rate of speed. There was no evidence on the part of the plaintiff as to the rate of speed at which the train was moving, while the uncontradicted testimony of the engineer is that he was running at about seven miles an hour. The fourth assignment of error must be sustained.

Judgment reversed, and venire facias de novo awarded.

(224 Pa. 536)

In re MULHOLLAND'S ESTATE.

(Supreme Court of Pennsylvania. 1909.) April 26.

VENDOR AND PURCHASER (§ 229*)-BONA FIDE PURCHASERS-NOTICE.

A purchaser who cannot make out his title except through a deed which leads to a fact is affected with notice of that fact.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 477; Dec. Dig. § 229.*]

2. EQUITY (§ 7*)—GROUNDS OF RELIEF—MISTAKE OF LAW.

That both parties having knowledge of the facts were ignorant of the law is no ground for equitable relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 15; Dec. Dig. § 7.*]

3. Vendor and Purchaser (§ 119*) — Rescission—Laches.

The law requires reasonable diligence in a purchaser to ascertain any defect of title, and, when once ascertained, he must exercise a like diligence in asserting his right to have the sale set aside.

proach was given by bell or whistle. He [Ed. Note.—For other cases, see Vendor and further testified that, though looking in each Purchaser, Cent. Dig. § 214; Dec. Dig. § 119.*]

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. EXECUTORS AND ADMINISTRATORS (§ 145*)-SALE OF REAL ESTATE - AUTHORITY OF COURTS.

No decree can be made upon a conveyance by an executor or trustee under a power con-ferred by will unless the aid of the court is required to supply some omission in the instrument creating the power.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 585; Dec. Dig. § 145.*]

5. Executors and Administrators (§ 149*)— Sale of Real Estate by—Power to Set ASIDE.

The authority of the orphans' court to set aside a sale in pursuance of a testamentary power is no more extensive than that exercised by the court over a sale in pursuance of its own order.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 602-606; Dec. Dig. § 149.*]

6. VENDOR AND PURCHASER (§ 230*)-BONA

FIDE PUBCHASEBS—NOTICE.

A grantee is affected with notice of a defect in his grantor's title shown by the recitals in the deed as soon as he accepts it. [Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 502; Dec. Dig. § 230.*]

Appeal from Orphans' Court, Philadelphia

Exceptions to a master's report in estate of Sarah Mulholland, deceased. From a decree dismissing the exceptions, James Mc-Devitt, executor, appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and EL-KIN, JJ.

John F. Gorman, Leo J. Gorman, and Wil-Mam Gorman, for appellant. Frederick L. Breitinger, for appellee.

MESTREZAT, J. This case is so clearly and radically wrong that all that is necessary to reverse it is to state the undisputed facts. The error of the master and of the court may be attributed to the manner in which the case was presented for their consideration.

James Mulholland died in 1876, leaving to survive him five children and a brother Felix. He was seised in fee of certain real estate in the city of Philadelphia at the time of his death, and his five children conveyed to his brother Felix "one undivided sixth part of and in all the real and personal estate of which James Mulholland died seised and possessed." Felix subsequently died intestate and left to survive him a widow, Sarab, and five children, all of whom died in their minority, intestate, unmarried and without issue prior to the death of their mother. Sarah Mulholland died in 1901 and by her will, duly probated, appointed James Mc-Devitt, the appellant, her executor. The will provides, inter alia, as follows: "And for the purpose of the better carrying my will into execution and effect, I do authorize and empower my executor James McDevitt to make sale of all my estate, real, personal or | will and the schedule of distribution as ap-

mixed and of which I may die seized and. possessed either at public or private sale and upon such terms as he shall judge best." The testatrix devised and bequeathed the residue of her estate to her "executor in trust to distribute the same among the several churches and charitable institutions hereinabove named or in his discretion to pay same from time to time for masses for the repose of my soul and the souls of my husband and our children." By virtue of the authority contained in the will, James McDevitt, executor and trustee, executed and delivered a deed, dated January 6, 1902, and recorded the following day, to James Conway, conveying to him "all the right, title, and interest of the said Sarah Mulholland, deceased, of, in, and to" three lots or pieces of ground situate on the south side of Pine street and east of Eleventh street in the city of Philadelphia' for the consideration of \$2,750. The deed recites that the property therein described is the same of which James Mulholiand died: seised and of which his five children conveyed the undivided sixth part to Felix Mulholland, who died intestate seised of the said! undivided interest in the property and leaving to survive him Sarah Mulholland and five children, all of whom died prior to their mother in whom all their interest in the premises vested. The deed to Conway is in the ordinary form used by an executor and trustee to convey real estate in pursuance of authority contained in the will. It recites. the title to the premises conveyed from Thomas Fraley in 1848 to Sarah Mulholland, the authority conferred by the will on the executor and trustee for making the sale, and the appointment of the executor and the probate of the will. It contains the usual special warranty against acts done or committed by the executor. Conway in pursuance of the title vested in him by the exec-: utor's deed took possession of the premises, and has since occupied and used them as hisown. On January 21, 1908, he presented a petition to the orphans' court of Philadelphia county setting forth, inter alia, that Sarah Mulholland died testate and the disposition made by her will of her estate: that the executor of Mrs. Mulholland had by deed dated January 6, 1902, conveyed to him "all the. right, title and interest of the said Sarah Mulholland, deceased," in the three lots of ground in Philadelphia, referring to the recital in the deed that Felix Mulholland, the husband of Sarah, had died seised of the undivided sixth part of the premises leaving to survive him a widow and five children. and the death of the five children unmarried and without issue, and that their interest in the premises vested in their mother; that the executor filed the account of his administra-. tion which was audited on June 30, 1902, "and by adjudication thereof distribution of the residue was awarded as directed in said

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

proved by the auditing judge." The petition further avers that the purchase money was paid: that at the time of the conveyance the executor was of the belief and opinion that the testatrix died seised of the said undivided sixth part of the premises; that testatrix, however, was not of the blood of the first purchaser of the said one-sixth interest in the premises, and therefore the fee thereof did not vest in her on the death of the last surviving of her children, but vested in the heirs and next of kin of her husband; that the facts relative to the title did not come to the knowledge of petitioner until October 15, 1907; and that the consideration money for the conveyance forms a part of the balance remaining in the hands of the executor and trustee and is undistributed. The petitioner prayed that the executor be ordered and directed to repay to him the purchase money with interest thereon.

The executor filed an answer in which he admits most of the facts averred in the petition. He admits that Conway paid the purchase money in the belief that the executor had the right to convey to him a good title in fee, and that the executor was of the same opinion; that the executor has funds awarded him sufficient to return to petitioner the amount paid by him as purchase money, but avers that he refused to repay Conway the purchase money, as the money in his hands had been set apart by the adjudication of the orphans' court for a specific purpose, "and your respondent is informed and believes in law he has no right to divert it from this purpose unless protected by an order of your honorable court." The answer further avers that the executor filed an account which was duly adjudicated by the orphans' court, and attaches a copy thereof to the answer. The final decree confirming the account and directing distribution was made by the court on June 30, 1902. and contains, inter alia, the following: residue of this estate is given to the executor in trust to distribute the same amongst the churches named in the proportions and manner as set out in the will of deceased, and in his discretion to pay the same from time to time for masses for the repose of the soul of testatrix and the souls of her husband and their children." The answer having been filed, the court appointed a master, who made a voluminous report, granting the prayer of the petition and awarding restitution of the money paid by Conway to Mc-Devitt, but permitting Conway to retain the title to the property conveyed to him by the executor. The reason for the conclusion of the learned master is stated by him as follows: "The master and examiner finds as a fact that the said Sarah Mulholland was not of the blood of the first purchaser of said one-sixth part of the property hereinbefore described, and that the aforesaid consideration of \$2,750 was paid by the said James Conway unto the said James McDevitt, ex-

ecutor and trustee, by reason of a mutual mistake of fact, innocently committed and through no fault of either party thereto. It also appears that the parties to said mistake can be put in statu quo, no other rights having attached in the meantime." The learned court below in a pro forma decree dismissed the exceptions, and confirmed the master's report absolutely. McDevitt, as executor and residuary devisee in trust, has taken this appeal.

It will be observed that the master committed manifest error in finding, as he did, "that the facts in reference to the devolution of the title to said one-sixth part of the said property first became known to said James Conway and James McDevitt on or about October 15, 1907," as the deed executed by McDevitt and received by Conway recited the title and thereby disclosed the fact that Sarah Mulholland, the decedent, had no valid title to the interest in the premises in question. This was notice to Conway of the defective title in 1902. Jennings v. Bloomfield, 199 Pa. 638, 49 Atl. 135. When a purchaser cannot make out his title but through a deed which leads to a fact, he will be affected with notice of that fact. Mertins v. Jolliffe, Amb. 311. Equally apparent is it that there is no foundation for the finding by the master "that the parties to said mistake can be put in statu quo, no other rights having attached in the meantime," as the petition and answer show that the executor filed an account of his administration of the estate which included the sum paid by Conway to McDevitt; that the account was finally confirmed and distribution made in June, 1902; and that the fund realized by the sale of the property to Conway was distributed as part of the testatrix's residuary estate and passed to the trustee for the legatees nearly six years prior to the commencement of these proceedings. The master's findings of fact are in conflict with the evidence, and with their disappearance his conclusions must likewise fall. It may be that both parties to the deed were ignorant of the law, but, with the full knowledge of the facts which the pleadings show they had, that of itself is no ground for equitable relief. Norris v. Crowe, 206 Pa. 438, 55 Atl. 1125, 98 Am. St. Rep. 783. And there are no special circumstances or facts in the case at bar that will aid the purchaser's ignorance or mistake of the law in moving a chancellor to grant the relief prayed for in the peti-

Under the undisputed facts disclosed by the evidence, the orphans' court had no power to set aside the sale and direct repayment of the purchase money to the executor. Such power would not exist in the orphans' court if this had been a sale made in pursuance of its own order. In such cases the court unquestionably has the authority to control the sale and protect a purchaser,

a proper time and under a state of facts which will justify the exercise of the equitable powers of the court. In De Haven's Appeal, 106 Pa. 612, 614, Green, J., delivering the opinion of the court, says: "Had the purchaser (of real estate at an administrator's sale) bought in the absence of any interference, or inducements held out by the administrator to persuade the appellant to buy, the maxim of caveat emptor would certainly have applied, and we would probably not have felt justified in reviewing the refusal of the court below to set aside the sale, So, also, if the sale had been confirmed, purchase money paid, and deed delivered, the transaction would be regarded as closed and beyond the reach of the courts. But here the application for relief was made to the orphans' court which had ordered the sale before the sale was confirmed, and while the whole matter was yet within the control of the court." In such a case the orphans' court retains control over the sale even until after its confirmation, but, as indicated in Justice Green's opinion, it will not exercise its authority to grant relief to a purchaser in the absence of fraud and after he has paid the purchase money and received his deed. There must be an end to such proceedings, and, if a purchaser desires to relieve himself of a defective title, he must exercise diligence in ascertaining the defect and invoking the aid of the court to afford him protection. The law requires reasonable diligence in a purchaser to ascertain any defect of title (Brush v. Ware, 40 U. S. 93, 10 L. Ed. 672), and, when once ascertained, he must exercise a like diligence in asserting his right to have the sale set aside. The purchaser here appeals to the equitable powers of the court, and they are never called into activity except by conscience, good faith, Smith v. Clay, and reasonable diligence. 3 Bro. C. C. 639, note.

We need not discuss or determine the extent of the powers of the orphans' court in setting aside a sale made by an executor in pursuance of a power contained in the will. We have held that in a proper case the orphans' court has power to review, set aside, and, if necessary, to order a resale of real estate made under a testamentary power. Dundas's Appeal, 64 Pa. 325. But a sale under a power in a will need not be confirmed by the court, nor is any order of court necessary to authorize the executor to convey. No decree can properly be made upon a conveyance by an executor or trustee under a power conferred by will unless the aid of the court is required to supply some omission in the terms of the instrument cre-

but that authority must be invoked within ating the power. Schwartz's Estate, 168 Pa. 204, 31 Atl. 1085. It may well be assumed, however, that the authority of the orphans' court to set aside a sale made in pursuance of a testamentary power is not more extensive than that exercised by the court over a sale made in pursuance of its own order. It is clear, as pointed out above, that, had this sale been made by a personal representative in pursuance of an order of the orphans' court, that court would have refused, under the circumstances of this case, to set aside the sale or to order the repayment of the purchase money. Conway is affected with notice of the title which his own deed disclosed; and, when he accepted the title, took possession of the premises, and retained them for more than five years, he cannot be permitted to attack the title and compel the executor to repay the purchase money. When he accepted the deed, he knew all. that he knows to-day in regard to the title. The facts were all before him, and, notwithstanding the finding of the master, Conway was not ignorant of or mistaken as to the facts in the chain of the title which the executor conveyed. The deed itself convicts the master of error in this respect, and . shows that in 1902 Conway was in full possession of all the facts relative to the title, of Mrs. Mulholland to the property which. her executor conveyed.

In addition to having accurate knowledge of the facts which would deprive him of the right to any relief in the orphans' court at: this time, the money which Conway now; seeks to have returned to him was charged. to the executor in the account which hefiled and was distributed in 1902 to the legatees as directed in the testatrix's will. Aside from any other reason, this of itself is an insuperable objection to the return of the money by the executor. He has disposed of it as directed in the will by order of the orphans' court, and he cannot now be required to refund it. As appears by the order, of the court awarding distribution, quoted above, the money is not now held by the executor for administration, but in trust for the beneficiaries named in the will of the decedent. It is not in the power of the trustee to refund it to the executor for the purpose of repayment to the purchaser of: the real estate. If the orphans' court had authority to compel the repayment of the money to Conway, it is now too late to invoke The facts of this case do not warrant any interference by the court with the sale made by the executor to Conway.

The decree of the orphans' court is reversed, and all the proceedings are set aside at the costs of the petitioner.

(224 Pa. 618)

FINK et uz. v. WILKES-BARRE & W. V. TRACTION CO.

(Supreme Court of Pennsylvania. May 10, 1909.)

STREET RAILEOADS (§ 117*)-INJURY TO CHILD ON TRACK-EVIDENCE.

In an action against a street railway com-any to recover for death of child on track, evidence held to sustain order for nonsuit.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 117.*]

Appeal from Court of Common Pleas, Luzerne County.

Action by Tavia Fink and wife against the Wilkes-Barre & Wyoming Valley Traction Company. From an order refusing to take off a nonsuit, plaintiffs appeal. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and ELKIN, JJ.

James L. Lenahan, for appellants. Frank A. McGuigan, Paul Bedford, and John T. Lenahan, for appellee.

FELL, J. The plaintiffs' child, three years old, was run over by a car of the defendant company on a business street near the center of the city of Wilkes-Barre. None of their witnesses saw the accident, and it was not shown how it happened. The only testimony produced that had any bearing on the circumstances connected with the accident was that of two witnesses. One of these, a woman, was at the time sitting at a second-story window, and saw the child on the street, saw the car coming, and tried to attract the attention of the motorman and of a woman on the street by calling. It did not appear how near the car was to the child, and there was nothing in her testimony that showed negligence in the management of the car. The other witness was a salesman, who was waiting on customers in the second story of a furniture store. He testified that he saw the child between the rails of the west track 60 feet north of the store. At that time no car was in sight, and he could see south, the direction from which the car came, 150 feet. About half a minute later he saw a car on the east track passing the store. There was not the slightest proof of what the child did after the time he was seen on the west track before the car came into sight. The car stopped within its length after the child had been struck and before the rear wheels had reached him.

It was essential to the plaintiffs' case that there should be affirmative proof of some act of negligence by the motorman. In the absence of all proof upon the subject, the presumption that he exercised due care will prevail. There was nothing in the circumstances shown that would warrant an inference of negligence, and a nonsuit was properly entered. In Woeckner v. Erie Electric Motor Co., 176 Pa. 451, 35 Atl. 182, relied on by the

the curb 25 feet from the track on an unobstructed street and advance towards his car, and he had full knowledge of the danger in time to guard against it.

The judgment is affirmed.

(224 Pa. 610)

LEWITZKY v. SOTOLOFF.

(Supreme Court of Pennsylvania. May 10, 1909.)

TENANOY IN COMMON (§ 15°)—ADVERSE POS-SESSION—EVIDENCE.

The possession of one tenant in common is prima facie the possession of his co-tenant, and mere proof that the tenant in possession re-ceived the profits without accounting to his co-tenant will not sustain a claim of adverse possession.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 42-52; Dec. Dig. §

Appeal from Court of Common Pleas, Philadelphia County.

Action by Simon Lewitzky against Barnet From an order making absolute Sotoloff. rule for judgment for want of a sufficient affidavit of defense, defendant appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, ELKIN, and STEW-ART, JJ.

J. B. Colahan, Jr., for appellant.

FELL, J. This action is on a contract in writing to recover the purchase price of real estate sold by the plaintiff to the defendant. It is averred in the affidavit of defense that the title tendered by the plaintin was not a marketable title to the whole property, and the following facts are set out as a basis of the averment: By sundry conveyances Chas. D. Freeman acquired title to fourteen-fifteenths of the property in 1880 The title to the remaining one-fifteenth was never acquired by him or by any one in the chain of the plaintiff's title, but is outstanding in one Ailes. Freeman entered into possession of the property in 1880, and remained in uninterrupted possession and collected all the rents thereof until his death in 1890. The devisees named in his will were in possession and collected the rents until 1907, when the property was sold under proceedings in partition to the plaintiff. Neither Mr. Freeman, nor his devisees, nor the plaintiff, ever accounted to Ailes for the rents, issues, or profits of the property.

The affidavit undoubtedly would have been good if it had stopped with the statement that the plaintiff did not own all the property he sold and that the title to one-fifteenth thereof was in Ailes. The proof of the averments made as to possession and the receipt of rents without having accounted therefor would not be sufficient to establish the plainappellants, the motorman saw the child leave tiff's title as against Ailes. A claim of ex-

eFor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that one tenant in common has entered upon the whole land and taken possession of and occupied the whole, claiming it as his own and taking the profits exclusively as his own for 21 years without acknowledging the claim of his co-tenant; but the possession of one tenant in common is prima facie the possession of his co-tenant also, and mere proof of the receipt of profits without accounting therefor will not sustain a claim of ouster or adverse possession. Susquehanna, etc., R. R. & Coal Co. v. Quick, 61 Pa. 328; Rohrbach v. Sanders, 212 Pa. 636, 62 Atl. 27. The admissions in the affidavit of defense were far short of the measure of proof required, and were insufficient to establish the plaintiff's title to one-fifteenth of the property sold.

The judgment is reversed, with a procedendo.

(224 Pa. 487)

CONSOLIDATED ICE CO. v. PENNSYL-VANIA R. CO.

(Supreme Court of Pennsylvania. April 19, 1909.)

Eminent Domain (§ 147*)—Condemnation of Leasehold—Improvements—Damages.

A railroad company, after acquiring a fee in leased premises, filed a bond to condemn the unexpired term of the lease, and notified the lessee to remove the improvements. On his refusal to do so the company sold the improvements after advertisement. Held, that the lessee could recover the railroad the lessee could be recovered to the lessee could be recovered to the lessee to the lessee could be recovered to the lessee to the provements after advertisement. Held, that the lessee could recover the value of the lease-hold interest, including the use of the improvements, and the amount which the company received from the sale of the improvements it made, after proper effort to secure the best price for the property.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 895; Dec. Dig. § 147.*]

Appeal from Court of Common Pleas, Allegheny County.

Action by the Consolidated Ice Company against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

The defendant presented the following

"(1) As to the value of the ice plant and machinery after removal, the measure of damages, where an opportunity of removal has been given to the owner, of which he has not availed himself, is the price which the railroad company obtained for the property after removal. The evidence being undisputed that such notice was given and such resale had in this case, in good faith, by the defendant company, the price obtained in this manner is conclusive upon the plaintiff. Answer: Refused.

"(2) As to machinery and plant in place, the measure of damages is the difference between the value of such machinery and , plant at the time of taking and their value value varies from the testimony of Mr. Me-

clusive right may be established by proof at the termination of the lease. In other words, the act of the defendant having shortened the term of the lease and anticlpated the period of removal, the plaintiff is entitled to recover the amount which represents the use or deterioration of the machinery, etc., during that period, without allowance of the items of repair work as such, as repairs, never having been made, should not be compensated for. Answer: Refused."

The court charged in part as follows:

"There is just one other question which has been urged strongly on both sides of this case, and for your purposes I will instruct you as to your disposition of it. The plaintiff company had the right of removal of the buildings and fixtures, all the improvements on the leasehold at its termina-It was not bound to remove them. What I mean by that is that there was no obligation upon the plaintiff to clear off the land when its lease expired. But, if it considered the improvements on the land of any value, it had the right to remove them or the right to leave them there, just as it saw fit. There is a question here as to whether or not, if these fixtures and improvements had a value and the plaintiff desired to avail itself of that value, it should have taken away the property. I charge you in this case that it was not the duty, but it was the privilege, of the plaintiff to take away its fixtures when this lease was condemned; and, whatever value they had, they belonged to the plaintiff, if it wanted to take them away. The plaintiff did not take them away: and the defendant, the Pennsylvania Railroad Company, disposed of them. defendant, in disposing of them and receiving money for them, would have to account for them, because it sold something that did not belong to the defendant. It would have to account for them in good faith. It advertised them for sale. It assumed to sell property which, under the law as I have instructed you, did not belong to it; and therefore in good faith it must account for it. It must act all the way through in good faith. It was, not technically, but in substance, the trustee, because of assuming to take charge of property that did not belong to it and sell it, and it must act throughout in good faith and account for what it got. If it did that, that is the measure of its responsibility, and it could not be held to more. There is some controversy here as to whether the defendant got what it should have reasonably gotten for these improvements that were on the leasehold. If I recollect aright, the testimony is undisputed that so far as the building was concerned it was not worth anything to remove. It would cost all the material was worth to remove it. But the evidence is conflicting as to what the machinery was worth.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Afee, who, I think, put its value at about \$65,000, to \$5,000 given by other witnesses.

"Now, gentlemen, this case is not without some difficulty on your part. It is a case which requires your careful consideration. It is not a case like most cases where witnesses testify to a positive fact and you simply take the testimony and determine the There is considerable more in this case. You must take the testimony and apply to it your own judgment in the matter. You must exercise a very large amount of intelligent judgment in disposing of this testimony. You must determine what was the value of this leasehold. And, in order that I may not be misunderstood, I want again to tell you that this leasehold consisted of the land as you have heard it described, the buildings erected upon it, and the fixtures, consisting of the machinery, coils, pumps, wells and all other items which you have heard testified to here going to make up this ice plant, with the electric light plant or any other permanent fixtures on the place.

"Again, we have permitted both parties to show the value in place and the removal value; that is, the value of these fixtures after they were taken away. Not that the plaintiff can recover as such the value of its machinery as a separate and distinct item; but it aids you in determining the main question in the case, to ascertain what the fixtures on this leasehold were, and what was the purpose for which they might be used, and what was their value in the market."

Verdict and judgment for plaintiff for \$117,687.

Argued before FELL, BROWN, MESTREZAT, POTTER, and STEWART, JJ.

Patterson, Sterrett & Acheson, for appellant. John S. Ferguson, for appellee.

MESTREZAT, J. By a lease dated April 1, 1891, Mary E. Schenley let to the executors of James Rees, deceased, an irregular shaped lot of ground fronting on Duquesne Way, in the city of Pittsburg, for the term of 20 years, for the annual rent of \$1,250 for the first 10 years and \$2,150 for the second 10 years. The taxes and assessments on the premises were payable by the lessees, and they had the privilege of removing improvements erected by them at the termination of the lease. The interest of the lessees in the premises subsequently became vested in the Consolidated Ice Company, the plaintiff in this action. At the date of the lease there was upon the lot a twostory brick building, occupying the whole -premises, open in the interior, and with a sort of gallery around and skylights above. The building had been used previously as a boiler works. The ice company erected a frame building on the premises, within and disconnected from the surrounding walls of the brick building, and in 1890 installed in

the building all the machinery necessary to equip an ice-manufacturing plant. It had a rated capacity of 155 tons of ice every 24 hours, and the product was disposed of in the district adjacent to the plant. Pennsylvania Railroad Company, the defendant, having acquired the fee in the lot, filed its bond, which was approved by the court, and on March 11, 1905, began condemnation proceedings to acquire the interest of the ice company in the premises. Before entry on the premises the defendant, on May 24, 1905, notified the ice company to remove its improvements from the premises; but on June 5, 1905, the ice company advised the counsel for the defendant company that it would not remove any of the machinery and fixtures, and that the defendant might dispose of the same as it saw fit. The defendant company thereupon, after advertising in the newspapers of the city of Pittsburg and seeking to find a bidder, sold the machinery and fixtures to a contractor for \$2,800, for which the defendant is willing to account to the plaintiff.

The trial of the cause in the court below resulted in a verdict and judgment for \$117,687 in favor of the plaintiff company, and the defendant has taken this appeal. The assignments of error raise substantially but one question, and that is as to the correctness of the court's rulings on the measure of damages. The learned judge of the court below instructed the jury that the leasehold, which was the subject of the condemnation proceedings, was the land, the buildings, and the fixtures constituting the ice plant, and that the loss sustained by the plaintiff company was the market value of its leasehold The defendant company alleges interest. that the court erred in its rulings as to the elements of damage represented by the value of the machinery and fixtures in place, and by the removal or wreckage value thereof. The defendant concedes that the measure of damages in case of an ordinary leasehold is the amount that any one would pay for the unexpired term over and above the rent and other charges, and that where the leasehold is improved with heavy fixtures and machinery, as here, the use value of the fixtures and improvements to the tenant for the balance of the term is also an element to be considered in ascertaining the value of the leasehold. The defendant company denies the right of the plaintiff company to recover the value of the machinery and fixtures in place, and contends that their only element of value was the use the plaintiff company could make of them until the term expired and their removal took place. The defendant further contends that the plaintiff company had abandoned its machinery and fixtures after it had notice and opportunity to remove them, and that the most it was entitled to receive for them was what the defendant company had received for them.

The plaintiff was entitled to recover in this

proceeding the value of its leasehold interest, including the use of the improvements it placed on the demised premises, for the unexpired six years of the term. Of course, this does not include estimated profits of future trade or business, or other supposed consequential injury. Pennsylvania Railroad Co. v. Eby, 107 Pa. 166. The plaintiff company was paying as a rental for the premises \$2,150 per annum and the taxes on the property, but this rental did not include compensation for the ice plant. As between the lessor and lessee, the leasehold was simply the lot and the structure thereon at the time the premises were let. The rental paid the landlord was compensation for the use of that Subsequently to the letting, the property. lessee constructed its ice plant, with the express reservation in the lease of the right, but without the obligation, to remove it at the expiration of the term. Therefore, in estimating the damages sustained by the plaintiff company, the jury should consider, not only what the leasehold proper was worth over and above the rental and other charges paid by the lessee, but the value of the leasehold as improved by the ice plant. In other words, the loss resulting to the plaintiff company is the difference between the value of the leasehold, as improved by the ice plant, for the unexpired term, and the rental and other charge's payable by the lessee. This, as is apparent, would include the use of the fixtures and machinery by the tenant, as well as the use of the demised premises for the residue of the term. The value of the leasehold proper for the unexpired term would be what the premises would be worth for any purpose for which they could reasonably be used over and above the rental and other charges payable by the lessee. To this must be added the use value of the machinery and fixtures until the expiration of the lease. These are not substantive elements of damage, but are for the consideration of the jury in estimating the plaintiff company's loss by being deprived of the residue of the term. Clearly the plaintiff was not entitled to have considered in ascertaining the value of the leasehold, or to recover as an element of damage, the value of the machinery in place at the time of the institution of the condemnation proceedings. By the terms of the lease, the plaintiff company had the right, at the expiration of the term, to remove the machinery and fixtures placed on the premises by the lessee. They belonged to the plaintiff, and were subject to its control and disposition, and it they had any value, and the company so desired, it could have removed them when the lease was determined by the action of the defendant. The filing and approving of the bond did not prevent this. It did not deprive the plaintiff of the ownership of or the right to remove the property, and the

to appropriate it, and gave notice and an opportunity to the plaintiff to remove it from the Schenley premises. The appropriation by the defendant determined the lease; but it did not take the fixtures and machinery placed upon the demised premises by the lessee. Hence it was error to allow the jury to consider the valuation placed by the witnesses on the fixtures and machinery in place as an element of value in estimating the loss sustained by the plaintiff by the appropriation of its lease.

The filing of the bond by the railroad company was not, as we have seen, an appropriation of the improvements by the company, imposing liability for their market value. The title to the property was still in the plaintiff, and, having received notice and an opportunity to remove it, the plaintiff company should have severed and disposed of it. However, as the defendant sold the fixtures and machinery, and received the proceeds of the sale, it should account to the plaintiff for their value. It concedes its liability to the extent of the amount received. In determining the value, the jury should consider the fact that the plaintiff had the right to sever and remove the property, and that the cost or expense thereof should not be placed upon the defendant. The failure to exercise the right of removal and disposition of the property by the plaintiff required the defendant to dispose of it, and it is responsible to the plaintiff company only for the amount it received from the sale of the property after having made a proper and bona fide effort to dispose of it to the best advantage. The defendant alleges that it in good faith attempted to realize the best price for the property by advertising and making other efforts to secure purchasers. If the jury should find this to be true, then the amount which it received for the property would be the value of it, for which the defendant would have to account to the plaintiff. If, on the other hand, the jury should be convinced by the evidence that the action of the defendant company was not such as to obtain for the property its fair market value, then the jury must find under the evidence what the value of the property was at the time the leased premises were appropriated by the company.

So far as the matters complained of in the assignments of error are in conflict with this opinion, the assignments are sustained, and the judgment is reversed, with a venire factas de novo.

(224 Pa. 575)

MANNING v. BADER et al. (Supreme Court of Pennsylvania. May 10. 1909.)

1. WILLS (§ 614*)—CONSTRUCTION—LIFE ERTATE.

deprive the plaintiff of the ownership of or the right to remove the property, and the defendant company disclaimed any intention of his deceased son, and after her death to her children, it vests a life estate in the widow, though she had no children when the will was made, or when it went into effect.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1403; Dec. Dig. § 614.*]

2. WILLS (§ 497*) - CONSTRUCTION - "CHIL-DREN.

a word of purchase, and not of limitation, and will not be construed as a word of limitation, unless there is found in the will an intent so to use it. The word "children," as used in a will, is

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1080; Dec. Dig. § 497.*

For other definitions, see Words and Phrases, vol. 2, pp. 1139-1140; vol. 8, p. 7601.]

Appeal from Court of Common Pleas, Lehigh County.

Action by Almeda Manning against Caroline Bader and Amanda Bader. Judgment for plaintiff, and defendants appeal. firmed.

Argued before FELL, BROWN, MESTRE-ZAT, POTTER, and STEWART, JJ.

Arthur G. Dewalt, for appellants. Marcus C. L. Kline and Edwin K. Kline, for appellee.

PER CURIAM. The devise was "* to Cecilia Hittle, the wife of my deceased son, Elias Keiper, the lot where I am now living. * * * After the death of Cecilia, the above-described lot shall go to her children."

Prima facie the word "children" is a word of purchase, and not of limitation, and. standing alone, without qualification, it must be given its ordinary meaning. It will not be construed as a word of limitation, unless there is found in the will an intention so to use it. That the first taker had no children when the will was made, or when it went into effect, does not warrant such a construction, where the gift to the children is not immediate, but by way of remainder. Cote v. Von Bonnhorst, 41 Pa. 243; Curtis v. Longstreth, 44 Pa. 297; Keim's Appeal, 125 Pa. 480, 17 Atl. 463; Lancaster v. Flowers, 198 Pa. 614, 48 Atl. 896.

We find nothing in the other parts of the will that indicates an intention to use the word "children" as a word of limitation.

The judgment is affirmed.

(224 Pa. 615)

BISTIDER V. LEHIGH VALLEY R. CO. (Supreme Court of Pennsylvania. 1909.)

RAILBOADS (§ 328*)—CONTRIBUTORY NEGLI-

GENCE—ACCIDENT AT CROSSING.

Where deceased, who was familiar with a railroad crossing, stopped at a point where he could not see the track on account of standing cars, and failed to go elsewhere to a point where he could have seen an approaching train, and was killed in crossing, his representative could not recover therefor.

[Fd. Note.—For other cases, see Railroads, Cent. Dig. § 1057; Dec. Dig. § 328.*]

Appeal from Court of Common Pleas, Luzerne County.

Action by Susan Bistider against the Lehigh Valley Railroad Company. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and ELKIN, JJ.

M. J. Mulhall, for appellant. Darling & Woodward, for appellee.

FELL, J. The plaintiff's husband was killed at a grade crossing of the defendant's road, with which he was familiar, where there were two main tracks and a siding. A train of some 50 empty coal cars stood on the siding, and the rear end of the train was within 15 or 20 feet of the crossing. These cars cut off entirely from a driver seated in his wagon a view of the main tracks to the south, the direction from which the train came. When about 10 feet from the siding the deceased stopped his horses and stood on the footboard at the front of his wagon and looked south. At this place he could by standing on the footboard see over the top of the last two cars of the standing train, which were lower than the other coal cars, and thus have a view of the main tracks for a distance of from 60 to 85 feet. At a point 10 feet nearer the track he could have had a clear view in either direction for more than a mile. His horses were struck by the engine of an express train as they were crossing the nearer main track. A nonsuit was entered on the ground that the deceased stopped where he could not see, and failed to go forward to a point from which he could have had a clear view of the approaching train.

The facts proved by the plaintiff left no ground for the application of the rule that, when a traveler has stopped at the usual place for stopping from which a view of the tracks could be had, it is not for the court to say as a matter of law that there was negligence in not stopping at another and better place. The case presented was that of a driver at a railroad crossing with which he was familiar, who stopped where, because of a temporary obstruction, he could not see, and who drove on without having looked from a point where he could have seen. This was not a compliance with the rule which imposed on him the fixed duty to stop, look, and listen. Stopping where he could not see was little better than not stopping at all, and it was not an observance of the duty the law imposes. Kintner v. Penna. R. R. Co., 204 Pa. 497, 54 Atl. 276, 93 Am. St. Rep. 795; Mankewicz v. Lehigh Valley R. R. Co., 214 Pa. 386, 63 Atl. 604.

The judgment is affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(224 Pa. 570)

In re YOUNG'S ESTATE.

(Supreme Court of Pennsylvania. 1909.) May 10,

WILLS (\$ 687*)—TERMINATION OF TRUST-

WILLS (§ 687*)—TERMINATION OF TRUST—DISTRIBUTION OF SURPLUS.

Testator died in 1785, and left certain ground to trustees for a family burial ground, but left no fund for its care. The lot fell into disuse and was valuable for other purposes. The orphans' court decreed its sale, and ordered a portion of the money to be used in buying a lot in an established cemetery, and a portion in removing the dead and marking the graves in the new lot, and a certain sum to be expended to provide for the perpetual care of expended to provide for the perpetual care of the property. *Held*, that a division of the re-mainder among the heirs of the testator was proper.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1639; Dec. Dig. § 687.*]

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of William Young, deceased. From a decree dismissing exceptions to adjudication, Henry K. Leech and Isaac L. Glascoe, substituted trustees, appeal. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER,

ELKIN, and STEWART, JJ.

Lewis Lawrence Smith, for appellants. John C. Hinckley and Robert H. Hinckley, for appellees.

POTTER, J. The appellants in this case are substituted trustees under the will of William Young, who died in 1785. By his will he placed a tract of ground in trust for all his heirs and their families and descendants, to be used as a family burying ground. A portion of this ground was actually so used. No funds were given to the trustees to enable them to maintain the burying ground. It fell into disuse, and as the city grew around it the ground became valuable for other purposes. Under the provisions of the Price act the land was sold for \$25,000, and under the decree of the orphans' court the trustees purchased a suitable lot in Arlington cemetery and removed the bodies which were in the old burying ground to the new resting place. An agreement was made with the cemetery company to provide for the perpétual care of the plot, and the orphans' court has allowed the sum of \$3,500 to be expended in properly marking the graves. After these matters were all provided for, there remained a sum, amounting to about \$10,000, which the orphans' court directed should be distributed among the heirs of William Young. Exceptions filed by the trustees to the distribution were overruled, and they have taken this appeal.

We agree with the auditing judge in his statement that there seems to be no good and sufficient reason why distribution should not be made. The duties of the trustees are at

any standing to object to the distribution. Certainly the trust will not be maintained for the benefit of the trustees. Nor can we say that the auditing judge was wrong in refusing to make an allowance for a separate and elaborate monument to the founder, William Young. No provision for anything of the kind was made in the will of the testator. The amount allowed for markers for all the graves was liberal, and the court below was apparently of the opinion that no need was shown for a more elaborate monument at the grave of William Young than at the others in the plot. We do not feel called upon to interfere with the discretion thus exercised.

The specifications of error are overruled, and the decree of the orphans' court is affirmed.

(224 Pa. 597)

MOSIER v. WOLVERTON et al.

(Supreme Court of Pennsylvania. 1909.)

TRIAL (\$ 328*) - JOINT VERDICT - SEPARATE ACTIONS.

A person brought three several actions for assault against three separate defendants. It was stipulated that the cases should be tried together, and that the jury should render a verdict in each of the three cases "separately with respect to the liability" of each defendant. Held error to permit the jury to render a ver-dict for a single amount against the three de-fendants, and to order judgment thereon in favor of plaintiff against them jointly.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 772; Dec. Dig. § 328.*]

Appeal from Court of Common Pleas, Philadelphia County.

Actions by H. Cassale Mosier against Runyon Wolverton, against Charles R. Hamilton, and against Florence W. Hamilton. Verdict for plaintiff, and defendants appeal.

In disposing of a motion for a new trial, Wiltbank, J., of the court below, filed the following opinion:

"This was a second trial. The sixth, seventh, eighth, and ninth reasons for a new trial have been considered together, and will be disposed of as growing out of one circumstance, which was the request of the parties plaintiff and defendants, through their counsel, when the cases were called for trial, and after the jury had been sworn as to the defendant Charles R. Hamilton, that the jury be sworn as to the two other defendants jointly with Charles R. Hamilton, and the cases be tried as one. The jury was accordingly sworn to try the issue between the plaintiff and the three defendants together. Three actions had been brought, growing out of an alleged assault and battery upon the plaintiff by a man, his wife, and his wife's brother, in a room of the house of the first named, which had been assigned to the plainan end. It is not clear that the trustees have I tiff as a governess or attendant of a child of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the family. The persons engaged, the time, and the place were the same. Two of these actions had been instituted in this court, and a third in the court of common pleas No. 3, from which it was later certified to us; and the three cases appeared consecutively on the trial list on Monday, November 2, 1908, on a special order for trial.

"When the case closed no points were presented on the part of the defendants bearing upon the subject of the four reasons for new trial we are considering, the court charged the jury upon the assumption that the defense was urged by the group of three, and not by separate members of that group, the instructions purposely discussed the defendants as a joint body, and the jury found one verdict as against the group, which was accepted and recorded. No exception was taken to the form of the verdict before it was entered, nor was any motion made that the jury be further instructed and sent out to determine if any, and what, part of the damages awarded should be charged to one or more of the defendants separately, so that the general finding should not bear upon all indifferently. The record stood thus until the presentation of the bill of exceptions, when for the first time the trial judge was informed that two papers had been filed by counsel, of their own motion, some time before the trial, and that the disregard of these by him had been error involving a mistrial, notwithstanding the concession that he had known nothing of them till thus apprised, and that the defendants might at any stage of the trial have called attention to them, as especially within their knowledge.

"The substance of these papers was as follows: On May 4, 1905, the plaintiff and Runyon Wolverton and Charles R. Hamilton, two of the defendants, agree that their cases shall be tried together, if reached, as of May 10, 1905, the jury by its verdict 'to find separately with respect to the liability of each of the defendants.' The trial judge assumed that the three were to go to the proofs and the jury separately, and, as already stated, he directed that the panel be sworn in one only. This was done, and immediately thereupon application was made that the jury be sworn in all three together. and this colloquy was had, and noted by the official stenographer:

"'Counsel for plaintiff and defendants move the court that these three cases be tried together.

"'The Court: Do you agree to that?

"'Mr. Shields: Yes, sir.

"'Mr. Monihan: Yes, sir; we agree."

"During the trial there arose an argument as to the competency of a question of counsel, and this colloquy was had, which likewise was noted by the official stenographer:

"'Mr. Shields: Will your honor allow me to have these objections noted as of record in the Wolverton case?

three cases, so that an exception here goes to all three.

"'Mr. Monihan: Exceptions, so far as the injuries to the abdomen are concerned, cannot affect the case of Mr. Wolverton and Mrs. Hamilton.

"'The Court: We are trying three cases-Every ruling I make applies to the three cases. If it is error as to one, it may be corrected as to the other two. You cannot tell. You are simply bound by it. If Mr. Shields feels. I have made a mistake in ruling as to one man, he cannot object if it is applicable to the other two; and so with you.

"This was assented to. On June 25, 1907, the plaintiff and Runyon Wolverton and Florence W. Hamilton, two of the defendants, agreed that 'their cases shall be tried together when the first-named case is reached'-the case against Wolverton-the jury by its verdict to find separately with respect to the liability, if any, of each of the defendants.'

"Our conclusions are that the convention of the parties could not make these papers a record without the sanction and order of the court; that without such allocatur the course of our practice under the common law and our statutes could not be effected in this manner by private arrangement of litigants between themselves; that on careful examination the papers will be found inconclusive upon the point now urged by the defendants, and inapplicable to the last trial, even if for purposes of argument they are regarded as more than nullities. The paper first named refers to a trial as May 10, 1905, and the other refers to the time when 'the first-named case' should be reached, even contemplating a trial which took place before that now under review. And, finally, in no one of these instruments are all the actions named together. The only united agreement of the three defendants with the plaintiff was reported orally to the trial judge after the jury had been initially sworn as already narrated, and this made no stipulation whatever for a separate verdict. The entry of the verdict on the trial list and the docket was of no significance; those books not being records of the court.

"We have, then, the case of joint tortfeasors, and our judgment may be entered as in such cases. We do not deem it necessary to file an opinion upon the other reasons for a new trial presented by the defendants.

"Rule discharged."

The facts are stated in the opinion of the Supreme Court. Verdict and judgment for plaintiff for \$2,500. Defendants appealed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, ELKIN, and STEW-ART, JJ.

A. S. L. Shields and Samuel M. Clement, Jr., for appellants. Henry J. Scott and James L. Monihan, for appellee.

MESTREZAT, J. H. Cassale Mosier brought "'The Court: This testimony is in all an action of trespass for an assault and bat-

tery against Runyon Wolverton to June term, | and that judgment was subsequently enter-1904, of the court of common pleas No. 2 of Philadelphia county. She also brought a similar action against Charles R. Hamilton to June term, 1904, of the court of common pleas No. 5 of Philadelphia county. Pleas were duly filed and both cases were put at issue on the pleadings in the respective courts. On May 4, 1905, by a writing signed by counsel for the parties, it was agreed that the cases should be tried together, when reached in the court of common pleas No. 2, "the jury by its verdict to find separately with respect to the liability of each of the defendants."

The plaintiff in the above actions brought another suit in trespass for an assault and battery committed on the same occasion against Florence W. Hamilton to June term, 1906, in the court of common pleas No. 3 of Philadelphia county, which was subsequently put at issue by a proper plea in that court. On June 25, 1907, by a writing signed by counsel for the parties, it was agreed that this ease should be tried with the case of Runyon Wolverton, when that case was reached in the court of common pleas No. 2, "the jury by its verdict to find separately with respect to the liability, if any, of each of the defendants." It thus appears by the stipulation of counsel for the parties filed of record that the three cases were to be tried together in the court of common pleas No. 2 and that the jury was to render a verdict in each of the three cases, "finding separately with respect to the liability of each of the defendants."

The cases were called for trial in common pleas No. 2 on October 21, 1908, but were continued; the court making an order that "the three issues involved in the cases entitled as above" should be tried on November 2, 1908. On the last-named day the cases were again called for trial, when the minutes of the court show the following to have occurred:

"Counsel for plaintiff and defendants move the court that these three cases be tried together.

"The Court: Do you agree to that? "Mr. Shields: Yes, sir.

"Mr. Monihan: Yes, sir; we agree."

The trial of the three causes proceeded. and resulted in a "verdict for plaintiff for \$2,500," without any separate verdict being rendered in the three cases. A motion for a new trial was made by the defendants, which was subsequently discharged, and the court directed that judgment be "entered in favor of the plaintiff and against the defendants in the sum of \$2,500." In the case against Charles R. Hamilton the docket entries show, as of November 5, 1908, a "verdict for plaintiff, \$2.500," and subsequently the entry of judgment on the verdict. In the case against Wolverton the docket entries of November 5, 1908, show the follow-

ed on the verdict. The docket entries in the case against Florence W. Hamilton are the same as those in the Wolverton case.

An appeal has been taken in each case by the defendant. The only assignment that need be considered is the one alleging error in the entry of judgment against the parties. It is clear that the learned trial judge misapprehended the intention of the parties, as well as their agreement, when he permitted a single verdict "for the plaintiff" in the trial of the three causes, and in not directing the jury to return a separate verdict in each case. The court, in receiving the verdict and entering judgment, treated the three causes as having been consolidated into one and tried as such; whereas the record discloses that the parties at no time intended that the cases should be consolidated into one cause, or tried as one cause. As suggested in the appellee's brief, "the whole affair [out of which the actions arose] occurred within a short space of time and was one continuous transaction"; but, instead of regarding the defendants as joint tortfeasors and bringing one action for the assault and battery, the plaintiff elected to separate them, and brought three distinct and separate actions against the three defendants. Separate pleas were filed and separate issues framed in the cases, and it was agreed "that these three cases be tried together," and not as one cause brought by the plaintiff against the three parties as joint tort-feasors. The plaintiff gave no indication that he intended that the three cases should be consolidated, and that one verdict and one judgment should be entered against the three parties jointly. No such intention appears in any of the proceedings until the court permitted a single verdict and entered a joint judgment thereon. This was not permissible under the pleadings, nor by any agreement of the parties disclosed by the record. During the trial of the causes the court recognized that they were separate actions being tried together. On one occasion the judge, in making a ruling, said: "This testimony is in all three cases, so that an exception here goes to all three." Again the learned judge said: "We are trying three cases. Every ruling I make applies to the three cases. If it is error as to one, it may be corrected as to the other two."

Notwithstanding the contention of the appellee to the contrary, the records disclose a judgment entered in each case in the sum of \$2,500. The record will not support these judgments. The verdict returned by the jury was "for the plaintiff," which entitled the plaintiff to a judgment against each of the defendants in the separate actions. The order, however, made by the learned trial judge, directed one judgment on the verdict in favor of the plaintiff and against the defendants jointly. This could not be done on ing: "For verdict C. P. 2, J. '04, 2516"- the verdict rendered, which required a sepgrate judgment to be entered against the ble for the injury that plaintiff received. three defendants in the several cases. We concede, as was admitted on the argument, that it was not the intention that a judgment for \$2,500 should be entered against each of the defendants. In fact, the statement in the case against Florence W. Hamilton claims only \$1,000. Of course, there was no authority for the prothonotary entering the judgment, as the docket entries disclose he did, against each of the defendants for \$2,500. The order of the court was that a judgment should be entered in favor of the plaintiff against the three defendants jointly for that sum. This was error, which requires a reversal of the judgment in the three several causes.

The judgment in each of the cases against Runyon Wolverton, Charles R. Hamilton, and Florence W. Hamilton is reversed, and a venire facias de novo awarded.

(224 Pa. 633)

RILEY et al. v. PITTSTON COAL MIN-ING CO.

(Supreme Court of Pennsylvania. May 17, 1909.)

1. MASTEE AND SERVANT (§ 228*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where a boy 17 years of age attempts to oil dangerous machinery while in motion, and is injured, he is guilty of contributory negligence, under Act June 2, 1891 (P. L. 188) art. 5, § 8, forbidding any person oiling dangerous parts of machinery while in motion.

[Ed. Note.—Ever other cases and Master and

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 228.*]

2. MASTER AND SERVANT (§ 228*)—INJURY TO SERVANT—SAFE PLACE TO WORK.

A servant, who is injured while oiling dangerous machinery while in motion, contrary to r statute, cannot complain that a safe place to work was not provided.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 228.*]

3. PLEADING (§ 36*) — CONCLUSIVENESS ON PARTY PLEADING—DANGEROUS MACHINERY Where plaintiff in his pleadings alleges that certain machinery was of a dangerous character, and that he was injured while oiling it when in motion, he cannot have the jury pass on its dangerous character.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 81-86; Dec. Dig. § 86.*]

Appeal from Court of Common Pleas, Lu-

Action by Francis Riley and another against the Pittston Coal Mining Company. From an order refusing to take off a nonsuit, plaintiffs appeal. Affirmed.

At the trial the court entered a nonsuit,

"The allegation of the plaintiff is that this machinery was constructed in violation of the mine act of June 2, 1891 (P. L. 176), and as a result of such construction this boy plaintiff was injured; that there was negligence on the part of defendant, and as a con-

The mine act of 1891 provides that no person under 15 years of age shall be appointed to oil the machinery, and no person shall oil dangerous parts of such machinery while it is in motion. You will recall the testimony of young Riley that he went to this moving machinery on the opposite side of this sprocket wheel where the box is, that he had an oil can with a spout on it six or seven inches long, that he oiled the box, the journal that was in the box, and that, having oiled that part of it, he started around the end of the box for the purpose of reaching the box on this side, in which the journal was located, to oil that, and while he was in motion for the purpose of reaching the box on the opposite side, where the journal was, for the purpose of oiling it, he slipped upon the sheet iron, and went down into the sprocket wheel, and was injured. The rule of law is that it matters not how negligent the defendant may be. If the plaintiff himself is negligent in the slightest degree, which inured and resulted in and caused him the injury for which he brings his action, he cannot recover. He was there, and oiled that journal in that box when it was in motion. He started around to oil the journal in the opposite box while the machinery was in motion, and he slipped upon the sheet iron, and went down into the box and was injured, and therefore he violated this part of the act of assembly: 'And no person shall oil dangerous parts of machinery while it is in motion.' He was guilty of negligence in oiling this machinery while it was in motion, and under this act of assembly is responsible for his negligence, and therefore it becomes our duty to sustain. this motion for a nonsuit.

"The nonsuit is allowed with the usual rule to show cause why the same shall not be taken off."

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and ELKIN, JJ.

Thomas F. Farrell and James L. Lenahan, for appellants. Benjamin R. Jones and Lawrence B. Jones, for appellee.

BROWN, J. Appellant was employed by the appellee to oil its machinery in connection with a conveyor or scraper line used to convey culm to a washery. On September 15, 1905, when he was in his seventeenth year, he sustained the injuries for which he seeks compensation in this action. The accident occurred when he was alongside of the machinery for the purpose of oiling it while it was in motion. A nonsuit was directed on what the court below properly regarded as his contributory negligence, in view of his disregard and violation of the act of June 2, 1891 (P. L. 176), which provides for the health and safety of persons employed in and about the defendant ought to be responsible anthracite coal mines. By section 8, art.



5. of that act it is directed that no person under 15 years of age shall be employed to oil machinery, and no person shall oil dangerous parts of it while it is in motion. The circumstances under which the appellant was injured appear from the following extracts from his testimony: "I started out to oil the breaker half-past 8-8 o'clock I guess it was-and I walked to that scraper line and oiled one box, and went to walk across to the other. Q. What did you do when you went to the box? A. I stood there and oiled it, then I went to walk across to oil the other box, and there was a piece of sheet iron run out from under: was covered with culm dirt. I walked across, slipped on the sheet iron, slipped in. I catched hold of the sheet iron, pulled it in with me, and it bent in a loop, and the scraper line broke. * * Q. What happened when you were drawn in? A. After I was drawn in, the scraper line broke. Q. How far were you drawn in? A. Up to my shoulders. Q. When you were drawn in, where were you squeezed-between the paddles and what? A. Between the paddles and the sheet iron. * * * Q. I wish you would tell just how you were squeezed and where you were squeezed. I don't think you told it very clearly. A. I walked down to the oil box and oiled it. I fell in the scraper line, and the scraper line catched my shoes first and pulled me all the way in until I come to here. They stuck then and broke. * * * Q. When you were oiling that machinery it was going, was it not? A. Yes. sir. Q. You had no business down at that wheel at all unless you went there to oil, did you? A. No, sir. Q. And at the time you was hurt you were there for the purpose of oiling that wheel? A. Yes, sir. Q. And you had oiled one box? A. Yes, sir. Q. And you started around the wheel while it was in motion to oil the other? A. Yes, sir."

The first reason urged for asking that this case be sent to a jury is that the appellant was not guilty of contributory negligence under the act of 1891, because at the time he was caught by the moving machinery he was not actually oiling it. This narrow construction of the act would in many instances defeat its very purpose, which is to protect oilers from all dangers connected with oiling machinery, and one of these certainly is getting into close proximity to it while it is in motion for the purpose of oiling it. An oiler approaching, passing around, or bending over moving machinery for the purpose of his employment, though not pouring oil upon it, is just as likely to be caught by it as when actually oiling it; and what this appellant did was clearly within the prohibition of the statute. He had just finished oiling one box, and, as he started around the revolving wheel to oil another, slipped and was caught

tributory negligence stands in the way of his recovery. Lenahan v. Pittston Coal Mining Co., 218 Pa. 811, 67 Atl. 642, 12 L. R. A. (N. S.) 461, 120 Am. St. Rep. 885.

It is next contended that, even if it be conceded that the appellant is to be regarded as having been engaged in the work of oiling at the time he was injured, his act was not the proximate cause of his injury and did not contribute to it; the same having resulting from an intervening cause—the negligence of the defendant in not providing him a safe place in which to do his work. We are not prepared to say that any such negligence was shown on the part of the defendant, and it is not necessary that we pass upon that question; for complaint cannot be made by a servant that a safe place was not provided for him when he is injured in doing that which he was expressly forbidden to do, either by his master or by the written law of the land. What happened to this appellant could not have happened if he had not been doing a prohibited thing.

Lastly, it is urged that the jury ought to have been permitted to pass upon the question of the dangerous character of the machinery. All moving machinery, from contact with which one is liable to be injured. is dangerous; and such was the character of the machinery in this case. In the first statement filed by the plaintiff it is described as dangerous, and in the second or amended one there is a similar averment by implication in the complaint that it was unguarded. These averments were established by the evidence, and under it the court could not have permitted the jury to find otherwise.

Judgment affirmed.

(224 Pa. 643)

HARRIER et al. v. DALE.

(Supreme Court of Pennsylvania. May 17, 1909.)

1. MASTER AND SERVANT (§ 284*)—INJURY TO SERVANT—QUESTION OF EMPLOYMENT.

In an action for injuries to a servant,

whether plaintiff was at the time in the employ of defendant held a question for the jury.

[Ed. Note.—For other cases, see Master an Servant, Cent. Dig. § 1004; Dec. Dig. § 284.*]

2. MASTER AND SERVANT (§ 289*)—INJURIES TO

Z. MASTER AND SEEVANT (§ 2007)—AND DEED AD SERVANT—QUESTION FOR JURY.

In an action for injuries to a servant, whether he had sufficient knowledge to understand and avoid the danger incident to his employment at the purching was a question for the ployment at the machine was a question for the jury

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1110, 1111; Dec. Dig. \$ 289.*1

3. MASTER AND SERVANT (§ 289*)-INJURY TO

SERVANT—QUESTION FOR JURY.

Whether an employe, injured while working at a machine, knew of the danger and did not use his knowledge to avoid it, was a question for the jury.

in the moving machinery. Being of an age [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \$\frac{4}{5}\$ 1089-1097, 1106-1126; that made his employment lawful, his con- | Dec. Dig. \frac{4}{5}\$ 289.*]

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Clearfield County.

Action by Rex N. Harrier and another against David Dale. Verdict for defendant, and plaintiffs appeal. Reversed.

Argued before FELL, BROWN, MESTRE-ZAT, POTTER, and STEWART, JJ.

S. V. Wilson and Thomas H. Greevy, for Thomas H. Murray, J. P. appellants. O'Laughlin, Hazzard A. Murray, and Oscar Mitchell, for appellee.

MESTREZAT, J. The questions in this case depend upon oral testimony, and we think they were for the jury. The alleged lease or hiring by Smeal from Dale, the defendant, of the thresher and corn husker, was not in writing. The authority of Smeal to operate and control both machines depends upon oral testimony, and the relation existing between Smeal and Dale was necessarily for the jury under the testimony in the case.

Did the relation of master and servant exist between the minor plaintiff and the defendant at the time the former was injured by the corn husker? The plaintiff alleges that it did, and introduced testimony to sustain his contention. Smeal employed the boy, through his father, to measure grain as it came from the thresher. Smeal and his assistants, including the boy, spent about ten days in operating the threshing machine in the vicinity of their home in Clearfield county. They then returned and placed the thresher in the defendant's barn, where was also the corn husker. Both machines, it is conceded, were owned by the defendant. Two or three days after the parties had returned from their threshing tour, the boy was put to work to feed the corn husker, which was then being operated in the barn for the purpose of husking the defendant's corn. The boy testified that when he went to work on the morning of the day when the accident occurred the defendant asked him to feed the machine, and told him that Mr. Smeal would assist him. He further says that while at work there he boarded with the defendant, and that he saw Smeal pay the money received for threshing to the defendant, Dale. Robert Harrier, the plaintiff's brother, testified that he was at the defendant's house on the evening of the accident. He went there to get his brother to accompany him to church. He asked Mr. Dale where he could find his brother, and Dale replied that he was hurt and had been taken to a doctor. Dale further said on this occasion, according to this witness, that, "Ferd Mains was to come and feed the machine, and as Ferd didn't come I had no other hand, and I put your brother at it."

As tending to establish the relation of mester and servant between Dale and the however, that the existence or nonexistence

Appeal from Court of Common Pleas, | plaintiff. He admits that the boy was employed through him, and that Dale, the defendant, paid him for the boy's services, but says his son was employed to work about the steam thresher and not the corn husker. It further appears from the plaintiff's testimony that Smeal directed all threshing bills to be paid to Dale; that if Smeal received any part of the pay for the work he turned it over to the defendant; that the latter furnished the oil for the thresher, and paid for the repairs and for the coal when the machine left Dale's premises to be operated at some other point. Dale employed other help to assist in operating the machine and husking the corn on the day of the accident. He himself was in and about the barn at such times as he would return with a load of corn from the field to the barn.

> If the evidence of the plaintiff is believed by the jury, we are unable to see why it does not make out a case of employment of the boy by Dale. The machine at which the boy was put to work belonged to Dale and was on his premises. He was directed by Dale to feed the machine. It was Dale's corn that was being husked. Dale furnished coal and oil for the machine, and paid for the repairs. He employed others to assist in operating the machine. Smeal retained no part of the money received for threshing, but directed it all to be paid to Dale. Smeal offered to pay the boy for assisting him in threshing wheat by giving an order on Dale. This testimony, if believed, was sufficient to establish the relation of master and servant between Dale and the injured boy.

On the part of the defendant it is denied that he had anything whatever to do with employing the boy to work at either the threshing machine or the corn husker. He alleges that there was an oral agreement between him and Smeal by which Smeal hired or leased both machines from him for a consideration agreed upon between them, that the machines were operated and controlled by Smeal, that the boy was employed by Smeal to work at both machines, and that at the time the boy was injured by the corn husker the machine was being operated and controlled by Smeal under the alleged hiring or lease. The defendant denies that he put the boy to work at the corn husker, or had anything whatever to do with employing him for such service. He also denies that he ever admitted that he asked or directed the boy to work at the machine. In other words, the defendant's position is that he let both machines to Smeal, who had absolute control over them and operated them entirely independently of the defendant. It is needless to say that, if the testimony satisfied the jury of the correctness of the defendant's contention, the plaintiff was not entitled to recovery. It is manifest, bove testimony was corroborated of the relation of master and servant be-Tarrier, the father of the minor tween the defendant and the injured boy at



the time of the accident was for the jury | from the jury and directing a verdict for the under the evidence submitted.

The negligence alleged in the statement on which the plaintiff seeks to recover is the failure of the defendant to instruct the boy as to the performance of his duties in feeding the corn husker. It is conceded that the defendant gave the boy no instructions. It is claimed, however, that Smeal gave him proper instructions. This is denied by the boy, who testifies that he received no instructions from Smeal or any other person, other than to feed the machine. That instructions how to operate the corn husker were necessary, and should have been given the boy, we think, is apparent without discussion. The machine was manifestly a dangerous one, and it is evident that the boy was not familiar with it. He had never worked about such a machine, his previous employment having been ordinary farm work, and he knew nothing about feeding or operating a corn husker. It is not necessary that a machine should be in a manufactory to make it dangerous, or that instructions need not be given to one unacquainted or unfamiliar with its operation because it is used elsewhere than in a manufactory. Whether the boy had sufficient knowledge to understand and avoid the danger incident to his employment at the machine was, under the testimony, for the jury. If he had such knowledge, and did not use it and avoid the danger, he was negligent. This was likewise a question for the jury. The simple fact that the rollers which caused the boy's hand to be crushed could be seen was not of itself sufficient to convict the boy of negligence. Such rollers, we have reason to know from cases in this court, are causing accidents almost daily to those whose youth or inexperience prevents them from protecting themselves while engaged in operating the machine. If it be conceded that the boy saw Smeal on one occasion clean the machine with his hands and relieve it from the corn which clogged the rollers, it does not follow that this was sufficient instruction to the boy to enable him to avoid the danger. In fact, it appears that the machine ought not to have been cleaned with the hands, but by something held in the hands suitable for the purpose.

The burden of proof was on the plaintiff, and it was incumbent upon him to establish the negligence alleged in the statement before he was entitled to recover. It was his duty to satisfy the jury that the defendant was responsible for negligence which resulted in his injury, and, failing in this, no responsibility rested on the defendant for the plaintiff's injuries. The evidence produced on the trial below, we think, was sufficient to submit to the jury in support of the plaintiff's claim, and therefore the learned

defendant.

The first assignment of error is sustained, and the judgment is reversed, with a new

(224 Pa. 620)

HOLT et al. v. KELLEY et al. LORAINE et al. v. SAME.

(Supreme Court of Pennsylvania. May 10, 1909.)

MINES AND MINERALS (§ 70°)—MINING LEASE
—RECOVERY OF MINIMUM RENTAL.

A coal lease provided that the lessee should not be required to pay the minimum rental or continue mining operations where the coal was less than 2 feet 6 inches in general thickness. Held, in an action for the minimum rental, the burden was on the lessees to show that the coal was of less thickness and where the evidence was was of less thickness, and where the evidence was conflicting, and tended to show that the lessee had not made proper examinations to test the actual thickness, a verdict for the lessors was proper.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 70.*]

Appeal from Court of Common Pleas, Clearfield County.

Actions by Mary Holt and others against M. D. Kelley and others, and by Fannie Loraine and others against the same defendants. Judgments for plaintiffs in both cases, and defendants appeal. Affirmed.

Reed, P. J., in the court below, specially presiding, charged as follows:

"By consent of the parties you have been sworn in these two cases, which are being tried together before you, but will you bear in mind that you are required to render separate verdicts; that is, a verdict in each case in accordance with the law and the evidence applicable to that case.

"The plaintiffs in these cases leased their respective lands to the defendants, to operate and remove therefrom the merchantable and workable coal. The leases are substantially identical in their language and covenants, with this exception: In the Holt lease the royalty is fixed at 7 cents per ton of 2,240 pounds and 15,000 tons of coal as the minimum quantity of coal to be mined each year. In the Loraine lease the royalty is fixed at 71/2 cents per ton of 2.240 pounds and 10,000 tons of coal as the minimum quantity of coal to be mined each year. The plaintiffs have brought these actions on their respective leases to recover the minimum royalty to which they are respectively entitled thereunder. The leases are dated October 15, 1903, and the covenant in each lease is that the minimum royalty for which payment is to be made shall begin three months thereafter, or on January 15, 1904. It is also provided that this minimum royalty shall be paid for on or before December 31st each year. The actions on these leases were begun July 6, judge was in error in withdrawing the case 1907, and therefore the claim in each case is

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

for the minimum royalty accruing during the tions thereon until the termination of the years 1904, 1905, and 1906, with interest. It is not contended or alleged by the defendants that they have paid any royalty under the Holt lease, and therefore the plaintiffs in that case claim to recover the full amount of the minimum royalty for the three years mentioned, with interest, namely, \$1,006.25 royalty on coal which should have been mined in the year 1904, with interest thereon from December 31, 1904, and \$1,050 royalty on coal which should have been mined in the year 1905, with interest thereon from December 31, 1905, and \$1,050 royalty on coal which should have been mined in the year 1906, with interest thereon from December 31, 1906. In the Loraine lease, with the exception of \$88.16, no royalty has been paid on coal mined under that lease, and therefore the plaintiffs in that case claim to recover the full amount of the minimum royalty for the three years mentioned, with interest, namely, \$718.-75 for royalty on coal which should have been mined in the year 1904, less \$88.16 paid on account thereof, leaving \$630.59 due for that year, with interest thereon from December 31, 1904, and \$750 royalty on coal which should have been mined in the year 1905, with interest thereon from December 31, 1905, and \$750 royalty on coal which should have been mined in the year 1906, with interest thereon from December 81, 1906. You will recall that in the Holt lease it is provided that the minimum tonnage to be mined each year is 15,000 tons at 7 cents per ton, and in the Loraine lease the minimum number of tons to be mined each year is 10,000 tons and the royalty is 71/2 cents per ton.

"The defense to these actions is identically the same in each case and is based on the following provision, contained in each lease, namely: 'It is further agreed that the coal to be mined under the provisions of this agreement shall be merchantable and workable coal, and it shall be optional with the said lessees [that is, the defendants] whether to work and mine any coal the vein of which is less than 2 feet 6 inches in general thickness, except in cases of local faults or where rolls occur so as to reduce the size of the vein below the general thickness, and in that event the coal in such fault or roll, when it is merchantable coal, shall be mined across and through such fault or rolls.' It is further provided that in such event—that is, the thinning of the coal-the lessees expressly agree to drive sufficient rooms and headings through such rolls, fault, or thin places, so as to determine whether or not such thinning of the coal or fault is continuous, and to develop, if possible, the coal beyond. There is also a provision in these leases that the defendants are to mine and carry away all the coal in the leased lands that is merchantable and practically minable; also that they are to proceed at once to open and develop the coal in said lands where not already

leases, which were to continue for a period of 15 years or until the merchantable coal in said lands was exhausted; also, that they would work the mines in a careful and judicious manner and after the methods of mining in general use, so as to prevent unnecessary waste of coal, and so as to produce from the seams or veins all the coal that could be produced with safety. They were to commence operations or the work of developing the lands within 30 days after the execution of the leases, and to pursue the work industriously, diligently, and continuously after that date, and to produce coal as rapidly as the conditions would permit. As already indicated, unless the merchantable and workable coal in the lands became exhausted, or the coal became less than 2 feet 6 inches in general thickness, they were to mine on the Holt lease not less than 15,000 tons of coal annually, or pay for that quantity at the rate of 7 cents per ton whether mined or not, and on the Loraine lease they were to mine not less than 10,000 tons of coal annually, or pay for that quantity at the rate of 71/2 cents per ton whether mined or not.

"Now, gentlemen, you will observe the plaintiffs' right to recover in these actions depends on two things: First, that the lands covered by their respective leases contain a sufficient quantity of merchantable and workable coal to produce in each of the years claimed for not less than 15,000 and 10,000 tons, respectively; and, second, that the coal was in general over 2 feet 6 inches in thickness. * * * If there was coal in the lands covered by these respective leases of the general thickness of 2 feet 6 inches, but not in sufficient quantities to produce minimum tonnage to be mined each year of the three years named, then the plaintiffs would be entitled to recover, respectively, proportionately, such sums as the quantity of coal that could have been mined would bear to the minimum quantity required to be mined under the leases. By this I mean that if the evidence warranted a finding that there was sufficient merchantable and workable coal in the lands, which was of a general thickness of 2 feet 6 inches, to produce at least a portion of the minimum quantity which the defendants were required to mine each year, the plaintiffs would be entitled to a verdict for the royalty on whatever quantity could have been mined during the years 1904, 1905, and 1906, at the rates fixed in their respective leases.

"The defendants' contention is that the coal in these lands was less than 2 feet 6 inches in general thickness, and therefore that they were relieved from mining the same under the express stipulation of the leases, to which I have called your attention, and consequently are not required to pay the minimum royalty provided for in said leases. The plaintiffs deny this, and also allege that the deopened, and to continue their mining opera- fendants have not made any adequate effort to determine the quantity of merchantable and workable coal of at least 2 feet 6 inches of general thickness contained in said lands, and thus is presented the issue or important questions which you are to determine.

"The burden is on the defendants to satisfy you by the weight of the evidence that the minimum quantity of coal, of the quality and kind provided for in the leases, could not be found and did not exist in the lands. The defendants admit that they did not do any mining under the Loraine lease, except that in operating an adjoining tract they got over the line and took out all the coal in the top or 'D' vein on the McClellan tract, which is the tract covered by the Loraine lease. They made no other openings or explorations under this lease, except to measure the thickness of the coal in the lower vein at the face of the headings, and perhaps at other places of an old development or working of the coal thereunder, before the execution of the lease in question, and also the putting down of a bore hole some distance ahead of the face of the old development. They called witnesses to show that the old development or mining on this tract indicated a thinning of the coal as the development advanced, and that the bore hole put down by them tended to conclusively establish this fact; also that the coal had so thinned down in the operation that had been carried on before they leased the land that it was less than 2 feet 6 inches in thickness at all places reached by the old development; that this thinning of the coal was not due to any fault, roll, or other trouble in the mine, but was a gradual thinning as the development advanced in the hill and the thickness of the cover over the coal increased; and their contention is that the testimony offered by them establishes the fact that the coal remaining in the land and covered by this lease is less than 2 feet 6 inches in general thickness. If you are satisfied of this fact by the weight of the testimony in the case, then the plaintiffs cannot recover, and your verdict will be in favor of the defendants.

"The plaintiffs, however, contend that the defendants have not made any adequate or sufficient explorations of the lands covered by the Loraine lease to determine what the thickness of the coal underlying the same is; also that they have not complied with the terms of the leases in exploring the same, which requires that they shall proceed to open and develop the coal on said premises where not already opened, which they have neglected to do; also that only a very small part of the tract had been operated before the same was leased to the defendants, and that the measuring of the coal exposed in the old openings or operations and the putting down of one bore hole would not be a fair test of the thickness of the coal in that very large part of the tract which remained untouched and undeveloped; and they have offered testimony tending to prove that the coal vein plorations as to justify the conclusion that

in this land was rolly and that there were dips and clay veins in it, and that the coal thinned and thickened by reason of these clay veins and dips, and also tending to prove there was coal exceeding 2 feet 6 inches in thickness underlying said land and which the detendants were required to mine under their lease of the same.

"It is not necessary that I should recite the testimony offered on either the part of the defendants or plaintiffs bearing on this question. You will recall yourselves and from it determine whether or not the defendants have made such developments or explorations and investigations under the Loraine lease as warranted the conclusion that the coal underlying the premises therein described is less than 2 feet 6 inches in general thickness. If you are satisfied that they have, and that the coal remaining in the land is less than 2 feet 6 inches in general thickness, then you will return a verdict in their favor in that case; otherwise, you will return a verdict for the plaintiffs in such sum as you may find that they are encored to under the terms of the lease,

"In the Holt case the defendants also explored the old workings. The lease in that case covers about 132 acres of land, and my recollection is that some witness testified that about 100 acres of it had been mined out at the date of the execution of the lease to the defendants. The defendants did not make any new openings on this tract, nor did they drive in the main headings of the old, except as hereinafter explained. They drained the old mines, and did some mining in driving a cross heading or entrance for a distance of about 60 yards, and they took out 1,152 tons of coal. They also put down three bore holes several hundred feet in advance of the face of the workings. They contend, and have offered testimony to show, that in the old workings there was a gradual thinning of the coal as the work advanced, and that the bore holes put down by them establish a continuation of the thinning of the coal; that it was less than 2 feet 6 inches in thickness at the face of all the old workings, and that the bore holes show that it was still less 500 or 600 feet in advance of the old workings than it was at the face of the same; and they therefore ask you to find as a fact that the coal remaining in the land covered by the Holt lease is less than 2 feet 6 inches in general thickness, and if you so find your verdict will be in their favor. The plaintiffs, however, have offered testimony to show that the defendants have not complied with the terms of their lease in this case; that they have not put in any new openings, nor have they driven in the headings of the old openings to determine whether or not the thinning of the coal is due to some fault or roll in the coal, or whether it is the general condition of the same, and generally that they have not made such investigations and exthe coal remaining in these premises is less set out in the charge of Judge Reed, specialthan 2 feet 6 inches in general thickness. They have also offered testimony to show that the coal remaining in the land is of greater thickness than 2 feet 6 inches, and that the thickness is also affected by clay veins and dips, and that defendants have not made good their contention that it is in general of a thickness less than 2 feet 6 inches. I may repeat what I said about the Loraine lease-that it is not necessary for me to recite the testimony offered by the defendants and plaintiffs bearing on the thickness of the coal. If the defendants have satisfied you by the weight of the testimony that they have made such investigations and explorations of the premises as to warrant the conclusion that the coal remaining therein is less than 2 feet 6 inches in general thickness, and you find this to be a fact, then you will return a verdict in their favor; otherwise, you will find for the plaintiffs in the case such sum as they are entitled to under the terms of this lease.

"It appears from the undisputed testimony that both the Holt and Loraine tracts contain at least one vein of merchantable and workable coal; the dispute being as to the general thickness of the coal in the vein. The plaintiffs, however, offered some testimony to show the probable existence of another vein of merchantable and workable coal of greater thickness than 2 feet 6 inches, below the admitted vein which has been opened and operated on these lands. The leases to the defendants cover all veins or seams of coal in the leased premises; but before the defendants could be required to expend money in exploring the property for this lower vein, or before you can consider that vein in fixing them with the minimum royalty provided under said leases, you must not only be satisfied of its existence in these lands, but also that it is reasonable and practicable to work the same; that by the exercise of ordinary care and diligence in the exploration and development of the lands for coal, such veins would have been discovered by the defendants; and that an ordinarily careful and prudent operator would have worked the same and taken the coal therefrom."

Verdict and judgment for plaintiffs. fendants appealed.

Argued before FELL, BROWN, MESTRE-ZAT, POTTER, and STEWART, JJ.

John G. Love, James A. B. Miller, Singleton Bell, and Howard B. Hartswick, for ap-Thomas H. Murray, James P. O'Laughlin, and Hazard Alex. Murray, for appellees.

PER CURIAM. These appeals involve the same questions and were argued together. The facts that gave ise to them, the contentions of the parties, and the grounds on which they were submitted to the jury are clearly

ly presiding.

We find no error of which the appellants can justly complain, and the judgments are affirmed.

(224 Pa. 628)

HEIGES et al. v. PIFER et al. (Supreme Court of Pennsylvania. May 10, 1909.)

1. Husband and Wife (§ 131*)-Wife's Sep-

ARATE PROPERTY—BURDEN OF PROOF.
Where a wife claims property acquired during coverture against her husband's creditors, she must show that it is her separate property by gift, descent, or otherwise, or that the money with which it was acquired was her own money, and was not the property, money, or credit of her husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 471; Dec. Dig. § 181.*]

Husband and Wife (\$ 133½*) — Wife's Separate Property—Question for Jury.

A wife claimed property as her own, which had been sold on execution against her husband, and the evidence showed that the wife had written to her brother-in-law, requesting money with which to buy the land, and that he had inclosed her a check to her order, which she had deliver-ed to the vendor at the time of the execution of the deed. It was shown beyond doubt that the check was used for payment of the land. Held, that the case was for the jury.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 133½.*]

Appeal from Court of Common Pleas, Clearfield County.

Action by Daniel Heiges and others against Agnes J. Pifer and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Argued before FELL, BROWN, MESTRE-ZAT, POTTER, and STEWART, JJ.

Thomas H. Murray and Pentz & Calkin, for appellants. A. L. Cole, for appellees.

PER CURIAM. This was an action of ejectment, brought by the heirs of a purchaser at a sheriff's sale. The title to the land was in a married woman, and the sale was under an execution on a judgment against her husband. The only question presented by the appeal is whether the court erred in not directing a verdict for the plaintiff, because of the insufficiency of the testimony produced by the defendant to sustain her title. She was incompetent as a witness because of the death of parties in interest. In support of her title it was shown by testimony of which there was no direct contradiction that she had written to her brotherin-law requesting a loan of money with which to buy the land; that in reply he had written to her, inclosing his check to her order for the amount of purchase money required; that she had indorsed this check and delivered it to her vendor in payment at the time of the execution of the deed. Her letter of request, the reply thereto, and the check were produced, and it was shown be-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date. & Reporter Indexes

yond doubt that the check was used in payment. This testimony made out a defense that was essentially for the jury.

It is an established rule of evidence that a wife, claiming property acquired during coverture against her husband's creditors, is required to substantiate her claim by proof sufficient to repel all adverse presumptions. But the law does not require proof of such a character as to relieve from every doubt, but only proof that is clear and satisfactory. A mere doubt will not operate to defeat the wife's claim. Tripner v. Abrahams, 47 Pa. 220; Flick v. Devries, 50 Pa. 266; Earl v. Champion, 65 Pa. 191. In submitting the case it was said by the learned judge: "Now, the law applicable to this case, as we understand it, is that in all such contests, where the creditors of the husband are claiming property against the wife, the burden is on her to show that the property itself was her separate property, by gift, descent, or otherwise, or that the money which she put into the property was her own money, or obtained upon her own credit, and that it was not the property or money or credit of her husband. This she must show by proof that is clear, full, and satisfactory." This instruction stated the rule clearly, and it was all the plaintiff was entitled to.

The judgment is affirmed.

(224 Pa. 573)

DUROSS et al. v. SINGER. (Supreme Court of Pennsylvania. May 10, 1909.)

1. EASEMENTS (§ 42*) — CONSTRUCTION — RESTRICTIONS—EXTENT OF USE.

Where a fee is granted subject to an easement, it carries the right to use the servient soil in any manner that does not interfer with the easement, unless an intent to limit the estate is clearly expressed by the granting clause. [Ed. Note.—For other cases, see Easements, Dec. Dig. § 42.*]

2. EASEMENTS (§ 42*) - RESERVATION - EX-

Where an owner conveyed the soil of an alley in fee, with a reservation to owners of other lands to use the same, but with the privilege to the grantee to build over the alley "at the same height and of the same depth as the same is now built over," does not restrict the right of the grantee to build over the alley to a greater depth than that to which it was built over at the time of the conveyance.

[Ed. Note.—For other cases, see Easements, Dec. Dig. § 42.*]

Appeal from Court of Common Pleas, Philadelphia County.

Bill by Mary T. Duross and others against Herman Singer. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

Argued before FELL, BROWN, MESTRE-ZAT, POTTER, ELKIN, and STEWART, JJ.

F. B. Bracken, for appellants. Alex. Simpson, Jr., and A. S. Ashbridge, Jr., for appellee.

PER CURIAM. The plaintiffs are the owners of property No. 609 South street, Philadelphia, and the defendant is the owner of the adjoining property to the west, No. 611. The prayer of the bill is for an injunction to restrain the defendant from building over the rear end of an alley on the east side of his lot, laid out prior to 1810 for the common use of the owners of both lots. The ownership of the soil of the alley is in the defendant, and his right to maintain a building over it, supported by an archway, to the depth of 25 feet 11 inches from South street, is conceded; but the right to build over it to a greater depth is disputed. The case was heard on bill and answer. The averments of the answer that the extension of the archway as proposed by the defendant will not interfere with the use of the alley as a passageway and water course, nor exclude light necessary for its proper use, being taken as true, narrow the dispute to the single question whether the deed creating the easement restricted the right of the grantee and his assigns to build over the alley to a greater depth than that to which it was built over at the time of the conveyance.

The grant to the plaintiffs' predecessor in title in 1810 gave him an easement in the following language: "Together with the free use and privilege of the said alley for free in common with the ingress. . . owners, tenants, and occupiers of the adjoining lot to the westward and of a water course therein, reserving to the owner of said adjoining lot to the westward the right of building over the said alley at the same height and of the same depth as the same is now built over. * * *" In a deed of the same date in the defendant's chain of title it is recited that a former owner had left open the easternmost 2 feet 11 inches of his lot as an alleyway for the common use of his lot and the adjoining lot to the eastward, and there was excepted and reserved out of the grant to and for the use of the owners of the adjoining lot to the eastward the free use of the alley, the grantee to have the right and privilege of building over the alley of the depth of the building then erected.

It is not controverted that the owner of land, who grants a right of way over it, conveys nothing but the right of passage, and reserves all the other incidents of ownership, and may build over the way, provided he does not materially impair the use of the easement by obstructing the way and shutting off the light recessary for its reasonable and convenient use. It is, however, contended that the stipulation, in the deed of 1810, that the grantee of premises No. 611 South street and his assigns should have the right to build over the alley to the same extent that it was then built over, created by

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

implication a restriction against building | delphia & Reading Railway, providing for the beyond the limit prescribed. The plaintiffs' case rests upon this proposition.

The grant of a fee subject to an easement carries with it the right to make any use of the servient soil that does not interfere with the easement, and this right cannot be abridged by words used in the granting clause, unless the intention to limit the estate is clearly expressed or is a necessary implication from the words used. restriction cannot be imposed upon a clear grant by merely naming one of its incidents. The rule that a deed or grant will be construed most strongly against the grantor applies with especial force to the restriction in a deed. Klaer v. Ridgway, 86 Pa. 529.

The judgment is affirmed.

(224 Pa. 612)

CHAPMAN DECORATIVE CO. ▼. PHILA-DELPHIA & R. TERMINAL R. CO.

(Supreme Court of Pennsylvania. May 10, 1909.)

EMINENT DOMAIN (§ 274*)-Injunction-Dis-MISSAL OF BILL.

In a bill against a railroad company by a

landowner to prevent it from taking his land to widen its roadbed, where it is alleged that the company had not obtained municipal consent, but after the filing of the bill such consent was obtained, the hill will be dismissed, without ascertaining the extent of compensation due plaintiff.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 274.*]

Appeal from Court of Common Pleas, Philadelphia County.

Bill by the Chapman Decorative Company against the Philadelphia & Reading Terminal Railroad Company. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, ELKIN, and STEW-ART, JJ.

Charles A. Chase, for appellant. Abraham M. Beitler, John G. Lamb, and Samuel Dickson, for appellee.

FELL, J. The plaintiff was the lessee of a factory building, and filed a bill for an injunction to restrain the defendant from appropriating a part of the leased premises for the purpose of widening its roadbed. Of the various grounds of complaint set out in the bill, only one was pressed at the argument of the appeal. This is that the defendant had no authority to exercise the right of eminent domain in taking the property in question without having first obtained municipal consent. The ordinance granting permission to the defendant to enlarge the bridge structures over public streets sufficiently to accommodate two additional tracks contained the provision that "it should not be of any effect until after the execution of a contract between the city of Philadelphia and the Phila-

elevation of the tracks of said company." This contract had not been executed at the time when the bill was filed, but it had been executed before the hearing, and the right was at the time admittedly complete.

The plaintiff has not in any manner been disturbed or interfered with in the possession and enjoyment of its property and the defendant does not contemplate any entry upon the property without first making or securing compensation. If the plaintiff's contention that the defendant was without authority to exercise the right of eminent domain until municipal consent had been obtained to widen its bridges over city streets be conceded, it still has no standing to obtain an injunction after permission has been granted. The evident purpose in insisting on a decree was to establish a date for the inception of a claim for damages that would permit a recovery for improvements made after the resolution of appropriation had been passed by the defendant's board of directors. The court was in effect asked to do this by additional request for findings of fact and law, but refused for reasons well stated by the learned judge: "The question of damages is not before this court, and we are not at liberty to indicate at what period of time the right of the plaintiff to damages had its inception, nor whether he has suffered prejudice meanwhile by reaon of his improvements and additions to the property. The bill is before us merely on the ground that at this day the defendant should be restrained from proposed action in widening its railway, as described in the pleadings, and, as at this day it is conceded by all parties that there is such right, it would seem that nothing further is necessary; the contention of the plaintiff obviously being one advanced in entire good faith, but which has relation merely to the ascertainment of the extent of compensation due him, which is to be determined by another tribunal. For this eason the exceptions on the part of the plain-:iff are each and all of them dismissed."

The decree is affirmed.

(225 Pa. 1)

ALEXANDRIA WATER CO. v. NATIONAL SURETY CO.

Supreme Court of Pennsylvania. May 17, 1909.)

1. PRINCIPAL AND SUBETY (§ 117*)-RELEASE OF SUBETY - UNAUTHORIZED PAYMENT TO PRINCIPAL.

Under a contract requiring payment to the contractor to be made on the engineer's esti-mates, but prescribing no form of estimate, a payment on an oral estimate, made without fraud or collusion, is proper, and does not constitute a violation of the contract, relieving the contractor's surety from liability.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. § 117.*]

•For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1997 to date, & Reporter Indexes

2 Principal and Subety (§ 117*)-Relbase

OF SUBETY—BREACH OF CONDITIONS.

A provision in a building contract that on completion of the work to the satisfaction of the owner's engineer and before final payment the owner's engineer and before final payment the contractor shall give satisfactory evidence, that all bills and claims against the contractor that might remain as a lien against the work are fully paid was for the protection of the owner, but did not impose on him the obligation to require satisfactory evidence of the absence of such claims and lien; and his failure to call for such evidence on payment to the contractor was not a breach of the contract, relieving the contractor's surety from liability for the amount of a mechanic's lien which the owner was compelled to pay. pelled to pay.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 284; Dec. Dig. § 117.*]

Appeal from Court of Common Pleas, Huntingdon County.

Action by the Alexandria Water Company against the National Surety Company. dict for plaintiff, and defendant appeals. Af-

On a motion for judgment non obstante veredicto, Woods, P. J., filed the following opinion:

"William M. Powell & Co. entered into a written contract with the Alexandria Water Company to install a water system in the borough of Alexandría, of said county. Under the terms of said contract the said William M. Powell & Co. agreed, inter alia, as follows: 'The said party of the second part agrees to execute to the said party of the first part bonds in amount equal to the amount of this contract for constructing a plant, with said security for the faithful performance of this contract, and indemnify the said party of the first part from loss, costs, or damages for or by reason of any liens, claims, or demands for material.' In pursuance to the provision contained in said agreement, the said William M. Powell & Co. produced a bond executed by the National Surety Company, whereby the said National Surety Company became surety for the said William M. Powell & Co. for the faithful execution of said water system.

"Among the conditions of the said bond is the following: 'Now, if the above bounden principals shall well and truly keep, do, and perform each and every, all and singular, the matters and things in said contract set forth and specified to be by the said principals kept, done, and performed, at the times and in the manner in said contract specified, and shall pay over, make good, and reimburse to the above-named obligee (water company of Alexandria) all loss and damage which said obligee may sustain by reason of failure or default on the part of the said principals (William M. Powell & Co.), then this obligation shall be void; otherwise shall remain in full force and effect.' Following the above condition of said bond there are certain things to be performed by the defendant in hereunder against the surety company shall be subject to the following conditions precedent: (1) The obligee shall perform the covenants performable by the obligee of the said contract. (2) The obligee shall immediately notify the surety, by registered letter addressed to the surety at its principal offices in the city of New York, of any default in any manner as and when such default shall occur by the principals of any matter and thing performable by the principals specified in the said contract. (4) Any failure of the obligee to comply to the requirements of the said conditions precedent shall relieve this surety from all liability under this bond.'

"The water system was completed on or about December 1, 1903, and on or about January 16, 1904, the Alexandria Water Company was notified by the said American Car & Foundry Company that the said William M. Powell & Co. had failed and neglected to pay for the cast iron pipe and specials which had been used by the said contractors in the construction of the said water system, and upon the said day the Alexandria Water Company, by its attorney, notified the defendant, the National Surety Company, of said default on the part of said William M. Powell & Co., and suit was brought to recover the costs of said pipe by the American Car & Foundry Company. The suit-American Car & Foundry Company v. Alexandria Water Company and William M. Powell & Co.was tried and finally determined in favor of the American Car & Foundry Company, and the Alexandria Water Company were compelled to pay to the said American Car & Foundry Company the amount of said judgment. This suit is now brought against the National Surety Company, the defendant, to recover the amount for which the Alexandria Water Company was compelled to pay, and is founded upon the bond given by the National Surety Company to indemnify the said Alexandria Water Company against any default on the part of William M. Powell & Co. In the trial of the case, after the plaintiff had rested, the defendant by their attorneys asked the court to direct a compulsory nonsuit for the reasons at that time stat-The court then reserved its decisions and directed the defendant to proceed with

"At the close of the testimony the attorney for the defendant asked the court to direct a verdict for the defendant, for the reasons assigned in the request for a compulsory nonsuit, which reads as follows: '(1) Because the plaintiff has not exhibited such a case by its pleadings and evidence as entitles it to a recovery against the defendant. (2) The contract to which the bond in suit refers, and which by its terms is made a part thereof, and the performance of which on the part of the obligee is made a condition precedent to this case, which read as follows: 'Recovery | liability on the part of the defendant, or the

right to recover thereon against the defendant, provides that monthly estimates be made upon which payment shall be made from time to time, less 10 per cent., which estimates shall be made upon the 1st of the month, and the testimony on the part of the plaintiff shows affirmatively that no such estimates were made as was provided by the contract. (3) Because it appears by the testimony on the part of the plaintiff that no monthly estimates whatever were made, except those made on October 10th and November 10th. The portion of the contract here invoked, which prescribed the duty of the plaintiff respecting the estimates, is as follows (23 of specifications): "On the 1st of each month the engineer will estimate the quantity of work done during the month previous, and 90 per cent. of the work so estimated shall be paid for within 10 days. On the completion of the entire work the contractor shall be paid 90 per cent. of the final estimate. One-half of the balance, or 5 per cent. shall be retained until the work had been tested satisfactorily to the engineer, and the remaining 5 per cent. shall be retained for a period of four months as a guaranty that the contractor will repair any leaking joints or irregularities in the street surface that may develop after the work has been accepted. If the contractor shall fail to repair and make good any defects that may develop during that period, the water company reserves the right to use the money retained for that purpose." (4) Because it appears by the testimony of the plaintiff that no estimate whatever was made for work done in the month of November, and no estimate whatever was made for work thereafter done. (5) Because the alleged additional contract made after the completion of the work was in fact for work done under the contract, and is nowhere separated from the contract, except by the averments in the plaintiff's pleadings or statement; that in fact that work was an extension of the work which is alleged to have been completed on November 30, 1903, and that it consisted substantially of an extension of pipe which had been previously laid; that it was arranged for in the early part of November, nearly a month before the time stipulated that the contract work was to be done; that the material which entered into the alleged new contract was blended with material under the contract proper; that the payments for it and for the contract proper were blended; that the credits were blended, as appears both by the oral testimony and by the writings exhibited by the plaintiff; furthermore, that it entered into the lien. and constituted a part thereof, and there was single recovery for the items constituting the lien, part of which were upon the original contract and part of which were upon the alleged additional contract, and being a part of the contract proper, and differing in no essential from it and from other work done

on the conditions and stipulations provided in the contract for additional work, or extension of the work under the contract, none of which are either alleged or shown to have been complied with. The portion of the contract imposing upon the plaintiff its duties with respect to such additional work is as follows: "It is mutually agreed between the parties to this agreement that if any change, alteration, or omissions or additions are made in the work during the progress of the work. and such changes, alterations, omissions, or additions are ordered by the engineer in writing, the same shall be made and performed by the parties of the second part, according to the prices agreed upon for that particular portion of the work on which the said parties of the second part may be engaged; or, in the event that no price for additional work ordered by the engineer has been agreed upon, the same shall be performed by the said party of the second part at the price to be agreed upon before such extra work has been commenced." (6) Because the plaintiff company failed to retain the 10 per cent. as provided by the contract upon estimate made in making the final payment, and also failed to comply with the other provisions of the contract relating thereto. (7) For the reason that it appeared by the testimony of the plaintiff's treasurer that no inquiry whatever was made as to the existence of liens against the property, or whether or not there has been any default in any of the stipulations, prior to the time that final payment was made, was a failure of duty upon the part of the plaintiff in its relation to the defendant as surety both by reason of that relation and also by reason of what appears in the fourth paragraph of the contract of September 8, 1903. which by the terms of the bond is made part of the bond, to wit: "(4) It is understood and agreed that when the work contemplated in this agreement shall have been performed agreeably to the specifications and to the satisfaction of the engineer, and before final payment shall have been made, the parties of the second part shall give satisfactory evidence, if called for, that all bills and claims against the said parties of the second part that in any way might remain as a lien against the work are fully paid and discharged."

"The first reason is to the effect that the plaintiff has not exhibited such a case by its pleadings and evidence as entitles it to a recovery against the defendant. This reason will be considered in connection with the other reasons.

furthermore, that it entered into the lien, and constituted a part thereof, and there was single recovery for the items constituting the lien, part of which were upon the original contract and part of which were upon the alleged additional contract, and being a part of the contract proper, and differing in no essential from it and from other work done under it, it could only be contracted for up-

on which payments shall be made from time ! to time. It is provided that these estimates shall be made by the engineer and shall be paid for within 10 days. The evidence shows that these payments were made in October and November upon written estimates from the engineer. Mr. Phillips further testifies that he made the last payment on a settlement with Mr. York, the engineer. The contract does not say that these estimates must be in writing, but that the estimates must be by the engineer. We are satisfied that this was a substantial compliance with the condition of the contract, and therefore these reasons are overruled.

"The fifth partakes of the alleged additional contract made after the completion of the work, and it is claimed by the defendant that this contract is nowhere separated from the alleged contract, except by the averments in the plaintiff's pleading or statement. Under the original contract all additions to the work were to be under the supervision of the engineer. The evidence in this case shows that Mr. Phillips entered into a new and separate contract with William M. Powell & Co. to run a short pipe line to the Pennsylvania Railroad station and the evidence further shows that this contract was made entirely independent of the engineer who had charge of the original contract, the prices paid for the pipe were different, and the evidence shows that it was done for other considerations. We do not think that the Alexandria Water Company violated the provisions of the original contract in this particular.

"We do not think that the sixth reason is sustained by the evidence.

'The seventh and last reason has reference to the following claims in said original 'It is understood and agreed that when the work contemplated in this agreement shall have been performed agreeably to the specifications and to the satisfaction of the engineer, and before final payment shall have been made, the parties of the second part shall give satisfactory evidence, if called for, that all bills and claims against the said party of the second part that in any way might remain as a lien against the work are fully paid and discharged.' And it is claimed by the defendant that because the Alexandria Water Company, the plaintiff, did not demand evidence of the payment of all bills and claims against the contractor before the final settlement with them, there was a breach of a contract, and, therefore, the surety is discharged. Under this clause of the contract it does not provide that it was necessary for such a call for said evidence of payment of bills; but it provides that the contractors shall, if called for, give such satisfactory evidence. This original contract is made a part of the bond upon which suit is brought in this case, and the fact that the Alexandria Water Company did not call for such evidence does not re- judgment was obtained on a mechanic's lien

lieve the defendant, because that is one of the risks assumed by the defendant when it became surety. They had it in their power to call for these satisfactory evidences of payment if they saw fit, and they cannot now escape liability because the plaintiff in this suit failed to call for such satisfactory evidences of payment. The position taken by the defendant is that these conditions precedent were to be fully and literally complied with on the part of the plaintiff in this suit.

"In all the positions taken by the defendant there is no contention that the surety was in any way prejudiced or injured, but claimed that, there having been, as it contends, a noncompliance with the strict interpretation of the contract, it is therefore relieved of any liability. While the rule of law is that, where a party secured does some act which changes the position of the surety to his injury or prejudice, the surety is no longer bound, yet that act must be to the detriment of the surety. When the act of the obligee is a breach of the contract, it must be to the prejudice of the surety company before it can be relieved. 'If there was change in the contract that would affect the surety or increase his liability he would be discharged.' Miller v. Eccles, 155 Pa. 36, 25 Atl. 776. It has been held in Holme v. Brunskill, L. R. 3 Q. B. Div. 495: 'Whenever it is self-evident that the alteration or departure is neither a substantial one, nor one that can be prejudicial to the surety, it is regarded as an immaterial one.' The defendant company became surety for William M. Powell & Co. to indemnify the Alexandria Water Company against any default on the part of the contract, and unless the Alexandria Water Company was guilty of nonperformance of the contract, so as to increase the risks of the National Surety Company, the defendant, it would not be relieved.

"We have given this case a great deal of thought, and have reached the conclusion that there has been no material or substantial variation from the original contract on the part of the Alexandria Water Company, and that the defendant has not been prejudiced by any behavior on the part of the plaintiff in connection with the contractors under the original contract, and that nothing has been shown by which the defendant can be discharged from liability. The defendant is a compensated surety company, having for its object 'the guaranteeing of the fidelity of persons holding places of public or private trusts, guaranteeing the performances of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all acceptances or proceedings or by law allowed.' The very loss which the plaintiff in this action sustained arose by reason of William M. Powell & Co. failing to pay for material which they purchased from the American Car & Foundry Company, and for which a

through the courts, and this is one of the very conditions in the contract for which the defendant in this case became surety for William M. Powell & Co., and for which they indemnified the Alexandria Water Company. To be sure, the water company had certain duties to perform; but we fail to find in all the evidence any material or substantial variation from the contract between the water company and William M. Powell & Co. on the part of the plaintiff in this action. They had reason to rely upon the National Surety Company for protection. If the water company deviated from the original contract, it in no way worked an injury or prejudiced the surety. To our mind the water company did everything, under the contract, to protect the defendant in this case."

Argued before FELL, BROWN, MESTRE-ZAT, POTTER, and STEWART, JJ.

John D. Dorris and Thomas H. Murray, for appellant. Samuel I. Spyker and Thos. F. Bailey, for appellee.

MESTREZAT, J. We need not restate in detail the facts of this case, as the learned trial judge has correctly found and fully stated them in the exhaustive opinion he filed in refusing judgment for the defendant. think the court below was right in directing a verdict for the plaintiff, and subsequently in refusing to enter judgment for the defendant. There is but a single question in the case, and that is whether the plaintiff, the Alexandria Water Company, deviated or departed from its contract with William M. Powell & Co., the contractors, so as to release the defendant, the National Surety Company, from the obligations of its contract. Powell & Co. entered into a written agreement with the Alexandria Water Company in September, 1903, to construct a gravity water system for the borough of Alexandria. Huntingdon county. One of the provisions of the agreement required the contractors to furnish a bond with security for the faithful performance of the contract and for indemnifying the water company against loss, costs, or damages for or by reason of any liens, claims, or demands for material, etc. compliance with this stipulation of the contract, Powell & Co. delivered a bond to the water company with the National Surety Company, the defendant, as surety thereon. Recovery on this bond against the surety was made subject to certain conditions precedent, and the defense in this action, which is on the bond, is that the water company did not comply with some of these conditions, thereby relieving the surety company from its obligation. The American Car & Foundry Company furnished certain material to the contractors, for which they filed a mechanic's lien, which was prosecuted to judgment, and the water company was compelled to pay it. The plaintiff is seeking in this action to recover on the bond what it was compelled to pay on the judgment.

The first reason assigned in support of the defense is that the water company made payments to the contractors without any estimate from the engineer, as provided in the contract, which required the engineer on the 1st of each month to make an estimate of the quantity of work done during the month previous. Payments were to be made within 10 days after the estimate. Phillips, the treasurer of the water company, testifies that he paid on two estimates, one on October 10, 1908, for the work done in September, and one on November 10, 1903, for the October work. He testifies, and there is nothing in contradiction of his testimony, that the work was completed in strict compliance with the contract on November 30, 1903. The complaint of the defendant is that the engineer made no estimate for the November work. It will be observed that the contract did not require the estimate to be in writing, or in any specific form. The total balance unpaid on the contract at the completion of the work was payable by its terms on or before December 10, 1903, except 5 per cent., which was to be held "until the work was tested satisfactorily to the engineer," and also 5 per cent., which was to be retained as a guaranty that the contractors would repair any imperfections in the work. The water system was completed to the satisfaction of the water company within the time provided in the agreement, and hence the company was relieved from the necessity of retaining 5 per cent. of the final estimate until the work was tested. It seems from the evidence that there was some difficulty in determining the balance due on the contract, but it was finally adjusted between the parties. Part of this balance was paid December 4, and the residue on December 11, 1903. It appears that the engineer had made some mistakes, and as soon as they were corrected the balance due on the contract was paid. Mr. Phillips testified: "Q. I change the word to additions, instead of modifications. Then you made certain additions to the estimate furnished by the engineer, and settled on that basis-made the final payment? A. We did.". This settlement was made by the treasurer of the water company with a representative of Powell & Co., the contractors, and a check was given to the order of the contractors for the balance found to be due on the contract. Mr. Phillips calls this a flual statement, and not an estimate, yet it is apparent, from his own testimony, that the settlement was made on an estimate of the engineer. In fact, we are at a loss to see how the balance due could have been otherwise ascertained. Under the terms of the contract, a simple oral declaration by the engineer as to the amount due would have been an "estimate," and this manifestly was furnished to the representatives of the water company and the contractors. The balance as shown by this estimate would have been paid at once on the completion of the contract, had not an error been



rection of which required a few days' delay. Had the water company paid to the contractors on December 1st what the engineer regarded as the balance due, we apprehend that the defendant in this action could not have successfully invoked as a defense the failure of the engineer to have made a formal estimate of the amount due for November. The contention here has no better basis to support it. There is no allegation of fraud or collusion between the water company and the contractors concerning any matter arising out of the contract. Nor is there any allegation that the water company did not pay Powell & Co. the balance in full due on the contract. It is not claimed that the surety company was prejudiced or injured by any act of commission or omission on the part of the Alexandria Water Company. We think the plaintiff complied with its agreement with the contractors in securing estimates from its engineer, and that, therefore, there was no breach of this covenant which will avail the defendant in this suit.

There is no merit in the contention of the defendant that the work was not completed on November 80, 1903, as required in the agreement. The only witness testifying on the subject says that it was completed on that date. He was the treasurer of the water company, paid the money due the contractors, and it was his duty to know when the work was finished. There was another contract between the water company and the contractors for some additional work, the laying of a pipe to carry the water to the Pennsylvania Railroad station. The only evidence on the question conclusively shows that this contract was separate and distinct from the written contract between the parties, that it was made without the knowledge of the water company's engineer, and that he had nothing to do with or control over the work to be done under it. The loss sought to be recovered in this action does not arise out of that contract. American Oar & Foundry Company's claim, which the plaintiff paid, and which it seeks to recover here, was not for work done and materials furnished in pursuance of the supplemental or additional contract.

It is provided in the construction contract that on completion of the work to the satisfaction of the water company's engineer, and before final payment of the balance due, the contractors "shall give satisfactory evidence, if called for, that all bills and claims against the said party of the second part that in any way might remain as a lien against the work are fully paid and discharged." No inquiry was made by the water company. prior to the final payment to the contractors, about unpaid claims or liens; and it is contended by the defendant that this was a breach of the contract, which relieves the surety company from liability in this action. It will be observed that the bond given by firmed.

discovered in the engineer's estimate, the cor- | the defendant was to protect the plaintiff, inter alia, from loss by reason of such claims and liens. If, therefore, the defendant's contention is sustained, the very purpose of the bond is nullified, and the plaintiff is in the same position as though no bond had been given. The defendant should make out a very strong case, and show conclusively that its interpretation of the contract is correct, before a court should give a construction to the agreement which would result in such consequences. The position taken by the defendant practically relieves it from all liability upon the bond, and makes the plaintiff become its own surety for claims and liens which it was compelled to pay by reason of the default of the contractors. condition precedent with which the plaintiff was required to comply before it could maintain an action on the bond against the surety was that it should observe the terms of its contract with the contractors. The stipulation of the agreement just quoted requires the contractors to furnish satisfactory evidence of the payment of claims and liens; but it does not impose upon the water company the obligation to require satisfactory evidence of the absence of such claims and liens. The stipulation was for the protection of the water company, and is a covenant on the part of the contractors that they would furnish information if called for. It was optional with the water company whether it should call for the evidence of payment and discharge of claims and liens, and, therefore, the failure to call for such evidence was no violation of the agreement. It may well be, and presumably is, the fact that the water company had evidence satisfactory to itself that all bills and claims against the contractors were paid when it made the final payment due under the contract. Though the evidence was satisfactory to it, the company was evidently misinformed or misled, as it was subsequently compelled to pay a claim which was a lien against its property. The very purpose of the bond in suit was to protect it against such loss. It was liable to err in its judgment or in its action with the contractors, and to sustain a loss by their noncompliance with the agreement, and the purpose of requiring the bond was to protect it from loss caused by any default of the contractors which was not attributable to its own violation of duty to the surety company. If the contract required the water company to be absolutely certain of the discharge of all claims and liens prior to making the final payment due on the contract, as a condition precedent to a recovery on the bond, there was no reason or necessity for the company requiring a bond at all. The construction placed upon this stipulation of the contract by the defendant deprives the plaintiff of the protection which it was manifestly the purpose of the bond to afford.

The judgment of the court below is af-



(224 Pa. 630)

ROLAND v. PHILADELPHIA & R. RY. CO. (Supreme Court of Pennsylvania. May 17, 1909.)

1. RAILROADS (§§ 347, 348*) — ACCIDENT AT CROSSING—SAFETY GATES.

Failure of a railroad company to have safety gates at a crossing lowered is evidence of negligence on its part, to be considered by the jury in passing on such question, but is not conclusive.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1131, 1141; Dec. Dig. §§ 347, 348.*1

2. RAILROADS (§ 347*)—ACCIDENT AT CROSSING -Evidence

In an action for injuries at a crossing, evidence that the watchman could not read or write, or tell time, is immaterial, where his alleged ignorance was not shown to have contributed to the accident.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1131; Dec. Dig. § 347.*]

Appeal from Court of Common Pleas, Lebanon County.

Action by Christiana Roland against the Philadelphia & Reading Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Errors assigned, among others, were in charging the jury that the defendant was negligent, and the answer to plaintiff's seventh point, which was as follows: "(7) If the jury believe that the watchman employed by the defendant company at the Front street crossing could not read or write, could not read the time-table of the trains or the rules and regulations governing his conduct, and could not tell the time by the watch or clock, he was incompetent to perform the duties of his position; and if the defendant company, with knowledge of these facts, retained him in its employ, it was guilty of negligence. Answer: That is affirmed."

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Charles H. Killinger and Howard C. Shirk, for appellant. Robert L. Adams, Paul G. Adams, and John Benson, for appellee.

BROWN, J. The negligence of the defendant company and the contributory negligence of the deceased were for the jury. Neither question could have been taken from them. The contributory negligence of the deceased was submitted under instructions free from error; but the negligence of the defendant was taken from the jury, the trial judge instructing them that it had been negligent. For this error the judgment must be reversed.

As the team approached the crossing the safety gates were up. From the testimony of Mohn, a witness to the accident called by the plaintiff, it is uncertain whether the watchman or gateman was at the crossing at the time the team was approaching; but,

because the undisputed evidence was that the gates were up, the court declared as a matter of law that the defendant was negligent, and instructed the jury to so find, without regard to any other testimony in the case. By this they, of course, understood that the negligence which made the railroad company responsible for the collision was the failure to have the gates lowered as the team approached. The failure to have them lowered was evidence of negligence on the part of the defendant, to be taken into consideration by the jury in passing upon that question. but was not, in itself, without regard to anything else that was proven, conclusive evidence of negligence. Lake Shore & M. S. Ry. Co. v. Frantz, 127 Pa. 297, 18 Atl. 22, 4 L. R. A. 389; Matthews v. Philadelphia & Reading R. R. Co., 161 Pa. 28, 28 Atl. 936. From other testimony in the case, if believed by the jury, they could fairly have found that the defendant had not been guilty of negligence. Witnesses called on its behalf testified that, for a distance of over 70 feet between a cooper shop and the track on which the collision occurred, there was an unobstructed view of 1,300 feet in the direction from which the train was coming: that between the watch box and the tracka distance of more than 40 feet-there was such a view of from 1,500 to 1,800 feet; that the whistle was blown at the whistling post east of the crossing, and the bell rung from that point up to the crossing. If the jury had believed this, a proper conclusion might have been that the company had not been negligent: but they were not permitted to consider this testimony, and the first and third assignments of error must be sustained.

Another error into which the court fell was in affirming plaintiff's seventh point. The watchman may not have been able to read or write, nor to tell the time by watch or clock; but there was no evidence that he could not see and hear a train approaching, whether running on schedule time or not. There was nothing to show that he was not able to discharge the duties for which he was employed, and his alleged ignorance, as set forth in the point, had no relevancy to the issue, and did not contribute in the slightest degree to the accident.

The judgment is reversed, and a venire facias de novo awarded.

(224 Pa. 594)

McGUIGAN v. PENNSYLVANIA R. CO. (Supreme Court of Pennsylvania. May 10, 1909.)

297*) - Collision with 1. RAILROADS (\$ 297*) — C STREET CARS—NEGLIGENCE.

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the car to cross and there was not time to do assurance of safety. To signal for a street so before a train backed on the crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 949-953; Dec. Dig. § 297.*]

2. Railboads (§ 297*) — Collision with Street Car — Evidence — Question for JUBY.

In an action by a passenger on a street car against a railroad company for injuries at a grade crossing by collision, the question of defendant's negligence held for the jury under the evidence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 949; Dec. Dig. § 297.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Roland McGuigan against the Pennsylvania Railroad Company. Judgment for defendant, and plaintiff appeals. versed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, ELKIN, and STEW-ART. JJ.

David Wallerstein, John G. Dunlap, and Francis Fisher Kane, for appellant. John Hampton Barnes, for appellee.

FELL, J. The plaintiff was injured in a collision between a street car in which he was a passenger and a train of oil tank cars which was running backwards at a street crossing of the defendant's road. The street car was stopped five feet from the safety gates, which were up, and the conductor went forward on the crossing. When he reached the railroad tracks, the defendant's watchman, who was stationed in a tower from which he operated the gates, signaled to him to go ahead, and he in turn signaled to the motorman to cross. When the car reached the middle of the crossing, the motorman saw a train of tank cars 125 or 150 yards from him, of the approach of which no signal had been given. He turned the power on quickly in order to get across. The car stopped on the railroad tracks, and the back end of it was struck within a few seconds afterwards. The time given by the witnesses during which the car stood before the collision varied from one to six seconds. The stopping of the car was due to the trolley getting off the wire or to the blowing out of the hood switch, a device designed to prevent the burning out of the motor in case the power is turned on too rapidly.

Under this state of facts a verdict was directed for the defendant on the ground that the evidence would not justify a finding of negligence on its part. In this conclusion we are unable to concur. The situation at the crossing as to safety was largely in the charge of the defendant's watchman. It was his duty to observe the movement of trains and to give warning of danger to persons about to cross. Others were not relieved of the duty of vigilance, but their actions would be to a great extent influenced by his has a just defense, shall be a compliance with

car to cross, when there was not ample time for it to do so before the oil cars would be backed on the crossing, was ground for the inference of negligence. In determining whether there was time for it to cross, the speed of the approaching train and the probability of the car's being accidentally delayed were to be taken into consideration. The conductor was not to be given the bare chance, with a margin of safety of a few seconds, to get over if nothing happened, but a reasonable opportunity, in view of the probability that something might happen to retard or entirely stop the progress of the car. The stoppage of a car by the coming off of the trolley is not an unusual occurrence, especially at a railroad crossing, where the jar of the car in crossing the tracks may cause it. If the car stopped because the hood switch was blown out, by the rapid turning on of the power, the stoppage was due to the motorman's effort to escape a danger into which he had been led by the watchman's signal. We do not decide that there was negligence that would make the defendant responsible, but that the question of negligence was for the jury.

The effect of the release given by the plaintiff to the street car company was not passed upon by the learned trial judge, because it was unnecessary to do so in view of the conclusion he reached as to the proof of negligence, and our consideration of it at this time would be premature.

The judgment is reversed, with a venire facias de novo.

(224 Pa, 588)

BOOTH et al. v. WOLFF PROCESS LEATH-ER CO. et al.

(Supreme Court of Pennsylvania. May 10, 1909.)

1. Mobigages (§ 399*) — Nonpayment of Taxes.

A provision in a mortgage that failure to taxes shall make the principal debt due is enforceable.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1164; Dec. Dig. § 399.*]

2. MORTGAGES (§ 417*)—FORECLOSURE—UNRE-CORDED ASSIGNMENT.

On a scire facias sur mortgage, an unrecorded assignment is not a defense, where it has been executed to carry out an agreement which has been abandoned, and the assignment is not delivered, but is in the absolute possession of the mortgagee.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1228; Dec. Dig. § 417.*]

3. COURTS (§ 85*) — RULES OF COURT — CON-STRUCTION—WHO MAY QUESTION.

The construction by the court of a rule of

the common pleas, providing that an affidavit of defense shall be required of persons sued in a representative capacity, providing that an affidavit by defendant that he has not been able to obtain sufficient information to set forth the character of the defense, but that he believes he

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the law, cannot be disputed by a trustee in bank- | this without regard to the other question in ruptcy, to whom the court has held the rule does not apply.

[Ed. Note.—For other cases, see Courts, Dec. Dig. \$ 85.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Alfred Booth and others against the Wolff Process Leather Company and another. From an order making absolute rule for judgment for want of a sufficient affidavit of defense, defendant Leather Company appeals, Affirmed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and EL-KIN. JJ.

Humbert B. Powell, for appellant. W. Horace Hepburn, for appellees.

FELL, J. This appeal is from an order making absolute a rule for judgment for want of a sufficient affidavit of defense in an action on a mortgage. The mortgage was payable in four yearly installments, and it contained a provision that, in the event of default in payment of an installment, or of interest, or of taxes on the property mortgaged, the whole of the principal debt should become due. This provision was set out in the scire facias, and it was alleged in the writ that default had been made in the payment of an installment of the principal and in the payment of taxes assessed against the mortgaged premises. No defense was made by the mortgagor. Four affidavits of defense were filed by his trustee in bankruptcy, the terre-tenant, and a rule was taken by him for the production of papers. These affidavits, with the answer to the rule and the copies of the papers produced, make a voluminous record of some 40 pages, the details of which it is unnecessary to discuss. The attempt of the defendant was to set up a new agreement, changing the time for the payment of the installments of principal, under which there had been no default in payment. If it be conceded that such an agreement went into effect, and the averment of its delivery appears to have been studiously avoided, the allegation that the taxes for the preceding year were unpaid remains undenied. The fact of the nonpayment of the taxes made the whole of the principal debt due according to the terms of the mortgage, and

the case. Williams v. Graver, 152 Pa. 571, 25 Atl. 874.

There are two grounds of defense argued that may be briefly noticed. One is that the mortgage had been assigned before suit brought by the plaintiff. This allegation was based on the fact that an unrecorded assignment was produced with other papers by the plaintiff in response to the rule taken by the defendant. But the answer to the rule contained an averment that the assignment had been executed in order to facilitate the carrying out of an agreement which was in contemplation, but was abandoned, and never went into effect, and that the assignment had not been delivered, that it transferred no right, and that it was in the absolute possession and control of the plaintiff, by whom it was produced. If the defendant had any fears that his knowledge of the existence of an unrecorded assignment exposed him to the danger of a second action, he could readily have resolved the doubt by inquiry of the assignee named.

The second ground is that the averments in the third affidavit of defense of the defendant's belief that he had a just and legal defense to the mortgage, and that he had made diligent inquiry and had not been able to obtain sufficient information to enable him to set forth particularly the nature and character of the defense, were sufficient to prevent judgment under rule 3 of the court. The section of the rule referred to is as follows: "An affidavit of defense shall be required from executors, administrators, guardians, committees and others sued in a representative capacity: Provided, that an affidavit by the defendant in such cases, stating that he has made diligent inquiry and has not been able to obtain sufficient information to enable him to set forth particularly the nature and character of the defense, but that he believes there is a just and legal defense, shall be deemed a sufficient compliance with this rule." The court of common pleas has not construed this section to apply to a trustee in bankruptcy, and there are obvious reasons why it should not extend to him, since he may possess himself of all the knowledge the bankrupt has. Manifestly we would not be warranted in holding that the court erred in the construction of its rule.

The judgment is affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(76 N. J. L. 691)

HASSELBUSCH V. MOHMKING.

(Court of Errors and Appeals of New Jersey. March 8, 1909.)

L. COVENANTS (\$\frac{15}{25}\$ 96, 127*)—BREACH OF COVENANT—RIGHT OF ACTION.

Where property was conveyed by a deed containing a covenant against incumbrances, a mortgage them existing upon the property, a right of action arose at once for breach of the covenant; and although, before such an action was brought, the mortgage may have been paid by the mortgagor, or a presumption of payment by the mortgagor, or a presumption of payment may have arisen from lapse of time, yet, in an action for breach of covenant, the covenantee is entitled to recover at least nominal damages.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. \$\frac{4}{1}\$ 115, 238-242; Dec.Dig. \$\frac{4}{5}\$ 96, 127.*] 2. COVENANTS (§ 116*)—ACTIONS FOR BERACH -Defenses.

In an action for breach of a covenant against incumbrances, the defendant pleaded that he had not broken the covenant within 20 years. There is no statute of limitations barring such an action if not brought within 20 years

after breach of covenant.

Held, that defendant could not, under this plea, defeat the covenantee's recovery by setting up as a defense that the lapse of time raised a presumption that the cause of action had been antisfied.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 209; Dec. Dig. § 116.*] (Syllabus by the Court.)

Error to Circuit Court, Bergen County. Action by Claus Hasselbusch against Anna Mohmking. Judgment for defendant, and plaintiff brings error. Reversed.

Samuel A. Besson, for plaintiff in error. Koester & Campbell, for defendant in error.

REED, J. This writ brings up a judgment of nonsuit entered in the Bergen circuit court by the direction of the trial judge at the close of the plaintiff's case. The action is for a breach of a covenant against incumbrances. contained in a deed made by one Anna Mahler and her husband, Michael Mahler, to Margarethe Hasselbusch and her husband, Claus Hasselbusch. Claus Hasselbusch, surviving his wife, is the plaintiff. Anna Mahler having survived her husband, and remarried, is the defendant under her present name of Anna Mohmking.

It appeared upon the trial that the deed in which the covenant against incumbrances was included was executed on the 1st day of July, 1873. It appears that there was at that date upon the property conveyed a recorded mortgage executed on September 21, 1869, to secure the payment of the sum of \$350 in three years. This mortgage had been given to and was then held by one Bernard McCloskey. About 1904 the Hasselbusches entered into a verbal agreement to sell the land so conveyed and mortgaged. In searching the title for the purpose of executing a deed for this property, in accordance with the verbal agreement entered into to convey

his wife, it was discovered that the Mo-Closkey mortgage was existing and still uncanceled, whereupon the Bogliolis refused to take the title while this incumbrance remained. A bill was then filed by the Hasselbusches against the administrator of Mc-Closkey, deceased, the mortgagee, and against his widow and heirs at law and next of kin, on November 4, 1905, for the purpose of quieting the title to the mortgaged property. A decree was signed in this suit adjudging that the defendants had no estate, interest, or incumbrance upon the same. Hasselbusch paid the taxed costs in this suit, amounting to \$146. The action at law for breach of covenant against incumbrances contained in the deed of July 1, 1875, was begun on April 24, 1907, more than 20 years after the breach of the covenant. One of the pleas interposed to the declaration was that the defendant had not broken any covenant in her deed within 20 years next before the commencement of the action. At the conclusion of the plaintiff's case, the counsel for the defendant moved to nonsuit the plaintiff, upon the ground that there was no incumbrance upon the property at the time when Hasselbusch attempted to make the conveyance mentioned to Boglioli, and, if there had been a breach of covenant, the breach had occurred when the deed containing it was made, and since that date an action had been barred by the statute of limitations. A nonsuit was granted upon the ground that the action had not been brought within the statutory period as laid down in decisions in this

An inspection of our statute of limitation, as pointed out by Mr. Justice Fort in his analysis of that statute, contained in his opinion in the case of Parisen v. New York & L. B. R. R. Co., 65 N. J. Law, 418, 47 Atl. 477, would disclose that there is no provision in that statute that an action brought for breach of covenant shall be barred if not brought within 20 years after occurrence of the breach. Indeed, it is admitted in the brief of the counsel for the defendant in error that there is no statute that provides directly for a plea barring an action by lapse of time in suits of this kind. The defendant, however, insists that the mortgage was presumptively paid at the time of bringing that action, and so the plaintiff suffered no loss, and therefore had no right of action. In support of this insistence a number of cases were cited to demonstrate that a mortgage is presumed to be paid in case the mortgagee had not entered or foreclosed, and no interest had been paid within 20 years. A consideration of the questions thus discussed is deemed to be altogether foreign to the point now presented. Assuming that at the date when the plaintiff discovered the existence of the incumbrance, or indeed at any date to the purchasers. John Boglioli and Stella, subsequent to the execution of the covenant

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ment or by presumption of payment, ceased to be a burden upon the land, that fact would not defeat the covenantee's right of action. That right arose at the moment the covenant was executed by reason of the presence of the incumbering mortgage. Had the mortgage been subsequently paid, or if by lapse of time a presumption of payment would have arisen, this would affect the degree to which the covenantee might be damaged by the breach of his covenant, but would not defeat his right to an action. There might have been substantial injury to the covenantee, although the incumbrance on the property may have been afterwards paid by the covenantor, or may have become nonenforceable by lapse of time. The cloud upon the title in the meantime may have resulted in material injury to the owner of the incumbered property; but, even if it resulted in no substantial injury, nevertheless, the right of action having arisen by breach of the covenant, the covenantee is entitled to recover nominal damages.

It is entirely settled that, where a breach of an agreement or an invasion of a right is established, the English law infers some damage to the plaintiff, and, if no evidence is given of any particular amount of loss, it declares the right by awarding what it terms "nominal damages," being some very small sum, as a farthing, a penny, or a sixpence. Sedgwick on Damages, p. 44. This principle is recognized in the cases of N. J. School Furniture Co. v. Board of Education, 58 N. J. Law, 646, 35 Atl. 397; Gerli v. Poidebbard Silk Mfg. Co., 57 N. J. Law, 432, 31 Atl. 401, 30 L. R. A. 61, 51 Am. St. Rep. 611; Jurnick v. Manhattan Optical Co., 66 N. J. Law, 380, 49 Atl. 681; Phillips v. Crosby, 70 N. J. Law, 785, 59 Atl. 142. In case of a covenant of seisin, which is broken upon its execution by the existence of some outstanding interest existing in a third party, although the holder of the covenant retains peaceable possession until it has ripened under the limitation act into a valid title, he can yet bring his action for breach of his covenant and recover nominal damages. Rawle on Covenants for Title, 101. When an incumbrance is removed by the grantor without expense or trouble to the grantee, the latter can recover only nominal damages. 11 Cyc. 1165. Said C. J. Ewing, in Stewart v. Drake, 9 N. J. Law, 139-141: "If there be a subsisting mortgage at the time of the covenant, the grantee under a covenant against incumbrance may recover nominal damages because there is a breach; but they shall be nominal only where he remains undisturbed and has paid nothing on the mortgage, for the incumbrance may be removed by the grantor, or he may be compelled by the mortgagee to discharge it, or the grantee

against incumbrance, the mortgage, by pay- may otherwise remain forever unaffected by ment or by presumption of payment ceased it."

All that is said and decided in these authorities, is in recognition of the well-settled doctrine that where a breach occurs nominal damages may be recovered, so that, if no special damages had been proved in this case, nevertheless the plaintiff by his proof of a breach of covenant was entitled to a verdict for nominal damages. There are cases, it is true, which hold that, after the lapse of 20 years following a breach of covenant, a presumption will arise that the cause of action has been in some way satisfied. Some of these cases will be found cited by Mr. Rawle in his work on Covenants for Title. Whether the 20 years is to be measured from the time when the cause of action arose by the technical breach of covenant against incumbrance, or to be measured from the time when special damages occurred, is a subject of some contrariety of opinion. A discussion of the questions presented by these cases would be aside from the point upon which the decision in the present case is put. All of this class of cases rest upon the doctrine of presumption—a presumption which is rebuttable. The defense set up in this case rests upon an absolute bar by force of the statute ot limitation. There being no statute of limitation, there is no absolute bar. The proper plea suggested in Jenkins v. Hopkins, 9 Pick. (Mass.) 543, to rest the defense of presumptive satisfaction received for breach of covenant, is a plea of accord and satisfaction. All that need be said now is that that defense cannot be raised under a plea setting up a statute of limitation.

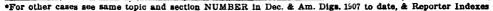
The conclusion is that the judgment of nonsuit must be reversed, and a venire de novo issue.

KINTZEL v. OLSEN.

(Supreme Court of New Jersey. July 9, 1909.) EXECUTION (§ 433*)—BODY EXECUTION—PRO-CEEDINGS TO PROCURE.

Prac. Act 1903 (P. L. 1903, p. 549) \$ 52, provides that the first process in personal actions in cases where the plaintiff is not entitled to bail shall be a summons. Section 56 provides that the writ of capias ad respondendum shall not be issued in any action founded on a tort, except upon proof to the satisfaction of the court, in which the action is about to be commenced, or to a judge, etc., of the grounds on which bail is required, and thereupon the court, judge, etc., shall make an order for bail in such sum as he shall think proper. Said section does not purport to limit in any way the already existing right to a capias ad satisfaciendum, applies only to judgments founded on contract. Held, that said sections do not change the English practice as it existed prior to the Revolution, whereby a capias ad satisfaciendum on a judgment in an action of tort issued as a matter of course and without a judge's order.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1232; Dec. Dig. § 433.*]



There was a judgment for plaintiff, and he applies for a capias ad satisfaciendum. Application granted.

Leon Abbett, for the motion.

SWAYZE, J. The plaintiff applied to the clerk to issue a capias ad satisfaciendum upon a judgment recovered in an action of tort; and, the clerk being in some doubt as to his right to issue the writ without a judge's order, this application was made to me. In view of the doubt that has thus arisen, it seems well to review the practice upon the subject.

Under the English practice as it existed prior to our separation a capias ad satisfaciendum issued in every case where a capias ad respondendum could issue. 1 Archbold's Practice, 303; 2 Tidd's Practice, 1025; 3 Blackstone, 414. After the statute of 19 Henry VII, c. 9, a capias ad respondendum, says Blackstone, might be had upon almost every species of complaint. 3 Blackstone, 281, 282. The distinction under the English practice was not between suits begun by summons and suits begun by capias ad respondendum, since substantially all could by means of the fictions described by Blackstone with his usual clearness be begun by capias. The distinction was between bailable and nonbailable actions. In nonbailable actions which included most actions of tort the capias was in effect a summons, and by the act of 5 Geo. II, c. 27, § 4, a notice was required to be indorsed notifying the defendant to appear. The form is given in Archbold's Forms, 273.

It follows that, since substantially all actions might be begun by capias and a ca. sa. was authorized in every such case, the latter writ ordinarily would issue as matter of course.

Our practice act of 1799 (Paterson's Laws 1709-1799, p. 357, § 18) enacted that the first process in personal actions where the plaintiff was not entitled to bail should be a summons, and, where he was entitled to bail, should be a capias.

The former provision now appears in section 52 of the practice act of 1903 (P. L. p. 549). But this change was a change in nomenclature only. The effect of the old capias in a nonbailable action with the statutory notice was substantially the same as the writ called by our statute a summons. It continued to be the practice to issue a ca. sa. as a matter of course where it was issuable under the English practice. The changes subsequently made by statute and by the con-

Action by one Kintzel against one Olsen to state in statutory form what had been previously held by the courts. Benson ads. Bennett, 1 Dutcher, 166, 172. Section 56 does not purport to limit in any way the already existing right to a ca. sa. It applies only to a capias ad respondendum. The only limitation as to a ca. sa. is contained in section 189 (P. L. 1903, p. 587) and applies only to judgments founded on contract, express or implied. If the Legislature had meant to limit the right to a ca. sa. in actions of tort, it would have used apt language for that purpose.

Mr. John A. Hartpence has very kindly examined for me the files of the clerk's office since the passage of the act of 1903, and I am thereby enabled to refer to the following cases in which writs of ca. sa. have issued without order of the court in actions of tort begun by summons since June 13, 1902, and up to December 31, 1908: Carter v. Doughten, Book A 36 of Process, p. 43; Zuccarelli v. Ungaro, p. 74; Angus v. Jungling, p. 80; Mueller v. Maurer, p. 85; Bennett v. Benton, p. 118; Schlicher v. Wendell, p. 167; Muckenstrum v. Hicks, p. 312; Stoebling v. O'Gorman, p. 325.

I conclude, therefore, that the plaintiff is entitled to a ca. sa. without a judge's order; but, in view of the doubt that has been suggested, I will sign the order.

(105 Me. 156)

MARTIN v. JOHNSON.

(Supreme Judicial Court of Maine. Feb. 24, 1909.)

1. TROVER AND CONVERSION (§ 16*)—RIGHT TO SUE—TITLE—POSSESSION.

In order for a plaintiff to maintain trover, he must have such a general or special property in the goods in question as entitles him to immediate possession.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 119-147; Dec. Dig. § 16.*1

2. Logs and Logging (§ 4°)—Cutting Tim-BER—EXECUTORY CONTRACT—TITLE TO TIM-BER CUT.

When a written permit to cut timber is under seal and exclusive, title passes to the permittee as soon as the timber is severed elther by himself or a trespasser. Title in such cases passes by reason of the executory contact, and not because the permittee himself tract, and not l does the cutting.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 13; Dec. Dig. § 4.*]

3. Logs and Logging (§ 4*)—Cutting Tim-BER—LICENSES—TRESPASS—TITLE TO TIMBER

-Conversion. In May, 1904, the owners of a township of wild land by written contract, not under seal, granted the plaintiff "permission, during the ensuing logging season only, to enter with subsequently made by statute and by the constitutional prohibition of imprisonment for debt did not apply to actions of tort.

Nor do I think that any change was introduced by section 56 of the practice act of 1903. That section seems to be an attempt

•For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

only" to enter upon mile squares numbered 1, 2, 7, 8, 13, and 14 in the same township, and cut and remove bark and timber therefrom. In the course of his operation upon lot 8 Worster got over the line, and cut certain spruce logs and railroad ties from lot No. 9, which was embraced in plaintiff's permit. The defendant embraced in plaintiff's permit. The defendant received the logs and ties cut on lot 9, and thereupon the plaintiff brought an action of trover against the defendant for the value of the same.

Held:

(1) That the plaintiff's permit did not convey any interest in the land or in the standing timany interest in the land or in the standing timber, but was an executory contract for the sale of timber when severed from the soil and converted into personal property, coupled with a revocable license to enter upon the land for the purpose of cutting and removing it.

(2) That the permit was not exclusive, but applied only to such timber as might be cut by the plaintiff himself or those acting under him.

(3) That the cutting by a mere trespasser up-

(3) That the cutting by a mere trespasser up on one of the lots permitted to the plaintiff did not give the plaintiff any property in the logs when severed. They still belonged to the land-owner to whom the trespasser, and not the plaintiff, was liable for the stumpage.

[Ed. Note.—For other cases, see Logs Logging, Cent. Dig. § 13; Dec. Dig. § 4.*]

(Official.)

Report from Supreme Judicial Court, Penobscot County.

Action by Charles P. Martin against Melville Johnson for conversion of certain logs and ties. On report by agreement at the conclusion of the testimony. Judgment for defendant.

Argued before EMERY, C. J., and SPEAR, CORNISH, KING, and BIRD, JJ.

Martin & Cook, for plaintiff. J. H. Burgess, and P. H. Gillin, for defendant.

CORNISH, J. On May 2, 1904, Henry Prentiss, as agent for the owners of a township of wild land known as North Yarmouth Academy Grant, by written contract, not under seal, granted the plaintiff "permission during the ensuing logging season only, to enter with four horses or more teams, upon mile squares numbered 9, 10, 11, 15, 16, 17, and 18, * * * and to cut and remove therefrom, spruce, cedar, fir and pine timber suitable for logs" under certain conditions and restrictions not material here. In the fall of 1904 the plaintiff went upon the premises with six horses, located his camp on lot 18 toward the easterly part of the township, and operated throughout the logging season.

On May 4, 1904, Mr. Prentiss gave to one Worster a written permit, not under seal, "during the ensuing logging and bark peeling season only," to enter upon mile squares numbered 1. 2, 7, 8, 13, and 14 in the same township, and cut and remove bark and timber therefrom. Worster also in the fall of 1904 went upon the premises permitted to him and operated upon lots 1, 2, 8, and 14 toward the westerly part of the town during the same logging season. In the course of his operation upon lot 8 Worster got over the line and cut certain spruce logs and railroad ties

from lot No. 9 which was embraced in plaintiff's permit. The defendant Johnson financed Worster in his winter's operation, and, as the plaintiff claims, received the logs and ties cut on lot No. 9. The plaintiff paid Prentiss for the timber cut under his permit, and Johnson paid Prentiss for the timber cut under the Worster permit and also that cut on lot 9 without authority.

On August 2, 1906, the plaintiff brought this action of trover against Johnson to recover the value of the timber cut and removed by Worster from lot 9.

The single question is whether a licensee under an unrevoked license of this sort can maintain trover to recover the value of timber cut and removed by a trespasser. A mere statement of elementary principles answers the question in the negative.

In order for a party to maintain trover, he must have such general or special property in the goods in question as entitles him to their immediate possession. Haskell v. Jones, 24 Me. 222; Ames v. Palmer, 42 Me. 197, 66 Am. Dec. 271; Ekstrom v. Hall, 90 Me. 186, 38 Atl. 106.

The plaintiff's claim of title rests wholly on his parol permit, and that is inadequate for the purpose. The legal effect of such a permit has often been defined in the decisions of this court. It does not convey any interest in the land or in the standing trees, but is an executory contract for the sale of timber after it shall have been severed from the soil and converted into personal property, coupled with a revocable license-to enter upon the land for the purpose of cutting and removing it. Emerson v. Shores, 95 Me. 237, 49 Atl. 1051, 85 Am. St. Rep. 404; Pierce v. Banton, 98 Me. 553, 57 Atl. 889. The contract in this case was not exclusive. It did not cover all the timber on the lots. It applied to only such timber as might be cut and removed by the licensee himself, or those acting under him during the specified time. The tract upon which he was allowed to enter was a large one, but he was given no property in or rights over any timber not embraced in his own operation. He was given the right to enter upon seven lots, but the landowner did not expressly agree to refrain from cutting himself or from permitting others to cut thereon. Doubtless if such cutting by the owner, or by others with the permission of the owner, should interfere with the work of the plaintiff so as to prevent his obtaining what he would otherwise have cut, it might be regarded as to that extent a revocation of the license, and the owner might be liable in damages for a breach of the executory contract. But no title to the lumber so cut would thereby be conferred upon the plaintiff. Gillett v. Treganza, 6 Wis. 343. Had the permit been under seal and exclusive, title would have passed to the permittee as soon as the timber was severed ei-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ther by himself or a trespasser. Title in such case would pass by reason of the executory contract, and not because the permittee himself did the cutting. This was decided in Freeman v. Underwood, 66 Me. 229. In that case the permit was under seal, the right granted was exclusive, and the property in the berries picked even by a trespasser was held to be in the licensee. In the case at bar the permit was not under seal, the right granted was not exclusive, and herein lies the distinction.

It follows, therefore, that the cutting by a mere trespasser upon one of the plaintiff's permitted lots did not give the plaintiff any property in the logs when severed. They still belonged to the landowner to whom the trespasser, and not the plaintiff was liable for the stumpage. The plaintiff's contract did not cover them.

The only case cited by the plaintiff in support of his contention is Keystone Lumber Co. v. Kohlman, 94 Wis. 465, 69 N. W. 165, 34 L. R. A. 821, 59 Am. St. Rep. 905, but that decision, even if accepted as sound doctrine, is not in point. In that case the Wisconsin Central Railroad Company had conveyed to the plaintiff's assignor the right to cut and remove for its own use, during the period of twenty years, all the pine timber standing on certain lands for a full consideration which was paid in advance. Subsequently the railroad company conveyed the lands to the defendant Kohlman, reserving to itself all the pine timber standing thereon with the right to enter and remove the same. The defendant, without right, cut and removed the timber and manufactured it into lumber, and the plaintiff, after demand, brought replevin to recover the property, which suit was sustained by a majority of the court. The ground of the decision was that the trespasser admittedly had no title and the licensor had no just claim for he had sold it, and received his pay. He was not injured. "To preserve the fiction of legal title in him beyond the severance can have no other effect than to obstruct justice. In justice the severed timber should belong to the licensee who has bought and paid for it." The opinion further holds that the plaintiff could waive the defendant's tort and adopt his wrongful act in severing and removing the timber; but he must adopt all his acts, if any, and therefore should be allowed to recover the lumber only upon reimbursing the defendant for all expenses connected with its enhanced value.

Chief Justice Cassoday in his dissenting opinion points out with clearness and vigor the anomalies in this decision where merely the question of legal title in a replevin suit and not an equitable accounting was in issue. Without adopting or rejecting the decision of the majority of the court, it is sufficient to note that the license was exclusive and the decision rested upon the full advance payment by the plaintiff for all the standing

timber on the land. For this reason, the court attempted to work out certain equities in the plaintiff's favor.

The case at bar lacks this fundamental fact, and therefore the equities. The plaintiff has never paid the stumpage on the timber cut by the trespasser Worster, but the defendant did pay it to the landowner who knew of the trespass when he received his pay. Moreover, the evidence is clear that the plaintiff's operation did not reach within one mile of lot 9, so that Worster's cutting in no way interfered with him or embraced timber which he could by any possibility have cut himself. It would have remained uncut when his permit expired.

The plaintiff has failed to show any legal title enabling him to maintain this suit, and the entry must be:

Judgment for defendant.

(225 Pa. 23)

FREDERICKS et al. v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. May 20, 1909.)

WATERS AND WATER COURSES (§ 179*)—FLOOD-ING LANDS—LIABILITY OF RAILBOAD COM-PANY.

In an action against a railroad company for flooding of lands by an ice jam alleged to have been caused by a dam erected by the company, where witnesses for plaintiff were not present at the time of the flooding, and their testimony was based only on their nonexpert opinions without stating any facts, showing that the dam was the cause of the jam, plaintiff cannot recover.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 250; Dec. Dig. § 179.*]

Appeal from Court of Common Pleas, Clinton County.

Action by James W. Fredericks and others against the Pennsylvania Railroad Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

On a rule for a new trial Hall, P. J., filed the following opinion:

"This was an action of trespass in which the plaintiffs sought to recover from the defendant for damages which were sustained to their lands by reason of an overflow of ice and water during a flood which occurred in Bald Eagle creek in March, 1902, alleging that the overflow of their lands was caused by an ice jam, which occurred at a point in the creek adjacent to said lands, above a certain dam erected by the defendant company, which it is claimed backed the water for a distance of about two miles, and thus caused the ice jam. Upon the trial the plaintiffs did not produce a single witness who was present or who saw the flood when it occurred, but sought to show that the dam was the proximate cause of the overflow by the testimony of witnesses who were

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

not: there and who were not experts, but preme Court, I feel it my duty as a matter who undertook to say because of their acquaintance with the stream and the premises that it was their opinion that the dam was the proximate cause of the overflow and the consequent damages which ensued. The court held that the evidence of these witnesses was incompetent to fix the responsibility upon defendant company and must be disregarded, and that, in the absence of any proof of facts from which the jury might find that the dam was the cause of the injury, there was nothing to sustain a verdict for the plaintiffs, and directed a verdict for the defendant.

"The plaintiffs' first to fifth reasons for a new trial are based upon the rulings of the court as to the competency of the opinions of these witnesses as evidence. Their sixth reason goes to the direction of the court to find a verdict for the defendant, and their seventh reason alleges that the court erred in the following portion of its charge to the jury: 'I am therefore of the opinion that if these plaintiffs were able to show that the damages which occurred to their land from an ordinary flood in the spring of that year was caused by the fact that this dam was in the stream at that timethat is, if they had been able to show that this dam was the cause of an ice jam which caused the water of the creek to overflow and damage the plaintiffs' land-that the plaintiffs could recover damages from the defendant company in this suit. But unfortunately for the plaintiffs they have failed to produce on this trial any witness who was present and saw that flood. Under the decision of the appellate courts of this state in order to recover damages in such a case it is necessary that they should prove affirmatively to the jury that the dam was in fact the direct cause of the damage which they suffered. It is not sufficient that they should be of the opinion that it was the dam that caused the damage. They must show facts to the jury sufficient to satisfy them that it was the actual contributing cause. Now, as I recollect the testimony in this case, the only thing tending to show that this dam was the cause of the damage to the plaintiffs' farm is the testimony of three or four different parties who were not there at the time of the flood and did not see the damage occur, but who say that it did occur, and that they are of the opinion that this dam must have stopped the ice from running out of that creek, thereby causing an ice gorge, which was the occasion of this overflow. This is their opinion only. far as they actually knew, this ice gorge, which they locate in the bend of the creek up there against the bluff, may have been caused by the natural location and contour of the stream, and might have occurred even though there had been no dam there, so far as the evidence in this case shows; and

of law to determine that there is not sufficient evidence in this case to go to the jury on the question of damages and to direct a verdict for the defendant.' We are of the opinion that this case is ruled by the case of Shaw v. Susquehanna Boom Co., 125 Pa. 324, 17 Atl. 426; and, notwithstanding the extremely able argument of the counsel for the plaintiffs, we are unable to see any distinction in principle between that case and the case at bar. In that case the plaintiff called quite a number of witnesses who lived along the river opposite the boom for many years, who testified to seeing the jam and flood which followed it; that there was an opening of only 100 feet between the last pier of the boom and the shore of the river; that the ice never went out of a part of the boom until spring: that it was jammed for miles down the river from plaintiffs' farm. Certain witnesses who had lived on the bank of the river for 50 years testified that they never saw the ice jam so that the high water would not carry it out, until after the boom piers were built. One witness who had lived alongside the boom for 30 years, and who also knew the river before the boom was constructed, was asked the following question: 'Q. From your knowledge and experience, and your knowledge of the action of the river, what do you say caused the ice jam in 1884? Defendant's counsel objected, because the question asked the opinion of the witness, which is not admissible. The plaintiffs can only show facts from which the jury are to find the facts. The objection was sustained, and this was one of the grounds of error. The court directed a nonsuit, and was sustained by the Supreme Court. The witnesses in that case had vastly greater opportunity to judge than those who testified in this case, for they knew the river before the dam and boom were built. They saw how the ice froze about the piers within the slack water and how it acted and gorged, and many of them were eyewitnesses of the flood. In the present case there was no evidence that any similar ice jam had occurred there, either before or after March. 1902, although the dam had been there since 1835. None of the witnesss could testify as to the action of the stream or of the ice in the flood of 1902, as none of them were there and saw it. All they could do was to express their opinion as to what caused the ice jam and overflow based upon the facts that it had occurred. In the Boom Company Case the Supreme Court says: 'The witness Davis was asked for his opinion as to the cause of the ice jam in 1884. He was not an expert, and his opinion was not competent under the well-settled rules of evidence. was the business of the jury to find the cause of the jam from the facts given by the witnesses. * * * The portion of the charge complained of is as follows: "There is no therefore, under the decisions of our Su-evidence whatever in this case which would justify a jury in finding that the defendant is in any way responsible for the injury complained of by the plaintiff. The motion of the nonsuit is allowed." An examination of the testimony shows that the learned judge below was entirely accurate in this instruction. There was not a scintilla to show that the works of the boom company had anything to do with the ice jam which caused the injury to the plaintiff's property. * * * They failed to point out any such testimony. and we were practically asked to assume that, because there was an ice jam in the river, the works of the boom company were the cause of it. It was entirely proper for the court below to nonsuit the plaintiffs. It would have been bald error to submit the case to the jury.'

"The present case rests entirely upon the testimony of Abram Bittner, J. H. Fredericks, J. W. Fredericks, J. G. Packer, and E. G Laubach. Not one of these witnesses testifies to any facts from which the jury could have found that the flood was caused by this dam. Their testimony was only as to their opinions. They did not see the flood or how it acted or how the ice jam was formed, or that any ice jam was formed, nor did they state any fact as to the appearance of the premises, stream, or dam that would indicate in any way that the dam was the cause of an ice jam. Their opinions were based entirely upon the fact that the dam formed a pool as high as its comb, which, however, only raised the water to a point within 41/2 feet of the level of the Fredericks' farm, and the opening above the comb was some 300 feet in width. They assume this back flow of water as the cause of the ice jam, though there was no evidence of any ice jam ever having occurred there either before or after, and this was an ordinary flood. Their evidence was given without their having any knowledge of the matter or question practically involved, and without any suggestion of their being qualified to know or to testify as to the action of the water in this stream after it got above the height of the dam.

"For the reasons under the decision in the case of Shaw v. Boom Company, above mentioned, we are unable to see that there was any error on the trial or in the direction of the court to the jury.

"The rule is therefore discharged." Argued before MITCHELL, C. J., and POTTER, ELKIN, and MESTREZAT, Stewart. JJ.

Max L. Mitchell, B. F. Geary, and W. C. Kress, for appellants. T. C. Hipple, and Henry Hipple, for appellee.

PER CURIAM. The judgment is affirmed on the opinion of the court below.

(224 Pa. 639) 1 CORNELY v. ZENTMYER et al. (Supreme Court of Pennsylvania. May 17, 1909.)

MINES AND MINERALS (\$ 50*)—COAL LEASE—
ASSIGNMENT—UNPAID RENTALS.
A coal lease for 99 years provided for a
minimum royalty. Neither the lessee nor his
assignee ever took possession of the coal or performed any of the covenants of the lease. Held,
that the assignee could not recover the coal, in
aircriment without paying the minimum royals. ejectment, without paying the minimum royalties in arrears.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 50.*]

Appeal from Court of Common Pleas, Clearfield County.

Action by W. P. Cornely against Porter B. Zentmyer and Thomas McGlynn. judgment on a directed verdict plaintiff appeals. Affirmed.

The court charged in part as follows:

"As we look at this case, then, gentlemen of the jury, it is simply a question of law, which we have determined in favor of the defendants—that they are entitled to a verdict at your hands, to be released, however, to the plaintiff upon the payment of the back royalties due to them since their purchase, amounting to \$16,155.34. The time in which he is required to pay that, however, is a matter for the jury, and he is entitled in such conditional verdict to a reasonable time. What that reasonable time is, of course, we cannot control, and it is wholly for the jury. In the argument of counsel, the counsel for plaintiff contended they ought to have a year, while the counsel on the other side contended it should not exceed six months. It is wholly for the jury; the form of the verdict being in this language: We, the jury, find in favor of the defendants for possession of the two seams of coal in the lease contract of June 23, 1886, to be released to the plaintiff on the payment by the plaintiff of the sum of \$16,155.34, royalties due under said lease contract, within the period of months.' It is your province, then, gentlemen of the jury, to find your verdict fixing the time which they shall have for repayment. Take this case, then, gentlemen, and pass upon that single question, bringing in a verdict in the form otherwise as I have given you."

The jury returned a verdict in the form stated in the charge.

Argued before FELL, BROWN, MESTRE-ZAT. POTTER, and STEWART, JJ.

Harry Boulton and Oscar Mitchell, for appellant. Krebs & Liveright, Bell & Hartswick, and James H. Kelley, for appellees.

MESTREZAT, J. The heirs of Robert Whiteside, deceased, by an "agreement of, lease," dated June 22, 1886, let to Thomas; Barnes and William Parker all the coal in two certain seams or veins in and underly-

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ty for a term of 99 years. The consideration or royalty to be paid was 10 cents per ton, and the lessees were to ship not less than 20,000 tons a year, and were to pay the royalty on that amount, whether it was shipped or not. If the lessees failed to pay the royalty on coal which had not been shipped in any year, they were to receive a credit on the succeeding year's shipment for the amount of the overpayment. The lessees assigned their "right, title, and interest in and to" the lease to Cornely, the plaintiff, by a writing dated May 21, 1905. It does not appear that the lessees or their assignee ever had possession under the lease or performed its covenants. The defendants claim title from the heirs of Robert Whiteside by virtue of certain legal proceedings in the courts of Clearfield county, not necessary to be referred to more particularly. It appeared on the trial that there are royalties amounting to more than \$16,000 due and unpaid to the lessors or the parties holding their title. The court directed the jury to find a verdict for the defendants, to be released to the plaintiff on the payment of the coyalties due and unpaid within such time as the jury might determine. Judgment was entered on the verdict, and the plaintiff has appealed.

We need not discuss or determine the many questions raised in the arguments of counsel. It is sufficient to say that under the undisputed evidence in the case the learned judge of the court below was clearly right in directing a conditional verdict. It is all the plaintiff was entitled to, and it was a charitable concession on the part of the defendants to accede to it. Conceding the plaintiff to be a grantee of the coal, as he claims, he is out of possession, and seeks to recover it by virtue of an executory contract with the terms of which it is admitted he has not complied. It is settled law that a plaintiff under such circumstances is not entitled to the specific performance of a contract, or to the possession of the real estate which he claims by virtue of the contract. If he invokes the equitable powers of the court to enforce the contract, the duty is cast upon him to show that he himself has complied with its terms. The plaintiff occupies the position of the lessees. By the assignment of the lease to him, he simply took all their "right, title, and interest," and, therefore, he must comply with the terms of the contract, just as they would have been compelled to do, had they attempted to assert their title against the lesgors or those claiming under them. This he has failed to do. As said in Kreutz v. McKnight, 53 Pa. 319, a case very similar to the one in hand, "the infirmity of the plaintiff's case is that there was an utter failure to show performance or offer of perform-

ing a certain tract of land in Clearfield countries of his covenants." In that case it is ty for a term of 99 years. The consideration or royalty to be paid was 10 cents per ton, and the lessees were to ship not less than 20,000 tons a year, and were to pay formance of his covenants."

The defendants, who claim under the Whiteside heirs and have been in possession of the premises for nearly 10 years, are not seeking to annul or set aside the agreement under which the plaintiff claims. All they ask is that he, standing in the shoes of the lessees, pay the purchase money due on the contract. It would be most inequitable, without prepayment of the unpaid royalties, to permit the plaintiff to take possession of the premises after the great lapse of time during which the lessors or those holding under them have been deprived of the royalties due them. It would be analogous to the case of a tenant attempting to prevent payment of rentals by collusion with an undertenant, which caused Chief Justice Woodward in Kreutz v. McKnight, 53 Pa. 319, to remark: "It would be an intolerable hardship to landlords, if tenants once in possession could allow themselves to be ousted by intruders for more than half the term; neither tenant nor intruder rendering the stipulated rent." The defendants are not claiming royalty for any coal which they or their lessees mined and removed. That is not included in the verdict. as is shown by the court's charge.

The judgment of the court below is affirmed.

(224 Pa. 604)

HUNT v. PHILADELPHIA & R. RY. CO.†
(Supreme Court of Pennsylvania. May 10,
1909.)

1. Courts (§ 104*)—Decisions—Necessity of Opinion.

Under Act April 22, 1905 (P. L. 286), where the court enters judgment notwithstanding the verdict, it must be such judgment as should have been entered upon the evidence, and it is the duty of the court to point out in an opinion the evidence which sustains it in setting aside the verdict.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 353; Dec. Dig. § 104.*]

2. MASTER AND SERVANT (§ 284*) — INJURIES TO SERVANT—QUESTIONS FOR JURY.

In an action by a brakeman against a rail-road company to recover for personal injuries, where plaintiff was working on a train belonging to his own company, but operated on defendant's track, and was injured by the alleged negligence of the engineer on one of defendant's engines, the evidence held sufficient to submit to the jury the question of identification of the engine and engineer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1000; Dec. Dig. § 284.*]

3. WITNESSES (§ 247*)—EXAMINATION—IDEN-TIFICATION OF SUBJECT-MATTER.

In an action against a railroad company, where the witnesses give an abbreviated form of

the name by which the company is popularly that thereupon "It shall be the duty of the known, it is sufficient.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 858; Dec. Dig. § 247.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Howard A. Hunt against the Philadelphia & Reading Railway Company. From a judgment for defendant notwithstanding the verdict, plaintiff appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, ELKIN, and STEW-ART, JJ.

Thomas Leaming and John R. K. Scott, for appellant. Wm. Clark Mason and Gavin W. Hart, for appellee.

MESTREZAT, J. As suggested by the learned counsel for the appellee, there is but a single question presented for consideration on this appeal, and that is whether there was any "evidence that the defendant was in control of the operation of that engine (which caused the accident) or in any way connected with it." The trial judge held there was sufficient evidence of this fact to go to the jury, saying: "This case is purely for the exercise of your functions, and it is not necessary for the court to at any length review the facts which as far as they go are uncontradicted." At the conclusion of the plaintiff's testimony, the defendant moved the court for a nonsuit on the ground that there was no evidence to warrant the jury in finding that the engine which was alleged to be the cause of the plaintiff's injuries was in control of the defendant company. The motion was denied, the case was submitted to the jury, and a verdict was returned for the plaintiff. Subsequently, on motion of counsel, the court entered a judgment non obstante veredicto in favor of the defendant. In entering this judgment the court filed no opinion and assigned no reasons for its action. In the recent case of Rankin v. Rankin, 224 Pa. 514, 73 Atl. 920, the court of common pleas No. 2 of Philadelphia county sustained exceptions to a master's report without filing an opinion or assigning reasons therefor. It was held that the trial court had failed to perform its duty, that it should have filed an opinion setting forth its reasons for its action in reversing the master, and the case was remanded. with directions to the court to file such opinion.

In the present case the judgment was entered under the provisions of the act of April 22, 1905 (P. L. 286). This act provides that, where binding instructions have been refused, the party presenting the request for such instructions may move the court to have all the evidence taken upon the trial duly certified and filed, and for judgment non obstante veredicto thereon, and Schuylkill river in the city of Philadelphia.

court, if it does not grant a new trial, to so certify the evidence, and to enter such judgment as should have been entered upon that evidence." Where, therefore, judgment is entered notwithstanding the verdict, it must be "such judgment as should have been entered upon that evidence," and hence it is the duty of the court in entering the judgment to point out in an opinion the evidence which sustains it in setting aside the verdict and in holding that the evidence does not sustain the verdict of the jury. The. judge having ruled on the trial of the cause that the evidence of the plaintiff's claim was sufficient to submit to the jury, justice to him as well as to the defeated litigant requires the court in banc, when it enters a judgment non obstante veredicto, to point out wherein the trial judge was in error in holding that the evidence was sufficient. The act of the court in entering judgment notwithstanding the verdict, without assigning its reasons for reversing the trial judge, is not judicial, but arbitrary, and a violation of the manifest intent of the statute authorizing the judgment. The act of 1905 clearly contemplates that a judgment non obstante veredicto shall be entered upon the evidence submitted to the jury and filed of record, and that the court is only warranted in setting aside the verdict for sufficient reasons arising from the evidence. These reasons should necessarily be embraced in an opinion filed at the time the court enters the judgment.

The court below having failed to perform its duty in assigning reasons for its action in entering the judgment notwithstanding the verdict, the case should properly be remanded for that purpose. We would make an order to this effect if it were not for the fact that the judgment entered by the court is clearly erroneous, and is wholly unsupported by the evidence which the judge held to be competent and admitted on the trial of the cause. This evidence is brief, and in order to prevent further delay in the adjudication of the rights of the parties we have concluded to pass at once upon the single question raised by the assignment, which alleges error by the court "in granting defendant's motion for judgment non obstante veredicto."

We are clear that there was sufficient evidence to submit to the jury on the question of the defendant's control of the operation of the engine which caused the collision resulting in the plaintiff's injuries. It is conceded that the railroad tracks where the accident happened belonged to the Baltimore & Ohio Railroad Company. A train of about 40 freight cars being hauled by the Baltimore & Ohio Company's locomotive stopped near Race street on the eastern side of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digz. 1907 to date, & Reporter Indexes

The train was divided, the locomotive and the trial. If a nonsuit is to be granted uptwo cars going forward and the balance of the cars left standing on the track. The plaintiff was the head brakeman of the train, , and when it was divided he assisted in shunting one of the two cars attached to the engine into the Race street siding; the two , parts of the train being separated by a gap of 6 or 8 car lengths. While he was thus , engaged, an engine approached the rear of the cars left standing on the track, pushed them forward until they collided with the ...car which was being shunted into the Race street switch, causing a collision which resulted in the plaintiff's injuries. The plaintiff claims that this was an engine of the Philadelphia & Reading Railway Company, the defendant, and was at the time in the control of and was being operated by that company's servants. We think the testimony produced by the plaintiff and admitted by the court was sufficient to sustain its contention. The conductor in charge of the Baltimore & Ohio train was called as a witness, and he testified that he had been working with this company three years, and that he was familiar with the engines passing up and down this part of the company's tracks. He says he saw on those tracks engines marked "Philadelphia & Reading." "Q. Whose engine was it that was pushing the half of this train? A. The Philadelphia & Reading engine. Q. Did you know the engineer who was running the engine? A. A fellow named Seward. Q. Who did he work for? A. The Philadelphia & Reading. Q. I guess you knew the engine, too, didn't you? A. Yes; I knew it was a Philadelphia & Reading engine, of course." The rear brakeman on the Baltimore & Ohio train, manifestly an unwilling witness for the plaintiff, testified that it was his duty to protect the cars left standing on the track. He testifies that the engine which caused the collision came up to the rear of the train to make a coupling; that he signaled the engineer to stop, but he did not heed the signal. In his testimony he refers to the engineer in charge of the engine which made the coupling as "the Reading engineer."

We think this and the other evidence in the case was sufficient to submit to the jury on the question of the identification of the engine and the engineer. It does not detract from or weaken it that the witnesses, in referring to the defendant company, did not give its full corporate name. It may be that there are other corporations containing the words "Philadelphia & Reading"; but they do not appear in this case, except in the argument of counsel. It is seldom that a witness in a railroad case, or even the court, gives the full corporate name of the railroad every time there is occasion to speak of the corporation in the progress of dict is reversed on appeal, and the court is di-

on such a technicality, the public should have notice of it, as there is no such precedent to sustain it in the books. Any Phil-. adelphia jury would understand, in an action against the defendant company, what a witness would mean in the use of the words "Philadelphia & Reading," "Reading," the "Reading Railroad Company," or the "Reading Railway Company." While every person in Philadelphia and vicinity knows of the railroad operated by the defendant company, yet he may not know whether the word "railroad" or "railway" is used in the corporate name; very few persons indeed, who, if they should hear of one injured on the "Reading," would not at once know that he had been injured on the Philadelphia & Reading Railway. In fact, it is common experience that, when the employes of a railroad speak of or testify in regard to any of the leading railroads, they use a generally recognized abbreviated form for the full corporate name of the road. It is not within reason to believe that the witnesses who testified in this case did not refer to the defendant company in speaking of the engine which caused the plaintiff's injuries, and that the jury did not so understand the witnesses.

If the jury were satisfied from the evidence that the engine responsible for the collision was owned by the defendant company, and was being operated by its servants at the time of the accident, they may infer, in the absence of testimony to the contrary, that the engine was on the Baltimore & Ohio Company's road by consent of that company. It will not be presumed, under the circumstances of this case, that the defendant's servants, in operating the engine on the Baltimore & Ohio tracks, were trespassers, but rather that the engine was operated on the tracks in pursuance of a traffic arrangement between the two companies.

It is, of course, the duty of the plaintiff, in this as well as in other cases, to sustain his claim by competent evidence. We think he has done so, and that, if the defendant company desired to relieve itself from responsibility for the accident resulting in the plaintiff's injuries, it should have produced testimony to meet the burden shifted to it by the plaintiff's evidence.

The judgment of the court below is reversed, and that court is directed to enter judgment upon the verdict.

(224 Pa. 610)

HUNT v. PHILADELPHIA & R. RY. CO. (Supreme Court of Pennsylvania. May 20. 1909.)

APPEAL AND ERROR (§ 347*)—REMAND—ENTRY OF JUDGMENT—TIME OF TAKING APPEAL.
Where a judgment notwithstanding the ver--Remand-Entry

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

rected to enter judgment on the verdict, the right | Company and another. Judgment for deof appeal in the original suit will run from the of the judgment entered below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1897; Dec. Dig. § 347.*]

On motion to modify judgment. Denied. For former opinion, see 73 Atl. 968.

PER CURIAM. In this case there was a verdict for plaintiff, judgment non obstante veredicto for defendant, and a reversal by this court, and a direction to the court below to enter judgment on the verdict. The defendant now asks for a modification of our judgment, on the theory, apparently, that it will lose its right of appeal by lapse of time. This is a misapprehension. The order of this court is so worded that, instead of entering the necessary judgment ourselves, we direct the court below to enter it, and the defendant's right of appeal in the original suit will run from the date of that judgment so entered.

(224 Pa. 554)

SACCONE et al. v. WEST END TRUST CO.

(Supreme Court of Pennsylvania. May 3, 1909.)

1. BOUNDARIES (§ 21*)—PRIVATE ALLEY.
There is no distinction between a call for a public highway as a boundary and an open-ed private alley, and grantee takes the fee to the center of the alley, as well as to the center of the highway.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 131; Dec. Dig. § 21.*]

2. Boundaries (§ 21*)-Contract-Construc-TION-PRESUMPTIONS.

Title to the fee of an alley laid out across one end of premises will be presumed to pass, in the absence of express or implied exception, where the premises are described as bounded by the alley.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 131; Dec. Dig. § 21.*]

3. Boundaries (§ 21*) — Land Conveyed - Construction of Contract.

CONSTBUCTION OF CONTRACT.

An owner of premises at intersecting streets divided them into five lots. The corner lot and three nearest it were 59 feet deep, and the further lot 62 feet. The first four lots were described in deeds to various grantees as extending to a 3-foot alley laid out for the accommodation of theirs and other adjoining lots, and each deed of the five lots granted "the free use and privilege of" the alley for a common passageway. The owner had no land on the opposite side of the alley. Held, that the grantees of the corner lot and three nearest it took the fee to so much of the alley as was immediately back to so much of the alley as was immediately back of their respective lots, subject to the easement of the other grantees.

[Ed. Note.-For other cases, see Boundaries, Cent. Dig. \$ 131; Dec. Dig. \$ 21.*]

Appeal from Court of Common Pleas, Philadelphia County.

Amicable action of ejectment by Albertina Wickersham Saccone and others, by John F. Keator, their guardian, and Mary W. Taf-

fendants, and plaintiffs appeal. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

H. Gordon McCouch, George S. Munson, James McMullan, and Keator & Johnson, for appellants. John Hampton Barnes, for appellees. H. O. & B. H. Evans, Watson & Freeman, and Robert Woods Sutton, amici curisa.

POTTER, J. This was an amicable action of ejectment, brought to recover possession of a strip of ground, 8 feet in width and 80 feet in depth, situated on the west side of Broad street, 59 feet south of its intersection with South Penn Square, in the city of Philadelphia. The parties agreed upon a case stated, which disclosed the following facts: On April 21, 1832, Robert A. Caldcleugh conveyed to various grantees five lots of ground situated on South Penn Square west of Brbad street, each 20 feet in width; the corner lot and the three lots nearest to it being 59 feet in depth and the westernmost lot 62 feet deep. Each of the first four lots was described in the deeds as extending "to a three feet wide alley laid out and opened by the said Robert A. Caldcleugh for the accommodation of this and other lots adjoining thereto, and leading westward from the said Broad street to the depth of eighty feet." Each of the five deeds contained a grant of "the free use and privilege of the said three feet wide alley as and for a passageway and water course in common with the owners and occupiers of the said adjoining lots." From the date of the deeds each of the owners of the lots continued to have, use, and enjoy the free and uninterrupted use and privilege of the alley as and for a passageway and water course in common with the owners and occupiers of the other four lots.

On November 11, 1846, Robert O'Neill acquired title to the premises adjoining the alley on the south, and on June 26, 1848, Caldeleugh conveyed to O'Neill the soil of the alley in fee, subject to the uses and privileges granted to the owners of the lots adjoining. On August 9, 1849, O'Neill conveyed to one Wickersham the premises south of the alley, "together with the free and common use and privilege of the aforesaid three feet wide alley as and for a passageway and water course into and from Broad street at all times forever." Subsequently, by various conveyances, three of the lots next the corner, originally granted by Caldcleugh, became vested in the West End Trust Company, and the other two lots, as well as the premises south of the alley, granted by O'Neill to Wickersham, became vested in the Girard Trust Company. Both companies made use of the soil of the alley in connecfini D'Angelico, against the West End Trust ition with buildings erected on their respective

eFor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes,

premises, and on October 6, 1905, they entered into an agreement with each other "that the said alley be and the same is hereby abandoned and vacated."

The plaintiffs are the heirs at law of Robert O'Neill, grantee of Caldcleugh by the deed of June 26, 1848, and the defendants are the West End Trust Company and the Girard Trust Company. Upon the facts stated, the court below held that each of the grantees of Caldcleugh, under the four deeds of April 21, 1832, took a fee-simple title to so much of the ground in dispute as lay immediately in the rear of the lot he bought, subject to an easement in the owners of the other lots, and that Caldcleugh parted with all his interest at that time, and no title to the soil of the alley passed by the deed of Caldcleugh to O'Neill on June 26, 1848. Judgment was entered on the case stated for the defendants, and the plaintiffs have ap-

If the alley in question had been a public highway, the grantees of land bounded thereby would without doubt have taken the fee to the center of the highway, if the grantor owned such fee, and had used no language in his deed indicating an intention to retain the fee in the highway. In one of our latest cases bearing on this question (Willock v. Beaver Valley R. R. Co., 222 Pa. 590, 595, 72 Atl. 237, 238), our Brother Elkin said: "If the plan of lots in the present case had been laid out by an individual in precisely the same manner as the commonwealth had done, and lots had been sold with streets as boundaries, the title to the fee to the center of the streets would have passed to the purchaser. This is the rule of our cases from Paul v. Carver, 28 Pa. 223, 67 Am. Dec. 413. to Neely v. Philadelphia, 212 Pa. 551, 61 Atl. 1006." We can see no good reason why the same rule should not apply to land which is conveyed as bounded by a private way. The doctrine was substantially adopted by this court in Ellis v. Academy of Music, 120 Pa. 608, 623, 15 Atl. 494, 496, 6 Am. St. Rep. 739, where it was said: "Nor did the court err in charging that parties who are entitled to a free use of an alley have the same right in it that the public has in its highways, and that if the way in this case were vacated the soil would belong to the plaintiff and defendant as tenants in common. By the several grants to these parties, their properties were not only bounded on the alley in controversy, but it was made appurtenant to those properties. Nothing, therefore, was left in the owner, and if the fee did not vest in these grantees it is hard to tell where it is. The case is very much like that of Holmes v. Bellingham, reported in 7 C. B. (N. S.) 329, in which Cockburn, C. J., says: "The direction complained of is that the learned judge told the jury that there was ·a presumption, in the case of a private way or occupation road between two properties,

medium to the owners of the adjoining property on either side. That proposition, subject to the qualification which I shall presently mention, and which, I take it, was necessarily involved in what afterwards fell from the learned judge, is in my opinion a correct one. The same principle which applies to a public road, and which is the foundation of the doctrine, seems to me to apply with equal force to the case of a private road.' As the doctrine here stated seems to be reasonable and sound, we cannot understand why we should not adopt it. It seems to be admitted that, were the alley public, its vacation would vest in each of the parties the unincumbered one-half of the fee in severalty, and why this should not apply to a private way, where, just as in the case of a public way, by the grant it was made appurtenant to the several properties, we cannot understand." The reference above to the plaintiff and defendant as being tenants in common of the soil in the alley in case it was vacated was probably a slip of the pen, as later in the opinion it is stated that vacation would vest in each of the parties one-half of the fee in severalty. In Rice v. Clear Spring Coal Co., 186 Pa. 49, 40 Atl. 149, the rule which was approved by this court was thus stated: "When the boundary given in a deed has physical extent, as a road, street, or other monument having width, courts will so interpret the language of the description, in the absence of any apparent contrary intent, as to carry the fee of the land to the center line of such monument." And in Schmoele v. Betz, 212 Pa. 32, 61 Atl. 525, 108 Am. St. Rep. 845, a case which involved the use of a private alley, the doctrine was again cited with approval that, in case of vacation, the rule which applies to a public highway is to be applied as between parties entitled to the use of a private alley.

In some of our cases the language used appears to sustain the contention of appellants that there is a distinction between a call for a public highway as a boundary and a private street or alley so designated. But we think upon examination that these decisions were not intended to go further than to hold that, where land is conveyed as bounded by an unopened street, the grantee takes the fee only to the side line of the street, with an easement over its bed. Thus in Cole v. Philadelphia, 199 Pa. 464, 49 Atl. 308, the deed called for a street which was unopened, and it was held that the call for an unopened street as a boundary only conveyed the title to the side of the street, and not to the middle thereof. Clymer v. Roberts, 220 Pa. 162, 69 Atl. 548, the deed called for "the middle line of Howard street 50 feet wide; thence along the middle line of said Howard street." Howard street was at the time an unopened street; but it was held that the purpose of that the soil of the road belongs usque ad | making the boundary to be the middle line of

the street was to vest the fee in the grantee | ent case did not expressly except from his as far as the center line, notwithstanding the fact that the street was at the time un-In Robinson v. Myers, 67 Pa. 9, where the rule with regard to unopened streets seems to have been first laid down, this distinction is expressly made. Justice Williams, after stating the doctrine of Paul v. Carver, 26 Pa. 223, 67 Am. Dec. 418, and Cox v. Freedley, 83 Pa. 124, 75 Am. Dec. 584, said, with reference to the case then before him: "But in this case there was no alley or street by which the lots were bounded. The recorded plan, which is to be taken as a part of the defendant's title, shows that the ground in question is a lot, and not a street. And it is admitted that no alley was ever laid out over the lot, or ever used by the public or by private individuals. There is, then, no ground or reason for the application of the rule laid down in Paul v. Carver to this case." The case of Van O'Linda v. Lothrop, 38 Mass. 292, 32 Am. Dec. 261, cited in Robinson v. Myers, and also by Justice Mercur in Spackman v. Steidel, 88 Pa. 453, relied on by appellants, was also a question of an unopened street. Morton, J., said (page 296 of 38 Mass. [32 Am. Dec. 261]): "The street did not then exist in actual use, but only in contemplation." The decision there seems to have gone upon the ground that the deeds showed an intention by the grantor to exclude the fee of the street from the grant.

In the present case the language of the deeds from Caldeleugh, as set forth in the case stated, shows that at the time of the conveyances the alley was already "laid out and opened by the said Robert A. Caldcleugh"; and it further appears from the case stated that after the conveyances were made the owners of the lots continued the use of the alley, and it was not abandoned or vacated until October 6, 1905, a period of over 78 years. So that the facts of this case distinguish it clearly from Robinson v. Myers, supra, and the subsequent cases relating to unopened streets and highways. When Justice Mercur, in delivering the opinion of this court in Spackman v. Steidel, 88 Pa. 453, said: "Where the street called for a boundary is not a public highway, nor dedicated to public use, the grantee does not take title in fee to the center of it, but by implication acquires an easement or right of way only over the lands"-and then cites the cases which we have above referred to (Van O'Linda v. Lothrop and Robinson v. Myers), we think it is apparent that he had in mind cases where the deed called for a street that was unopened, as the two cases which he cites had reference to such unopened streets.

The authorities are uniformly to the effect that the question of whether the grant includes the fee to the bed of the highway

conveyances the fee of the alley in the rear of the lots conveyed, and it is hardly reasonable to suppose that he intended to reserve a strip at the end of the four lots. 3 feet wide and 80 feet long, which he was subjecting to easements which, so long as claimed by the grantees, would prevent him from making any beneficial use of the fee in the strip. We think it is apparent that Caldcleugh in 1832 intended to part with his entire interest in the property, and that the alley was laid out and opened, as stated in his deeds, "for the accommodation of this and other lots adjoining thereto." It will be recalled that the westernmost lot, No. 5, was described as being 62 feet in depth, and that Caldcleugh did not reserve the 3 feet at the rear of that lot. If he had intended to reserve to himself the fee in the alley, he would naturally have reserved the same space in the rear of lot No. 5. But he evidently conveyed that lot to its full depth, because, as it was at the head of the alley, access could be had thereto without any such reservation. Neither the language of the deeds, nor the situation of the ground, nor the circumstances connected with the conveyances, indicate any intention on the part of Caldcleugh to retain the fee to the bed of the alley when he made the conveyances in 1832.

The assignments of error are overruled, and the judgment is affirmed.

(224 Pa. 564)

OLIVER et al. v. ORMSBY et al. (Supreme Court of Pennsylvania. May 8, 1909.)

Boundaries (§ 20*)—Call for Alley.

Where an alley is actually laid out and opened, and is appurtenant to the properties abutting on it, a deed calling for the alley will carry title to the center line, in the absence of an express intent to the contrary.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 132; Dec. Dig. § 20.*]

Appeal from Court of Common Pleas, Allegheny County.

Bill by George T. Oliver and others against Robert G. Ormsby and others. Decree for. complainants, and defendants appeal. Affirmed.

The court entered the following decree:

"And now, to wit, March 23, 1909, this cause came on to be heard at this term, and was argued by counsel, and upon consideration thereof, it is ordered, adjudged, and decreed as follows, viz.: That the plaintiffs are the lawful owners in fee simple of the land formerly occupied by Freiheit's alley, originally called Carpenter's alley, in the city of Pittsburg, and extending 10 feet in width from Oliver avenue to Sixth avenue, and that plaintiffs have a lawful right to the exclusive use and occupation of the said is one of intention. The grantor in the pres- | strip of land formerly occupied by said alley;

that the defendants are jointly and severally for Allegheny county, relation thereunto beperpetually enjoined from any interference whatever with the possession and use of said strip of land formerly occupied by said alley by the plaintiffs, and from any interference with the erection over said strip of land of the office building now being erected by the said plaintiffs; that the foregoing decree is also entered pro confesso against all the defendants who have not entered appearances or filed answers in said cause."

Argued before FELL, BROWN, MESTRE-ZAT, POTTER, and STEWART, JJ.

Wm. M. Hall, G. C. Burgwin, A. P. Burgwin, Frank C. Osborn, Chas. Gibbs Carter, and George C. Flowers, for appellants. David T. Watson, H. O. & B. H. Evans, and Robert Woods Sutton, for appellees.

POTTER, J. This bill in equity was filed by the trustees under the will of Henry W. Oliver, deceased, and by his widow and daughter, against the heirs of Oliver Ormsby, deceased, praying for a decree to quiet the title of plaintiffs to a strip of ground, latterly known as Freiheit's alley, situated in what is now the Second ward of the city of Pittsburg, 10 feet in width and lying 60 feet westwardly from and parallel with Smithfield street, and extending from Sixth avenue southwardly to Oliver avenue. Plaintiffs base their claim upon the following facts:

In 1812 Oliver Ormsby was the owner of two adjoining lots in the plan of the town of Pittsburg. These lots were numbered 433 and 434, and each of them fronted 60 feet on Sixth street, and No. 433 ran southwardly along Smithfield street 240 feet to Virgin alley. Mr. Ormsby made a plan, subdividing lot No. 433 into 11 smaller lots, and running an alley, called Carpenter's alley, between Nos. 433 and 434, 10 feet in width, extending from Sixth street to Virgin alley. This plan he acknowledged and recorded in 1814, and on the plan he placed the following statement: "In consideration of sundry advantages, I do hereby give and grant for the use of an alley 10 feet of ground in breadth along the southeast side of said lot No. 434, extending through from Sixth street to Virgin alley, for the accommodation of the persons who may hold the said 11 lots, and for the accommodation of the owner or owners of the remainder of said lot No. 434, which said 10-foot alley, called Carpenter's alley, shall be and remain open forever for the uses and purposes aforesaid." Subsequently Mr. Ormsby laid out the residue of said lot No. 434 into 11 other lots, each of which fronted on the westerly side of Carpenter's alley. All the lots in the plan were sold by Mr. Ormsby, and in the deeds Carpenter's alley was called for as a boundary, and these words were added: "Together with the free use and privilege of the said alley, called Carpenter's

ing had, will more fully appear."

By various mesne conveyances all of the lots fronting upon both sides of Carpenter's alley became vested in the trustees under Henry W. Oliver's will, thus covering the frontage on both sides of the alley running from Sixth street to Virgin alley. It appears from the evidence that this Carpenter's alley was opened, laid out, and in actual use from 1812 down to within a short period of the filing of the bill in this case. It further appears that in 1881 the name of Carpenter's alley was changed to that of Freiheit's alley by the city of Pittsburg by ordinance duly passed. The alley was paved twice. Its use was granted by the city to a telephone company for the purpose of laying conduits under the surface. The ailey was policed and cleaned and kept in order by the city. On November 27, 1908, the alley was vacated by an ordinance of the city of Pittsburg, under an agreement with the trustees under the will of Henry W. Oliver that in the erection of a proposed building upon their land running from Virgin alley, now called Oliver avenue, to Sixth street, they would construct and maintain a corridor for public use, extending from Oliver avenue to Sixth avenue, through said building, located about 40 feet west of the location of Freiheit's alley, and at the grade of said alley; this corridor to be for the use of the public for foot passengers only, and to be kept open to the public as required by the city of Pittsburg.

In their answers filed the defendants deny that the legal effect of the language used on the plan, and in the deeds of Ormsby, gives the plaintiffs title in fee simple to the soil of the alley, and they aver that plaintiffs have but an easement or right of way over the alley, which has now been abandoned. They deny that the alley ever became a public highway, and aver that it was only a private way. The court below reached the conclusion that Carpenter's alley, as marked upon the plans of Oliver Ormsby, was dedicated to public use; that, being a public highway of the city of Pittsburg, the ordinance of the city, by which it was vacated, was effectual; that the conveyance of lots abutting on said alley by Oliver Ormsby, in which the alley was called for a boundary, passed title to the purchasers to the middle line of the alley; that when the alley was vacated the plaintiffs, who then owned all the land abutting upon the alley, succeeded to the exclusive right to use and occupy the soil of the alley.

The main contention of counsel for appellants is that the alley in question was not a public highway, but was a mere easement or private way. If it were necessary to rest the decision upon that point alone, we would not hesitate to accept the finding of fact, in that respect, of the trial judge. There was ample evidence to support the finding alley, as by the plan intended to be recorded that Carpenter's alley was actually opened in the office for recording of deeds in and upon the ground in accordance with the plan

of Oliver Ormsby, and that it was in contimpous use by the public for a period of more than 65 years, and that during much of that time it was under the control and supervision of the municipal authorities, the same as other public highways. If Carpenter's alley was a public highway, that is the end of appellant's contention; for, as this court said in Neely v. Philadelphia, 212 Pa. 551, 557, 61 Atl. 1096, 1098, speaking through Justice Mestrezat: "It may now be regarded as settled by our decisions that a conveyance of land bounded by a public road or street gives the grantee title to the middle of the road or street, if the grantor had the title to it and did not expressly or by clear implication reserve it." But we go further than this, and hold that, whether the alley be public or private, if it be actually laid out and opened, and is appurtenant to the properties abutting upon it, the rule is the same. The call for the alley will carry the title to the cepter line, in the absence of an expressed intention by the grantor to the contrary. We have this day filed an opinion in Saccone et al. v. West End Trust Co. et al., 224 Pa. 554, 73 Atl. 971, in which this court so held, and the facts of this case make even more appropriate the application of the same rule.

As suggested in the argument of counsel, a private alley is usually narrower, though ordinarily not so long, as a public highway, and it is for that reason all the more improbable that the owner, who dedicates it and sells the lots abutting thereon, intends to reserve to himself the fee in a narrow strip which would be useless to him, except as a means of harassing the owners of the adjoining lots. In the present case the lots were sold upon the faith of the alley, as it was shown upon the plan, and the deeds called for the alley as a boundary. We can see no interest that the grantor could have had, under the circumstances, in reserving the ownership of the soil in the alley, and no reason why the rule of construction applied to conveyances bounding upon a public highway should not be applied in this case. This is the rule set forth in the text-books, as sustained by the weight of authority. In Jones on Real Property, \$ 448, it is said: "It is an established rule that a conveyance of land, bounded by or along an existing way, whether public or private, carries the title to the center of the way, subject, of course, to the public use of it as a highway, unless there be something showing an intent to the contrary." As we pointed out in Saccone v. West End Trust Co., all the authorities hold that the question whether the grant includes the fee of the street or alley is one of intention. We see nothing in this record to indicate that Ormsby intended to except from his conveyances the fee in the

alley in question; and, on the other hand, there is much in the circumstances connected with the laying out of the plan of lots, and in their situation, and in the language of the deeds referring to the alley, to manifest his intention of parting with the fee and dedicating it to the use of the adjoining lot owners.

The assignments of error are dismissed, at the cost of the appellants, and the decree of the court below is affirmed.

(224 Pa. 425)

McLAUGHLIN v. SUMMIT HILL BOR-OUGH.

(Supreme Court of Pennsylvania. April 12, 1909.)

1. MUNICIPAL CORPORATIONS (§ 867*)-ELEC-TION-INCREASED INDEBTEDNESS-FORM OF BALLOT.

The ballots to be used at an election to as-certain whether the indebtedness of a borough shall be increased must be official ballota furnished by the county commissioners, and must be in the form prescribed by Act April 29, 1903 (P. L. 338).

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 867.*]

2. STATUTES (§ 135*)-AMENDMENTS-VALIDI-

TY OF AMENDED ACT—TITLE OF ACT.
Act April 29, 1903 (P. L. 338), amending
Act June 10, 1893 (P. L. 419), and Act July 9,
1897 (P. L. 223), relating to the nomination and
election of public officers, etc., is not unconstitutional, because such two acts are unconstitutional for defective title, where the latter act not only amends the title of such acts, but also re-enacts a section therein.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 202; Dec. Dig. § 135.*]

3. MUNICIPAL CORPORATIONS (§ 867*)-STAT-UTES-REPEAL.

Act April 29, 1903 (P. L. 338), relating to official ballots, repeals Act June 9, 1891 (P. L. 252), relating to elections on the question of increasing the indebtedness of municipalities.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 867.*]

4. STATUTES (§ 135*)—AMENDMENT—VALIDI-

TY OF AMENDED ACT.

A section of an act which is unconstitutional, because of the defective title of the act, cannot be amended even by changing the title of the original act.

[Ed. Note.—For other cases, see Cent. Dig. § 202; Dec. Dig. § 135.*]

Appeal from Court of Common Pleas, Carbon County.

Bill in equity for an injunction by David McLaughlin against Summit Hill Borough. Decree for plaintiff, and defendant appeals. Affirmed.

Heydt, P. J., filed the following opinion in the court below:

"Findings of Fact.

"(1) David McLaughlin, the plaintiff, is a citizen, property owner, taxpayer, and resident of the borough of Summit Hill, Carbon county, Pa.

"(2) The borough of Summit Hill is duly

incorporated under the act of April 8, 1851 (P. L. 320).

"(3) The borough of Summit Hill on June 4, 1906, duly enacted and passed an ordinance authorizing an increase of the bonded indebtedness of the said borough to the amount of \$39.000 for the purpose of constructing sewers in the borough, and providing for submitting to the voters, at a special election to be held on Tuesday, July 10, 1906, the question whether or not the indebtedness should be increased.

"(4) In pursuance of said ordinance, a special election was held on Tuesday, July 10, 1906, resulting in 226 votes in favor of, and 87 votes against, said increase.

"(5) At the special election held on July 10, 1906, the commissioners of Carbon county did not furnish any official ballots to be used by the said electors in voting on said question of increasing the indebtedness of said borough.

"(6) At said special election held on July 10, 1906, no official ballots in the form prescribed by the act of April 29, 1903 (P. L. 338), were used.

"(7) The ballots used at the special election held on July 10, 1906, were prepared and furnished by the authorities of the borough of Summit Hill, and were in the form prescribed by the act of June 9, 1891 (P. L. 252), being as follows: '(a) Debt may be increased. The purpose of the said increase is to construct sewers in the borough, and the amount of such increase is not to exceed \$39,000." Indorsed: 'Increase the debt.' (b) No increase of debt. The purpose of the said increase is to construct sewers in the borough, and the amount of such increase is not to exceed \$39,000.' Indorsed: 'Increase the debt.'

"(8) No bonds have been issued by the borough of Summit Hill in pursuance of said ordinance and election, and since July 10, 1906, no tax has been levied and assessed for the purpose of paying the principal and interest of such bonds.

"(9) The borough of Summit Hill is about to issue bonds in pursuance of said ordinance and election.

"Conclusions of Law.

"(1) The ballots to be used at an election to ascertain whether the indebtedness of a borough shall be increased must be official ballots, furnished by the county commissioners, and must be in the form prescribed by the act of April 29, 1903 (P. L. 338).

"(2) The ballots used at the special election held in the borough of Summit Hill on July 10, 1906, were not proper, valid, and legal ballots.

"(3) The special election held on July 10, 1906, in the borough of Summit Hill, was illegal and void.

"(4) The increase of the indebtedness of the borough of Summit Hill in the sum of \$39,-000 is not authorized by a legally conducted election.

"(5) The complainant is entitled to the relief prayed for.

"Discussion.

"The act of June 9, 1891 (P. L. 252), is clearly repealed by the act of April 29, 1903 (P. L. 338), if the latter is valid. It was conceded upon the argument that the determination of this question is decisive of the case. That the act of June 19, 1891 (P. L. 349), and the act of June 10, 1893 (P. L. 419), did not repeal the act of June 9, 1891 (P. L. 252), is decided in Evans et al. v. Willistown Township et al., 168 Pa. 578, 32 Atl. 87. By the act of July 9, 1897 (P. L. 223), the fourteenth section of the act of June 10, 1893, was attempted to be amended, but this act is equally defective with the acts of June 19, 1891, and June 10, 1893, in not meeting the requirements of section 3, art. 8, of the Constitution, in so far as it relates to the increase of municipal indebtedness. The defendant contends very earnestly that the act of April 29, 1903 (P. L. 338), also is unconstitutional, because it is an amendment of the act of June 10. 1893, as amended by the act of July 9, 1897, and that, since these two latter acts are unconstitutional, the act of April 29, 1903, necessarily is so also.

"The defendant's contention that an unconstitutional or void section of an act cannot be amended, and that an unconstitutional or void section of an act cannot be amended by changing the title of the original act is sound doctrine and good law. It must be sustained upon principle and authority. Unfortunately for the defendant, the case at bar does not fall within these lines. If the fourteenth section of the act of June 10, 1893, contained only the provision relating to how the tickets shall be printed when a vote is to be taken on a constitutional amendment or other question, then, no notice thereof being given in the title, the section would be unconstitutional, and then the entire section would be void and of no effect. Then there would be nothing left to amend. Then the language: 'The act never became a law, as such has no existence. The attempt of the Legislature to breathe the breath of life into this inanimate object by amending the title was ineffective'-quoted from Bennett v. Sullivan County, 29 Pa. Super. Ct. 120, would be applicable. The fourteenth section of the act of June 10, 1893, however, contains a number of other provisions, e. g., how the ballots shall be printed, how names of candidates shall be arranged, etc., the constitutionality of which provisions has never been questioned, so that after the one clause (not the section) was declared unconstitutional, there was something of form and substance left which was constitutional. It was not a 'dead body.' It was something real and alive. It was a living stem upon which a limb could be engrafted. The same may be said of the act of July 9, 1897. The act of April 29, 1903, did not simply amend the acts

of June 10, 1893, and July 9, 1897, by amending the title, but it re-enacted the entire four-teenth section thereof, and gave notice of the subject in the title of such amendment, and it is, therefore, a valid amendment, and repeals the act of June 9, 1891.

"The question before us is, however, not one of first impression. In Conshohocken Borough v. Montgomery County Commissioners, 14 Pa. Dist. R. 141, Judge Swartz in a well-considered opinion reaches the conclusion that the act of April 29, 1903, is constitutional. The facts in the case at bar are similar to those in Holtzman v. Braddock, 14 Pa. Dist. R. 547. and we follow the rulings in that case. It follows, from what has been said, that the increase of indebtedness of the borough of Summit Hill was not authorized by a vote of the people obtained at a properly conducted election, and that the relief prayed for in the bill should be granted.

"Now, January 14, 1909, this cause came on to be heard upon bill and answer at this term, and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed as follows, viz.: (1) That the borough of Summit Hill and its officers be restrained by injunction perpetually from issuing any of the bonds for the construction of sewers. (2) That the election held on July 10, 1906, for the purpose of increasing the indebtedness of said borough to an amount not exceeding \$39,000 for the construction of sewers, be declared illegal, and that the authority to issue said bonds based upon said election be declared illegal and void."

Argued before FELL, BROWN, MESTRE-ZAT, ELKIN, and STEWART, JJ.

Laird H. Barber, E. E. Scott, and Leighton C. Scott, for appellant. W. G. Thomas and Freyman & Nothstein, for appellee.

PER CURIAM. The decree is affirmed, on the opinion of the learned judge of the common pleas.

(225 Pa, 38)

EASTBURN et al. v. UNITED STATES EX-PRESS CO.

(Supreme Court of Pennsylvania. May 20, 1909.)

MUNICIPAL CORPORATIONS (§ 705*)—COASTING IN CITY STREET—COLLISION WITH WAGON— NEGLIGENCE.

Where seven boys coast down a city street and there strike a wagon, or are struck by the front wheels of the wagon, and a boy is injured, and there is no evidence that the driver could have seen the sled in time to prevent the accident, he cannot be charged with negligence because he was driving fast.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1515; Dec. Dig. § 705.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Margaret H. Eastburn and William D. Eastburn against the United States Express Company. Judgment for defendant, notwithstanding the verdict, and plaintiffs appeal. Affirmed.

At the trial it appeared that the plaintiff, a boy nine years old, was injured on Saturday afternoon, January 14, 1905, in a collision between a sled on which the boy was coasting and a wagon of the defendant. The accident occurred at the junction of Rubicam and Collom streets. There were seven boys on the sled with the plaintiff in front. The hill on which the boys were coasting was very steep. Four boys testified as to the facts of the accident. The two older boys testified that the collision occurred at a point about the middle of the two streets, and that the sled struck the wagon between the front and the back wheels of the wagon. The two younger boys testified that the sled was struck by the front wheel of the wagon somewhere between the center line of Rubicam street and the east curb. When the boys were near the bottom of the hill, they saw the horse and wagon, and attempted to turn the sled to the right to avoid the wagon. There was testimony that the wagon was being driven at a high rate of speed, and that one of its wheels passed over plaintiff. There was also testimony that, as the boys came down, they were shouting "Ike, Ike, the railroad spike." The jury returned a verdict for Margaret H. Eastburn for \$2,-000 and for William D. Eastburn for \$1,100,

On motion for judgment non obstante veredicto Von Moschzisker, J., filed the following opinion:

"This was not a case of one in plain sight and about to cross the street in front of a horse, with opportunity on the part of the driver to see the person and avoid an accident, but was a case of a sled moving rapidly, beyond sufficient control of the boys to avoid a collision with one who had no reasonable expectation to look for such an event. In this aspect of the case, the speed of the horse in our opinion did not cause the accident, because we cannot see how that speed in any way contributed to the result. At best, the testimony on the subject of the speed of the wagon was vague. It was to the effect that the horse was going on a gallop, which at least one of the witnesses described as going fast. But one of the boys testified that the sled was going faster than the wagon. As a practical matter, therefore, if the wagon had arrived at a point opposite the middle of Rubicam street or east of that middle, and was struck there by a rapidly moving sled, which all the witnesses say was being turned to the right to avoid an accident, it must necessarily be that the sled was a considerable distance up the hill when the horse and wagon appeared in sight. How

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes 73 A.—62



the driver could be charged with negligence a duty upon him when he arrived at the corunder these circumstances is not clear, and we are of opinion that the jury by their verdict were not warranted in such a finding.

"There is evidence that there were children with sleds at the bottom of the hill on Collom street at the time of the accident, but whether that meant that they were standing there before the accident, or that they arrived at the bottom at the same time as the large sled, is not clear. Neither were their positions in the roadway shown, but, if it was clear from the evidence that certain children were standing with their sleds in the roadway in a safe place, that fact would not put a driver upon notice that a large sled was likely to run into his wagon at great speed, and require him to take steps to avoid that possibility. There is also evidence, that the boys called out loudly, 'Ike, Ike, the railroad spike' as they came down the hill; but. even were it clear that the sound was loud enough to reach the driver's ears, it is difficult to see what idea it could convey to his mind if he did not see the boys. The sounds of boys' voices in the streets on Saturday is certainly not sufficient warning to require a driver to stop his team and make inquiry as to the location of the sounds and their mean-

"A number of questions were asked the surveyor with a view of ascertaining at what point upon the hill the driver could have seen the boys had he been looking across the corner of the two streets and before he reached the corner, but the answers throw no light upon the question of negligence, because they were purely hypothetical, and assumed as facts what the evidence did not disclose. There was nothing in the evidence to show that the sled was at any exact point upon the hill when the driver was approaching the corner, and, the respective speeds of the sled and the wagon not having been taken into consideration in the calculation, the result is pure conjecture. But, assuming that the driver when he arrived at the corner could have seen the boys at a considerable distance up the hill coasting down toward him, was he obliged to anticipate the possibility of their steering their sled into his wagon? We do not think he was. The driver's story, to the effect that the sled appeared like a shot out of a cannon, graphically describes the incident, and we do not find that his own admission that, when he was walking on that street a night or two before, he had seen children sledding on that hill, charges him with negligence on the occasion when the accident occurred. The mere fact that children coasted on that hill without injury on one occasion, while it was properly admitted as evidence, cannot charge the driver with negligence because his wagon was struck in the side by a sled on a subsequent occasion. It is manifest that the driver was lawfully upon the road, and there is nothing in the evidence to warrant the imposition of

ner to stop his team and wait until all the children coasting down that hill should have arrived safely at the bottom.

"In many particulars the case of Gould v. Traction Company, 190 Pa. 198, 42 Atl. 477, tried in this court, is strikingly like the case at bar. There a young boy, while riding a bicycle on a street running at right angles to the street upon which the defendant company operated its cars, either ran into the car or the car ran into the bicycle. As is shown by the paper books on appeal, there was testimony both ways, but the Supreme Court in its opinion states that the car was struck by the bicycle. In that case, as in the present one, the plaintiff claimed that the defendant was negligent in operating its vehicle at an undue speed, and in not avoiding the accident upon due opportunity. and also, as before stated, there was some testimony on the part of the plaintiffs to the effect that the vehicle had run into him, and that he had not run into it. Several witnesses for the plaintiff testified in a general, but much more exact way to the speed of the car than in the case at bar. In disposing of the case the Supreme Court said: 'The speed of the car, however, did not cause the accident. The collision occurred within a moment of the time the plaintiff turned into Tenth street. If the car had been standing still, and the plaintiff had taken the same course, he would have run into it. His difficulty was that he could neither stop quickly nor remain on his bicycle if he stopped. * * * The plaintiff was not misled by the movement of the car, nor surprised in an attempt to do what ordinarily he might have done with safety. He turned toward the car when it was then at his side, because he could neither go forward nor stop. motorman was not under the circumstances negligent in not seeing him. If he had seen him, it was too late to avoid the collision.' With a very little variation, those words could be applied to the case at bar. The case of Gould v. Traction Company, 190 Pa. 198, 42 Atl. 477, clearly shows that where the testimony as to the speed is of the nature of the testimony in the case at bar, or where the alleged excessive speed cannot reasonably be found from the evidence to be the proximate cause of the collision, that the question of speed should not be submitted to the jury. Also see Moss v. Traction Company, 180 Pa. 389, 36 Atl. 865; Cominskey v. Railway Company, 4 Pa. Super. Ct. 631; Yingst v. Railway Company, 167 Pa. 438, 31 Atl. 687; Hooper v. Traction Company, 17 Pa. Super. Ct. 638. In the case at bar it is clear that there was not sufficient in the testimony to reasonably justify a finding by the jury that the horse was being driven at such a speed as to constitute negligence, or, even if the horse was going at an undue speed, that the speed contributed to the happening of the accident. The sled was going much faster than the horse and wagon. If we view it that the sled passed between the front and hind wheels of the wagon, or If we view it that the front wheels first came in contact with the sled, in either event, if the horse had been going at a less rate of speed, the conclusion is irresistible that the sled would have struck the horse instead of the wagon, and, in all probability the injury would have been greater than under the present circumstances. On this point, see Goshorn v. Smith, 92 Pa. 485; Pletcher v. Traction Company, 185 Pa. 147, 39 Atl. 837; Downey v. Railways Co., 219 Pa. 592, 69 Atl. 71. The rate of speed at which the horse was going is really immaterial, for a review of the testimony leads one irresistibly to the conclusion that the sled suddenly darted out and struck the wagon under such circumstances that it cannot be justifiably said that the driver, as an ordinarily careful man, was bound to have seen and avoided the collision. The case is strikingly similar to that of a child who suddenly runs into the front of a moving vehicle, where it has uniformly been held there can be no recovery. Keller v. Railroad Co., 214 Pa. 82, 63 Atl. 413, and cases there cited. We cannot hold drivers to be negligent when their only fault is a failure to avoid a collision under circumstances which are unusual and not likely to be anticipated. Baker v. Fehr, 97 Pa. 70; Funk v. Electric Traction Company, 175 Pa. 559, 34 Atl. 861; Kline v. Traction Company, 181 Pa. 276, 37 Atl. 522.

"Much reliance is placed by counsel for plaintiffs upon the testimony of the surveyor as to distance; that is, the distance that the wagon was from the intersecting street at the time the driver could have had a view of the boys on the sled. However, there is not any testimony to justify the jury in finding that the driver did have such a view, or that he was looking in such a direction that he must have had such a view. On the contrary, the uncontradicted testimony is to the effect that the horse was moving on a slippery street, and that the driver's attention was attracted to holding the horse up and to looking ahead, and therefore that he did not see the boys until they were at such close proximity to the wagon that in a second or so the collision occurred. 'Negligence cannot be imputed because of the failure to perform a duty so suddenly and unexpectedly arising that there is no opportunity to apprehend the situation and to act according to the exigency.' McKee v. Traction Company, 211 Pa. 47, 60 Atl. 498. There is not any testimony to justify a finding that the driver had knowledge that the boys were sledding on the hill, or that they were likely to be sledding on the hill, at the time he was on the opinion of the court below.

passing the foot of the hill. It cannot be doubted that for boys to come down a hill such as described in the testimony in this case, on a long sled accommodating seven children, at the accompanying rate of speed which would necessarily follow such a deseent, and to run into a city street at the foot of the hill, would be a wrongful act. The tender age of the plaintiff may well have been sufficient, in the view of the jury, to excuse him from the charge of contributory negligence, but that does not change the nature of the act, and, as said in P. & R. Railroad Co. v. Hummell, 44 Pa. 375, 84 Am. Dec. 457: 'Precaution is a duty only so far as there is reason for apprehension. No one can complain of want of care in another where care is only rendered necessary by his own wrongful act. If the law declares, as it does, that there is no duty resting upon any person to anticipate wrongful acts in others, and to take precaution against such acts. then the jury cannot say that a failure to take such precautions is a failure in duty and negligence.'

"In order to maintain the verdict, the plaintiffs are bound to point to evidence which would justify men of ordinary reason and fairness in saying that the defendant's driver, if he had exercised ordinary care, could have avoided this accident. A most careful review and scrutiny of all of the testimony satisfies us that there is not even what could be justifiably called a scintilla of evidence, which, taken in connection with the other evidence in the case, would justifiably lead to such a finding. Of course, if we were of the opinion that there was a conflict of evidence on material facts, or that the material facts taken together might reasonably be said from any point of view to show such negligence on the part of the defendant's driver, then, even though the court might be of opinion that the preponderance of the evidence was the other way, we would not disturb the finding of the jury other than to grant a new trial. Taking the most favorable view of the testimony that any reasonable mind could justifiably take for the benefit of the plaintiff, we are brought to the conclusion that the plaintiff has failed to make out his case.

"The motion for judgment for the defendant non obstante veredicto is granted."

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and EL-KIN, JJ.

Charles Hunsicker and Jos. W. Hunsicker, for appellants. James F. Campbell, for appellee.

PER CURIAM. The judgment is affirmed

(225 Pa. 28)

SCHWOERER V. LEHIGH VALLEY R. CO. (Supreme Court of Pennsylvania. May 20, 1909.)

RAILROADS (§ 350*)—ACCIDENT AT CROSSING
—QUESTION FOR JURY.
In an action for injuries caused by a collision at a grade crossing, where the evidence was conflicting, the question of defendant's negligence was for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1152; Dec. Dig. § 350.*]

Appeal from Court of Common Pleas, Bradford County.

Action by Charles W. Schwoerer against the Lehigh Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

On a rule for judgment non obstante veredicto Fanning, P. J., filed the following opinion in the court below:

"This suit is brought by the plaintiff for injuries to his person and property because of the alleged negligence of the defendant.

"The plaintiff was seriously injured, his horses killed, and wagon demolished February 2, 1907, at a grade crossing on a curve on the Lehigh Valley Railroad near Wyalusing, Pa., by the 'milk train' westward bound running at a high rate of speed. This crossing is on an extensively traveled thoroughfare; it being the main highway leading from Wyalusing borough to several towns and an extended thickly settled area of country south of the Susquehanna river. Plaintiff approached the crossing from the south driving a spirited team hitched to a wagon upon which he had been drawing baled hay, and stopped, as he states, from 100 to 125 feet from the tracks (the place indicated by actual measurement is 110 feet), took off his ear laps and mittens, and looked and listened for approaching trains. He started on, and, upon reaching the crossing at the second track, his horses were struck by the locomotive, but were not sufficiently over the crossing at the time as they approached from the south to be seen by the engineer from the north side of the train, which was moving west. At the point where the plaintiff testifies he stopped, he could see down the tracks to the whistling post about 1,153 feet, or not far from 69 rods. Beyond that was an embankment about seven feet high dotted with trees, etc. He states that no train was in sight, no warning signals heard, and, 'if there had been a train, he could have seen it.' He then proceeded toward the railroad. Between the point where he stopped and the tracks, obstructing the view eastward, was a lumber office 16 by 32 feet. The northeast corner of this office is nearest the railroad track, its distance from the southern rail of the westbound track, where the accident occurred,

and sat near the rear wheels about 20 feet from the heads of the horses. The railroad line is on a curve at and in the vicinity of this crossing, which the plaintiff approached from within the circle, and easterly from the crossing the curve is to the southeast and seems pronounced because of the acute angle at which the highway intersects it, and the testimony as to just how far the track can be seen from the highway easterly immediately after passing the lumber office, the side from which the train injuring the plaintiff came, is not in entire harmony.

"The testimony of Hiram E. Bull, a surveyor, is to the effect that the office building, as stated, is 16 by 82 feet, with the end toward, but not square with the street, and 56 feet distant from its center. From the north side of the building at the front to the first rail of the track in line with the building is 71 feet, and from the northeast corner of the office building to the railroad track, in line with the rear of the building, is 43 feet and 4 inches; but this northeast corner of the office building diagonally to the track is somewhat nearer. He states that from the crossing one can see to the whistling post, and gives it as his opinion that after passing the office building a few feet, or 10 feet from the right of way line, a view of probably 300 feet can be had down the track, and, when from 121/2 to 15 feet from the eastbound track, the view extends to the whistling post.

"Charles W. Schwoerer, the plaintiff, testifies in direct examination that at the point where he stopped, which was the usual stopping place for travelers, he had a view of the track, and could see if a train was coming from the crossing eastward for 1,000 or 1,500 feet, and this notwithstanding the location of the office and box cars, which he claims were there (although a number of witnesses testify that they were on the switch on the opposite side of the track); that after passing the office he could not get a view of the track at all, and on redirect examination that after passing the office building to a point where he was able to see east any distance at all-200, 300, or 400 feet-his horses would be on the track, and that at the place where he stopped, 110 feet from the track, there was nothing to obstruct his view at all. On recross-examination he states that, when he got by the lumber office, his horses' feet would be on the east-bound track, about 9 feet from the westbound track, before he could see. He also testified that he was looking both up and down with his horses under control, but that they began to rear up and plunge when he got to the track and the cars struck him.

"Ira Hoover and John A. Ford corroborated the plaintiff's description of the crossing. "Edward Dettrick testified that he was being about 43 feet. The plaintiff was alone, fireman on the engine at the time of the

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plainly, and in a position to observe, and was looking: that he saw the team on the side of the office as it came out toward the railroad; that the team started up quickly as if on a trot or a run, and, as appeared to him, sprang forward, and that the train at that time was going about 45 to 50 miles an hour and might have been going 5 or 6 miles faster; that 150 feet from the crossing be could not see the plaintiff, but, when he got up the least bit closer, he could see him sitting on the wagon.

"Although plaintiff stopped near the lumber office at the usual stopping place, he was still bound to continue to use his senses, and if he had a view down the track from where the train came 200 or 800 feet after passing the office a few feet, increasing and enlarging so that, when he was still 12 or 15 feet from the crossing, he could have seen the east-bound track to the whistling post nearly 69 rods away, as estimated by Mr Bull while on the witness stand, had he looked. If such were the facts and there were no obstructions, the case would be ruled by Carroll v. Penna. R. R. Co., 12 Wkly. Notes Cas. 348, where the court said, 'It is vain for a man to say that he stopped, looked, and listened if in spite of what his eyes and ears must have told him he went directly in front of a moving locomotive;' and the numerous other decisions down to Walsh v. Penna. R. R. Co., 222 Pa. 162, 70 Atl. 1088, approving and settling this legal principle, but this line of decisions applies only where the facts clearly bring the case within it. Beach v. Penna. R. R. Co., 212 Pa. 567, 61 Atl. 1106. The testimony was not clear, and there was a dispute as to the distance the plaintiff could view the track to the east after passing the lumber office, whether the view was obstructed by the box cars, and whether the defendant gave proper signals or warnings of the approach of the train which was running at a high rate of speed. In view of all this testimony and the uncertainty owing to the curve at the acute angle of intersection and the alleged obstructions at what point a train could be seen after passing the lumber office, the fact that the train was running at a high rate of speed, and the testimony, though strongly contradicted that no warning signals were given, that the plaintiff was looking both up and down the track, taken in connection with the testimony of the brakeman and others that the horses sprang or started up when the plaintiff was committed to the act of crossing, the case, we think, was one for the jury. McNeal v. Railway Co., 131 Pa. 184, 18 Atl. 1026; McGill v. Pittsburg & Western Ry. Co., 152 Pa. 331, 25 Atl. 540; Davidson v. Railway Co., 171 Pa. 522, 33 Atl. 86; Armstrong v. Penna. R.

accident, and on the side where he could see | Chester Traction Co., 214 Pa. 382, 63 Atl. 604; Vincent v. Lehigh Valley Transit Co., 220 Pa. 350, 69 Atl. 812.

"For the reasons given, the rules above stated were discharged in the manner and upon the conditions as in the orders filed in this case February 2, 1909."

Argued before MITCHELL, C. J., and MES-TREZAT, POTTER, ELKIN, and STEW-ART, JJ.

Henry Streeter, William Davies, Frank W. Wheaton, and Wm. Maxwell, for appellant. L. T. Hoyt and M. E. Lilley, for appellee.

PER CURIAM. The judgment is affirmed on the opinion of the court below.

(225 Pa. 39)

In re LONG'S ESTATE. Appeal of MURPHY et al. (Supreme Court of Pennsylvania. May 20, 1909.)

WILLS (§ 634*)—Construction—Vested and "Contingent Remainder."

Where testator executed his will in 1867 and died in 1870, and gave a portion of the residue of his estate to his niece for life, and on her death to her children living at her decease, it created a remainder in the children of the niece contingent on their surviving her.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1488; Dec. Dig. § 634.*

For other definitions, see Words and Phrases, vol. 2, pp. 1503–1506; vol. 8, p. 7615.]

Appeal from Orphans' Court, Philadelphia County.

In the matter of the adjudication of the estate of Charles T. Long, deceased. From decree dismissing exceptions, Randolph Clay Murphy and others appeal.

Lamorelle, J., filed the following adjudication:

"The fund which is the subject of the present accounting represents the net proceeds arising from a sale in partition in which the accountant was trustee for the share of Helen Y. Shepperd. Upon the death of Helen Y. Shepperd, which occurred March 10, 1908, the principal became presently distributed under the will of Charles T. Long, who died April 11, 1870. The provisions of his will, dated March 18, 1867, confirmed by codicil, dated January 24, 1870, so far as they apply to the question before the court. are as follows: 'Item.-All the rest residue and remainder of my Estate Real personal and mixed, whatsoever and wheresoever, I order and direct to be divided into three equal parts and the interest and income of one of the said equal one-third parts, I give devise and bequeath unto my beloved niece, Helen Y. Shepperd for and during the term of her natural life, and from and immediately after her decease then I give devise and bequeath the said equal one-third part of R. Co., 212 Pa. 228, 61 Atl. 831; Doyle v. my estate to the children of my said niece

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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Helen Y. Shepperd living at the time of her decease share and share alike.' At the time of the death of Helen Y. Shepperd she had no living child or children. Her one son and only child, John P. Shepperd, died in the year 1897. There was therefore no one in existence answering the description of those who upon her decease were to take the principal of the estate, and that the gift to her children was contingent upon their being alive at the time of her death under the language of the will is settled by a long line of cases beginning with McBride v. Smyth, 54 Pa. 245 (decided in the year 1876). and ending with Mulliken v. Earnshaw, 209 Pa. 226, 58 Atl. 286 (decided in 1904). In the latter of these cases, after the devise to the widow for life, the will provided 'and from and immediately after her death or marriage, I give and devise my real estate unto my children then living. • • • Said Mr. Justice Mitchell: 'All these remainders are clearly contingent. No child takes a vested interest because, until the happening of the contingency prescribed, the death of the widow, it cannot appear that he will be in the class to whom the devise is made, to wit: those then living, * * * that this was the time actually meant by the testator is so clear on the face of the will that it would not admit of contradiction by the presumption of a different intent under any rule of construction.'

"The claim of the administrator of the estate of John P. Shepperd is accordingly disallowed."

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and EL-KIN, JJ.

Lucius S. Landreth and William A. Gordon, for appellants.

PER CURIAM. The decree is affirmed on the adjudication of the auditing judge, approved by the court in banc.

(225 Pa. 54)

VEIT v. CLASS & NACHOD BREWING CO. (Supreme Court of Pennsylvania. May 20, 1909.)

MASTER AND SERVANT (§ 287°) - INJURY TO SERVANT—INCOMPETENT FELLOW SERVANT.
Where a master placed in charge of a steam

regulator an engineer of intemperate habits, and an accident resulted from the fault of the engineer intoxicated at the time, the question of negligence whereby plaintiff's intestate was injured was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1056; Dec. Dig. § 287.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Katherine Veit against the Class & Nachod Brewing Company. Verdict for plaintiff, and defendant appeals. Affirmed | ELKIN, and STEWART, JJ.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and EL-KIN, JJ.

Thomas Raeburn White and W. W. Smithers, for appellant. John M. Vanderslice and Francis Shunk Brown, for appellee.

PER CURIAM. This case being close on its facts has had more than usual consideration, both in the court below and in this court. When it was here before (216 Pa. 29, 64 Atl. 871, 116 Am. St. Rep. 757) it was held that the evidence was sufficient to establish a prima facie case of negligence in giving the night engineer charge of the steam regulator when he was known to be a man of intemperate habits, and there was some evidence that he was intoxicated on the night of the accident. It was therefore held to be a case for the jury. At the last trial, from which we have this present appeal, the testimony was substantially the same, and the judge was therefore right in submitting it to the jury.

Judgment affirmed.

(224 Pa. 577)

UNITED STATES CIRCLE SWING CO. v. REYNOLDS et al.

(Supreme Court of Pennsylvania. May 10, 1909.)

1. REPLEVIN (§ 69*)—PARTIES—INTERVENTION Judgment.

Where, in replevin against two defendants a third party intervenes, claiming only a small portion of the property, which is conceded, and defendants plead only to the effect that plaintiff is not a corporation as alleged, it is not error to direct the jury to be sworn as to the in-tervener only, there being no issue as to the other defendants, and instruct that their du-ty is simply to determine the value of the goods replevied.

[Ed. Note.—For other cases, see Replevin, Dec. Dig. § 69.*]

2. Corporations (§ 661*)—Foreign tions—Registration—Replevin. -Foreign Corpora-

A foreign corporation need not be registered under Act April 22, 1874 (P. L. 108), to recover in replevin personal property taken from it by one having no contractual relation with the company.

[Ed. Note.—For other cases, see Cor Cent. Dig. § 2543; Dec. Dig. § 661.*] -For other cases, see Corporations.

3. TRIAL (§ 133*)—REMARKS OF COUNSEL.

A judgment will not be reversed because of objectionable remarks of counsel, where the court instructed the jury to disregard them, and states in his opinion on motion for new trial that he believes the jury were not influenced thereby.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 316; Dec. Dig. § 133.*]

Appeal from Court of Common Pleas. Lackawanna County.

Action by the United States Circle Swing Company against Annette Reynolds and Arthur Frothingham. Judgment for plaintiff, and defendants appeal. Affirmed.

Argued before FELL, BROWN, POTTER,

•For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

A. A. Vosburg, M. J. Martin, and C. W. Dawson, for appellants. Clarence Ballentine and John P. Kelly, for appellees.

POTTER, J. This was an action of replevin for an amusement device known as a circle swing. The suit was brought by the United States Circle Swing Company against Annette Reynolds and Arthur Frothingham, trading as the Rocky Glen Park Company, a partnership. On June 8, 1906, Annette Reynolds, as the agent of her brother, William B. Reynolds, filed an affidavit that the property replevied belonged to him; and upon this petition, sworn to by Annette Reynolds, the said William B. Reynolds was permitted to intervene as party defendant. Thereafter he filed an affidavit of defense in which he claimed to have bought the property replevied at a landlord's sale, and that he was at that time the owner of the said property by virtue of the title so acquired. the case was called for trial William B. Reynolds, by Annette Reynolds, his attorney in fact, presented a petition, asking leave to amend his former affidavit of defense so as to limit his ownership to a small portion of the apparatus, consisting of six cars. His claim to this much was conceded by the plaintiffs. Upon the trial the court directed the jury to be sworn as to William B. Reynolds alone as a defendant, and took the position that under the pleadings there was no question of ownership of the property at issue, and instructed the jury that the only fact to be determined by them was the value The verdict was of the goods replevied. for the plaintiffs for all the property described in the writ of replevin, except the six cars, and was for the defendants, as to them. This appeal has apparently been taken by Annette Reynolds and Arthur Frothingham, but, as there was no judgment against them, they have no standing to appeal; and, as William B. Reynolds obtained judgment for all that he claimed at the trial, his ground of appeal is not clear. We see no error in the refusal of the court to strike the case from the list, or in directing the jury to be sworn as to William B. Reynolds. The case was at issue as to him alone. The record does not show whether the objection to the swearing of the jury as to William B. Reynolds alone was made on behalf of all the defendants or not. If it was on behalf of Annette Reynolds and Arthur Frothingham, they have no reason to complain; for there is no verdict or judgment against either of them. If the objection was made on behalf of William B. Reynolds, it is apparent that he was not prejudiced in any way by the trial. In the affidavit of defense which he first filed, he claimed all of the property in suit, and set forth that he acquired it at the other defendants. This claim was in-

other defendants. For some reason, before the trial he withdrew his claim to the greater part of the property, but the case was still at issue as to him, and the plaintiff was entitled to have the case tried.

It is also contended that the court below erred in permitting the jury to be sworn as to William B. Reynolds alone, for the reason that Annette Reynolds and Arthur Frothingham, the original defendants, had filed what was alleged to be a plea in abatement, in which they averred that the suit was brought in the name of a fictitious person, and that there was no such corporation as the United States Circle Swing Company. This was not a plea in abatement, for its effect would be, not merely to abate this particular suit, but to destroy the right of action itself. It does not pretend to give the plaintiffs a better writ, or point out a mistake which might be avoided by the plaintiffs in forming their new writ. This requirement has often been made the test by which to distinguish whether a given matter should be pleaded in abatement or in bar. The effect of the matter here set out was to impugn the right of action altogether. It was therefore a plea in bar, and not in abatement. The defendants Annette Reynolds and Arthur Frothingham filed no response to the writ of replevin, except this alleged plea in abatement, but which was as we have pointed out, really a plea in bar. William B. Reynolds had intervened, and given a counter bond and filed an affidavit of defense, claiming to own the property. The case was therefore at issue between the plaintiffs and the intervening defendant alone. When the case went to trial it was unnecessary for the plaintiffs to offer any evidence of its title because, as the record then stood, the declaration of the plaintiffs was uncontradicted by any of the pleadings in the case, except as to the ownership of the six small cars. We think the trial judge was clearly right in his view that the only question left for the consideration of the jury was the value of the property.

In the eighteenth assignment of error complaint is made of the ruling of the court below as to the right of the plaintiffs to bring this action, without being properly registered under the Act of April 22, 1874 (P. L. 108). But the question does not seem to have been raised in the affidavit of defense, and was not apparently an issue in the case. But, in so far as the facts of this case go, they disclose nothing which would forbid the plaintiff, as a foreign corporation, to maintain an action in the courts of Pennsylvania, to recover its personal property. William B. Reynolds who claimed and retained the property, had no contract constable's sale, and by assignment from relations with the plaintiffs, and he would therefore have no standing to object that consistent with the existence of any right | the plaintiff corporation was doing business of property whatever on the part of the in this state, without having complied with the registration act. This principle is clearly set forth in King Optical Co. v. Royal Insurance Co., 24 Pa. Super. Ct. 527.

It is further contended that objectionable remarks made by counsel for plaintiffs in his address to the jury were of such a nature that the court erred in refusing to withdraw a juror and continue the case. The trial judge instructed the jury to disregard any remarks made by counsel outside of the evidence, and in his opinion refusing a new trial he states that he believes the jury were not influenced as to the amount of the verdict by the alleged offensive remarks of counsel. We see no reason for doubting the correctness of his conclusion in this respect. Nor do we see any merit in any of the questions raised by the assignments of error.

They are overruled, and the judgment is affirmed.

(225 Pa. 17)

NEWTON et al. v. BOROUGH OF EM-PORIUM.

(Supreme Court of Pennsylvania. May 20, 1909.)

1. MUNICIPAL CORPOBATIONS (§ 292*)—STREET IMPROVEMENTS—PAVING—PETITION — CON-DITIONAL SIGNING.

Where a property owner wrote the word "conditionally," after his signature to a petition for the paving of a portion of a street, without specifying what the condition was, the property could not be counted in determining whether the petition was signed by the owners of the requi-site two-thirds of the frontage; any condition invalidating such a signature.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 768, 770; Dec. Dig. see Municipal

2. MUNICIPAL CORPORATIONS (§ 292*)—STREET PAVING — PETITION — SIGNATURE — WITH-DRAWAL.

A signer of a petition for street paving may withdraw his signature by notice to the proper officers before action has been taken, but not after the council has passed the authorizing ordinance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 772; Dec. Dig. §

3. MUNICIPAL CORPORATIONS (§ 292*)—STREET PAVING—PETITION—SIGNATURE — TENANTS IN COMMON.

Where property abutting on a street to be paved is owned by tenants in common, all of them must sign the paving petition before the property can be counted as a part of the requisite frontage to authorize the improvement. site frontage to authorize the improvement.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 768, 770; Dec. Dig. § 292.*]

Appeal from Court of Common Pleas, Cameron County.

Petition by Emily M. Newton and others for the quashing of an ordinance of the Borough of Emporium authorizing the paving of a portion of Fourth street at the expense of the abutting property owners. From an order quashing the ordinance, the borough appeals. Affirmed.

The following is the opinion of Hall, J., in the court below:

"The town council of the borough of Emporium adopted an ordinance in due form requiring the curbing and paving of a certain part of Fourth street, in the borough of Emporium. The ordinance recited that whereas the petition of two-thirds of the owners of property representing not less than two-thirds in number of feet of the properties bounding or abutting on the part of Fourth street between the west end of the brick paving now on Fourth street and the west side of Wood street has been presented to the council of the borough of Emporium requiring the said council to require the curbing and paving of said street between the said points with brick, stone, or or other suitable material, and to collect two-thirds of the cost and expense of the same from the owners of the real estate on said street. Therefore it was ordained and enacted that the said paving should be done. Emily M. Newton and four others, owners of property abutting on that portion of Fourth street affected by the ordinance, filed their appeal from said ordinance, and presented their petition asking that it be quashed. The grounds alleged in the petition are that the borough council was without jurisdiction to pass the ordinance for the reason that the necessary two-thirds of the owners of property representing not less than two-thirds in number of feet of the property fronting and abutting on that part of Fourth street proposed to be paved had not signed the petition.

"It appears from the testimony that the total frontage of the property abutting on that portion of Fourth street proposed to be paved is 1,757 feet 7 inches, and two-thirds of this would be 1,171 feet 8% inches. The sole question to be determined in the case is whether the abutting property owners representing two-thirds frontage signed the petition to the council requesting that this paving be done, thereby conferring upon it the necessary jurisdiction to pass the ordinance. The borough claims that the signers to the petition represent 1,245 feet, while the petitioners claim the petition in fact only represents 1,0981/4 feet. The difference of 1461/4 feet arises out of a dispute as to what effect should be given to three signatures appearing on the petition, to wit, those of M. C. Tulis, John Hogan, and John F. Parsons. We will consider them in their order. It is the uncontradicted testimony that M. C. Tulis is the owner of 711/2 feet and that he signed the petition, appending, however, to his signature the word 'conditionally.' He testifies that the petition was presented to him by a member of the town council, and that he stated to him at the time that he signed the petition on the condition that the sewers should first be improved, as he thought it would be money wasted to pave the street before that

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was done. There is no evidence, however, that this conversation was ever repeated to the town council while in session, or that any legal notice was given them as to what was meant by the word 'conditionally' which followed his signature. We may, therefore, assume as a matter of law that the town council had no such official knowledge.

"We think there can be no question that a petition to confer jurisdiction on a borough council to pave streets must be signed unconditionally by the owners of the necessary two-thirds of the feet frontage thereon in order to fully and legally bind the petitioners. In the case of Von Steen v. Beatrice, 36 Neb. 421, 54 N. W. 677, the condition was that the grade should be satisfactory and that the trees should not be molested. The Supreme Court of Nebraska said: 'We agree with the district court that the petition to confer upon the council jurisdiction must be unconditional, and that no argument is required to prove that the signatures should have been rejected.' The Nebraska statute is different from ours only in the respect that it requires the petition to be signed by a majority of the owners representing a majority of the feet frontage, instead of two-thirds, and that it imposes the whole cost of the paving upor the abutting owners instead of two-thirds thereof. To the same effect is the case of Batty v. Hastings, 63 Neb. 26, 88 N. W. 139. In the case of Norwood v. Mills' Estate, 8 Ohio S. & C. P. Dec. 669, the signature was by the owner of the fee conditioned on the tenant's agreement to pay the costs, and the decision of the court was to the same effect. In all three of the decisions above cited, however, the condition was specified, and the next question to be considered is whether the mere adding of the word 'conditionally' to the signature, without specifying what the condition was, would be sufficient to render it invalid. We are reluctantly forced to the conclusion that it would, for the reason that the act requires the signature to be absolutely unconditional. The fact that the word 'conditionally' followed the signature put the council upon notice that it was not such an unconditional signature as the law requires. but that there was some condition attached to it, and it was entirely immaterial what that condition might be. The mere fact that there was any condition at all rendered the signature void for the purposes of conferring jurisdiction upon the council. This signature. therefore, must be rejected.

"John Hogan is the owner of 50 feet frontage abutting upon that portion of the street proposed to be paved. He signed the petition, but subsequently wrote a letter to the council withdrawing his name. This letter he handed to the chief of police for presentation to the council, and it appears that it was read at the council meeting after motion had been made and seconded that the ordinance be passed, but before the vote

the appellants that, unless otherwise provided by charter, signers of a petition are free to withdraw their names at any time before the municipality has acted upon the same, and a number of decisions from the courts of last resorts of other states have been cited in support of this position. The law, however, seems to be otherwise in Pennsylvania. As I understand it, the rule is that a petitioner is free to withdraw his name at any time before jurisdiction has attached, but cannot do so thereafter. this case if Hogan had served his notice on the proper officers of the corporation before the meeting, or had appeared and served the notice before the petition was presented at the meeting, we think it would have been sufficient, but the evidence in this case shows that his notice was not presented to the council until after the petition had been presented and a vote was about to be taken upon the passage of the ordinance. There is no precisely similar case in Pennsylvania, but the principle I have laid down is asserted as to a petitioner before a grand jury in Tullytown Borough, 1 Pa. Dist. R. 292, and Borough of Quakertown, 3 Grant, Cas. 203; and the precise question in this case was covered in White v. Buffalo, 1 Sheld. (N. Y.) 180, where it was held that when a petition, duly and regularly signed and submitted, asking for local improvements, was before a common council for consideration, the council was not bound to examine a remonstrance filed by some of the petitioners asking to have their names struck from the petition. This signature is therefore sustained.

"John F. Parsons, one of the petitioners, is the owner individually of 50 feet frontage of abutting property, and is the owner as a tenant in common of the undivided one-half interest in another 50 feet. As to the 50 feet that he owns individually there is no question, but the counsel for the appellants contends that the 50 feet in which he owns an undivided one-half interest should not be counted at all, as the petition is not signed by his tenant in common. The counsel for the appellee, on the other hand, contend that, as he is the owner of the one-half interest in this 50 feet, 25 feet, or one-half of it, should be counted. The position of the appellee in regard to this matter cannot be sustained upon any theory either of law or common sense. The law requires the petition to be signed by the owners of the property. This means by all of the owners in any given piece of property. To hold otherwise would be to hold that, if all the property on any block were owned by tenants in common, the holder of an undivided 1/100th interest in the same might cause the block to be paved and the lien, therefore, to attach to the property, although the owners of the other 99/100ths interest were opposed to it. was taken. It is contended by counsel for The position that the proportionate part of the frontage representing the proportion of | 2. the co-tenant's interest may be counted upon his signature is equally untenable. The petitioner in this case does not own 25 feet of this property. His interest is an undivided interest in every foot of it, and no particular foot frontage may be set aside for him, because in every foot so set aside his co-tenant would be an equal owner. We are of the opinion, for these reasons, that the signature of John F. Parsons cannot be counted for the 50 feet frontage owned by himself in common with Ella Parsons.

"Disregarding the 711/2 feet represented by the conditional signature of M. C. Tulis and the 25 feet which it is claimed by the appellee should be allowed on the 50-foot lot owned by John F. and Ella Parsons, and allowing the 50 feet represented by the signature of John Hogan, we find that the total frontage represented by the petition is 1,1481/2 feet, which is less than the necessary two-thirds required by the act of assembly. We have arrived at this conclusion only after a most careful consideration and very reluctantly, because we feel that in the end it can be of no practical benefit to any one, and that its effect will be merely to delay, for a time, a very desirable and much needed improvement in the borough of Emporium. If there were an appeal from our decision, we would feel very much disposed to hold that the Tulis signature was valid in the absence of a condition specifically stated, hoping that the appellate court might sustain us in the interest of the progress and welfare of the town, but as there is no such appeal, and therefore no redress if we should be in error, we are bound under our conscience and our oath to decide the case strictly under the law as it now exists and as we understand it."

Argued before MITCHELL, C. J., and ELKIN, MESTREZAT, POTTER. STEWART, JJ.

J. C. Johnson, for appellant. E. H. Baird, for appellees.

PER CURIAM. The judgment is affirmed on the opinion of the court below.

(225 Pa. 42)

RANDAL V. GOULD.

(Supreme Court of Pennsylvania. May 20, 1909.)

1. TRIAL (§ 48*)-EVIDENCE ADMISSIBLE IN PART.

While no reference should be made to the fact that defendant is protected by a policy of insurance, yet competent evidence for plaintiff, such as notice of a defective title, should not be excluded because it collaterally involves a showing of the fact that defendant holds such a policy.

[Ed. Note.—For other cases Dig. § 120; Dec. Dig. § 48.*] -For other cases, see Trial, Cent. TRIAL (§ 146°) — QUESTIONS FOR JURY — WITHDRAWAL OF JUROR.
On trial of an action in ejectment, motion

was made to withdraw a juror on plaintiff's of-fer of proof that defendant had not only bought with notice of fraud in his title, but had paid an extra premium to a title insurance company for insurance against it. The jury was sent from the room, and, after argument on the mo-tion, it was overruled and the offer was with-drawn, whereupon the jury was returned. *Held*, that the court properly refused to withdraw a juror.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 146.*]

3. TRIAL (\$ 218*)-COMMENTS BY JUDGE ON

EVIDENCE.

The trial court cannot be held in error for controverting in his charge a manifestly fallacious argument of counsel.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \$\$ 487, 488; Dec. Dig. \$ 218.*]

VENDOR AND PURCHASER (§ 229*) - BONA

FIDE PURCHASERS—NOTICE.

Defendant in ejectment is charged with notice of the fraudulent nature of his grantor's ti-tle, where he had participated prior to his acquiring title in legal proceedings in which the question of the fraudulent nature of the title was raised.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 477-494; Dec. Dig. § 229.*]

5. HUSBAND AND WIFE (§ 81°)—ACTS OF MAR-BIED WOMEN—VALIDITY. A bond executed by a married woman may

be valid, though a mortgage securing it is void for nonjoinder by her husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 332; Dec. Dig. § 81.*]

6. JUDGMENT (§ 470*)—COLLATERAL ATTACK.
Where plaintiff in ejectment claims title under a sheriff's deed, defendant cannot collaterally attack the judgment on which the execution issued, where it stands unappealed from.

[Ed. Note.-For other cases, see Judgment, Cent. Dig. § 907; Dec. Dig. § 470.*]

7. EXECUTION (§ 70*)—ISSUE—DEATH OF DE-FENDANT—NOTICE TO PERSONAL REPRESEN-TATIVES.

A venditioni exponas issued after the death of defendant in execution without notice to her representatives as required by Act February 24, 1834 (P. L. 70) § 33, is not invalid where defendant had conveyed her land to another before her death, although fraudulently as against her creditors, and her grantee had come into court creditors, and her grantee had come into court, and opposed the issue of the process.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 70.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Harry L. Randal agains Isador M. Gould. Verdict for plaintiff, and defendant moves for new trial, and for judgment notwithstanding the verdict, which were denied, and defendant appeals. Affirmed.

Ejectment for real estate at 247 South Second street, Philadelphia. At the trial the jury returned a verdict in favor of the plaintiff. On a rule for a new trial and motion for judgment non obstante veredicto, Wilthank, J., filed the following opinion:

"This case has been twice tried and twice ably reviewed before us on rules, and we

effor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

have been assisted in its examination by the thus Randal might collect the money lawfulindustry of counsel inspired by their sense of ly due him. its importance to two innocent parties. Either the plaintiff or the defendant must eventually find himself the irresponsible victim of a combination of three persons, who, according to the finding of the jury at the last trial, acted with the intention of defrauding one or the other of them. If a fraud was consummated, it was necessarily upon one or the other, either in depriving Randal of the fruits of his judgment, or in passing off upon Gould a title in jeopardy on account of a cloud upon it. After the first trial we considered the evidence, and made the rule absolute on the ground that the judge at nisi prius had erred in ruling that, no matter what the fraud, if any there were, the defendant had taken title without having been put upon notice of it. At the second trial it was conceded that the question of notice arose upon documentary evidence found in records and other instruments, and that this evidence was for the court in respect of its significance as to notice; that it involved, therefore, a question exclusively of law, and could not be left to the jury for a finding of its legal effect. The trial judge ruled that it showed notice to Gould, and to this ruling he sealed a bill. We think that this ruling was not error. The evidence, then, of the fraud has been again considered by us. The jury have found that it was the plaintiff who was defrauded, and in doing so have established facts, of which a concise statement is as follows: On May 8, 1902, one Mary C. Bell became indebted in \$4,000 to the plaintiff, Randal, and executed and delivered to him a bond with warrant for the amount. This bond she attempted to secure by a mortgage of the real estate in dispute, the title to which was in her, but she sealed, signed, and delivered her mortgage without joinder of one Alonzo Bell, her husband, then living. It was duly re-corded, and shortly after its delivery one Watson, who was then and had been before the professional adviser, as a member of the bar, of her and her husband, instructed the couple that the mortgage was irregular and invalid. Before the payment of the first six months' interest fell due, Watson and the Bells arranged a sale of the land with one Fisher, a half-brother of Alonzo Bell, in order to avail themselves of the invalidity of the mortgage, and to pass the land beyond the reach of Randal in the event of his using the warrant of attorney attached to his bond. The land was thus, as they hoped, by deed of August 18, 1902, put beyond the reach of a lien of a judgment in favor of Randal. The urgency arose upon the apprehension of the two actors that, if they postponed their step until Randal should have demanded his first installment of interest, they would, as

"The grantee, Fisher, was a man without an estate. He was a laboring man, some time a motorman, a farm hand, and finally the owner of a small tract for the cultivation of garden products and fowl. He supported a family, on wages and peddling which at no time, according to his showing, exceeded \$500 a year. He had no bank account; but about three months before his purchase of the land in question he had saved something under \$500. He carried most of his savings 'in his clothes,' and he held the rest in a small tin box at his home. It was from these receptacles that he produced to Watson at the settlement \$2,000 to be paid to the Bells. His purchase secured to him a store in this city worth at least three times that amount, and which, after the lapse of three years and ten months, he conveyed to the defendant Gould for over \$6,000 His deed was executed June 28, 1906. He sold to Gould, he explained, because during his ownership the investment had brought him nothing. He had no knowledge of a negotiation for a sale to Gould till a day or so before he executed his deed, which he did at the instance of Bell, and he did not know what was the price of the land till, at that execution and under the guidance of Watson, he took part of the purchase money, and received the impression that Watson must have accounted to his satisfaction for the balance. Fisher was silent, inactive, uninformed, and contented during the term of his ownership. a period as already stated of nearly four years. Alonzo Bell had retained during that period the control of the real estate. There was some evidence, although only slight, that, when the Bells conveyed to Fisher, they took from him and his wife an eventually unrecorded reconveyance of the property. This aspect of the case was presented upon the testimony of a member of the bar and notary public, who acted officially at the instance of Watson; and it was argued for the plaintiff that the probability presented was strengthened by other proofs. On two consecutive days Watson, who was on the same floor of the office building in which the notary practiced, took Bell and wife and Fisher and wife for the acknowledgment of three deeds before the notary, and for the certificate of the latter. At the trial it was conceded that one of these deeds was that from the Bells to Fisher. Alonzo Bell testified that another was a conveyance by him and his wife of other land owned by them. The difficulty of identification attached to the third deed. This was executed by Fisher and wife, but the notary's record in showing this much did not show the grantee or grantees. Bell testified to his ignorance of this deed. Fisher said it might have been made in some dealing of his and his wife's about the result of Randal's alarm, find Mary Bell's an inheritance of hers in Gettysburg. Watland bound by a judgment on her bond, and son, who had introduced the parties to the notary, with admittedly two, and, by tacit admission, three, deeds, was emphatic in disclaiming knowledge. The notary testified that to the best of his recollection the third deed was a deed from Fisher and his wife to Bell. The trial judge warned the jury to reach no hasty conclusion on this point.

"Our narration must include details of this character in order that we may justly dispose of certain reasons for the rule for a new trial urged with earnestness at the argument. That Bell managed the property during Fisher's ownership, received the rents, directed the repairs, and paid taxes and other charges was not seriously disputed. That he did this as owner was, however, earnestly denied, and he produced a power of attorney from Fisher. All of the issues of fact were skillfully discussed, and the findings reached by the jury were the result, not only of the plaintiff's proofs, but also of those of the detendant, the latter tending to contradict and annul the tendency and value of the former, and the jury deciding after weighing them. We find the verdict not against the weight of the evidence. In our opinion, if there was error at the trial, it lay in certain rulings on three, or some of three, points. These embrace the refusal of the court to withdraw a juror; the charge concerning the alleged character of the third deed testified to by the notary; and the finding of notice to the defendant.

"In behalf of the defendant the court was moved to withdraw a juror upon an offer of proof made by the plaintiff, that the defendant had not only bought with notice of the fraud in his title, but had paid an extra premium to a title insurance company for indemnification against it. Upon the motions being presented, the court ordered that the jury be taken out; and an argument proceeded in their absence. This resulted in an overruling of the motion and the sealing of a bill for the defendant. The offer was withdrawn and the jury were then brought in. The primary object of the offer was to show by proof of a high order that the defendant had been put upon notice, not only of the invalid and ineffective mortgage, notice of which would have amounted to nothing, but also of the attempt of Bell and his wife to make away fraudulently with the property, to defeat Randal on an execution under his judgment. That a party sued for damages may not be put to the hazard of a loss because a jury believes him to be protected by insurance, and therefore safe, has been decided in many forms of action; and the courts have deprecated mention of an insurance in a general way, and have rebuked counsel who have gone farther, and founded an argument upon it in order to win in a contest against the assured. Lenahan v. Pittston Coal Mining Co., 221 Pa. 626, 70 Atl. 884. But attention to the situation at this trial must show the inapplicability of the

the primary inquiry was as to notice, and insurance was most persuasive evidence of this. Proof of the radical point of notice should not have been excluded merely because it involved the showing collaterally of the minor and irrelevant point of insurance. This was not a valid reason for exclusion. The plaintiff was entitled to that which made heavily in his favor, and without which he might have been prejudiced through a substantial denial of justice, and, on the other hand, the jury could have been instructed to disregard the other significance of the proof. This would have been the familiar practice of admitting evidence specially, for a stated purpose, to which the court peremptorily restricts it in view of its capacity to prove something else, not admissible on the issue. Sheaffer v. Eakman, 56 Pa. 144. The withdrawal of the offer left the defendant free to object only to the use of the phrase, payment for insurance, in the hearing of the jury, and this objection did not show good cause for any adverse action of the court. This was the more clear because the insurance company's investigation of the title had been under discussion by both sides as the trial advanced, and its officers and papers had been extensively examined.

"The second point grew out of the charge of the court concerning the alleged character of the third deed-that executed by Fisher and his wife and acknowledged before the notary Lewis. This deed, according to the best recollection of the notary, was from Fisher and wife to Bell; but Fisher testified that it may have been in settlement of some matter of the estate of his wife's father, a late inhabitant of Gettysburg. His manner and the vagueness of his testimony were criticised by the plaintiff's counsel in his summing up, and in reply the counsel for the defendant met the strictures offered, and also urged the argument that it had been the duty of the plaintiff to investigate the subject before charging Fisher with an untruth, or at least a weak pretense. Inasmuch as Fisher had not been called by the defendant at the former trial, and the plaintiff had not had notice of his story, the trial judge could not permit the argument to prevail, that the plaintiff could have learned in Gettysburg whether or not Fisher and his wife had executed the deed referred to. It was also proper for him to controvert an argument that, even at the stage by that time reached, an investigation might yet be inaugurated by the plaintiff, and upon ascertainment of the unsubstantiality of the story a new trial might be moved for, and redress thus secured in the manner usual upon the discovery of proof after verdict.

Pittston Coal Mining Co., 221 Pa. 626, 70 Atl.
884. But attention to the situation at this trial must show the inapplicability of the principle. It may be doubted that insurance defendant, the argument was exception-

future action of the court, and as in its enlargement too zealously upholding the shameless partizanship of Fisher. The court charged, therefore, with some vigor on the point, but, as we find, not with a greater degree of emphasis than was required, according to the accepted measure of the duty of a judge. The weight of the evidence was with the plaintiff on the issues of fact, and a verdict the other way might have awakened our solicitude. The expressions of the charge on the point raised were timely, and we fail to find in them any reason for directing a third trial of a long and exhaustively presented contest.

"The third point for examination is the finding of the court that the defendant, Gould, had been put upon inquiry before taking title. It was agreed at the trial that this was a question of law arising upon documents in evidence, and the court charged that notice was shown. The error assigned is, not that the question should have been left to the jury, but that, resting as it did with the court, it should have been decided the other way. The defendant argues that the documents did not show notice to him. The documents showed how the defendant took his title. It appears that when Randal had obtained his judgment against Mary C. Bell, which was had in the court of common pleas of this county No. 5 to September term, 1904, No. 1,224, writs of execution duly issued from that court, and a vend. ex. went out returnable to the first Monday of May, 1906. Under this writ, the defendant bought the property and paid down the stipulated deposit of \$50. He failed to comply with the terms of the sale, and on June 27, 1906, he petitioned the court to order the return of his deposit on the ground that, whereas the property had been sold on Randal's writ as that of Mary C. Bell, in fact Mary C. Bell had then no interest therein. This information he acquired upon examination of the record on which the sheriff had sold. That record showed that Fisher, who, as already stated, had taken title from the Bells August 18, 1902, had petitioned the court on April 30, 1906, to stay the execution of Randal's vend. ex. on the ground that Mary C. Bell had then no interest, but had previously conveyed her title to him; and the record also showed that Randal had on May 3, 1906, filed an answer thereto, setting forth that the deed to Fisher had been executed and delivered fraudulently, and with intent to escape the lien of a judgment apprehended under the bond and warrant which Randal held. This scheme, the answer averred, was conceived and executed with the knowledge of Fisher. The same record also showed that on June 27, 1906, which was, as the dates show, prior to the petition filed by the defendant Gould above referred to, Fisher had filed a bill against the plaintiff Randal

able as glancing at relief to the plaintiff in term and number for an injunction to restrain Randal from proceeding with his execution setting up the exhaustion of the title in Mary C. Bell by her conveyance to Fisher. This bill was filed by the attorney of Fisher and the attorney of the defendant Gould. An affidavit by way of answer to this bill was on June 29, 1906, filed by Randal, setting up the fraudulent transaction; but between the dates of the filing of the bill and of the coming in of the affidavit (that is to say, on June 28, 1906) Gould had taken his deed from Fisher. Gould took his deed from Fisher upon the faith of a title insurance policy of the Equitable Trust Company, stipulating to indemnify him from actual loss in the premises. The application for this insurance was made by Gould's attorney, and it exhibited as foundation of risks 'objections to title known, Randal v. Bell, Common Pleas 5, Sept. Term, 1904; No. 1224, or rumored.' In the meanwhile Randal had proceeded under an alias vend. ex. of June 2, 1906, and had bought in the property, obtaining the sheriff's deed therefor on July 16, 1906. this deed Randal depended at the trial.

> "Upon this evidence, as we have already said, we could find no error in the charge of the trial judge that Gould had been put upon inquiry of the alleged fraud of certain of his predecessors in the title.

"Two other points were urged upon us: That the bond on which Randal had secured his judgment was void because the mortgage which was given to fortify it was a nullity, and that the vend. ex. on which the sale was made by the sheriff was also void because it had gone out after the death of Mary C. Bell without notice to her representatives. Act Assem. Feb. 24, 1834, \$ 33 (P. L. 79). These points need not be discussed. The judgment of a court of concurrent and equal jurisdiction has been relied upon by the plaintiff, and it is not competent for us to go behind it to inspect the bond. As the foundation of the plaintiff's case that judgment stands unappealed from and valid. We may note, however, that in any event an invalidity of the mortgage could not nullify the bond. This latter expressed and established the obligation of a woman who, under the law, was competent to execute and deliver it. A futile effort on her part to support it by the pledge of her land was a secondary and collateral circumstance not bearing in any degree upon the liability primarily established. McCoy v. Niblick, 221 Pa. 123, 70 Atl. 577; King v. Grannis, 29 Pa. Super. Ct. 367. An analogous criticism may be made of the impeachment here of the process of another court. No appeal lies to us from that court, and the presumption of regularity in the execution which arises upon the acknowledgment and delivery of a sheriff's deed is not rebutted by any evidence in the record of the death of Mary C. Bell before vend. ex. We do not think that it is expedient to enlarge of record in the same court and of the same | upon this situation because of the paramount

consideration that, no matter what the conclusion as to the regularity of the vend. ex., it must be admitted that the act of February 24, 1834, does not apply, because at the time of her death Mary C. Bell was not the owner of the land, and her deed to Fisher, whether within the statute of Elizabeth or not, could not have been denied by her if living. She had passed her title irrevocably, and her personal representative would have had no standing to oppose the execution. If her deed had constituted Fisher her trustee, which is the utmost that could be claimed by an avoided or defrauded creditor, not the less the legal title was in him, and he had had full notice in the premises and had come into court to oppose the vend. ex. as has already been shown from the record, and thus had had his day. Reichart v. Castator, 5 Bin. 109, 6 Am. Dec. 402; Murphy v. Hubert, 16 Pa. 50; Colborn v. Trimpey, 36 Pa. 463. Cases applying by analogy being decisions upon the effect of the 34th section of the act of February 24, 1834, are McCormick v. Skelly, 201 Pa. 184, 50 Atl. 765; Smith v. Grim, 26 Pa. 95, 67 Am. Dec. 400; Drum v. Painter, 27 Pa. 148; Irwin v. Hess, 12 Pa. Super. Ct.

"The rule for a new trial is discharged. The motion for judgment non obstante is overruled."

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and ELKIN, JJ.

V. Gilpin Robinson and B. I. De Young, for appellant. Stanley Folz and Leon H. Folz, for appellee.

PER CURIAM. The judgment is affirmed on the opinion of the court below.

(224 Pa. 586)

WAGNER v. BURNHAM et al.

(Supreme Court of Pennsylvania. May 10, 1909.)

1. Bankruptcy (§ 154*)—Claims—Set-Off— Mechanics' Liens.

Where subcontractors' liens had become fixed on the building before the contractor's adjudication in bankruptcy, and were perfected by the filing of liens after the adjudication, within the statutory period, and the owners paid the liens, such payments were available as a set-off against the bankrupt's trustee seeking to recover the balance due on the contract.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 451; Dec. Dig. § 154.*]

2. Bankruptcy (§ 154*)—Contractors—Lien Creditors—Sureties.

The owners of a building in process of construction, being in effect statutory sureties of the contractor for the payment of debts due subcontractors, are within Bankr. Act July 1, 1898, c. 541, § 68, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), authorizing a surety who has paid his principal's debt, after bankruptcy

has intervened, to set off the amount so paid against his debt to the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 451; Dec. Dig. § 154.*]

3. COURTS (§ 97*)—CLAIMS—SET-OFF—RULES OF DECISION.

The decisions of federal courts construing the bankruptcy statute relating to set-off must be followed by the state courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 329-334; Dec. Dig. § 97.*]

4. BANKBUPTCY (§ 154*)—CLAIMS—COUNTER-CLAIMS.

Where a claim against a bankrupt's estate is provable at the time it is sought to be enforced, it is then available as a counterclaim in an action by a bankrupt's trustee against the claimant.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 451; Dec. Dig. § 154.*]

5. Bankbuptcy (§ 154*)—Action by Trustee
—Counterclaim.

A claim against a bankrupt provable in its nature, whether proved or not, is available as a set-off in an independent action brought by the bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 451; Dec. Dig. § 154.*]

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit to recover balance due on a building contract by Louis Wagner, as trustee in bankruptcy of Charles Gilpin, against George Burnham and others. From an order discharging a rule for judgment for want of a sufficient affidavit of defense plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and ELKIN. JJ.

Humbert B. Powell and Thomas O. Peirce, for appellant. John G. Johnson and James Wilson Bayard, for appellees.

MESTREZAT, J. We think the learned court below was right in discharging the rule for judgment for want of a sufficient affidavit of defense. Charles Gilpin entered into a contract with the defendants to tear down an old building and erect a new building in the city of Philadelphia. After performing part of the work, he filed a voluntary petition in bankruptcy, and was duly adjudicated a bankrupt. The plaintiff is his trustee in bankruptcy. At the date of the bankruptcy, Gilpin was indebted to certain subcontractors for work done and materials furnished who subsequently to that date entered mechanics' liens against the property of the defendants to enforce their claims. The defendants were compelled to pay these claims. This suit was brought by the trustee to collect the amount due Gilpin on the contract, and the defendants claim as a defense a set-off for the amount which they were compelled to pay the subcontractors on the mechanics' liens filed against their property. The right to interpose this set-off as a defense in this action and thereby defeat the

*bor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1307 to date, & Reporter Indexes

The right to the set-off depends upon the provisions of the bankruptcy act (Act July 1. 1898, c. 541, § 1, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), relative thereto. The part of the act controlling the question is section 68, which provides, inter alia, as follows: "In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid. A set-off or counterclaim shall not be allowed in favor of any debtor of a bankrupt which is not provable against the estate." Is the counterclaim or set-off of the defendants in this action allowable under this provision of the bankruptcy act? It is strenuously contended by the plaintiff that the defendants' claim was contingent, uncertain, was not provable against the bankrupt at the date of the adjudication in bankruptcy, and therefore cannot be allowed as a set-off. This view, however, we think entirely overlooks the nature and character of the defendants' claim as well before as at the time it was interposed as a set-off. At the date of the adjudication the bankrupt was indebted to the subcontractors on the claims which were subsequently paid by the defendants. The primary liability for payment of these claims rested upon the bankrupt, and the claims could have been enforced against him to the extent of his liability to pay. By the law of this state, however, the subcontractors had a lien against the property of the defendants for the work done and the materials furnished by them. This property was made subject to a statutory lien to secure the payment of the debts of the subcontractors, and by a subsequent section of the statute the lien of the claim took effect "as of the date of the visible commencement upon the ground of the work of building the structure or other improvement." The lien of the subcontractor's claim, therefore, began with the commencement of the work on the defendants' premises, and was, of course, in full force and effect at the date of the adjudication in bankruptcy. It was inchoate from the beginning, it is true, but it was an existing claim or demand for which the defendants' property was liable on failure of the contractor to pay. During the time for filing the lien the subcontractors had a preferential statutory claim in the nature of a nonperfected equitable lien which was perfected by filing the lien after the adjudication in bankruptcy, but within the statutory period. In re Grissler, 136 Fed. 754, 69 C. C. A. 406. The statute provides the method for perfecting and enforcing the lien, and the bankruptcy of the contractor does not prevent its enforcement. Section 20 of the mechanics' lien law of June 4,

plaintiff's recovery is the only question in 2487), makes specific provision for the enforcement of the claim after the insolvency or bankruptcy of the contractor as follows: "When any such contract has been suspended or ended, the right to file a claim or to sue under the contract shall remain, and may be exercised with the same effect as if further proceedings under such contract had been determined by consent of all parties." The work was done and the materials were furnished prior to the adjudication in bankruptcy. The subcontractors, therefore, had the right to file a lien and enforce it under the terms and within the statutory period provided in the act of 1901. The lien, however, of the subcontractors did not arise or was not created by the filing of the claim in the common pleas for the purpose of its enforcement, but came into existence at the commencement of the improvement of the defendants' property by the contractor. The claim, therefore, of the subcontractors, now held by the defendants and proposed to be set off by them against the plaintiff's demand, existed in its inchoate form at the date of the adjudication in bankruptcy, and was subsequently perfected by filing a lien in conformity with the provisions of the act of 1901. While the primary debtor of the subcontractors was the contractor whose duty it was to pay the claim, the property of the defendants, and hence the defendants themselves, were the statutory sureties for the payment of the debt of the bankrupt to the subcontractors. Bassett & Brown v. Baird, 85 Pa. 381. surety paying the debt of his principal after bankruptcy may under the bankrupt act of 1898 set off the amount so paid against his debt to the bankrupt. In re Dillon (D. C.) 100 Fed. 627. It is clear, we think, that the claim of the defendants sought to be set off in this action is for money expended by them as quasi surety for the bankrupt, and is therefore a "mutual credit" within contemplation of section 68 of the bankrupt act. It should not be overlooked that the right of the debtor to a set-off in an action brought against him by the trustee is not based upon the rules of equitable set-off administered in the state courts, but upon those rules which prevail in the federal courts which are generally broader and more liberal in permitting the set-off. These rules must be observed by the state courts in construing the bankrupt act.

Is the proposed set-off "provable against the estate" of the bankrupt within the meaning of section 68 of the act? This question must receive an affirmative answer unless we interpret the section differently from the decisions of two courts of the highest respectability, one of which is a federal court whose construction of an act of Congress we must accept. After a very careful consideration of the bankruptcy act, we are satisfied that the conclusion of those courts is correct, 1901 (P. L. 441, 3 Purdon's Dig. [13th Ed.] and that a counterclaim "provable against

the estate" of the bankrupt by his debtor; in an action brought by the trustee is such claim as is provable in its nature at the time the set-off is sought to be enforced. The status of the claim at that date determines its provability in contemplation of the act of Congress. This is conclusively shown by Holmes, C. J., now a justice of the Supreme Court of the United States, in the opinion in Morgan v. Wordell, 178 Mass. 350, 59 N. E. 1037, 55 L. R. A. 33. This was an action by a trustee of a bankrupt, and the defense was set-off, the defendant claiming that he occupied the position of a quasi surety who had paid and therefore was subrogated to the claim of a joint creditor of himself and the debtor. The right to a set-off under section 68 of the bankrupt act was the question at issue, and in delivering the opinion the chief justice said, inter alia: "The defendant also claims a set-off by virtue of his covenant. We assume that it has been adjudicated between the parties in the district court that the defendant has not a claim which he could prove in his own name, and that this decision carries with it the corollary that he could not prove his claim on the covenant against the estate. If, therefore, the prohibition of a set-off of a claim 'which is not provable against the estate' is to be taken with simple literalness as applying to any claim that could not be proved in the existing bankruptcy proceedings, the defendant's set-off cannot be maintained. But we are of opinion that the seemingly simple words which we have quoted must be read in the light of their history and in connection with the general provision at the beginning of section 68 for a set-off of mutual debts 'or mutual credits,' and that so read they interpose no obstacle to the defendant's claim. The provision for the set-off of mutual credits is old. But, while the provision as to mutual credits was thought to be more extensive than that as to mutual debts, it was held that even the broader phrase did not extend to claims which, when the moment of set-off arrived, still were wholly contingent and uncertain, such, for instance, as the claim upon this covenant . would have been if the defendant had not yet been called upon to pay anything upon the original partnership debt. But the mo-

ment when the set-off was claimed was the material moment. The defendant's claim might have been contingent at the adjudication of bankruptcy, and so not provable in the absence of special provisions such as are to be found in the later bankrupt acts in England and in the United States act of March 2, 1867 (14 Stat. 517, c. 176), although not in the present law, and yet if it had been liquidated, as here, by payment, before the defendant was sued, he was allowed without question to set it off (citing authorities). The limitations worked out by these decisions were expressed in the section of the act of 1867 cited above, in the words, 'but no set-off shall be, allowed of a claim in its nature not provable against the estate.' These words, as it seems to us, following the cases, refer yet to the nature of the claim at the moment when it was sought to set it off, not to its nature at the beginning of the pending bankruptcy proceedings, and did not prevent a set-off of a claim which was liquidated at the later moment merely because. when the bankruptcy proceedings began, for some reason it did not admit of proof. Provable means provable in its nature at the time when the set-off is claimed, not provable in the pending bankruptcy proceedings." This case is followed and approved by the United States Circuit Court of Appeals in Norfolk & W. Ry. Co. v. Graham, 145 Fed. 809, 813, 76 C. C. A. 385, 389. In that case it is said, inter alia: "We think that the true solution of the question before us is that the counterclaim which may be set off in an independent action brought by the trustee is * * one that is provable in its nature, and need not necessarily be one that has been, or may yet be, proved in the bankruptcy proceeding. It may be true that Pages' liability to the company was at the time of the filing of the petition and at the date of the adjudication contingent. But, before this liability was asserted as a counterclaim, it had become fixed and certain in amount. It was certainly provable in its nature when it was asserted in the court below."

It follows from what has been said that the judgment of the common pleas should be affirmed.

The assignments of error are overruled, and the judgment is affirmed.

(82 Vt. 361)

STATE v. McCLELLAN.

(Supreme Court of Vermont. Chittenden. Sept. 9, 1909.)

1. BILLS AND NOTES (§§ 214, 815*)—Assignment Without Indorsement.

The owner of a negotiable instrument, payable to his order, can transfer it by a formal assignment instead of an indorsement, or by parol with manual delivery, and such assignment is complete and effectual as between the assignor and assignee without notice to the debtor, and with notice will secure the assignee the entire interest, subject to any existing defenses.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \$\frac{4}{2}\$ 492, 505, 751-769; Dec. Dig. \frac{4}{2}\$ 214, 815.*]

2. LARCENY (§ 5*)—PROPERTY SUBJECT OF LAR-CENY—UNINDORSED BANK CHECK—VALUE.

Under P. S. 5755, relating to larceny, and providing that one who steals from the possession of another money, bank notes, bills of exchange, or other bills, orders, or certificates, etc., shall be imprisoned, etc., a check payable to the order of the holder, though unindorsed, is the subject of larceny; its value being the amount it represents.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 13; Dec. Dig. § 5.*]

Exceptions from Chittenden County Court; E. L. Waterman, Judge.

George McClellan was convicted of grand larceny, and excepted. No error.

Argued before ROWELL, C. J., and MUN-SON, WATSON, HASEYTON, and POW-ERS, JJ.

John G. Sargent, Atty. Gen., and Henry B. Shaw, State's Atty., for the State. J. J. Enright and Brown & Hopkins, for respondent.

MUNSON, J. The respondent is charged with the larceny of a private mail bag and of a bank check for \$875, signed by J. P. Morgan & Co., payable to the order of E. O. Webb, and not indorsed. The respondent excepted to the admission of evidence offered to show that there were funds to meet the check, and to the charge submitting the question of value to the jury. It is contended that the check had only a nominal value, and that, if the value was more, it was its fair market value at the time and place of the larceny while unindorsed.

Property of this class is made the subject of larceny by P. S. 5755, but without any provision regarding its valuation. No case standing like this has been brought to our aftention. In State v. Hill, 1 Houst. Cr. Cas. (Del.) 420, there was no statute applicable to the paper taken. In State v. Musgang, 51 Minn. 556, 53 N. W. 874, the statute required the instrument to be "completed and ready to be issued or delivered," and those taken lacked, among other things, a necessary signature. The charge in Whalen v. Commonwealth, 90 Va. 544, 19 S. E. 182, was the larceny of a check which appears from the

evidence recited in the opinion to have been unindorsed; but the statute provided that the amount due on or secured by the writing and remaining unsatisfied should be deemed its value. It will be well to mention a few other cases. In Phelps v. People, 72 N. Y. 334, the statute provided that the money due on the writing or secured thereby and remaining unsatisfied, or which in any contingency might be collected thereon, should be deemed its value. The writing taken was a draft which had not been indorsed by the official to whom it was made payable by the last indorser, and the defense argued that this could not be larceny because the instrument was not effective and operative when taken, but the court said that, inasmuch as the indorsements transferred the power to use the draft to obtain the money which it called for, it was a legal and operative instrument at the time it was taken. In State v. Wade, 7 Baxt. (Tenn.) 22, the respondent was charged with stealing certain coupons of the bonds of the state, and the court treated them as coupons that had been paid, but considered them valuable to the state as vouchers and therefore the subject of larceny. This was under a statute which covered "any instrument of writing whereby any demand, right or obligation is created, ascertained, increased, extinguished or diminished, or any other valuable paper writing." In State v. Allen, R. M. Charlt. (Ga.) 518. the court declared it to be the holding of that state that on an indictment for stealing a bank note the note must be shown to have been genuine, but sustained a conviction without evidence of genuineness on the following reasoning: "Stealing a counterfeit bill is certainly not larceny, as a general rule, because the thing stolen must be of some value. But it is not necessary that the subject-matter of the larceny should be of value to third persons, if valuable to the owner. The prosecutor, having received these bills from the bank whose notes they purported to be, * * could have made such corporation pay specie for them, whether genuine or not, and they were therefore of the same value to him."

The respondent argues that the value of stolen property is to be determined by its condition when taken; that a check payable to order is an incomplete instrument as long as it remains unindorsed; that no one could have drawn the money on the check in question—not even the payee—and that consequently it was only of nominal value. This argument is opposed by several considerations. It is evident that this check was property in the hands of Mrs. Webb of a value equal to the amount for which it was drawn. The respondent took this property from her constructive possession with the intention of converting it to his own use. The fact that

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

he found the property in such a condition that he could not convert it to his own use at the time he deprived the owner of it ought not to determine its value in his favor when he is called to account for his criminal act. As regards its lawful owner and holder. it was a completed paper. It gave Mrs. Webb the control of an amount of currency equal to the face of it, with the power of transferring that control by indorsement to any one who might become the bearer. But she could have realized the substantial value of the check without indorsing it, for an indorsement was not essential to the value of the check in the hands of an honest holder. The owner of a negotiable instrument payable to his order can transfer it by a formal assignment, instead of an indorsement, or by parol with manual delivery. Freund v. Importers', etc., Bank, 76 N. Y. 352. Such an assignment will be complete and effectual, as between the assignor and assignee, without notice to the debtor; and with notice it will secure the assignee the entire interest, subject to any existing defenses. The holder of a paper thus transferred can enforce his right by a suit in equity in his own name or by a suit at law in the name of the payee. All these considerations point to the conclusion that this check as it existed at the time of the taking was of substantial and not nominal value. Moreover, the law treats it as something more than a paper of nominal value in the hands of a wrongdoer. If the respondent were sued for it in trover, he could not say that its value was merely nominal. He would be held for its actual value to the lawful owner, which prima facie would be the amount due on it. See Robbins v. Packard, 31 Vt. 570, 76 Am. Dec. 134. This view is certainly consistent with our statute, and is perhaps required by it. In the eye of the common law a check is but a token, representing property located elsewhere, but valueless in itself, and therefore not a subject of larceny. The statute changes this, making the instrument a subject of larceny; in other words, treating it as a thing of value in itself. And, if the instrument is to be valued as a check and not as a piece of paper, what is its value? Obviously the amount it represents if the check is good. This method of valuation is practically required by the nature of the change effected by the statute. The fact that the statutory list includes documents which afford no basis for a valuation of this character does not discredit the rule as applied to writings which furnish the basis.

Judgment that there is no error in the proceedings, and that the respondent take nothing by his exceptions.

(82 Vt. 859)

WARD v. CHILDS.

(Supreme Court of Vermont. Windham. Sept. 7, 1909.)

1. Appeal and Error (§ 1050°)—Harmless Error.

In an action for goods sold, defendant contended that plaintiff could not recover because the goods were not furnished by plaintiff but by a firm of which he was a member. Plaintiff, after testifying on cross-examination that he had caused to be printed some billheads with "and Co." after his name, was asked if he did not use such billheads during the continuance of the partnership, and replied; "Oh, yes; I presume I am using them to-day." Held, that the part of the answer following the first two words, even if made with intent to confuse the jury as to the duration of the partnership, if one existed, did not prejudice defendant, since if the use of such billheads tended to show the existence of a partnership when the goods were furnished, that such portion of the answer tended to show it still existing could not harm defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4166; Dec. Dig. § 1050.*]

2. APPEAL AND ERROR (§ 1033*)—HARMLESS ERROR.

One may not predicate error on the admission of evidence favorable to himself.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \$\$ 4032-4062; Dec. Dig. \$ 1063.*]

3. EVIDENCE (§ 111*)—RELEVANCY—COURSE OF BUSINESS.

Evidence that it was customery at plaintiff's store to destroy certain duebills after they had been traded out was legitimate, as tending to account for plaintiff's failure to produce them, after notice so to do.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 247-253; Dec. Dig. § 111.*]

Exceptions from Windham County Court; W. W. Miles, Judge.

Assumpsit by Orrin O. Ware against Rollin S. Childs. Judgment for plaintiff and defendant excepted. Affirmed.

Argued before ROWELL, C. J., and MUN-SON, WATSON, HASELTON, and POW-ERS, JJ.

Herbert G. and Frank E. Barber, for plaintiff. Arthur P. Carpenter, for defendant.

WATSON, J. One claim in defense was that plaintiff was not entitled to recover for the goods in question because they were furnished by a partnership of which the plaintiff was one of three partners. The plaintiff denied that they were so furnished, and, when testifying in his own behalf, was asked in cross-examination questions, and made answers, as follows: "Q. Now, after using the stamp for a while, and stamping upon your billheads 'and Co.' after the name O. O. Ware, you then had some billheads 'and Co.' printed, did you not-'O. O. Ware & Co.'? A. I think there were some printed. I don't know just when they were printed. Q. And you used those billheads during the continuance of the partnership, did you not? A. Oh yes; I presume I am using them to-day." To the last answer, except the first two

eFor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

words, defendant objected, as not responsive danger so apparent that the servant must be to the question. Whereupon, at the request of plaintiff's attorney, the part objected to was stricken from the record, and the jury instructed not to consider it as evidence. It is argued that the part excluded was made with the intention of confusing the jury as to the duration of the partnership, if one existed, and hence it was prejudicial to the defendant. If the use of such billheads tended to show the existence of a partnership at the time the goods were furnished, the fact that the portion of the answer objected to tended to show it still existing could do the defendant no harm.

Secondly, the defendant alleges error in the following admission of evidence: bearing upon an issue raised by plaintiff's claim and defendant's denial that certain duebills had been transferred to other persons, the trial court allowed the plaintiff's attorney to inquire of the defendant on crossexamination whether he had ever transferred any duebills to other persons. It is a sufficient answer to defendant's claim of error on this point that the error, if any, was harmless to the defendant, for in his answer he strongly denied ever having transferred the duebills except in a certain solitary instance. It is entirely clear that the evidence was favorable to the defendant, and consequently he cannot predicate error on its admission.

Thirdly, the parties disagreed as to whether there were outstanding duebilis not traded out at plaintiff's store, and which should be allowed in offset, except one produced by defendant and received in evidence. plaintiff was notified to produce at the trial the duebills in question, but he did not do so, claiming they were destroyed after goods had been obtained on them, and that no record was kept showing when they were traded out or destroyed. Against a general objection the plaintiff was permitted to show that it was the custom at his store to destroy these duebills after they had been traded out. The evidence was legitimate, as tending to account for their nonproduction.

Judgment affirmed.

(83 Vt. 136)

FRASER v. BLANCHARD & CROWLEY. (Supreme Court of Vermont. Washington. Sept. 7, 1909.)

APPEAL AND ERROR (§ 664*)—TRANSCRIPT SUFFICIENCY OF EVIDENCE.

The transcript controls as to the sufficiency and tendency of the evidence, but the bill of exceptions may be considered for that purpose where it is sufficient.

[Ed. Note.—For other cases, see Appeal and rror, Cent. Dig. §§ 2856-2859; Dec. Dig. § Error, 664.*1

2. MASTER AND SERVANT (§ 288*)—ASSUMPTION OF RISK—OBVIOUS DANGER—NATURE OF DANGER—QUESTIONS FOR JURY.
That the elements from which the danger

arises may be visible does not always make the in the manner the work was done, a question

held to comprehend and assume the risk there of, as the conditions may be recent and the danger obscure to an inexperienced workman, and in such cases the question of assumption of risk is for the jury, but, if the dangerous condi-tion is more or less permanent and obvious to one of common understanding and the servant is mature, intelligent, and experienced, the ques-tion of assumption of risk is for the court.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*1

8. MASTEE AND SERVANT (§ 288*)—INJURIES—ACTION—ASSUMPTION OF RISK—JURY QUES-TION.

In an action for injuries from the slipping of a derrick mast which fell on plaintiff while he was assisting to raise it, which plaintiff claims was not properly secured at the foot, whether he assumed the risk of injury from such cause held for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. §

4. Master and Servant (§ 286*)—Injuries-

ACTION—JUBY QUESTION—NEGLIGENCE.
In an action for injuries from the slipping of a derrick mast which fell upon plaintiff while he was assisting to raise it, which he claimed was not properly secured at the foot, whether defendant was negligent in not properly securing the mast held for the jury.

[Ed. Note.—For other cases Servant, Cent. Dig. §§ 1010-1050; Dec. Dig. §

5. MASTER AND SERVANT (§ 117*)—MASTER'S DUTY — SAFE APPLIANCES — TRANSITORY Risk.

The rule that the master's absolute duty to use due care to provide safe appliances does not extend to mere transitory risks was not applicable where the side chains used to hold the foot of a derrick mast on the ground while it was being raised were placed too high by the foreman, who stopped the raising of the mast when it was discovered, and directed plaintiff to remedy the defect.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 117.*]

6. Master and Servant (§ 285*)—Injuries— JUBY QUESTION-PROXIMATE CAUSE.

In an action for injuries from the slipping of a derrick mast which fell on plaintiff while he was assisting to raise it and which he claimed was not properly secured, whether the failure to attach a third chain to the foot of the mast to keep it from slipping endways was the proximate cause of the accident held for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1016, 1035, 1043, 1053; Dec. Dig. § 285.*]

APPEAL AND ERROR (\$ '90*)—RECORD—QUESTION FOR REVIEW—ADMISSIBILITY OF EVIDENCE.

Where plaintiff asked his witness if he had been employed by defendant to look up witnesses to which defendant excepted, but the bill of exceptions or the transcript does not show that the question was answered or show anything further upon the exception, no error appeared.

[Ed. Note.-For other cases, see Appeal and Error, Cent. Dig. \$\$ 2897-2908; Dec. Dig. \$ 690.*1

8. WITNESSES (§ 269*)—EXAMINATION—CROSS-EXAMINATION - SCOPE OF EXAMINATION IN CHIEF.

Where one of plaintiff's witnesses who testified as an expert how a derrick should be raised and what the dangers were in raising it

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

on cross-examination whether such dangers were 15. JURY (§ 100*) — Competency—Formation of Opinion—Newspaper Reports in increase. not discoverable to any one was without the scope of the examination in chief, and improper.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949-954; Dec. Dig. § 269.*]

9. TRIAL (§ 132*)—CONDUCT OF COUNSEL—IMPROPER QUESTIONS—ACTION OF COURT.
The harm of asking an improper and prejudicial question is cured when counsel withdraws the question, or the court at once rejects
it, and instructs the jury not to consider it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 316; Dec. Dig. § 132.*]

10. WITHESES (\$ 269*) — EXAMINATION — CROSS-EXAMINATION—LIMITATION TO SUB-JECTS OF DIRECT EXAMINATION.

Where defendant's witness in a servant's injury action testified in chief as to being at plaintiff's house the first night after the accident, when defendant's foreman was there, and that plaintiff told him he did not blame any one for the accident, a question on cross-ex-amination whether the witness was there the night the foreman was trying to settle with plaintiff, claimed to have been asked to identify there being nothing the time, was improper; else in the record to justify it.

[Ed. Note.-For other cases, see Witnesses, Cent. Dig. §§ 949-954; Dec. Dig. § 269.*] 11. TRIAL (§ 183*) — IMPROPER QUESTIONS SUFFICIENCY OF ACTION OF TRIAL COURT.

Where defendants' witness in a servant's injury action testified in chief to being in plain-tiff's house the first night after the accident, when defendant's foreman was there, and that plaintiff told the latter he did not blame any one for the accident, the prejudicial effect of a question on cross-examination whether the witness was there the night the foreman tried to get a settlement, of which there was no evidence offered, claimed to have been asked to identify the time, was cured by the court immediately directing the jury to disregard any evidence of a settlement.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 316; Dec. Dig. § 133.*]

NEW TRIAL (\$ 29*)-GROUNDS-IMPROPER EVIDENCE.

If the trial court believed that its action directing the jury not to consider the evidence sought to be elicited by an improper question did not cure the harm done thereby, it should set aside the verdict.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 43, 44; Dec. Dig. § 29.*]

APPEAL AND ERROB (§ 290*)-RECEPTION OF EVIDENCE-EXCEPTIONS-WAIVER.

While defendant should have moved to set aside the verdict for plaintiff if he thought the court's action in directing the jury to disregard an improper question did not cure the error, his failure to do so did not waive his exception to the question.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1674, 1675; Dec. Dig. § 290,*1

.14. APPEAL AND ERROR (§ 1060*)—HARMLESS ERBOR-ASKING IMPROPER QUESTION.

The mere asking of an improper question which is not answered and which the court directs the jury to disregard is not like actually admitting an improper question, but is analogous to an offer of improper evidence which is excluded, which is rarely reversible error, though it may be if counsel persists in trying to get it it may be if counsel persists in trying to get it before the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4135; Dec. Dig. § 1060.*]

That two jurymen in a servant's injury ac-Inat two jurymen in a servant's injury action had read a newspaper article stating that the parties were trying to settle the case did not disqualify them where they had never formed or expressed an opinion thereon and it would not have necessarily disqualified them if they had done so, since, to disqualify, the opinion must be based on substantial facts and permanently hims the mind. bias the mind.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 449-457; Dec. Dig. § 100.*]

Exceptions from Washington County Court: Wm. H. Taylor, Judge.

Action by David Fraser against Blanchard & Crowley. Judgment for plaintiff, and defendants except. Affirmed.

Argued before ROWELL, C. J., and MUN-SON, WATSON, HASELTON, and POW-ERS, JJ.

John W. Gordon, for plaintiff. Richard A. Hoar, for defendants.

ROWELL, C. J. This is case for negligence in not properly securing the foot of the mast of a derrick that the plaintiff was helping raise on the dump of defendants' quarry, by reason whereof the mast slipped and fell and injured him. No copy of the declaration is furnished, but, according to the defendants' brief, it consists of two counts-one, that the plaintiff was ignorant of the work of raising a derrick, which the defendants well knew. and yet did not instruct him in it; the other that the defendants did not furnish him a safe place in which to do the work, in that they did not properly secure the foot of the mast from slipping and the mast from falling.

Although the transcript is made to control as to the tendency of the evidence, yet, as no claim is made that the bill of exceptions does not fairly disclose its tendency, we follow that by which it appears that the testimony on the part of the plaintiff tended to show that he hired out to the defendants a few days before the accident to work for them in their quarry as boss derrickman, a business at which he had worked in different quarries in Barre for about a year; that the duties of such a boss were to assist in and oversee the hoisting and moving of stone and the clearing of refuse from the quarry; that the business of raising and lowering derricks was not within the scope of his employment, nor contemplated when he entered into it, but was a thing that he knew nothing about, and so informed the defendants; that he did not know how to raise a derrick with safety to himself, nor know nor appreciate the dangers connected therewith, and that the defendants gave him no instructions in respect thereto; that the defendant Crowley called him to help raise the derrick in question, in and about which work he was acting merely as a helper under the personal supervision and direction of Crowley, who

eFor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

giving orders, which he and the others were obeying; that the derrick consisted of a mast and a boom, the mast being about 30 feet long and a foot in diameter at the butt and 10 inches at the top; that the cast-iron socket in which the foot of the mast was to rest was circular in form on the outside, and fastened to timbers that rested on the ground; that, when the mast was in place for raising, the butt end was against the outside rim of the socket to keep it from slipping; that, in order to hold it there, it was necessary to fasten that end with a chain on each side, and to attach to it a third chain and hitch it to some suitable object to keep the mast from slipping endways, but that Crowley had only one chain attached when the mast was being raised, and that a side chain.

The testimony on the part of the plaintiff further tended to show that, when the mast was being raised. Crowley stopped it, and ordered the plaintiff to get some tackle blocks and go under it at a place about 10 feet from the butt where the mast was 5 or 6 feet from the ground, and attach the blocks to a chain; that the plaintiff obeyed, and, when under the mast to perform that work, it slipped endways because not properly fastened, and fell upon the plaintiff and severely injured him. The testimony on the part of the plaintiff further tended to show that as boss derrickman he had nothing to do with hitching the chains at the foot of the mast, and had not sufficient experience, as the defendants knew, to enable him to determine when the foot of the mast was sufficiently secured.

The testimony on the part of the defendants tended to show that, when Crowley hired the plaintiff, he represented himself to be a boss derrickman and as understanding how to operate derricks; that he told him where he had worked, and how long he had worked in other quarries, and that Crowley spoke to him about taking down this very derrick, and he said he could do it; that what induced Crowley to hire him and agree to pay him as much as he did was because he told what a good man he was and capable of taking down and erecting the derrick in question all right; that Crowley had had no experience in raising and handling derricks, and wanted to hire a man capable of taking down and setting up this derrick; that the day before the accident Crowley put the plaintiff in full charge of taking down and setting up this derrick; that the plaintiff had the entire charge of the work; and that, although Crowley was in general charge of the quarry, he took no charge of this particular work, and gave the plaintiff no orders as to how the derrick should be taken down nor set up, nor how to attach the chains nor the tackle blocks; that the plaintiff took down the derrick and moved it to the place where it was to be set up and attached the necessary chains the day before the accident; that

was present, taking charge of the work and | were placed too high up from the butt of the mast, and attached to large stones on eitherside of the mast to keep the foot of it against the socket and foundation so it would not slide sideways when being raised; that, when the top of the mast was raised 12 or 15 feet from the ground, it was discovered that the side chains were too tight, whereupon the plaintiff stopped the engine and went for some tackle blocks, took off one of the side chains, and hitched on one of the pulley blocks, and then took the block and went up the dump to hitch it to another chain that he had put around a big stone the day before to draw the mast up by; and, when he was in the act of thus attaching the block, Crowley warned him of the danger; that the derrick shot straight ahead towards the engine house; that Crowley gave the plaintiff no directions to go under the mast to attach the blocks to the chain around the big stone, but told him to keep out of there for it was dangerous; and that whatever the plaintiff was doing at the time of the injury was done of his own accord. The defendants claimed that all the testimony showed that the chains were in plain sight, and that, with the exercise of due care, the plaintiff could have seen and ascertained the condition and situation of everything connected with the work.

The defendants moved for a verdict, for that there was no evidence of negligence on their part, and none of due care on the plaintiff's part; that the plaintiff knew and understood, or in the exercise of due care could have known and understood, all the risks and dangers incident to the work he was doing at the time of the injury, and therefore assumed them as matter of law; that his evidence failed to show any causal connection between the negligence of the defendants, if any there was, and the injury received; and that a verdict for the plaintiff would have to be set aside as against the evidence and the weight of evidence.

As to there being no evidence of negligence on the part of the defendants, it is claimed that they were not bound to instruct the plaintiff, because the work he was doing and the manner in which it was being done were so obvious that he must be taken to have known and comprehended the danger of it. But though the elements and combinations out of which the danger arises are visible, it cannot always be said that the danger itself is so apparent that the servant must be taken as matter of law to comprehend and assume the risk of it. The visible conditions may be of recent origin, and the danger arising from them obscure, especially to one not acquainted with the work. In cases of that class, to which this case belongs, the question of assumption of risk is for the jury. But if the conditions are constant and of long standing, and the danger is one that is suggested by the common knowledge of all, and both the conditions and the dangers are obon the day of the accident the side chains | vious to the common understanding, and the

servant is of full age, intelligent, and of adequate experience, and these elements appear without contradiction, the question becomes one of law for the court. Butler v. Frazee, 211 U. S. 459, 29 Sup. Ct. 136, 53 L. Ed. . , The claim that there was no evidence of due care on the part of the plaintiff is largely based on the same ground as the claim that there was no evidence of negligence on the part of the defendants, namely, that everything about the work was so visible that the plaintiff could have seen and comprehended the danger if he had exercised due care, and that the fact that he was hurt shows conclusively that he did not exercise due care. But what we have said on the assumption of risk is applicable here, and this claim is not sustained.

As to the failure of the defendants properly to secure the foot of the mast, it is claimed that it is apparent from the evidence that the unfastening of the side chain was merely temporary, a transitory part of the work, and that the absolute duty of the master to see that due care is used to provide safe appliances does not extend to all the passing risks that arise from short lived causes. But such risks are those that naturally arise in the due prosecution of the work, as is shown by the cases to which the defendants refer. Thus in McCann v. Kennedy, 167 Mass. 23, 44 N. E. 1055, the plaintiff fell and was injured by stepping on a joist that had just been sawed nearly off for the purpose of making a well hole in a house that was being repaired. He knew that the customary way of making such holes was to lay the joists and then cut them out, and knew where the hole would te. The only ground on which he could recover was that while the joist remained it was a trap, and that he ought to have been warned. But the court said that the danger was momentary, and that it would be impracticable to require the master to warn his servant of every such transitory risk when the only thing the servant did not know was the precise time when the danger Whittaker v. Bent, 167 Mass. would exist. 588, 46 N. E. 121, also referred to by the defendants, is to the same effect. But here the risk did not so arise, but arose through the fault of the defendants, for Crowley himself testified that the side chains were placed too high up from the butt of the mast, and that when the top of the mast was lifted that was discovered, whereupon the plaintiff stopped the mast and took off one of the side chains, but the plaintiff's testimony tended to show that the chains were thus placed under Crowley's directions and not under his, and that Crowley stopped the mast and not he. So the rule invoked does not apply here, and it must be said that there was evidence of negligence on the part of the defendants, for Crowley's testimony was to the effect that the danger was created by taking off the chain, and that he warned the plaintiff of the danger.

In support of the claim that the evidence fails to show any causal connection between the defendants' negligence and the plaintiff's injury, it is argued that the lack of instructions had nothing to do with the fall of the mast, for it does not appear that because of such lack the plaintiff did or omitted to do anything that contributed to its fall; and that, assuming that the unfastening of the chain satisfies the allegation of negligence, still it must appear with reasonable certainty that the lack of that fastening caused the mast to fall, and that it does not so appear, but appears that, with the exception of Crowley, every witness who testified on the subject said he did not know why nor how the mast fell, and that the closest description given was that the whole thing shot forward in the direction of the socket, and did not slip sideways, and that, therefore, there was nothing but speculation to show that the absence of the side chain caused the fall. But that is not all there is of the testimony, for the plainfiff's tended to show that, in order to keep the butt of the mast from slipping off the outside rim of the socket, it was necessary to fasten it with two side chains to hold it in place, and also to attach a third chain to it, and hitch it to some suitable object, to keep the mast from slipping endways, which was not done. This omission, the jury might well say, accounted for the mast's slipping endways instead of sideways, if such was the fact. The plaintiff asked one of his witnesses if he had been employed by the defendants to look up witnesses, to which the defendants excepted. It does not appear that the question was answered. This is all the bill of exceptions shows, and we are referred to nothing in the transcript for anything more. It is enough to say of this exception that error does not appear. One of plaintiff's witnesses who had testified as an expert how a derrick should be raised, and what the dangers were in raising one in the way undertaken in this case, was asked on cross-examination if such dangers were not discoverable to any one. The question was excluded. The defendants insist that that was error, for that, if the witness was competent to testify as an expert what the dangers were, it was an improper limitation of the crossexamination to prevent eliciting from him the fact that the dangers were obvious, as that question was very material to the issue. But that was a thing dehors the matters of the examination in chief, and so not a proper subject of cross-examination.

One of the defendants' witnesses testified in chief to being at the plaintiff's house the first night after the accident, when Crowley and others were there, and that the plaintiff then told him that he did not blame anybody but himself, for Crowley told him not to go in there. On cross-examination he was asked if he was there the night Crowley was there trying to get a settlement with the plaintiff, and he said he was not. This was

excepted to, whereupon the cross-examiner that nothing was said about it in their desid he was trying to identify the time. liberations. Thereupon the defendants mov-, Thereupon the court said that the jury would disregard any reference to settlement, that it was not to be considered in any way affecting the rights of the parties. But neither the bill of exceptions nor the transcript discloses any excuse, much less any justification, for asking the question, and the only thing for consideration is whether the court dealt with the offense sufficiently to cure the mischief. We said in Smith Woolen Machine Co. v. Holden, 73 Vt. 396, 403, 51 Atl. 2, that the great weight of authority holds that the mischief of such a thing is cured when the offending counsel withdraws what he has said or done or the court at once rules out the objectionable matter and instructs the jury not to consider it; but that if, after all, the court thinks the mischief is not sufficiently cured to insure the verdict against its taint, it would be its duty to set it aside, and on such terms as would be just. This is a salutary rule, and ought to be vigorously applied by the trial court, for it is obviously much better that the mischief should be cured there rather than dealt with here, and in this case a majority of the court thinks the mischief was cured by the timely and efficient action of the court. And it is fair to presume that the court thought so, for otherwise it would have been its duty to set the verdict aside, which it did not do. And so of defendants' counsel, for otherwise they should have moved to set the verdict aside, as said in Lockwood v. Fletcher, 74 Vt. 72, 52 Atl. 119. But they did not waive their exception by not doing so. This is not like the admission of improper evidence that cannot be charged out. It is more like an offer of improper evidence that is not let in, which rarely vitiates, though it will sometimes, as it did in Rudd v. Rounds, 64 Vt. 432, 25 Atl. 438, where the persistent efforts of the plaintiff's attorney to place before the jury the contents of a letter that had been excluded were characterized as "very reprehensible," and, because it was allowed, it was held to be reversible error, curable only by showing that the letter was admissible, which was not done.

Before the charge counsel for the defendants called the attention of the court to an article in a daily paper published in the city, which stated that the parties were trying to settle the case. Counsel moved that the jury be discharged and the case continued, but said they did not want the court to inquire then whether any of them had read the article, and the court did not inquire, but overruled the motion, saying that, as it did not appear that any of them knew about the article, it would not be warranted in discharging them. When the verdict was returned, the court inquired of the jury and learned that two of them had read the article, but |

ed to set aside the verdict as against the evidence and the weight of evidence, and for that some of the jurymen had read the arti-, cle. The first ground of the motion has virtually been disposed of in another connection. As to the second ground, the court saidthat, as the matter came to the notice of counsel during the trial, it thought that the course they took then was such as to waive their right to raise the question after verdict; but, whether that was so or not, that the court could not see that the verdict was in any way affected by what the jurymen. read, and so overruled the motion, and right. ly we think, for it does not appear that the jurymen even formed an opinion about the case reading the article, much less expressed. one; and, if they had done both, it would not necessarily have disqualified them, as shown by State v. Meaker, 54 Vt. 112, where it is said that the opinion in order to disqualify must be an abiding bias of the mind, based upon substantial facts in the case, in ! the existence of which the juror believes, and . that the character of the opinion must be left. largely to the determination of the trial court. upon the evidence adduced. So in Reynolds. v. United States, 98 U.S. 145, 25 L. Ed. 244, it is said that in these days of newspaper enterprise and universal education every case of public interest is almost sure to be brought to the attention of all the intelligent people in the vicinity, and that scarcely any one can be found among those best fitted forjurors who has not read or heard about the case and has not some impression or opinion. as to its merits; that it is clear, therefore, that on trial of the issue of fact raised by a challenge for such cause the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as, in law, necessarily to raise. the presumption of partiality; that the affirmative of that issue is upon the challenger, and the question presented one of mixed law and fact, to be determined as to the facts like any other issue of fact upon the evidence; and that the finding of the trial court upon that issue ought not to be set aside by the reviewing court unless error is so apparent that the law would leave nothing to the "conscience or discretion" of the trial court. See, also, Spies v. Illinois, 123 U.S. 131, 179, 8 Sup. Ct. 22, 31 L. Ed. 80.

Judgment affirmed.

(105 Me. 177)

STAPLES v. BOWDEN.

(Supreme Judicial Court of Maine. Feb. 26, 1909.)

1. TRUSTS (§ 86*)—RESULTING TRUST—PURCHASE PRICE—PAYMENT.
It is a familiar principle in equity that the

beneficial estate attaches to the party from whom the consideration comes. Hence when

For other cases see same topic and section NUMBER is Dec. & Am. Digs. 1907 to date, & Reporter Indexes

son, and the purchase money is paid by another, generally a resulting trust will be presumed in favor of the party who pays the price, and the holder of the legal title becomes a trustee for him.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 128; Dec. Dig. § 86.*]

2. APPEAL AND ERBOR (§ 901*)—TRUMES (§ 96*)
—BURDEN OF SHOWING ERBOR—RESULTING
TRUST—RELATION OF PARTIES.

The plaintiff purchased certain real estate with his own money, and had the conveyance made to his sister, the wife of the defendant. The plaintiff claimed that he intended that the title to the real estate should be held in trust by the sister for his benefit. The sister died intestate, and the legal title to the real estate by the sister for his benefit. descended to her husband, the defendant, and her son and only child. Subsequently the son conveyed his interest in the real estate to the de-fendant. On a bill in equity brought by the plaintiff praying that it be decreed that the de-fendant held the real estate in trust for him and be ordered to convey the same to him the jury found that it was not the intention of the plain tiff that the conveyance to the sister should be a gift to her, but that it should be held in trust by her for his benefit. These findings were confirmed by the decree of the single justice, and the defendant was ordered to convey the real estate to the plaintiff. On appeal from this decree, held (1) that the burden was upon the defendant to show that the decree was clearly arranges. (2) that it is not shown that the ly erroneous; (2) that it is not shown that the decree was manifestly wrong; (3) that the appeal be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3670; Dec. Dig. § 901;* Trusts, Cent. Dig. § 128; Dec. Dig. § 86.*]

(Official.)

Appeal from Supreme Judicial Court, Waldo County, in Equity.

Bill by Wilson G. Staples against Oliver R. Bowden. Decree for complainant, and defendant appeals. Appeal dismissed, and decree affirmed.

Bill in equity praying that it be decreed that the defendant holds certain real estate in trust for the plaintiff, and that he be ordered to convey the same to the plaintiff.

The plaintiff's bill, omitting formal parts, is as follows:

"Wilson G. Staples, of Stockton Springs, in the county of Waldo, and state of Maine, complains against Oliver R. Bowden of said Stockton Springs, and says:

"(1) That the plaintiff on the 7th day of April, A. D. 1887, purchased from William Hichborn, of said Stockton Springs, the following described real estate, to wit: [Description omitted in this report.] And paid the said William Hichborn therefor the sum of \$675 of his own money, and caused the legal title of said real estate to be conveyed to his sister, Orilla Bowden, since deceased. Said deed is dated the 7th day of April, A. D. 1887, and recorded in Waldo Registry of Deeds, Book 215, page 452, a copy of which deed is hereto annexed, marked 'Exhibit A.' (Exhibit omitted in this report.)

· "(2) That no part of the purchase price of

property is purchased and the conveyance of said real estate was paid by said Orilla the legal title is taken in the name of one per Bowden or any other person, except the Bowden or any other person, except the plaintiff, and said conveyance to said Orilla Bowden was not intended as a gift, but was intended that the legal title should be held by her in trust for the use and benefit of the plaintiff, all of which was well known by the said Oliver R. Bowden and by Leonard H. Bowden, son of said Orilla Bowden, hereinafter mentioned.

> "(3) That the said Orilla Bowden died on the - day of July, A. D. 1906, seised of said legal title to said real estate, leaving a husband, the said Oliver R. Bowden, and one son, Leonard H. Bowden, of Stockton Springs, as her only heir at law, to whom said legal title to said real estate descended.

> "(4) That on the 10th day of September, A. D. 1906, the said Leonard H. Bowden gave the said Oliver R. Bowden a quitclaim deed of all his right, title, and interest in said real estate, which deed is recorded in Waldo Registry of Deeds, Book 280, page 215, a copy of which deed is hereto annexed, marked 'Exhibit B.' [Exhibit omitted from this report.]

> "(5) Said Oliver R. Bowden now claims to own said real estate absolutely in fee simple, and refuses to convey the same to the plaintiff or to recognize the plaintiff's equitable ownership thereof, and claims that the plaintiff has no right, title or interest therein.

"Wherefore the plaintiff prays:

"(1) That it may be decreed that the said Orilla Bowden took the legal title to said real estate in trust for the use and benefit of said plaintiff.

"(2) That it may be decreed that the said Oliver R. Bowden now holds the legal title to said real estate under a resulting trust in favor of the said plaintiff, and that he be ordered to convey said real estate to said plaintiff by a good and sufficient deed of conveyance.

"(3) That the plaintiff may have such other and further relief as the nature of the case and equity may require."

To this bill the defendant filed an answer, which, omitting formal parts, is as follows:

The answer of defendant, who answers and SAVS:

"First. The defendant says that the conveyance of plaintiff to Orilla Bowden was intended as a gift, and that it was not intended that the legal title should be held by her in trust for the use and benefit of the plaintiff.

"Second. The defendant says that the plaintiff never called for a conveyance from Orilla Bowden, nor has he called for a conveyance from defendant, nor has he ever claimed an equitable ownership thereof."

The plaintiff then filed a replication, which, omitting formal parts, is as follows:

"The replication of the plaintiff, Wilson G. Staples, to the answer of Oliver R. Bowden. "The plaintiff says that the allegations

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the defendant's answer are not true, and this he is ready to prove.

"And the plaintiff prays that issues of fact may be directed to be framed for the purpose of submitting to a jury the following questions:

"(1) Was the money paid by the plaintiff for the real estate described in the bill intended as a gift by the plaintiff to Orilla

"(2) Was the conveyance of the real estate described in the bill by William Hichborn to Orilla Bowden intended by the plaintiff as a gift to her?

"(3) Was it the intention of the plaintiff at the time said conveyance was made that said Orilla Bowden should hold the legal title to said real estate in trust for his use and benefit?"

The cause was then heard on bill, answer, replication, and evidence, and the issues of fact as specified in the replication were submitted to the determination of the jury. The jury answered the first two questions in the negative, and the third question in the affirmative. Thereupon the presiding justice ordered, adjudged, and decreed as follows:

"(1) That the verdicts rendered by the jury be confirmed.

"(2) That the bill be sustained with costs. "(3) That Orilla Bowden, named in said bill, took the legal title to the real estate described in said bill in trust for the use and benefit of the plaintiff.

"(4) That the said defendant, Oliver R. Bowden, now holds the legal title to said real estate in trust for the plaintiff.

"(5) That the said Oliver R. Bowden be, and hereby is, ordered and decreed to convey said real estate to the plaintiff by a good and sufficient deed of conveyance within thirty days from this date."

The defendant then appealed to the law court as provided by Rev. St. c. 79, \$ 22. The case appears in the opinion.

Argued before EMERY, C. J., and WHITE-HOUSE, SPEAR, CORNISH, and KING, JJ.

William P. Thompson, for appellant. Dunton & Morse, for appellee.

WHITEHOUSE, J. This is a bill in equity in which the court is asked to decree that the defendant holds the real estate described in the bill in trust for the plaintiff, and that the defendant be ordered to convey the property to the plaintiff. It is claimed in the bill that the plaintiff purchased the real estate in question with his own money in the year 1887, and had the conveyance made to his sister "Orilla" (Aurelia) Bowden, the defendant's wife, intending that the title should be held by her for his benefit. Orilla Bowden died in 1906, leaving the defendant and one son as her only heirs, to whom the legal title

contained in his bill are true, and those in | son quitclaimed his interest to the defendant. who now claims absolute title to the property.

In his answer the defendant does not deny that the property was purchased by the plaintiff with his own money, and alleges that the conveyance to Orilla Bowden was intended as an absolute gift, and denies that the legal title was held by her in trust for the plaintiff.

Upon issues of fact framed for their determination the jury found that it was not the intention of the plaintiff that the conveyance to Orilla Bowden should be a gift to her, but that it should be held in trust by her for the plaintiff's benefit. These findings of the jury were confirmed by the decree of the single justice and the defendant ordered to convey the property to the plaintiff. The case comes to the law court on appeal from this decree.

It is a familiar principle in equity that the beneficial estate attaches to the party from whom the consideration comes. Hence, when property is purchased and the conveyance of the legal title is taken in the name of one person and the purchase money is paid by another, generally a resulting trust will be presumed in favor of the party who pays the price, and the holder of the legal title becomes a trustee for him. But this presumption exists only when the transaction is between parties where there is neither legal nor moral obligation for the purchaser to pay the consideration for another. The rule is reversed in its application between husband and wife, and also between father and child. Wentworth v. Shibles, 89 Me. 167, 86 Atl. 108, and cases cited.

In the case at bar it is not in controversy that the consideration for the property was paid by the plaintiff out of his own money, and it is not suggested that there was any legal or moral obligation on his part to make this payment for his sister. The burden is upon the defendant to show that the decree of the single justice is clearly erroneous.

Neither the defendant nor his son was called to testify as a witness, and the plaintiff himself, who was the only living person who knew what his intention was respecting the conveyance to his sister, was excluded from testifying.

The defendant relies upon the evidence showing the friendly relations between the parties and certain declarations alleged to have been made by the plaintiff, who was an unmarried man, tending to show that he caused the conveyance to be made to his sister as a gift with the intention of making his home with her, and it appears that when not absent at work he did make his home with his sister until her death, and frequently and habitually furnished large quantities of supplies for the household.

The testimony of Edith Moody was introduced by the defendant to the effect that six of this property descended. Subsequently the | years after the purchase of the place the plaintiff said, speaking of Orilla, that "he had given the place to her. It was hers."

Frank Dickey also testifies that he had a conversation with the plaintiff in 1907, and the plaintiff said "he gave the place to Rilla," meaning Mrs. Bowden. Thomas P. Moody also testified for the defendant that he heard the plaintiff say that he bought the place and gave it to his sister with the understanding that he should have a home there, and that after his sister died Bowden kicked him out.

But the plaintiff's counsel calls attention to the fact that the conversation by the two witnesses last named appear to have been after the commencement of this suit in equity, and after the plaintiff had been informed of his legal and equitable rights, and accordingly insist that it is wholly improbable that he made the statements in the precise form stated by the witnesses, as he understood perfectly well that, if it was an absolute gifto her, she did not hold it in trust for him.

In behalf of the plaintiff, it appears from the assessors' books that the property was taxed to the plaintiff for five years after it was purchased by him, that he made extensive repairs upon the buildings at his own ex-. pense and paid for painting and papering up to and including the year 1905, and the plaintiff contends that the fact that he made this house his home when not away at work from 1887 to 1906, when his sister died, strengthens the plaintiff's contention rather than the defendant's. After 1892 the property appears to have been taxed to the defendant Oliver R. Bowden by some arrangement made at the time which appears to have been satisfactory to the parties. But, as it had never been taxed to his sister Orilla, it is claimed that the assessment to the defendant is very significant evidence that there was originally no intention to make an absolute gift to the sister Orilla in 1887 when the deed was made.

In Young v. Witham, 75 Me. 536, a case closely analogous to the one at bar, the court said: "On appeal the burden lies upon the appellant. There is good reason for the rule in our practice. Cases are now heard before a single judge mostly on oral evidence. When the testimony is conflicting, the judge has an opportunity to form an opinion of the credibility of the witnesses not afforded to the full court. Often there are things passing before the eye of a trial judge that are not capable of being preserved in the record. A witness may appear badly upon the stand and well on the record."

Applying this rule, the court does not feel justified in saying that the decision of the single justice affirming the findings of the jury was manifestly wrong. The certificate must therefore be:

Appeal dismissed.

Decree below affirmed, with costs.

PHILBRICK v. INHABITANTS OF WEST GARDINER.

(Supreme Judicial Court of Maine. Feb. 24, 1909.)

1. HIGHWAYS (§ 197*)—DEFECTS—INJURY TO TRAVELER—CONTRIBUTORY NEGLIGENCE.

The doctrine of assumption of risk applies to actions against towns for injuries received through defects in ways.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 498; Dec. Dig. § 197.*]

2. HIGHWAYS (§ 197*)—DEFECTS—INJUBY TO TRAVELER—CONTRIBUTORY NEGLIGENCE.

If a traveler sees horses standing crosswise the road while feeding, and undertakes to pass behind them, he assumes the risk of injury from such horses.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 197.*]

3. HIGHWAYS (§ 197*)—DEFECTS—INJUBY TO TRAVELER—HORSES ON HIGHWAY.

While the plaintiff was undertaking to pass behind some horses feeding on the road, one of them by backing or kicking frightened the plaintiff's horse, to his injury. Held, that the risk of fright from such backing or kicking was assumed by the plaintiff, and he cannot recover of the town.

[Ed. Note.—For other cases, see Highways. Dec. Dig. § 197.*]

(Official.)

Exceptions from Supreme Judicial Court, Kennebec County.

Action by Winfield S. Philbrick against the Inhabitants of West Gardiner. Verdict for plaintiff, and defendants except and move for new trial. Motion and exception sustained.

Special action on the case under Rev. St. c. 23, § 76, against the inhabitants of the town of West Gardiner to recover damages for personal injuries alleged to have been received by the plaintiff on a public way in said town known as the "Pond Road," and caused by the alleged defective condition of said way. Plea, the general issue. Verdict for plaintiff for \$658.12. The defendants then filed a general motion for a new trial, and also excepted to several rulings made by the presiding justice during the trial.

The case is stated in the opinion.

Argued before EMERY, C. J., and WHITEHOUSE, SPEAR, CORNISH, KING, and BIRD, JJ.

George W. Hesleton, for plaintiff. Heath & Andrews and Anson M. Goddard, for defendants.

EMERY, C. J. The evidence for the plaintiff showed the following: The road commissioner of the defendant town with a road machine and several men and four or more horses was engaged in repairing one of the highways in that town, but during the noon hour the work was suspended, the machine drawn out near one side of the road, the horses unharnessed and led to the side of the machine to feed from it. While

[•]For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

thus feeding, they stood crosswise the road, their hind quarters being only some 20 inches from the outer edge of the traveled part of the road. The commissioner and his men were near by, eating their dinner. The place was upon or near a culvert.

This situation was clearly seen by the plaintiff as he approached in a wagon drawn by one horse. He slowed to a walk as he came near, and, without asking to have the feeding horses removed from the road, or to have room made for him to pass, he undertook to pass by turning out round and close to them. When his horse had got behind the feeding horses, one of the latter suddenly backed, or kicked, or switched his tail, and so frightened the plaintiff's horse that he suddenly bolted, throwing the plaintiff out upon the ground, to his injury. The plaintiff could not have turned further out without incurring some risk upon the other side.

Ignoring the question whether any defect in the road was the proximate cause of the injury, and ignoring some other questions raised by the defendant, we consider only the question whether the plaintiff assumed the risk incurred in undertaking to pass so close behind the feeding horses. We think he did. He was acquainted with horses, their habits, temperaments, and uncertainties. He was chargeable with knowledge that unharnessed feeding horses are liable to back, or kick, or switch their tails when anything comes near them from behind. He was also chargeable with knowledge that his own horse might be frightened by such movements so near him. The situation, its temporary nature, and the risk of undertaking to pass so near the feeding horses were seasonably known. He did not ask to have the horses moved out of the way. He did not wait till they could be so moved, but immediately undertook to pass by them as they were. He took upon himself the risk of the evident danger in so doing, and, it having gone against him, he must himself bear the consequences. Merrill v. No. Yarmouth, 78 Me. 200, 3 Atl. 575, 57 Am. Rep. 794; Lane v. Lewiston, 91 Me. 292, 39 Atl.

Motion and exceptions sustained. Verdict set aside.

(106 Me. 161)

STATE v. RIGLEY.

(Supreme Judicial Court of Maine. Feb. 24, 1909.)

Intoxicating Liquors (§ 202*)—Unlawful Possession—Complaint — Allegations — Intent.

A complaint for having in possession intoxicating liquors "with intent that the same be sold in this state in violation of law" con-

tains a sufficient allegation of the intent under Rev. St. 1903, c. 29, § 47.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 222; Dec. Dig. § 202.*] (Official.)

Exceptions from Supreme Judicial Court, Washington County.

Complaint by the State against James Rigley for having in his possession intoxicating liquors with intent to sell. Defendant demurred to the complaint, and his demurrer was overruled, and he excepts. Exception and demurrer overruled, with leave to respondent to plead over.

Complaint against the defendant for having in his possession intoxicating liquors with intent to sell the same, contrary to the provisions of Rev. St. c. 29, § 47. The complaint is as follows:

"State of Maine.

"Washington, ss.

"To the Recorder of the Calais Municipal Court holden at the City of Calais within and for said County of Washington. Ferd E. Stevens of Lewiston, in county of Androscoggin, said state, in behalf of the state of Maine, on oath complains that James Rigley of Calais, in said county of Washington, on the eleventh day of July in the year of our Lord one thousand nine hundred and eight, at Calais, in the county of Washington, unlawfully did have in his possession a certain quantity of intoxicating liquor, to wit, one bottle containing five gills of whisky, one bottle containing one quart of wine, with intent that the same be sold in this state in violation of law, against the peace of the state, and contrary to the form of the statute in such case made and provided.

"Therefore, said complainant prays that said accused may be apprehended and held to answer this complaint, and further dealt with relative to the same as the law directs.

"[Signed] Ferd E. Stevens."

On this complaint a warrant in due form of law was issued, and the defendant was duly apprehended thereon. The record does not disclose what disposition of the matter was made by the municipal court, but presumably judgment was for the state, and the defendant them appealed to the Supreme Judicial Court, Washington county. The defendant demurred to the complaint, and the matter was heard at the October term, 1908, of said Supreme Judicial Court. The demurrer was overruled, and the defendant excepted, and was granted leave to plead anew if his exceptions were overruled.

The case is stated in the opinion.

Argued before EMERY, C. J., and WHITE-HOUSE, SAVAGE, SPEAR, KING, and BIRD, JJ.

C. B. Donworth, County Atty., for the State. R. J. McGarrigle, for defendant.

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

is provided that "no person shall deposit or have in his possession intoxicating liquors with intent to sell the same in the state in violation of law, or with intent that the same shall be so sold by any person, or to aid or assist any person in such sale." By section 49 it is provided that, "if any person competent to be a witness in civil suits makes sworn complaint before any judge of a municipal or police court or trial justice that he believes intoxicating liquors are unlawfully kept or deposited in any place in the state by any person and that the same are intended for sale within the state in violation of law," the court shall issue a warrant to search the place, and, if liquors are there found, to arrest the person named as so keeping the liquors, etc. In the case before us it was alleged in the complaint that the respondent unlawfully did have in his possession intoxicating liquors, "with intent that the same be sold in this state in violation of law," etc. There was no other allegation of intent. The respondent contends that the complaint does not sufficiently allege the intent, in that it does not state whether the intent was that the liquor should be sold by the respondent himself, or by some other person, or to aid or assist some other person to sell.

It was not necessary so to particularize. The gist of the offense was in the intent itself the intent of unlawful sale, not in the proposed mode of execution. The offense, the intent, was the same whichever and whatever way it was to be carried out. It was the intent, not the execution of it, that constituted the offense, and that intent was sufficiently alleged. State v. Kaler, 56 Me. 88; State v. Connelly, 63 Me. 212.

Exceptions overruled.

Demurrer overruled.

Respondent to plead over as per stipulation.

WEEKS v. WEEKS.

(Supreme Court of New Jersey. Sept. 13, 1909.)

1. JUDGMENT (§ 162*)-VACATING-EVIDENCE -DECEPTION

On an application to open a judgment taken against defendant in attachment proceedings, evidence held not to show that defendant was prevented from making a defense by deception. [Ed. Note.—For other cases, see Judgment, Cent. Dig. § 322; Dec. Dig. § 162.*]

2. JUDGMENT (§ 138*)-OPENING-DEFENSES-

LACHES. An application to open a judgment against defendant in foreign attachment proceedings, in which the affidavit was filed June, 1906, and judgment was rendered April 4, 1907, and the application to enjoin the enforcement of the judgment was returnable July 19, 1909, on the ground that defendant was not a nonresident at the time, should not be allowed, where defend-ant had knowledge of the writ of attachment,

EMERY, C. J. By Rev. St. c. 29, § 47, it to prevent the continuance of the suit for such a length of time.

[Ed. Note.—For other cases, see Cent. Dig. § 250; Dec. Dig. § 138.*]

3. Attachment (§ 154*)—Writ—Amendment —Notice — Necessity — Foreign Attach-MENT.

An attachment against a nonresident being a proceeding in rem, no notice to defendant of an order amending the writ so as to include other property was necessary, nor does the statute contemplate such notice.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 154.*]

4. Compromise and Settlement (\$ 20*) -

BREACH-EFFECT. Where a release was executed by plaintiff to defendant, by which the latter agreed to return certain articles, concerning which the parties had been litigating, in consideration of the release of all debts and the discontinuance of the actions, and the goods were not delivered as agreed, and the release was executed more than two years before plaintiff brought an action to attach some of the same goods, the release was not a bar to the attachment action.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. § 88; Dec. Dig. § 20.*]

5. JUDGMENT (§ 153*)—OPENING.
Plaintiff had begun actions against defendant concerning some articles, but the parties thereafter executed a release, by which defendant agreed to return certain articles in considant agreed to return certain articles in consideration of a discontinuance of the actions, but some of the articles were never returned, and thereafter plaintiff began attachment proceedings against defendant as a nonresident, and judgment was rendered April 29, 1907, and more than two years thereafter defendant applied to have the judgment vacated. Since the judgment was rendered plaintiff has become dumb and defendant is now dead; but the latter in his lifetime knew of the issuance of the attachment and entry of judgment against him, and promised to settle with plaintiff. Held, in view of the lapse of time since entry of judgment and of the changed conditions, that it would not be equitable to now vacate the judgment.

[Ed. Note.—For other cases, see Judgment,

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 300; Dec. Dig. § 153.*]

6. JUDGMENT (§ 342*)—OPENING—TIME.

The general rule is that the power to open a judgment is exhausted after the expiration of the term.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 668; Dec. Dig. § 342.*]

Attachment proceeding by Margaret Weeks against Charles H. Weeks, in which judgment was rendered against defendant. On rule to show cause why judgment should not be opened. Rule discharged.

Argued before VOORHEES, J., pursuant to statute.

Hudspeth & Lane, for the rule. Roe & Runyon, opposed.

VOORHEES, J. On June 24, 1909, a rule was granted upon the plaintiff to show cause why the judgment in the above case should not be opened, and restraining a sale of the property attached. This rule was returnable July 19, 1909. The case is one of foreign attachment, in which affidavit was filed on the and delayed making a defense or taking steps 1st day of June, 1906, and the writ issued,

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

returnable June 28, 1906. The affidavit was sworn to April 24, 1906. Regular proceedings were had in the cause, whereby judgment against the defendant was obtained April 4, 1907. On April 29th following the judgment an order was made to sell the real estate. The defendant in attachment died in May, 1908. On May 24, 1909, a petition was filed setting forth the death of the defendant and that he owned other lands than those appraised in the state of New Jersey at the time of the issuance of the writ, and an order was entered that the clerk amend the writ by annexing a description of such real estate. Under this all lands have been advertised for sale by the auditor. Attachment Act (P. L. 1901, p. 160) § 8.

The application to open is made upon several grounds: First, the defendant was prevented from making defense because of deception; second, at the time of the issuance of the writ he was not a nonresident; third, the order amending the writ by including other property is illegal, because no notice to the defendant's representatives; fourth, the affidavit was not filed in time. In addition to the above reasons, on the argument it was the endeavor of the defendant to show that there was no cause of action existing at the time of the making and filing of the affidavit. The plaintiff is the daughter-in-law of the defendant. They had before 1906 been in litigation in the state of New York. The plaintiff offers a release, entitled in two actions pending in the state of New York, Sullivan county, providing for the discontinuance of those actions upon the following conditions: "The defendant is to deliver to the plaintiff, on demand by herself or her agents, all the personal property described in the schedules in the plaintiff's complaints, and all the plaintiff's clothes and wearing apparel, and in consideration of the premises the plaintiff is to and hereby does release. etc., the defendant, Charles H. Weeks, Sr., and Charles H. Weeks, Jr., from all debts, etc., to the present time from any and all causes of action and rights of action arising from any and all causes heretofore existing between the parties, and either of them. Dated February 5, 1904."

The first reason for setting aside the judgment arises from the following conversation, related by the plaintiff's attorney as having been held with the defendant. The attorney said: "I told him [defendant] of this attachment suit, and he seemed greatly surprised, and said that could not be, because he had not been served. I started to show him the claim of Mrs. Weeks, when he backed toward the door, apparently afraid that he would be served. I assured him that we did not intend to make any service upon him, and he thereupon left the office." Counsel says this is an intimation on the part of the attorney to Mr. Weeks that he agreed with Weeks' contention that he could not be sued because he had not been served and the promise on the part of counsel not to

serve the defendant. The remnant of the conversation is: "I, plaintiff's attorney, heard nothing further from Mr. Weeks until after the issuance of the order of publication, and some time between that and the entry of judgment, when he came again to my office with a printed copy of the notice of publication and wanted to know what it was all about, and said he came on the understanding that I would not serve him; that he did not see how we could bring any suit without serving him, especially as he lived in New York. I showed Mr. Weeks the list of articles that Mrs. Weeks claimed. He said that he thought Maggie was treating him pretty roughly; that he always expected to do something for her, but didn't expect her to push him. I told him to consult some one as his attorney, and he said he would have nothing to do with any lawyer; that he has been cheated with every lawyer that he had anything to do with.". After the matter had ripened into judgment, and the rule to sell the real estate entered, the plaintiff instructed her attorney to allow the matter to stand. I do not think that it can be said that the defendant was prevented from making a defense because of deception.

The second ground, that he was not a nonresident, must in like matter be dismissed, because he had knowledge of the issuance of the writ, and has delayed making a defense or taking measures to prevent the continuance of the suit for so long a time.

Third. The order amending the writ was not illegal without notice to the defendants. The proceeding was in rem and did not contemplate any notice, nor does the statute contemplate such notice. There was no one to notify.

The fourth reason may be dismissed without discussion.

The main question arises upon the effect of the paper called a release. It seems to be admitted that some articles agreed to be delivered to the plaintiff according to that release were not so delivered, and it further appears that this suit was commenced more than two years after the date of that release. It, therefore, on its face is not a bar to this action. A judgment in attachment as to the property attached does not rest on any less secure footing than a judgment in personam. The judgment had been entered over two years before an application to open it was made. Since its entry the plaintiff in attachment has become afflicted with aphasia, having been so affected for about two years. The testimony shows that while she is of sound mind, yet she cannot express herself in words, and is thus practically disqualified from giving her testimony. As before stated, the defendant is now dead. The circumstances have, therefore, materially changed, so that it would now be to the great disadvantage of the plaintiff to disturb the judgment. When we consider that the testimony shows that the defendant had

him in his lifetime and of the entry of the judgment, and promised to settle with the plaintiff, it is not equitable to disturb the entry of the judgment thus regularly made; and this is so aside from the rule, which may or may not be an inflexible one, that the power to open a judgment is exhausted after the expiration of a term.

As to the effect of the release. It is said that this release operates in præsenti, and that it must be repudiated altogether or else operate as a unit, referring to the fact that part of the goods, as it is alleged, were delivered to the plaintiff and part retained by the defendant; but the length of time since the judgment was entered, and the fact that the defendant did not carry out the terms of the release by delivering the whole of the articles therein mentioned, is sufficient to justify the court in refusing to open the judgment, which would be giving to the so-called release its most technical effect; and while the cases cited by the defendant's counsel might govern the court upon the trial of the cause, yet they should not be carried to their extreme result in a case of this sort, which is an application to the equitable, rather than to the legal, power of the court.

On the whole, I conclude, therefore, that the rule should be discharged, with costs.

(72 N. J. E. 816)

BATEMAN et al. v. RILEY.

(Chancery Court of New Jersey. Dec. 21, 1906.)

1. Specific Performance (§ 17*)—Contract of Sale — Assignment — Rights of As-SIGNEE.

A bill for specific performance may be maintained by the vendee's assignee.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 39½; Dec. Dig. § 17.*]

2. Specific Performance (\$ 29*)-Contract -DESCRIPTION.

Where a contract for the sale of land described it as "all the beach front and marsh land that I own at or near the Fortescue," the boundaries of which are clearly ascertainable from the records in the county clerk's office, the de-scription was sufficient to sustain specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 80; Dec. Dig. § 29.*] 3. EVIDENCE (§ 460*)—PAROL EVIDENCE—OWN-ERSHIP OF LAND.

In a suit for specific performance of a contract to convey all the marsh land testator owned at or near a certain island, parol evidence was admissible to show that defendant owned only certain land which would answer the description in the contract.

[Ed. Note.—For other cases, see Cent. Dig. § 2119; Dec. Dig. § 460.*]

4. Specific Performance (§ 127*)—Contract of Sale—Joinder by Wife.

Specific performance by a husband of a contract for the sale of land, with either abatement from the price or with indemnity, will not be decreed, where the wife has not joined in the contract of sale and refuses of her own volition to join in the deed; the vendee being

knowledge of the issuance of this writ against, only entitled to a decree of specific performance as against the husband.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 410; Dec. Dig. § 127.*] 5. Specific Performance (§ 134*)—Costs.

Where a vendee was not entitled to specific performance as to a wife's contingent interest in the land, and the husband tendered a conveyance of his interest, as to which only performance was decreed, he was entitled to costs. [Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 441; Dec. Dig. § 134.*]

Suit by Luther Bateman and others against William W. Riley for specific performance. Decree for complainant for part only of the relief demanded.

Walter H. Bacon, for complainants. Charles E. Sheppard and Carrow & Kraft, for defendant

LEAMING, V. C. The bill is filed by complainants, as vendees, to procure a decree of specific performance of a contract made by defendant for the conveyance of land.

The written contract is as follows:

"Recd. of Luther Batem one hundred \$ on payment of a thousand \$ for all the beach front and marsh land that I own at or near Fortescue Island and I agree to turn over all leases that I hold to him.

"Dated Jan. 13th, 1906.

"Wm. W. Riley.

"Deed given on the 15th inst.

"Wm. W. Riley."

It is urged on behalf of defendant that a decree of specific performance cannot be made in this cause because complainants Samuel Bradford and Lewis N. Bradford, Jr., are not parties to the written contract. This objection is without merit. At the hearing a written assignment was received in evidence whereby the vendee named in the contract assigned to his co-complainants each an undivided one-third interest therein. A bill for specific performance may be maintained by the assignee of the vendee in a contract for the sale of land. The only conflict of authorities upon the subject is as to whether it is necessary for the assignee of the original vendee to make the original vendee a party. But that question is not present in this case. Pom. Spec. Perf. § 487. At the hearing evidence was received showing that the contract was made in the interest of the three That evidence need not be complainants. considered.

It is further urged on behalf of defendant that the description of the land, as contained in the contract, is too uncertain to entitle this court to decree specific performance. There is no difficulty in ascertaining the land to which this contract refers. An examination of the records in the county clerk's office discloses the exact boundaries of the land referred to in the contract. At the hearing these records were produced and received in evidence. The statute of frauds requires no

•For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

with reasonable certainty. It is enough if the property is described so that it may be with certainty ascertained, and parol evidence is admissible to show that defendant owned only certain land which would answer the description of the contract. Robeson v. Hornbaker, 3 N. J. Eq. 60; Camden & Amboy Railroad Co. v. Stewart, 18 N. J. Eq. 489, 491; Lewis v. Reichey, 27 N. J. Eq. 240; Tillotson v. Gesner, 33 N. J. Eq. 313, 319; Champion v. Genin, 51 N. J. Eq. 38, 39, 27 Atl. 817; Price v. McKay, 53 N. J. Eq. 588, 32 Atl. 130; Riley v. Hodgkins, 57 N. J. Eq. 278, 41 Atl. 1099; Brooks v. Wentz, 61 N. J. Eq. 474, 49 Atl. 147.

A third objection urged on behalf of defendant is fatal to complainants' right to the relief sought. It has been the uniform practice of this court to refuse to decree the specific performance by a husband of a contract for the sale of land, with either abatement from the price or with indemnity, where a wife has not joined in the contract of sale, and refuses, of her own volition to join in a deed. Young v. Paul, 10 N. J. Eq. 401, 418, 64 Am. Dec. 456; Hawralty v. Warren, 18 N. J. Eq. 124, 128, 90 Am. Dec. 613; Pinner v. Sharp, 23 N. J. Eq. 274, 282; Reilly v. Smith, 25 N. J. Eq. 158, 159; Peeler v. Levy, 26 N. J. Eq. 330, 335; Blake v. Flatley, 44 N. J. Eq. 228, 229, 10 Atl. 158, 14 Atl. 128, 6 Am. St. Rep. 886; McCormick v. Stephany, 61 N. J. Eq. 208, 224, 48 Atl. 25.

An effort was made upon the part of complainant to show that defendant induced his wife to refuse to sign a deed in fulfillment of the contract in question. A finding to that effect could not be justified on the evidence

I am obliged to refuse a decree for specific performance against the husband, with either an abatement from the purchase price or indemnity against the inchoate dower of defendant's wife. Complainants may take a decree for conveyance from the husband, without abatement or indemnity, or the bill will be dismissed. In either event defendant will be entitled to costs, as defendant tendered a deed from himself to complainants for the land in question before the bill was filed.

(225 Pa. 118)

McCULLOUGH v. RAILWAY MAIL ASS'N. (Supreme Court of Pennsylvania. May 25, 1909.)

1. Appearance (§ 24*)—Defective Service—Waiver.

An appearance either in person, by counsel, by giving bail, filing an affidavit of defense, by making a defense before arbitrators, or by appeal from an award or an agreement that an amicable action may be entered, cures all defects and irregularities in the service of the writ.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 118-143; Dec. Dig. § 24.*]

more than that the land shall be described 2. APPEABANCE (§ 19*)—JUBISDICTION—OBJECTIONS—PRACTICE.

A defendant may question the court's jurisdiction without submitting thereto, by entering an appearance de bene esse for that specific purnose.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. § 81; Dec. Dig. § 19.*]

3. APPEARANCE (§ 19*) — JURISDICTION — AP-

PEAL.

Where a defendant appears de bene esse to question the court's jurisdiction of his person, and the court rules against him, he may either appeal or appear and defend on the merits; but, if he does the latter, he waives his objection to the jurisdiction.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 79-90; Dec. Dig. § 19.*]

4. INSURANCE (\$ 668*)—ACCIDENT INSURANCE—EXTERNAL INJURIES—EVIDENCE—QUESTION FOR JURY.

In an action on an accident policy insuring a railroad postal clerk against death, whether his death was caused by external bodily injuries held for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1745; Dec. Dig. § 668.*]

5. TRIAL (§ 92*)—RECEPTION OF EVIDENCE—MOTION TO STRIKE.

A motion to strike evidence admitted without objection, not made until after plaintiff's case in chief is closed, is too late.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 245; Dec. Dig. § 92.*]

Appeal from Court of Common Pleas, Crawford County.

Action by Elizabeth McCullough against the Railway Mail Association, doing business as the National Association of Railway Postal Clerks. Judgment for plaintiff, and defendant appeals. Affirmed.

From the record it appeared that the court was moved to set aside service of summons on the ground that the defendant was a foreign corporation not doing business in Pennsylvania, and not registered in this state. The court discharged the rule. The facts relating to the accident are stated in the opinion of the Supreme Court.

At the trial, after plaintiff had rested, and the defendant had offered testimony, defendant's counsel made the following mo-"Defendant's counsel: I wish to make a motion to strike out the testimony on the part of the plaintiff. This book I have in my hands is a copy of the constitution and by-laws, which were offered in evidence yesterday by the plaintiff. By examination of the same I find that section 15 of the constitution provides as follows: 'And in case of any post mortem examination by or on behalf of persons, representatives or beneficiaries, the association shall be given reasonable opportunity to attend and participate.' It appearing by the evidence of the plaintiff's witnesses that an autopsy was held some four hours after the death of Mr. Mc-Cullough, and it appearing by the evidence of the plaintiff that she didn't furnish any notice to the defendant company, and the evidence of a requirement on the part of

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the company that they did not have notice of the holding of the autopsy not having appeared in the case until after the evidence of the physicians who held the autopsy has been given in court before the court and jury, I now move the court to strike out that evidence for the reason that the autopsy was held and the evidence furnished in violation of the constitution of the company. Plaintiff's counsel object because it is too late to make such a motion. The Court: The evidence relating to the autopsy and the physicians as revealed thereby having been admitted without objection, and no motion to strike out the same made until after the plaintiff's case in chief was closed, we think the motion comes too late at this time, and the motion is overruled, and bill of exceptions sealed for the defendant."

Defendant presented these points:

"(2) That there is not sufficient evidence in this case to justify the jury in finding that F. A. McCullough's death was the result of injuries received by or inflicted upon him on December 9, 1905, through external, violent, and accidental means. Answer: Refused.

"(3) That there is not sufficient evidence to justify the jury in finding that F. A. Mc-Cullough received the injuries alleged by plaintiff on December 9, 1905, after Dr. Taggart first called upon and visited him on the afternoon of said day at the post office in Salamanca. And if the jury believe the evidence of Dr. Taggart that said McCullough told him at their first meeting on the afternoon of said day that he (McCullough) had not been injured, and the jury shall further find that said McCullough was at the time of sound mind and memory, then they must under the pleadings in this case find for the defendant. Answer: So much of this point as reads as follows is affirmed: "That there is not sufficient evidence to justify the jury in finding that F. A. McCullough receiv-December 9, 1905, after Dr. Taggart first called upon and visited him on the afternoon of said day at the post office in Salamanca.' So much of this point as reads as follows: 'And if the jury believe the evidence of Dr. Taggart that said McCullough told him at day that he (McCullough) had not been injured, and the jury shall further find that said McCullough was at the time of sound mind and memory, then they must find under the pleadings in this case for the defendant'-is also affirmed, with this qualification, that if the jury further find that such statement was the fact.

"(4) That under the law and the evidence the verdict must be for the defendant. Answer: This point is reserved."

Verdict and judgment for plaintiff for \$3,340. Defendant appealed.

Argued before MITCHELL, C. J., and L, BROWN, MESTREZAT, and POT-

Geo. F. Davenport and Otto Kohler, for appellant. Frank J. Thomas and Manley O. Brown, for appellee.

MESTREZAT, J. It is a familiar rule of practice in this state that an appearance by the defendant cures any defect or irregularity in the service of the writ. A defendant may appear in person or by counsel. he appear by counsel, the latter causes his name to be entered on the record. It is not necessary, however, that the defendant should formally appear personally or by counsel to give the court jurisdiction, and to make him amenable to its order, decree, or judgment. He will be regarded as having appeared if he give bail to the action, if he file an affidavit of defense to the merits of the cause, if he make defense before arbitrators, or appeal from an award, or if he agree that an amicable action may be entered. By taking either of these steps in an action brought against him, the defendant submits himself to the jurisdiction of the court for the trial of the cause on its merits, and is bound by the judgment.

If a defendant wishes to attack the regularity or sufficiency of the service of the writ or question the jurisdiction of the court without submitting to the jurisdiction for the trial of the cause on its merits, he may do so by entering an appearance de bene esse for the specific purpose. This is not such an appearance as will authorize the court to take any steps affecting the merits of the cause. The appearance is for the single purpose of attacking the regularity of the proceeding and the authority of the court to exercise jurisdiction in the cause. The question thus raised is a preliminary one and should be decided before any further steps are taken in the cause. If the decision of the court is favorable to the defendant, he is not in court or subject to its jurisdiction, and the merits of the case caned the injuries alleged by the plaintiff on not be inquired into. If, on the other hand, the court rules the preliminary question against the defendant, he has one of two courses to pursue. He may rely upon the position he has taken and attempt to sustain it by an appeal to the proper appellate court, or he may consider himself in court and detheir first meeting on the afternoon of said fend the action on its merits. He is required to select one of the two courses, and, having done so, he must accept the legal consequences of his action. He cannot deny the jurisdiction of the court, and at the same time take such action to defeat the plaintiff's claim as will amount to an appearance. By taking the latter course he admits himself in court and must abide by its judgment. He cannot deny the jurisdiction of the court and at the same time defend the cause upon its merits, which implies a submission to its jurisdiction. This has long been the settled practice in the state. Lycoming Fire Insurance Co. v. Storrs, 97 Pa. 354; Jeannette Borough v. Roehme, 9 Pa. Super. Ct. 83.

we need not determine the correctness of the trial court's conclusion in refusing to set aside the service of the writ. The defendant association entered a conditional appearance for the purpose of moving to set aside the service of the summons and to quash the writ. After the court had refused the motion, the association filed an affidavit of defense and entered a plea in the case. This action must be regarded as an appearance by the defendant and a waiver of any irregularity or insufficiency in the service of the writ.

This was an action on a beneficiary certificate issued by the association in favor of the plaintiff to recover \$3,000, the amount named in the certificate, for the death of the plaintiff's husband, which, as alleged by the plaintiff, was caused by bodily injuries through external, violent, and accidental means while he was engaged in the railway postal service of the government. The affidavit of defense denies that McCullough's death resulted from bodily injuries through external, violent, and accidental means, and avers that it was occasioned by cerebral hemorrhage resulting from illness from which he had previously been suffering. This was the issue raised on the trial and submitted for the decision of the jury. The defendant contends that there was no evidence which would warrant the jury in finding that McCullough received bodily injuries on December 9, 1905, the date laid in the statement, which caused his death. This contention was not sustained by the court, which held that the evidence, if believed by the jury, was sufficient to show that McCullough did receive bodily injuries on that day. It appears that McCullough complained of a severe headache during the night of December 7th, and also on December 8th. His services as postal agent were performed on the railway between Youngstown, Ohio, and Salamanca, New York. He went from Youngstown to Salamanca in the forenoon of the day and returned in the afternoon. He made the usual trip on December 7th and 8th. On Saturday morning, December 9th, he left Youngstown in the mail car for Salamanca. He was accompanied as far as Randolph, N. Y., by an assistant. From that point to Salamanca, 18 miles farther east, he traveled alone. At the latter place he was found in the car in a semiconscious condition. He was taken to a hospital in Salamanca, and on Sunday morning was taken to his home at Meadville. An examination at his home by the attending physician disclosed a swelling and redness on his head above the right temple, and afterwards two other external marks or swellings were discovered by the nurse or physician. On the following Sunday, December 17th, McCullough died. An autopsy was held by two physicians, who testified that they found a blood clot in the skull on the side where the and the judgment is affirmed.

From what has been said it follows that | swelling had appeared, and that the clot was, in their judgment, produced by external violence, and not by disease. physicians testified that the pains in the head complained of by the deceased were not the usual manifestations of cerebral hemorrhage due to disease, and that the symptoms manifested by him were characteristic of brain concussion, rather than of apoplexy.

There is no evidence to show that the deceased had received any bodily injury prior to Saturday morning, when he started for Salamanca. He had a headache; but it appeared by the evidence that that was accompanied by sickness of the stomach, which, it was claimed, produced the pain in the head. The marks of external violence were first discovered on Sunday morning, and if the testimony of the physicians is believed the jury were justified in finding that they produced McCullough's death. We also think that the jury was justified in its conclusion that the injury to the body took place on December 9th while he was in the postal car. There is no evidence whatever to warrant the finding that McCullough received any external injuries on December 7th or 8th. It is true there is no direct testimony that he received his injuries on the mail car from Randolph to Salamanca. It is also true that a witness testified that McCullough told him on Sunday morning that he had not been injured and was not sick; but at that very time he was in a semiconscious condition, which discredited his own alleged declarations. He might have received the injuries on Sunday morning, which were afterwards discovered on his head, and which resulted in his death; but there is no evidence to show that he did receive them at that time. On the other hand, the condition in which he was found in his car at Salamanca would warrant the conclusion that the injuries on his head were caused by some violence in the postal car after he had left Randolph, where he separated from his assistant. The physician testified that the swelling resulting from a blow on the head might not be noticeable for some hours after the blow, and that it was possible for paralysis which took place on December 16th to be the result of a blow on December 9th. We do not think the court would have been justified in holding that the evidence produced on the trial was not sufficient to warrant the jury in finding that the deceased received the external injuries resulting in his death on December 9th, and in directing a verdict for the defendant.

We cannot convict the court of error in refusing to strike out the evidence relating to the autopsy. The reason assigned by the court for the ruling shows that it did not abuse its discretion in declining the defendant's motion.

The assignments of error are overruled,

(225 Pa. 105)

SANDERS v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. May 24, 1900.)

1. RAILROADS (§ 270*)—CROSSING ACCIDENT— DEFENSES—BURDEN OF PROOF.

Where plaintiff was injured at a crossing on the tracks of defendant railroad company by his automobile being struck by a train, the burden was on defendant to establish its defense that the accident was due to the negligence of the crew of another company, operating a train for it over defendant's tracks under a traffic arrangement.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 865; Dec. Dig. § 270.*]

2. RAILBOADS (§ 260*)—CROSSING ACCIDENT— USE OF TRACKS BY DIFFEBENT COMPANIES— OWNER'S LIABILITY.

Where a railroad company permits another company to run cars over its tracks, the arrangement for such use is in the nature of a license, and the company owning the tracks is, in general, and in the absence of a provision in the contract to the contrary, liable for damages caused by the negligence of the operatives of the licensee.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 817; Dec. Dig. § 280.*]

3. RAILROADS (§ 260*)—CROSSING ACCIDENT—PERSONS LIABLE—USE OF TRACKS BY DIFFERENT COMPANIES.

Defendant railroad company permitted the use of its tracks at a grade crossing where plaintiff was injured by another railroad company, defendant controlling the safety gates at the crossing. Plaintiff attempted to cross in an automobile when the gates were up and after he had been directed to do so by the employés of the licensee company, who were subject at the time to the rules and regulations of the licensor; plaintiff being struck and injured by a train operated by the licensee before he succeeded in getting across. Held, that an action for plaintiff's injuries was properly brought against the licensor company.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 817; Dec. Dig. § 260.*]

4. RAILROADS (§ 350*)—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

In an action for injuries at a railroad crossing, whether plaintiff was negligent held for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1166, 1169-1192; Dec. Dig. § 350.*]

Action by J. S. Sanders against the Pennsylvania Railroad Company to recover damages for personal injuries. Judgment for plaintiff for \$3,500, and defendant appeals. Affirmed.

At the trial it appeared that the plaintiff was riding on the evening of July 16, 1905, in an automobile operated by his son-in-law. As the machine approached a grade crossing at the intersection of Barney street and the defendant's track in the city of Wilkes-Barre, it was seen that the safety gates were raised, and that no watchman was in attendance. The evidence for the plaintiff tended to show that as the machine approached the crossing of and indemnity against all claims for per-

it was stopped, or came nearly to a dead stop, but on a signal from a trainman it started over the crossing, and was struck by coal cars which were being backed on one of the tracks. There was also evidence that no warning of the approach of the cars was given. Other facts appear by the opinion of the Supreme Court. The court refused binding instructions for defendant.

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and ELKIN, JJ.

F. W. Wheaton, John McGahren, and Henry W. Palmer, for appellant. John M. Garman, and W. Alfred Valentine, for appellee.

ELKIN, J. The first assignment seeks to convict the learned court below of error in not giving binding instructions for the defendant at the trial; and the second challenges the correctness of the ruling in refusing to enter judgment non obstante veredicto. The appellant contends that this case presents a question of law for the court, and not of fact for the jury. This contention is predicated upon two grounds: First, that the injuries complained of resulted from collision with a train of cars moved by and belonging to another railroad company whose employes were in charge of the train, and that. if there was any negligence in the case, the company owning the train of cars and employing the servants in charge of the same is alone responsible; and, second, that under the facts proven at the trial appellee was so clearly guilty of contributory negligence as to warrant the court in holding as a matter of law that there can be no recovery of damages. As to the first proposition the testimony is meager and unsatisfactory. It does not clearly show what the traffic arrangement between the two companies was. The letter of the superintendent of the appellant company dated September 10, 1902, refers to a former letter dated July 9, 1902, which contained the terms and conditions upon which trackage rights would be given, but this letter is not in evidence, and therefore the court is not in position to determine what the contractual trackage rights of the other company are. The testimony does show that the right of way, roadbed, and railroad tracks belong to and are under the control and management of the appellant company. The accident occurred at a grade crossing on the tracks of the Pennsylvania Railroad Company, and this makes out a case of primary responsibility if negligence be shown. If for any sufficient reason this primary responsibility may be avoided, the burden is upon the company denying it to establish the facts necessary to shift it. In the present case the evidence is not sufficient to shift the burden. The statement in the letter of September 10, 1902, relating to the assumption

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sonal injuries, may very properly be considered in determining the ultimate responsibility between the contracting railroad companies, but cannot be used to defeat the right of the appellee to recover for injuries against the company primarily liable for the same.

Again, the general rule is that, where a railroad company simply permits another railroad company to run cars upon its tracks, it is liable for damages caused by the negligence of the company enjoying the permissive use. Under such circumstances, the arrangement for trackage rights is in the nature of a license, and the company enjoying the same is a licensee. Of course, the application of the rule depends largely upon the nature of the contract between the companies. The lessor company may, and often does, transfer to the lessee company for a term of years all of its property under a contract which gives the lessee exclusive control and management of the whole system. In such a case, depending upon the facts and circumstances, it may be that an action for personal injuries should be brought against the operating company. Then, too, there may be such a joint construction and use of tracks under joint rules and regulations as to make each company enjoying the joint use liable for its own negligence. These are exceptional cases, and depend upon their own peculiar facts. No such question arises under the facts of the case at bar. The safety gates at the crossing were under the control of the appellant company. While the train which caused the injuries belonged to another railroad company, it came upon the tracks of the appellant company only after orders so to do had been given by the employés of the latter company, the rules and regulations of which the employés of the former company were subject to at the time of the accident. We therefore hold under these facts that the action can be maintained against the appellant company. It may be that the plaintiff might have elected to have brought his suit against the Delaware & Hudson Company, but we are not dealing with that question now and it is not necessary to pass upon it.

As to the second proposition, we do not agree with the contention of the learned counsel for appellant that the evidence showed such a clear failure on the part of the appellee to perform his duty on approaching the crossing as to justify the court in holding as a matter of law that there could be no recovery on the ground of contributory negligence. No useful purpose can be served by reviewing the testimony on this branch of the case. We are all of opinion that it was sufficient to go to the jury, and that the learned trial judge committed no error in its submission.

Judgment affirmed.

(225 Pa. 85) McKINNON et al. v. MERTZ et al. (Supreme Court of Pennsylvania. May 20, 1909.)

SCHOOLS AND SCHOOL DISTRICTS (§ 90*)-DEBT

LIMIT—CONSTRUCTION—EXCESS.

Const. art. 9, § 8, after fixing the ultimate debt limit of any school district at not to exceed 7 per cent. of the assessed value of taxable property therein, provides that no district shall incur any debt, or increase of indebtedness, beyond 2 per cent. of the assessed valuation of the prop-erty, without the assent of the electors thereof at a public election. *Held*, that a school building contract at a price which, in addition to previous existing indebtedness, would create a total debt in excess of 2 per cent. of the assessed valuation of the property of the district, though payable only from "funds legally available," entered into without the holding of an election, was illegal.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 211; Dec. Dig. § 90.*]

Appeal from Court of Common Pleas, Allegheny County.

Bill by C. L. McKinnon and others against Jacob Mertz and others, constituting a school board of the School District of Mc-Kees Rocks, Allegheny County, Pa., and another. Decree for complainants, and defendants appeal. Affirmed.

From the adjudication it appeared that on June 9, 1908, the defendant school board entered into a written contract with H. L. Kreusler to build a school building for \$148,970. Subsequently, on July 27, 1908, a supplemental agreement was executed. which recited that the question had been raised as to whether said contract by its terms creates an indebtedness in excess of the amount which the said district is permitted to contract, without the authority of the legal electors of said school district, and provided further as follows: "Now, this supplemental agreement witnesseth: That said agreement of June 9, 1908, shall create no indebtedness of said school district to said H. L. Kreusler, except for work done and materials furnished under said contract of the value in amount of the funds legally available to said school board for building purposes at the time the said contract was entered into. It is further agreed by and between the parties hereto that said H. L. Kreusler shall continue the work of the erection of said building in accordance with the conditions of the contract of June 9, 1908, so long as any funds legally available for the erection of said building when the said contract was entered into shall remain unexpended. If at any time the said school board shall be without legally available funds to further carry on said work, then said Kreusler shall cease work on said building, until said board is provided with funds for further building purposes, when, if the school board so elect, he shall resume work under said contract, and continue the

[•]For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

same to completion, or so long as funds are legally available to the school board for carrying on the said work. Should said Kreusler cease work on said building for the cause hereinbefore mentioned, or be compelled to cease for any other cause, he shall then be entitled to be paid on the estimates of the architect in full for all work then done and material then furnished by him, in so far as the funds for this purpose legally available to the school district will permit."

Miller, P. J., filed the following opinion in the court below:

"Section 8, art. 9, of the Constitution of Pennsylvania, after fixing the ultimate limit of the debt of any county, city, borough, township, school district, or other municipality or incorporated district, may have, not to exceed 7 per cent, of the assessed value of taxable property therein, further provides: 'Nor shall any such municipality, or district, incur any debt, or increase of indebtedness beyond two per cent. upon the assessed valuation of property, without the assent of the electors thereof at a public election.' It is manifest that the contract price, standing alone, for the erection of this building in the sum of \$148,970, in addition to the previous existing indebtedness, created a total debt in excess of 2 per cent, of the assessed valuation of the property; but it is earnestly contended that the manner of payment in the original, and especially in the supplemental, agreement, 'from available funds,' limits the debt to an amount less than the contract price, and may keep it within the constitutional prohibition. purpose contemplated by the contracts was the erection on or before August 1, 1909, of a completed school building, to be paid for on monthly estimates; final payment to be made of the 15 per cent, remaining within 30 days after completion. The debt was fixed by the contract price, and there is nothing in the clause relating to available funds in the original or supplemental contract that decreases the contract price as fixed. the contrary, the supplemental contract reaffirms the original in every material respect, except so far as it would appear to give the parties discretion to work piecemeal on this building, thus resulting in an incomplete building at an indefinite time. Not only does the amount of the contract price remain, but the contractor is to receive interest on all deferred payments. modification is as to the manner of the payments, but is not a decrease of the indebtedness.

"Granted that the defendant parties to the contract intended to avoid the prohibition of the Constitution by limiting the manner of payment to available funds of current revenues as they may arise from a special tax levy, or otherwise, it is manifest that they bound the district for a fixed debt of at least

of their right, and an effort to avoid the increase by stopping the contractor when available funds cease, in the absence of an abrogation of the contract price itself, is futile. The contention that the board had over \$102,000 on hand when the contract was made, while admitted by the plaintiffs for the purpose of this case, is far from the exact fact. Neither the funds collected by the unbonded delinquent collector, nor the taxes for 1908 levied, were, or are, in the treasury of the board, nor are available. There was more clearly but one-half of this estimated amount available when this contract was made. If there were nothing more in these contracts than to provide for the district's ordinary expenses within the current revenues, the conclusion of Wade v. Oakmont Borough, 165 Pa. 479, 30 Atl. 959, might be applicable; but the erection of this school building is an extraordinary expense. The contracts contemplate a complete structure within a fixed time, to be delivered to the district at a fixed price. The same attempt to avoid the constitutional prohibition appears in Brown v. City of Corry, 175 Pa. 528, 34 Atl. 854, where a contract to construct a complete water system, and deliver it to the city, was entered into, the waterworks to be paid for, inter alia, at the rate of \$6,000 per annum for 20 years, 'From the current revenues of said city and not otherwise.' There, as here, was the incurring of an extraordinary expense for a structure to be erected and delivered upon completion. The manner of payment there, as here, did not change the creation of the principal debt. The liability to pay for the work as done, out of available funds, in the special manner contemplated by the supplemental agreement, is a debt, or a series of successive debts. Separately and in the aggregate they are obligations of the district, limited only by the amount of the original contract price. As held in Brown v. City of Corry, 175 Pa. 528, 34 Atl. 854, and in the cases therein cited, 'the making of a contract for a fixed price * * * or the borrowing of money, creates a debt, irrespective of the method of remedy for its collection, and whenever by the terms of its creation, unless for the ordinary expenses of the municipality, it exceeds the constitutional prohibition, it cannot be sustained.' 'Funds legally available' is a very indefinite term. Only a small part of this contract price could be met by present available funds. How the rest was to be provided does not appear. A public improvement to be completed within a limited time is imperiled if depending upon a fluctuating, indeterminable balance of current funds. Suppose the funds are exhausted, and under the contract the work stops, how are they to be supplied? When will the building be finished? Suppose the work goes on, the board in good faith believes it can raise available the contract price. This exceeds the limit | funds, and it fails. The builder 'shall then

be entitled to be paid on an estimate of the architect in full for all work then done and material furnished by him.' If there are no funds available, is there any question of his right to recover, and may it not be the full amount of this contract price?

from the city plan Ruscomb street from the east line of the Philadelphia, Germantown, & Norristown Railroad eastward to Twentieth street. This act of the municipal authorities was taken in 1902. Ruscomb street full amount of this contract price?

"It is clear that the erection of this building is a necessity. It must be admitted as a general proposition that no money is so well used as that which is necessarily and honestly applied towards the erection and maintenance of needed school buildings, and the support of a well-established school system; but the law points out the way of procedure, and it must be followed. In the meanwhile, if necessity exists for the preservation of what has been done, and the safeguarding of the rights of those interested, application may be made for such temporary orders as will best serve all interests."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, and POTTER, JJ.

R. A. & Jas. Balph, for appellant school district. Kinnear, McCloskey & Best, for appellant H. L. Kreusler. John Marron, for appellees.

PER CURIAM. The judgment is affirmed on the opinion of the court below.

(225 Pa. 55)

SIDDALL v. CITY OF PHILADELPHIA. (Supreme Court of Pennsylvania. May 20, 1909.)

MUNICIPAL COBPORATIONS (§ 386*)—STREETS— VACATION—DAMAGES—LIABILITY OF CITY. Where a street was laid out on a city plan on

Where a street was laid out on a city plan on both sides of a railroad, but not across the right of way, there being a mere permissive crossing, the vacation of a portion of the street on one side of the railroad did not render the city liable for damages to owners of property abutting on the street on the other side, especially in the absence of proof that the crossing on the vacated side joined any well-defined road corresponding at any time with the platted lines of the street on that side.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 929; Dec. Dig. § 386.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Joseph H. Siddall, Jr., against the City of Philadelphia for damages for the striking from the city plan of a portion of Ruscomb street from the east line of a certain railroad to Twentieth street. The jury awarded plaintiff \$2,000, and, from a judgment for defendant non obstante veredicto, he appeals. Affirmed.

On a motion for judgment for defendant non obstante veredicto Ferguson, J., filed the following opinion:

"The claim in this case is based upon the right of way. There was evidence that formact of the municipal authorities in striking erly the station existed on the east side of

east line of the Philadelphia, Germantown, & Norristown Railroad eastward to Twentieth street. This act of the municipal authorities was taken in 1902. Ruscomb street east of the railroad had existed upon the city plan from 1886, and in that year Charles W. Henry, the owner of the soil over which the street was plotted, dedicated the soil of the street within the plotted lines to the city of Philadelphia for public use, and the street was graded down to Twentieth street. Previous to 1886 Ruscomb street east of the railroad did not exist officially on the plans of the city of Philadelphia from 1877. Prior to 1877 upon several plans Ruscomb street was on the city plan, but in different positions; the variation between the location of the street on these plans running as high as 84 feet. West of the railroad Ruscomb street had existed for a great many years, and was physically opened and houses erected thereon, and the claim for damages is made on behalf of the owner of property on Ruscomb street west of the railroad by reason of the change in the city plan in 1902, striking from the plan Ruscomb street east of the railroad.

"The trial judge in his instructions to the jury pointed out to them that as a matter of law there could be no claim for damages against the city by reason of this change in the plan so far as it affected the properties west of the railroad, unless they could find from the evidence that the connecting link across the railroad was established as a public use; for, if the public had no legal right to cross the right of way of the railroad at the point involved, it would follow that any damage which the property owners west of the railroad suffered by reason of the striking of the street from the plan would not be different from that of the public at large. It was sought to be shown that the public had a right to cross the railroad at this point. Evidence of several witnesses was heard, which was to the effect that from about 1875 there had always been a way through Ruscomb street and across the railroad to Twentieth street. The street was never paved on either side of the railroad, and. while on the west side the line of the street was clearly marked on the south line, to the east of the railroad its location was not clearly defined. The witnesses testified that Ruscomb street was a well-traversed thoroughfare across the railroad at this point, and, while some of them thought the crossing over the railroad was exactly in line with the actual lines of the street west of the railroad, they were not certain, and the plaintiff, Siddall, admitted it was at the north line of the street. The crossing itself was planking laid between the tracks. The station on the railroad at the present time exists on the west side of the right of way. There was evidence that form-

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the railroad. There was evidence on the part of the defendant to the effect that the planking was at the station, was laid down and maintained by the railroad at its own expense, and that the crossing of the railroad did not correspond with the plotted lines of Ruscomb street either east or west of the railroad, but was north of those lines, and that the driveway of Ruscomb street west of the railroad proceeded almost to the line of the right of way when it curved to the north to the crossing, and on the east side it curved to the south to the lines of Ruscomb street again.

"We are of opinion that the learned trial judge was entirely accurate in his statement that there could be no recovery unless there was a public way across the right of way of the railroad at this point connecting Ruscomb street on the east and west sides of the railroad, but we think the evidence was not sufficient to sustain a finding that there was a public way across the railroad which could be held to be in law a public street. It is true there was evidence that there was a crossing which was used by the public for a number of years, but to establish a way by prescription it has always been held that the evidence must show not only that there was a user, but that that user was hostile and adverse and under a claim of right. There must be a user without consent, or municipal action looking toward the establishment of a public way. There was no evidence of any municipal action with this end in view. The plotting of a street across the right of way of a railroad, while it is not in any sense binding upon the municipality, may be taken as an indication of an intention to lay out in the future a street across the right of way. No such plotting was made by the municipality in this case. When a street crosses such a right of way and has been used by the public for a long period of years as an open street, and the crossing is paved or maintained in a condition for a crossing of the tracks by the municipality, such paying may be construed to be municipal action consistent with the existence of a public street or of acquiescence on the part of the railroad and an intention on its part to dedicate to public use. There was no evidence in this case that the crossing was maintained by the municipality, and the only evidence on the subject was to the effect that the crossing was maintained by the railroad company itself.

"We have, therefore, upon the part of the plaintiff, evidence only to the effect of the The evidence as to its adverse and hostile character was not sufficient to sustain a finding that a public way or street existed. If the railroad company, for the purpose of making a convenient mode of access to its station on the east side of the railroad for the public coming from the west side, chose to maintain a crossing there at its own expense, the mere fact that the public used it generally for other purposes would ed. There was no evidence to show that

not estop the railroad company from exercising its right at any time in its discretion to abolish the crossing, and subsequently. when the station was established on the west side of the railroad, if, for the convenience of the public to the east of the railroad, it continued the maintenance of that crossing, the same rule would apply. In Esling v. Williams, 10 Pa. 126, it was held: 'A user will not give title to the public when it is under leave or favor and by permission and at the will of the owner. The presumption may be repelled by evidence, which accounts for the possession or user, without resorting to a title by grant or otherwise.' In Griffin's Appeal, 109 Pa. 150, it was held: 'Long continued use by the public is evidence of an intent to dedicate, but it is by no means conclusive, and always yields to contrary proof of a satisfactory character.' In Root v. Commonwealth, 98 Pa. 170, 42 Am. Rep. 614, the illustration is given of the use by the public of ground in front of a warehouse extending to the river, and it was pointed out that, though the owner permitted the public to use that ground continuously, it gave the public no right against the will of the owner, because the use was not adverse to him, but was by his consent, and it was not exclusively used by the public, but in common with the owner himself for travel and other purposes. It was also pointed out that no length of time during which the property was so used could deprive the owner of his title or give the community the right to abate the owner's fences over the property as a nuisance on the ground that the public had acquired a legal easement. In the same case it was pointed out, if the owner invited the public to use the way, he would not be likely to protest against the use and prevent it, and, if he permitted the use, he naturally would not object to it. The evidence, therefore, as has been stated, only amounted to proof of the use for a period over 21 years. Nothing in the nature of a street existed. The crossing consisted only of planking suitable for wagons, with no sidewalks. The railroad company, however, has produced evidence to the effect that the crossing was maintained in a condition for travel by the railroad company itself. There was no evidence of any character of municipal action with regard to the crossing that could be taken to be adverse. No evidence was offered in rebuttal to contradict this evidence as to the maintenance of the crossing by the railroad company, and, as was said in Griffin's Appeal, 109 Pa. 150, the existence as to the use of the street to establish the easement must yield to the definite and contradictory proof showing that the use was permissive only. Penna. R. R. Co. v. Freeport Borough, 138 Pa. 91, 20 Atl. 940.

"But for another reason we are of opinion the claim of the plaintiff cannot be sustain-



the eastern side of the crossing over the rail-1 the claimants. Instead, however, of taking road joined a well-defined road which at any time corresponded with the plotted lines of Ruscomb street on that side. The plans showed that Ruscomb street on that side of the railroad had been changed, and was located at several places and ran at different angles. If the actual roadway to the east of the railroad as used by the public was always in the same place, and there was no change as to its location, it must necessarily have been at times during the period of 21 years that the public traveled over private property, for the evidence shows that from 1877 to 1886 no street existed on the plan. There is no contention here that a prescriptive right was obtained over this private property, and it must be said that, so far as the evidence is concerned, when we take into consideration the fact that the claim for damages is based upon the vacating of a street laid down definitely upon the city plan, that the evidence fails to show that the crossing corresponded at any time with the lines of the street. The evidence is indefinite and vague and lacking in those qualities of accuracy which the law requires in such cases. Even though the evidence were positive and clear, showing an adverse and continued user of a crossing sufficient to make it a public way, it is not sufficient to support a finding that that way at any time met the lines of the street on the east side as they were plotted on the plan. It must not be forgotten that the claim is based upon the vacation of a street on the east side of the railroad, and, in order to establish a claim peculiar to the present plaintiffs, the connection between the west side and the east side must be legally established. In our opinion the evidence fails to establish that connection.

"Another matter might be referred to, which throws light upon the physical conditions, although of no weight in arriving at the conclusion of the court. The logic of a verdict for plaintiff in this case would be that the public had acquired an easement across the right of way of the railroad without formal grant, although the railroad was not a party to the proceeding. There was evidence to the effect that the railroad company at or about the time of the action of the municipal authorities erected a high board fence along both sides of its right of way, and removed the planking. Had appropriate action been taken against the railroad for maintaining a nuisance in these fences, or in equity for their removal, the right of the public, if any existed, would doubtless have been established. The erection of these fences undoubtedly prevented the public from passing across the railroad at this point, and it was this fact, if anyaction to require the removal of these fences and to restore the crossing which might have established the easement across the right of way, if one existed, the claimant has sought to hold the municipality in damages for closing a street on the east side of that right of way. With the fences existing. it was certainly immaterial, so far as the claimant was concerned, whether the city maintained Ruscomb street on the city plan on the east side or not. It had lost its peculiar value to him.

"The motion for judgment for defendant. non obstante veredicto is granted. We are also of opinion that the verdict was excessive and upon that ground a new trial should be granted, but, in view of our ruling upon the motion for judgment non obstante veredicto, it is unnecessary to further express our views upon that question or to now dispose of that motion.'

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and EL-KIN, JJ.

Samuel H. Kirkpatrick and Joseph G. Lester, for appellant. John Lamb, William Gray Knowles, Assistant City Solicitor, and J. Howard Gendell, City Solicitor, for appellee.

PER CURIAM. The judgment is affirmed on the opinion of the court below.

(224 Pa. 464)

DORRANCE et al. v. BRISTOL BOROUGH et al.

(Supreme Court of Pennsylvania. April 19, 1909.)

1. WATERS AND WATER COURSES (§ 183*) -WATERWORKS - FRANCHISES - EXCLUSIVE-NESS.

Where a water company several years after it had laid its main in the streets of a borough, it had faid its main in the streets of a borough, without permission or contract, agreed to furnish the borough with water for fire purposes only for a fixed period without new construction, the company had no exclusive franchise to furnish water to the borough under which the borough could be restrained from thereafter constructing waterworks of its own under an amondment of its charter conferring such right amendment of its charter conferring such right which it did not previously possess.

[Ed. Note.—For other cases, see Water Courses, Dec. Dig. § 183.*] see Waters and

WATERS AND WATER COURSES (§ 183*)-MU-

2. WATERS AND WATER COURSES (§ 183*)—MUNICIPAL SUPPLY—METHOD—OBDINANCES.

A borough ordinance requiring persons making excavations, in the streets to lay water, gas, or other pipes to puddle the dirt in refilling excavations, passed prior to a contract between the borough and a water company for the furnishing of water to the borough for fire protection, was immaterial on the question whether the borough had adopted a method of supplying it with water which would prepart its subsection. it with water which would prevent its subse-quent construction of its own works under authority subsequently acquired.

at this point, and it was this fact, if any- [Ed. Note.—For other cases, see Waters and thing, which caused the actual damage to Water Courses, Dec. Dig. § 183.*]

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

8. WATERS AND WATER COURSES (§ 183*)-MU-NICIPAL SUPPLY—WATER COMPANIES—EX-OLUSIVE PRIVILEGES—LOSS.

Where a private corporation organized to furnish water for a borough had for 20 years prior to 1905 declared and paid dividends at the rate of 10 per cent. per annum, its exclusive privilege to furnish water in that territory granted by its charter was terminated, and it was within the power of the borough to provide a water supply under new conditions.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 183.4]

4. WATERS AND WATER COURSES (§ 192*)—GA (§ 7*) — PUBLIC SERVICE CORPORATIONS-RIGHTS IN STREETS—REGULATION.

Public service corporations, such as gas and water companies, authorized by charter to lay their mains in the public streets, may do so without permission of the borough; the borough's only authority being to subject them to proper police regulation, to prevent the impairment of the streets for public travel, being without power to prohibit such companies from enout power to prohibit such companies from en-tering on and laying its pipes in the streets.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 279; Dec. Dig. § 192;* Gas, Cent. Dig. § 2; Dec. Dig. § 7.*]

5. WATERS AND WATER COURSES (§ 183*)-MU-NICIPAL SUPPLY-METHOD-ADOPTION-EF-FECT.

A municipality authorized to obtain a ter supply may do so either by contract with a private corporation, or by constructing and op-erating its own works; the adoption of one method being necessarily the exhaustion of the city's power and a rejection of the other.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 183.*]

6. Waters and Water Courses (§ 183*) PUBLIC SUPPLY-AUTHORITY-STATUTES.

Where a borough incorporated under a special law without power to create indebtedness in excess of \$10.000 becomes subject to the general borough law (Act April 3, 1851 [P. L. 320]), in proceedings authorized by Act June 4, 1901 L. 362), it thereby acquires the right to erect waterworks for public use conferred by Act May 3, 1901 (P. L. 140).

[Ed. Note.—For other cases, see Water Courses, Dec. Dig. § 183.*] Waters and

7. MUNICIPAL CORPORATIONS (§ 863*) — OR-GANIZATION—SPECIAL LAW — INDESTEDNESS -Increase.

Act June 9, 1891 (P. L. 252), authorizing any county, borough, or other municipality or incorporated district in the commonwealth to increase its indebtedness in a specified manner, applies to all boroughs subject to the general borough law, Act April 3, 1851 (P. L. 320), including boroughs organized under special act which have become subject to the general law in proceedings authorized by Act June 4, 1901 (P. L. 362).

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 863.*]

8. STATUTES (\$\frac{6}{5}\$ 159, 162*)—GENERAL AND SPECIAL LAW—REPEAL.

A general statute will not repeal a local or special law without negative words, but a general statute will repeal by implication an earlier general statute repugnant to or inconsistent with Its provisions.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 229, 231, 235-237; Dec. Dig. §§ 159, 162.*]

Appeal from Court of Common Pleas, Bucks County.

the Burgess and Council of Bristol Borough and others for an injunction. From a decree dismissing the bill, complainants appeal, Affirmed.

Argued before FELL, BROWN, MESTRE-ZAT, ELKIN, and STEWART, JJ.

Harmon Yerkes and D. T. Watson, for appellants. John G. Johnson and Gilkeson & James, for appellees.

MESTREZAT, J. This is a taxpayer's bill filed by the plaintiffs to restrain the defendants from erecting a water plant, and from increasing the indebtedness of the borough for that purpose. The court below refused the relief prayed for and dismissed the bill. The plaintiffs have appealed. The pleadings raise but two questions which are material and controlling in the disposition of the case: (1) Has the borough by its action or relations with the Bristol Water Company exhausted its power, and thereby precluded itself from erecting waterworks? And (2) has the borough the power to construct a water plant and the authority to increase its indebtedness for that purpose to the extent proposed by the defendants? The learned judge of the court below filed an exhaustive opinion in which he found and stated the facts and his conclusions of law. In reviewing the case and in determining the questions presented for our consideration, we do not deem it essential to consider the correctness of the learned judge's findings of many of the facts which are controverted by the appellants. We will state briefly such of the court's findings of fact as we deem established by the evidence and material to a proper determination of the questions at issue in this court.

The borough of Bristol was originally established by letters patent in 1720, and was re-established by an act of the Legislature (Act September 16, 1785 [2 Smith's Laws] P. 343). The charter was amended by an Act approved February 15, 1851 (P. L. [1852] 677). by section 10 of which it is enacted: "The burgess and council shall have the power to borrow for the use of said borough, any sum or sums of money which they shall deem necessary, • • • provided that the whole amount of indebtedness of said borough shall not at any time exceed the sum of ten thousand dollars." By the act of March 14, 1905 (P. L. 88), this section of the act of February 15, 1851, was amended by striking out the proviso limiting the amount of indebtedness of the borough. The burgess and town council of Bristol made application to the quarter sessions of Bucks county to have the borough made subject to the general borough act of April 8, 1851 (P. L. 320), and on September 18, 1905, a decree was entered by the court that the borough "shall hereafter be subject to the restrictions and shall Bill by G. M. Dorrance and others against | possess the powers and privileges conferred

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

by the aforesaid act, and it is further de- tion. In December, 1892, when the contract creed that the provisions of the former charter of the said borough shall be and they are hereby annulled, so far as they are in conflict with the provisions of said act." The Bristol Water Company was incorporated August 21, 1874, under the general corporation act (Act April 29, 1874 [P. L. 73]) of that year for the purpose of supplying water within the borough of Bristol. It completed the construction of its plant between February and April, 1875, furnishing water to the Pennsylvania Railroad Company in February of that year, and for domestic purposes in the following April. The court found: "It [the water company] claimed the right to construct its works and lay its pipes in the borough without the consent of the authorities thereof, and constructed and laid the same without such consent. The borough had nothing whatever to do in the matter of consenting or dissenting. The water company acted entirely independently of it." The only ordinance bearing upon the laying of water pipes in the streets of the borough was passed April 12, 1875, and ordained that "from and after the passage of this ordinance all persons, firms, or corporations making any excavations in the public streets of the borough of Bristol for the purpose of laying water, gas, or other pipes shall puddle the dirt in refilling said excavations.

No contract for the supply of water to the borough or upon its account was entered into with the water company until 1886, when it was agreed that the company for the consideration of \$600 per annum should for the period of six years from January 1, 1887, "furnish water to the said borough for fire protection, to hydrants to be erected at points on the present mains of said water company where fire plug branches are now located, and also at the dead ends of present mains, and upon a main that may hereafter be placed upon Buckley street." The borough agreed to expend such sums as should be necessary "in furnishing and laying the necessary pipe and stop valves from the branches in the mains and from the aforesaid dead ends of mains, to the fire hydrants, which connecting pipes and valves were to be the exclusive property of the said water company." It was further agreed that a person designated by the borough could use water for the purpose of cleaning the then public culverts under certain stipulations restricting the use of the water, and that the company should be relieved from liability for failure to supply water for fire purposes or otherwise. At the date of the contract there were about 40 or 45 fire plugs in the borough which have been increased to 85 plugs. The company of its own volition subsequently laid water mains of a larger size, but it was not in the discharge of any duty imposed by the contract with the borough. Nor did the water company agree to lay any additional mains or pipes or to make any additional distribu- the Bristol Water Company did not confer

was about to expire, negotiations took place between the parties for its renewal for fire protection which resulted in the water company addressing a letter to the borough in which it proposed to furnish water to the borough for fire protection on the terms of the original contract without compensation therefor. The proposition was accepted by the borough, and it endeavored to have the agreement indorsed on the contract, but it did not succeed. Since January 1, 1893, the water company, without any other agreement or understanding, has furnished water to some 85 water plugs for fire protection only. Occasionally the use of water has been permitted for flushing the streets. The court finds that: "Since 1892 there has been an understanding, revocable at the will of either party, with reference to a supply of water for a limited purpose as above specified." By an ordinance approved May 21, 1906, the borough of Bristol ordained that its indebtedness should be increased in the sum of \$100,-000 for the purpose of the erection and construction of waterworks and a filtration plant, and that the increase of indebtedness being more than 2 per centum and less than 7 per centum of the assessed valuation of the borough the question of the increase should be submitted to the voters of the borough at an election to be held on July 10, 1906. The election was held, and by a vote of 4 to 1 the assent of the electors was given to the increase of indebtedness. The proceedings taken by the borough to increase the indebtedness were regular and in conformity with statutory authority. Three days prior to the election this bill was filed. The court refused the injunction restraining the holding of the election, but granted a preliminary injunction restraining the defendants from increasing the borough's indebtedness, and from erecting a water and filter plant or entering into any contracts for that purpose until. the further order of court. Subsequently, after a hearing, the court entered a decree that the bill be dismissed. From that decree we have this appeal.

1. Has the borough of Bristol by its action or relations with the Bristol Water Company exhausted its power, and thereby precluded itself from erecting waterworks? It was found as a fact by the trial court that the Bristol Water Company for at least 20 years prior to 1905 had declared and paid dividends at the rate of 10 per cent. per annum. The exclusive privilege of the company to furnish water in that territory granted by its charter was therefore lost, and it was within the power of the borough to provide a supply of water by contract with that or any other company. Centre Hall Water Company v. Borough of Centre Hall, 186 Pa. 74, 40 Atl. 153; Philipsburg Water Company v. Philipsburg Borough, 203 Pa. 562, 53 Atl. 847. And, as against the borough, the charter of

water within the municipal limits. Lehigh Water Company's Appeal, 102 Pa. 515; Freeport Waterworks Co. v. Prager, 129 Pa. 605, 18 Atl. 560, 561; Commonwealth v. Consumers' Gas Co., 214 Pa. 72, 63 Atl. 463. It is claimed by the plaintiffs, however, that the borough is precluded from erecting its own works by its conduct and its relations with the Bristol Water Company. But with this that the learned court below was right in holding the contrary, and that there was no action on the part of the borough that would prevent it constructing a water plant either on the ground of estoppel or by having exhausted its authority to supply water for its own use. The water company was chartered under the act of 1874, and it had the authority to enter upon the streets of Bristo! borough and lay its mains and construct its plant without permission of the borough. In fact, this is the very thing it did. It made no contract with the borough, and sought no permission of it to construct its plant. The company was not organized or created under or in pursuance of any arrangement or contract with the borough for the purpose of supplying the municipality with water. The fact that some of the citizens urged the incorporation of the company for the purpose and took stock in the company does not bind the borough in any way whatever. There was no official action by the borough authorities in regard to the matter which would bind it. The ordinance of April 12, 1875, cannot be construed as consent or permission by the borough for the water company to enter upon the streets for the purpose of laying its pipes, nor does it appear that the company entered upon the streets in pursuance of such authority. The ordinance was simply a street regulation of general applicability and applied to "all persons, firms, or corporations making any excavations in the public streets," and required them to puddle the dirt in refilling the excavations, with a proviso that in "laying pipes other than for gas and water" they should first obtain permission of the borough. Gas and water companies are not required to obtain permission of a borough to lay pipes in its streets, for the manifest reason that their charters give them the right to enter upon the streets and lay their mains without such permission. The only authority of a borough over such companies is the right to subject them to police regulation in regard to the streets so as to prevent their impairment for public travel. Act April 29, 1874, c. 2, § 34 (P. L. 93), as amended by section 2 of the act of May 16, 1889 (P. L. 226). The borough cannot annul the charter of a gas or water company by prohibiting the company from entering upon and laying its pipes in the streets.

As held in Carlisle Gas & Water Company v. Carlisle Water Company, 188 Pa. 51, 41 pose. The same would be true if the com-

upon it an exclusive privilege to furnish Atl. 321, a municipality may adopt one of two methods to supply itself with water. It may construct and operate its own works by municipal taxation, or it may contract with a private corporation to construct works and supply the municipality. When it has adopted either of these methods, it has necessarily rejected the other, and its authority is exhausted. In the case in hand the municipality was not vested with power authorizing it contention we cannot agree. We are clear to construct a water plant prior to 1905. It was chartered by a special act of the Legislature which conferred no power to supply water to the public. It is clear, we think, that until it became subject to the general borough act of April 3. 1851 (P. L. 320), Bristol borough was without authority to supply itself with water by constructing its own plant. There was no inducement held out by the borough to the incorporators of the company to obtain a charter and supply the municipality with water, nor was there any other act by the borough which disclosed an intention on its part not to exercise its power to supply water to the municipality and thereby deprive itself of the right to construct its own water plant. The learned court below was clearly right in finding that "no expenditure was made by the water company in the way of original construction, or subsequent extension, in consequence of any contract obligation which obliged it to construct or extend." It is earnestly contended by the appellants that the contract of December 4. 1886, was an election by the borough to supply the municipality with water, and that such action precluded it from subsequently constructing its own plant. This contention overlooks the terms and conditions of the contract. The contract certainly did not induce the incorporation of the company, as it was not executed for more than 11 years after the erection of its waterworks. duration of the contract was six years. It did not provide for a supply of water to the borough generally, but for a specified purpose. There was no provision for water for cleaning or flushing a sewer system, and there was a stipulation against liability on the part of the company for failure to supply water for fire purposes. The consideration was a certain sum payable annually. The contract did not provide for laying any additional mains or pipes, or that the company should lay pipes of any particular dimensions. It is obvious, therefore, that both of the contracting parties entering into the agreement considered the contract as a temporary arrangement for supplying water for a specified purpose, and that the contract was to have the same force and effect as if entered into between the company and any other consumer in the borough.

We do not overlook the fact suggested by the appellants that the company by undertaking to furnish the water was required to furnish the means to accomplish the pur-

pany had agreed to furnish water to an in- | poses. The consequences to the borough of dividual or a corporation. The fact that it had to supply the means with which to carry out the purpose would not be an inducement to construct the plant, in view of the fact that the plant had been constructed 11 years prior to the contract, and that there was no duty imposed by the contract to extend the plant. In this connection it should be noted that, if any additional mains or pipes were laid, it was the voluntary act of the company, and not by virtue of a duty imposed by its contract with the borough. The fact that the company was incorporated for the purpose of supplying water in the borough of Bristol, and that it would have to provide the means for so doing, was not, as argued by the appellants, a provision made by the state for furnishing water to the municipality so as to preclude the latter from erecting its own plant. The water company complying with the statute was entitled to a charter from the state, but, without some act by the municipality depriving it of the right, the company could not prevent the borough from exercising its power to construct and operate its own water plant. The contract of 1886 terminated on January 1, 1893, and was not renewed. In December, 1892, there were negotiations by the parties for its renewal for fire protection, but they were not successful. The water company. however, addressed a letter to the borough. saying that it would continue to furnish water for fire protection on the terms and conditions of the contract without compensation therefor. The borough accepted the offer and attempted to have an agreement indorsed on the contract, but did not succeed. By this arrangement the water company proposed to furnish a limited supply of water for some of the purposes required by the borough. The duration of this supply would, of course, depend upon the pleasure of the company and the borough. The obvious objection by the borough to this proposal was that it did not agree to furnish sufficient water for all borough purposes, was revocable at any time by the company, and protected the water company against liability for failure to supply water. It needs no argument to show that the municipality would not comply with its corporate duty to supply water by an arrangement of this character. It is wholly insufficient, and does not meet the duty imposed by law upon the borough to furnish an adequate supply of water. The appellants contend that it is immaterial whether this arrangement was determinate or indeterminate. With this contention we do not agree. If it be determinate, as it unquestionably is, the company may at any time decline to continue to furnish water to the borough for the purposes named in its offer. The court could not compel the company to specifically comply with the offer, and continue on the

a sudden discontinuance of water, entirely possible, discloses the necessity for the borough having a binding obligation which it can enforce. The water company cannot be permitted to deprive the borough of making sufficient provision for furnishing an adequate supply of water for all its wants by a simple gratuitous offer, determinable at any time, to furnish a partial supply for municipal purposes. An agreement or an arrangement of that kind is lacking in mutuality, and, if legally enforcible, would impose a responsibility upon the borough without a corresponding responsibility on the water company.

2. Has the borough the power to construct a water plant, and the authority to increase its indebtedness for that purpose? Prior to 1901 Bristol borough did not possess the power to construct waterworks or to create an indebtedness in excess of \$10,000. September of 1905 by a decree of the court of quarter sessions of Bucks county, in a proceeding instituted under the act of June 4, 1901 (P. L. 362; 1 Purdon's Dig. [13th Ed.] p. 481), the borough was made subject to the general borough act of April 3, 1851. This decree made the borough subject to the restrictions imposed, and invested it with the powers and privileges conferred by the act of 1851. It annulled the provisions of the former charter so far as they were in conflict with the provisons of the act. The act of 1851 confers the power "to provide a supply of water for the use of the inhabitants, to make all needful regulations for the protection of pipes, * * reservoirs and other constructions or apparatus and prevent the waste of water so supplied" in a municipality subject to its provisions. By the act of May 3, 1901 (P. L. 140; 1 Purdon's Dig. [13th Ed.] p. 501), it is enacted: "Every borough of this commonwealth shall have power and authority to provide a supply of water for the use of the public within such borough, either by erecting and operating waterworks or by entering into a contract or contracts with one or more persons or corporations authorized to supply water within the limits of said borough, or partly by the erection and operation of waterworks and partly by entering into a contract or contracts, as aforesaid." Assuming the correctness of the position, stated above, that Bristol borough had not by contract or its relations with the water company precluded itself from establishing a water plant, it is clear that the borough is empowered by statutory authority to construct a plant if it is authorized to increase its indebtedness for that purpose. This question must be resolved by an examination of the legislation on the subject.

As we have seen, the borough was originally established by letters patent in 1720. and was re-established by the act of 1785. same terms to furnish water for such pur- By the act amending the borough's charter.

approved February 15, 1851, it was provided | would be less than that provided in the in section 10 that the indebtedness of the borough shall not at any time exceed \$10,-000. By clause 26 of section 2 of the general borough law of 1851 a borough is authorized to borrow money not exceeding \$1 in every \$100 of the assessed value of the real and personal estate in the borough. It is contended by the appellants that the present debt limit of Bristol borough is either \$10,000 or \$1 in the \$100, and, in either event, the borough cannot borrow \$100,000, as proposed, for the erection of a water plant. In other words, the appellants' contention is that the proviso of the act amending the charter of Bristol borough which limits the indebtedness to \$10,000 is not inconsistent with the borrowing limitation in the general borough act, and that those restrictions on the power to borrow or to create an indebtedness are still in force, notwithstanding the act of June 9, 1891 (P. L. 252; 3 Purdon's Dig. [13th Ed.] p. 2723), enacted to carry into effect article 9, \$ 8, of the present Constitution, and which provides, inter alia, as follows: "The indebted-. . ness of any county borough • • or other municipality or incorporated district in this commonwealth may be authorized to be increased to an amount exceeding two per centum, and not exceeding seven per centum, upon the last preceding assessed valuation of the taxable property therein, with the assent of the electors thereof, duly obtained at a public election to be held in the said district or municipality." We are not inclined to the view of the learned counsel for the appellants that the limitation either of \$10,000 or of \$1 in every \$100 is still in force as to boroughs subject to the act of 1851. That is an act entitled, "an act regulating boroughs," and provides in detail for the government of boroughs generally of the commonwealth, and repeals all laws inconsistent therewith. cree of the quarter sessions of Bucks county annulled the charter of Bristol borough so far as it was in conflict with the general borough act, and subsequent to the decree Bristol borough occupied the same position as a borough originally incorporated under the general borough law, except in so far as any provisions of its charter were not in conflict with the general borough act. limitation of \$10,000 in the Bristol special act, assuming, as contended, the repealing act of March 14, 1905 (P. L. 38), to be unconstitutional, is not the same as the limitation of \$1 in each \$100 provided in the general borough act. The debt limit in the act of 1851 is indefinite, and would depend each year upon the assessed value of the real and personal property of the borough. The limitation, therefore, might be greater or less than that in the Bristol special act, and never would be the same save by a coincidence which would rarely, if ever, occur. The probability is that the \$10,000 limitation

general borough act. In being made subject to the general borough act therefore Bristol would not, as provided in the decree of the quarter sessions, possess the powers and privileges conferred by the act. We think the limitations in the two acts are not the same, but are inconsistent and in conflict with each other, and hence the limitation on the borrowing capacity imposed by the Bristol special act and all other inconsistent provisions thereof are repealed.

We are of opinion that the act of June 9, 1891, applies to all boroughs subject to the general borough act of 1851. In terms it applies to "any county, borough or other municipality or incorporated district of this commonwealth." The purpose of the legislation was to enforce the constitutional mandate, to procure uniformity on the subject in the laws regulating the municipalities of the state, and to confer authority to increase the indebtedness of municipalities in the manner pointed out in the act. Uniformity in the laws governing and regulating the boroughs of the commonwealth was the purpose in enacting the statute of June 4, 1901, permitting boroughs with special charters to become subject to the general borough law; and it is equally manifest, we think, that such was the purpose of the act of 1891 as to the subject of which it treats. If we hold that the act of 1891 has no application to boroughs subject to the general borough law, its operation would indeed be limited, and we would be imposing a restriction not contemplated by the Legislature in enacting the statute. It is true that neither it nor the act of 1874 contains a repealing clause; nor is either of them entitled a supplement to the general borough act, but this is not sufficient to prevent the applicability of the provisions of the act of 1891 to municipalities within the express terms of the statute. A general statute will not repeal a local or special law without negative words. but a general statute will repeal by implication an earlier general statute repugnant to or inconsistent with its provisions. decree of the quarter sessions made the borough of Bristol subject to the act of 1851 which is a general, and not a local, statute, and its provisions which are inconsistent with the act of 1891 are necessarily repealed by the latter act. The purpose of the Legislature was to make the act of 1891 a part of the system regulating all boroughs within the commonwealth, and there was no intention of excluding its operation from any borough subject to the provisions of the general borough law. Uniformity on the subject, dealt with in the act, among all boroughs, was the purpose of its enactment. If Bristol borough possesses all the powers and authority and has all the rights of a borough incorporated under the general bor ough act of 1851, we are unable to see why it is not within the provisions of the act of 1891, and why it does not possess the authority conferred by that act to increase its indebtedness within the restrictions named in the act.

We think it clear, without discussion, that the electors of the borough legally authorized the creation of the indebtedness for the erection of the waterworks. The proper steps were taken, and the proceedings were entirely regular. The question of the authority of the borough to increase its indebtedness for the purpose of constructing a sewage system need not be discussed nor determined in this proceeding. We are only concerned here with the right of the borough to erect a water plant. Whether it should be constructed before the sewage plant is a question for the legislative authorities of the municipality. So far as we can see, there has been no abuse of discretion by the borough in the proceedings to construct the water plant and to provide for the indebtedness, and therefore the courts cannot interfere.

The decree of the court below is affirmed.

(225 Pa. 68)

NAUGLE v. NESCOPECK TP.

(Supreme Court of Pennsylvania. May 20, 1909.)

1. REFERENCE (§ 69*)—Powers of Referee-

NONSUIT-STATUTES.

Under Act April 6, 1869 (P. L. 725), providing that a trial before a referee shall be conducted in the same manner as a trial by the court with a jury, a referee has power to enter

a nonsuit in a proper case.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 103; Dec. Dig. § 69.*]

2. BRIDGES (\$ 7*)—TOWNS—FORDS—NUISANCE.
Though a town is bound to maintain a ford
as a part of the public road, it is not bound to construct a bridge in the place of a ford at a particular place for the benefit of a property owner for his use in times of high water.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. § 15; Dec. Dig. § 7.*]

3. NUISANCE (§ 72*)—PUBLIC NUISANCE—PRI-VATE INJURY.

Failure of a town to maintain a bridge as part of a highway in the place of a ford was not a nuisance for which a landowner could sue, because he used the road more frequently than others; his inconvenience, though greater in degree, being of the same sort as that of the general public.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 164-169; Dec. Dig. § 72.*]

Appeal from Court of Common Pleas, Luzerne County.

Trespass to recover damages to land by William A. Naugle against Nescopeck Township. From an order of the court of common pleas confirming the report of a referee in favor of defendant, plaintiff appeals. firmed.

The case was referred to G. J. Clark, Esq., who reported as follows:

"At the close of plaintiff's evidence the defendant moved for a compulsory nonsuit for

reasons given, which reasons are attached to the testimony. After careful consideration the referee is of the opinion that the motion should prevail. Under the Bradford county reference act of April 6, 1869 (P. L. 725), a trial before a referee is conducted in the same manner as a trial by the court with a jury, and it would be a fair general statement to say that the referee has all the powers of a judge in such trial, including the power to enter nonsuit in a proper case. plaintiff on his own evidence is not entitled to recover, he ought not to ask the defendant to go to the expense of producing witnesses and trying a case already lost. If the referee state findings of fact and conclusions of law upon the plaintiff's own showing, the plaintiff certainly ought not to complain of not having a full trial. Holding, therefore, that a referee has the power, in a proper case, to enter a nonsuit, I have carefully examined the evidence and have stated findings of facts and conclusions of law; the controlling conclusion being that the plaintiff is not entitled to recover in this action.

"This is an action of trespass by William A. Naugle against the township of Nescopeck by reason of the township authorities failing to keep a public road in proper condition so that Naugle could at all times pass and repass along the same with the products of his mills and farm. By reason of being unable to travel this road Naugle claims he was greatly damaged. We may concede at once that, had the creek been bridged and the road kept in good condition, the Naugle property would have been much more desirable as a business place and farm, and consequently much more valuable. But, when we attempt to charge this loss on the township, several important questions present themselves. Is it mandatory on a township to bridge every stream crossed by a public road? No law to that effect has been produced. It is well known that all over the state many streams of water on crossroads and roads where there is little travel are crossed by public roads at fords. Where so crossed, it is the duty of the municipality to keep the ford in good condition as a part of the public road, but travelers must take notice of high water, and if inconvenienced thereby, have no right to claim damages from the municipality. By the high water between Kingston and Wilkes-Barre many people have been very seriously inconvenienced at times, yet there has never been a suggestion that any municipality is liable in damages. So in this case with Mr. Naugle. No doubt he has been seriously inconvenienced by high water, but the resulting loss cannot be charged to the township. If he had occasion to cross the stream many times, his inconvenience and resulting loss would be great, but there would be no more reason for charging it on the township.

"The building of a bridge is a matter of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



judgment and discretion on the part of the jured in a manner different in kind and demunicipal authorities, and involves the question of necessity as measured by the demands of public travel, the kind required and the ability of the municipality. In this case I can readily understand how the expense of building two bridges over this stream so near together would be entirely disproportioned to the ability of the township in view of any demand of public travel. Mr. Naugle does not contend that the general public travel would be greatly benefited by such bridges, but rather contends that his property would be greatly benefited and enhanced in value by affording him convenient access at all times. Suppose no road at all led to the Naugle farm, and by proceedings in the quarter sessions one should be laid out and ordered opened, but the township authorities should wholly neglect to open it. Could Naugle as a private citizen in his individual right compel the township authorities to open the road so that his land might be benefited? This may well be answered in the language of the Supreme Court in Heffner v. Commonwealth, 28 Pa. 108 (change 'alley' to read 'road'): 'He has no more right to call on the municipal authorities to open an alley to put money into his pocket than he would have to require them to build him a house. The ground on which his action rests is his right of passage—his right is to enjoy the alley as an alley-and this right is not peculiar to him but common to the whole town, and therefore a subject of public concernment.' The right of Naugle in the public road crossing his land is to use it as a road, and this is a right common to all who choose to travel that way. To ascertain his damages we must necessarily determine that some right has been infringed. Naugle's early life was spent on this farm, and he bought it 20 years ago with full knowledge of its situation. He erected and improved his planing mill, feed and sawmill, and cider mill, and now complains that he could not do business because the township authorities failed to keep the public road in repair. It was testified that \$250 would have put the road in good repair including the fords, and it seems strange that Mr. Naugle would suffer the loss he claims when it could have been so easily avoided even if done at his own expense. The substantial gist of his complaint is that the township would not erect bridges over this creek at the fords so that he could at all times cross with the products of his mills and farm, his children could cross to attend school, and the high water and winter isolation of his place be thus over-

"Counsel for plaintiff conceded the rule of law to be that, to warrant a recovery in this action, Mr. Naugle must prove that his injury is 'different in kind from that suffered by the general public and not merely one that is greater in degree' (21 Am. & Eng. Ency. of Law [2d Ed.] 714), and in their brief set

gree from the general public. These may all be properly included under the seventh, viz.: Access to his farm has been practically shut off. His farming and mill business all depended on access, and the desirability of the farm as a home depended on access to school, etc. If the public roads did not furnish satisfactory means of access, Mr. Naugle could invoke the laws of the state to give him a private road. The fact that a man by choice or necessity locates along a stream does not of right give him a road or bridge, the most convenient way out at public expense. When Mr. Naugle bought his farm and improved his mills, he knew the conditions and situation, and ought not to complain that the township should build bridges to make his mills and farm profitable. Were it the law that a township must build bridges whenever a landowner desired to enhance the desirability or value of his property, I apprehend the burden of taxation would soon be very griev-As before remarked, the gist of the complaint is the failure of the township to put the fords in such condition that access to the Naugle farm could be had at all times. This could only be done by bridging. That this road, if bridged, would be a convenient and valuable highway for Mr. Naugle cannot be doubted, but to say that he has a private right of action against the township for injuries suffered by being denied such a highway is an entirely different proposition.

"In Buck Mountain Coal Co. v. Lehigh Coal, etc., Co., 50 Pa. 91, 88 Am. Dec. 534, the plaintiff complained that it had expended large amounts of money in roads, buildings. etc., to reach the canal, and had shipped coal that way for over 20 years and had no other outlet. The canal was washed out by a flood, and plaintiff lost over \$50,000 a year by being unable to ship coal. The bill was to compel the defendant to repair the canal so that plaintiff could ship coal. The relief was denied. The Supreme Court said: 'It seems to us they are not the proper parties to enforce this duty on the part of the company to the public, in the absence of any such special injury to themselves or property; and by this we mean any injury, special in its operation, resulting from a failure to perform some specified duty to them, or to make compensation for injury and deterioration - to their property, as contradistinguished from injury to them in common with the whole public, in the loss of a convenient and valuable highway.' Pittsburg, etc., R. R. Co. v. Jones, 111 Pa. 204, 2 Atl. 410, 56 Am. Rep. 260, was an action to recover damages for interference with a ferry landing at a public street. The syllabus gives the gist of the contention on the point that Jones. having an exclusive ferry right, was specially damaged, viz.: 'When through the construction of a railroad bridge the travel upon a public highway is obstructed, such obstruction is a forth seven reasons why Mr. Naugle was in- | public nuisance, and the injury to the owner

of a ferry whose landing is at the terminus, of said highway cannot maintain a private action for such obstruction; his injury, though greater in degree, being, of the same character as that offered by the public at large.' Gold v. Philadelphia, 115 Pa. 184, 8 Atl. 386, is an action for damages for nonrepair of a highway by reason of which the plaintiff claims to have suffered special injury to her business of innkeeper. The road was so bad that travel was diverted to other roads. It was ruled that the neglect of duty on the part of the city, though causing loss to the plaintiff, was a damage similar in kind, though greater in degree to that suffered by all persons having occasion to use the road. I am unable to distinguish the case at bar in principle from the Gold Case. Both arise from nonrepair of a public road, and the Supreme Court said in the Gold Case (page 198 of 115 Pa., page 393 of 8 Atl.): 'If we once throw open the door to a recovery in such cases, how are we to measure the extent to which a public highway may be out of repair to entitle owners of property abutting thereon to recover damages? Such questions would have to be referred to a jury whose standard of duty would be as shifting as their verdict would be uncertain and in many instances oppressive.' Apparently Mr. Naugle has assumed that by reason of this being the onl road over which he could travel to and from his property he has suffered special injury by its nonrepair. I am unable to see where he has any special property right or special right of passage over this road. Being a public road, all persons having occasion to pass that way had the same right as Mr. Naugle to use the road. His injury was greater in degree because he had occasion to use the road more frequently than others, but it was of the same kind. Anv person traveling over the road would meet the same obstructions—the stones, holes, sand, the creek, the stones in the fording places-as would Mr. Naugle. His injury was greater because of frequency with which he desired to use the road, but it was no different in kind from that suffered by the public generally. The bad road affected all travelers in the same manner. The plaintiff relies upon Stetson v. Faxon, 19 Pick. (Mass.) 147; 31 Am. Dec. 123, which is a case of one individual against another for obstructing a public road, and Knowles v. Railroad Co., 175 Pa. 623. 34 Atl. 974. 52 Am. St. Rep. 860, which is another action by an individual against a private corporation for obstructing a public road. An examination of authorities will show that the rules applied in such cases are different from the ones applied against a municipal corporation. Thus in Massachusetts (Willard v. Cambridge, 8 Al-

len, 574) the city removed bridge plank and kept them up for 16 days, preventing the plaintiff from reaching his wharf. In his action for damages the court said: 'No doubt the annoyance and injury by the acts alleged were much greater in amount than those which were caused to any other person having occasion to use the same highway. But it was a similar sort or species of damage. The manner and nature of plaintiff's business did not change the kind of damages but only increased the extent of the injury.' And in Blackwell v. Old Colony R. R. Co., 122 Mass. 1, where there was a total obstruction to the navigation of a public stream, the court said: The fact that the plaintiff alone now navigates the stream or has a wharf thereon at which he carries on business only shows that the present consequential damages to him may be greater in degree than to others, but does not show that the injury is different in kind, or that other riparian owners and the rest of the public may not, whenever they use the stream, suffer in the same way.' The other cases cited by plaintiff are actions for injuries through defects in the highway and the like, and are not in point in this case where the claim is not for damages received in the use of the road but for damages because plaintiff could not use the road at his pleasure. I have examined cases from many states, and in no state do I find a rule different from our own case of Gold v. Philadelphia, 115 Pa. 184, 8 Atl. 386, which follows the rule in other states as is shown in the report of the referee in that case. I am now satisfied that in receiving plaintiff's evidence an erroneous measure of damages was adopted, but, as the plaintiff is held not entitled to recover, the measure of damages adopted is immaterial.

"On the whole case the referee holds that the injuries suffered by the plaintiff, though much greater in degree, were of the same kind as the injuries to other persons by reason of the neglect of the township authorities to repair the highway and the plaintiff has no right of action.

"A judgment of nonsuit is entered."

The court confirmed the report of the referee.

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and ELKIN, JJ.

George McLaughlin and R. J. Dever, for appellant. Frank McCormick, for appellee.

PER CURIAM. The referee found as a fact that the injury or inconvenience to the plaintiff, while greater in degree, was the same in kind as that of the public. The court approved this finding, and we have not been convinced that it was error.

Judgment affirmed.

(225 Pa. 110)

WELLER v. LEHIGH VALLEY R. CO. (Supreme Court of Pennsylvania. May 24, 1909.)

RAILROADS (§ 305*)—CROSSINGS—OBSTRUCTION—EMISSION OF STEAM—FRIGHTENING HORS-ES—NEGLIGENCE.

Where a railroad company permits an engine to stand over the entire sidewalk and extend out onto the street at a crossing for several feet, and while standing causes steam to be blown from the engine without warning and frightens a horse attached to a carriage passing in front of the engine, the railroad company is liable for the resulting injury to the driver.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 969, 971; Dec. Dig. § 305.*]

Appeal from Court of Common Pleas, Luzerne County.

Trespass for personal injuries by Morgan Weller against the Lehigh Valley Railroad Company. Judgment for plaintiff for \$5,000, and defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and ELKIN, JJ.

Wheaton, Darling & Woodward, for appellant. John M. Garman and W. Alfred Valentine, for appellee.

ELKIN, J. The single question raised by this appeal is whether the facts established at the trial show such a failure of duty on the part of appellant as to make it liable in damages on the ground of negligence. An engine belonging to defendant was left standing at a grade crossing in the city of Wilkes-Barre so as to cover the entire sidewalk and to extend out into the street several feet. How long the engine had stood there is not definitely fixed, because the offer to prove this fact was refused on the ground that it was immaterial. The exclusion of this testimony has not been assigned for error, and since the plaintiff recovered a judgment in the court below it is not important to now consider whether or not it was properly excluded. It is an answer, however, to the argument made for appellant, that there was no evidence to show how long the engine stood upon the crossing. There is no such evidence, because the offer was refused on the objection of counsel for appellant. While the engine was standing in this position, appellee in a one-horse carriage approached the crossing. Just as his horse was passing in front of the engine, steam was suddenly blown off, which caused the horse to become frightened and run away. The plaintiff was thrown from his carriage and seriously and perhaps permanently injured. The evidence shows that the train to which the engine was attached was not being moved at the time of the accident, and that there was other space on the track some distance from

the crossing where it could have stood. Under these circumstances it must be determined whether there can be a recovery.

The learned counsel for appellant rely upon a line of cases in which it has been held that the emission of steam and smoke are the necessary accompaniment of the use of locomotive engines, and that it is only in exceptional cases where negligence can be imputed to railroad companies because horses on the highway are frightened by escaping steam. As a general proposition this may be accepted as a correct statement of the rule. It has been frequently held that the running of locomotives in the usual method or of blowing off steam for proper purposes is not negligence. This is a sound rule, and there is no disposition to disturb it. An examination of the cases cited by appellant will show that this rule has been followed and each case properly decided under its particular facts. We are not convinced, however, that the case at bar is ruled by any of the cases cited, or that anything said in those cases was intended to announce a principle which would deny the right to recover under the facts here presented. The rule is want of care under the circumstances. It is true that a railroad company has ordinarily the right to the exclusive use of its tracks and right of way, and that it enjoys the privilege of running its trains and operating its engines according to its rules and regulations for every proper purpose. grade crossings the situation is somewhat different. The railroad company does not have the exclusive use, and the rights of the public must be considered. The railroad company, on one hand, and a traveler on the highway, on the other, each has a duty to perform respecting the rights of the other. In the present case the appellee was driving on a street where he had a right to be. He had a right to drive his team over the crossing, and it is not contended that he was negligent in the performance of any duty imposed upon him. He saw an engine standing at rest without showing any signs of moving. It extended out into the street. It was necessary for him to pass it. He attempted to do so, and just as he got in front of the engine the steam was suddenly and without warning blown off with such force as to frighten his horse and cause the injuries complained of. We think under these circumstances it was for the jury to determine whether the railroad company in the exercise of its rights and privileges had due regard for the rights of the appellee by permitting the steam to be blown off without any warning or notice just as his horse passed in front of the engine.

Judgment affirmed.

eFor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(82 Vt. 344)

SOWLES et al. v. MINOT et al.

(Supreme Court of Vermont. Franklin. Sept. 7, 1909.)

1. ESTOPPEL (\$ 29*) - ESTOPPEL BY DEED-COMMON GRANTOB.

Where both parties claim title through the same source, neither can dispute the title of the common grantor.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 69; Dec. Dig. § 29.*]

2. PROPERTY (§ 10*)-Possession-Presump-TIONS.

Persons obtaining a good title to premises will be treated as having received possession along with the deed, though it is not shown that they actually took possession.

[Ed. Note.—For other cases, see Property, Dec.

Dig. § 10.*]

8. MORTGAGES (§ 319*) - DISCHARGE - PRE-BUMPTION.

There is no presumption that a mortgage note was paid at maturity.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 855-863; Dec. Dig. § 319.*]

4. Mortgages (§ 137*)—Rights of Mortga-ger—Legal Title.

While the legal title passes to a mortgagee on condition broken, he holds it only as security for the debt, and the burden is on him to show that his title has been enlarged.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 274; Dec. Dig. § 137.*]

5. Mortgages (§ 319*)—Presumptions—Conveyance of Mortgagob's Interest.

The law will presume a relinquishment to the mortgagee of the mortgagor's interest only in case of actual possession by the mortgagee. [Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 875, 913; Dec. Dig. § 319.*]

6. MORTGAGES (§ 319*)—DISCHARGE—LIMITA-

TION.

The lapse of 15 years without recognition of the mortgagee's interest by payment or otherwise, and without enforcement of the security, defeats his interest in the property by presumption of payment.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 855–863; Dec. Dig. § 319.*]

7. ABANDONMENT (§ 4*)—REAL PROPERTY.
Failure to occupy land for an indefinite time does not constitute abandonment of title.

[Ed. Note.—For other cases, see Abandonment, Cent. Dig. §§ 3, 4; Dec. Dig. § 4.* For other definitions, see Words and Phrases, vol. 1, pp. 4-13; vol. 8, p. 7559.]

8. WATERS AND WATER COURSES (§ 48*)-WA-

TER RIGHTS-ABANDONMENT.

The right to use water power is not lost by its nonuser.

[Ed. Note.—For other cases, see Waters and Vater Courses, Cent. Dig. § 38; Dec. Dig. § 48.*1

9. WATERS AND WATER COURSES (§ 48*) -- ABANDONMENT-INTENTION.

There can be no abandonment without intention to abandon, so that mere nonuser of water power would not justify an inference of in-tention to abandon it, even if right to use it could be lost by nonuser.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 38; Dec. Dig. § 48.*]

10. Waters and Water Courses (§ 48*).
Abandonment—Evidence.

Because of the peculiar nature of the property, the nonuser of water power would not jus-

tify an inference of its abandonment, even if right thereto was capable of being abandoned, nor will abandonment be inferred from failure to pay taxes.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 38; Dec. Dig. § 48.*1

11. WATERS AND WATER COURSES (§ 156*)—
INTEREST GRANTED—WATER POWER.

A grant of land "with the privilege of taking and using from the flume now occupied" by a certain person "or any other flume which may be there located sufficient water to carry two tub bellows for a blast furnace" made the reference to the tub bellows, the measure of the power granted, and not a restriction on its use. power granted, and not a restriction on its use, so that the fact that tub bellows are no longer used in manufacturing iron did not avoid the

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 174-183; Dec. Dig. § 156.*]

12. Adverse Possession (§ 68*)—Essentials
—Claim of Right.

Where the tract in question was excepted from a conveyance, the inclosure of such tract by one holding under the grantee in the conveyance, and use thereof as a hog lot, did not give title by adverse possession; nothing showing that the user was under a claim of right.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 387-393; Dec. Dig. §

13. Adverse Possession (§ 100*)—Possession OF PART-SUFFICIENCY OF DESCRIPTION.

Defendant's title originated in a deed of the undivided half of 28 acres of an original allotundivided half of 28 acres of an original allot-ment, which 28 acres covered water privileges and mills, and the deed to the remaining half stated that it was to the whole of the lot on which the grantor then resided. The subsequent grants described the property by reference to the original description, except one deed which conveyed a larger tract from which the undivid-ed half of the 28 acres was excepted, and the grantee's subsequent deed bounded the premises by general reference to lands of others. Held. grantee's subsequent deed bounded the premises by general reference to lands of others. *Held.* that the doctrine that the adverse possession of a part is equivalent to the possession of the whole only applies to possession under a deed giving definite boundaries, and the original grant of the undivided half of the 28 acres did not applied to the control of the co sufficiently designate the boundaries to support a claim of constructive adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 547-574; Dec. Dig. § 100.*]

14. BOUNDARIES (§ 6*)—COURSES.

The change of a course in a subsequent deed from "northeasterly" to "northwesterly" as well as other variations from the original description may be disregarded as immaterial, where the description as taken from all the deeds shows that the changes were errors.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 47-57; Dec. Dig. § 6.*]

15. BOUNDARIES (§ 6*)—COURSES.

A call in a deed for 50 feet, more or less, in a certain direction, must be taken to be the length stated, unless the distance is controlled by other cells. by other calls.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 47-57; Dec. Dig. § 6.*]

16. ROUNDARIES (§ 6*)—Courses.

The court cannot disregard the direction of the starting point as given in the deed with-out some definite information concerning the monuments showing the course to be erroneous.

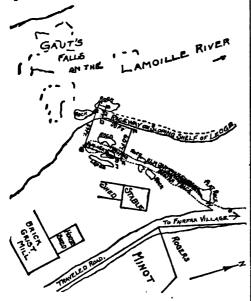
[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 47-57; Dec. Dig. § 6.*]

•For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Henry R. Start, Chancellor.

Suit by Margaret B. Sowles and others against Harriet G. Minot and others. From a pro forma decree dismissing the bill, the orators appeal. Affirmed upon stipulation.

The following is the map referred to in the opinion:



Argued before ROWELL, C. J., and TY-LER, MUNSON, WATSON, HASELTON, and POWERS, JJ.

E. A. Sowles and Farrington & Post, for the orators. Fuller C. Smith and C. G. Austin & Sons, for defendants.

MUNSON, J. This case was fully heard by the late Henry E. Rustedt as special master. His death occurred soon after the hearing was completed, and without a report having been filed. The testimony having been stenographically reported, the parties agreed that the case might be heard by the late Chancellor Start on the depositions, exhibits and evidence taken, and joined in a request that the chancellor inspect the premises. It was also agreed that, if either party considered further testimony necessary, such party might apply to the chancellor for permission to introduce it, and that the chancellor in his discretion might order it to be taken and prescribe the form of taking. Nothing was done under this provision; and the case was finally disposed of by Chancellor Start, then in failing health, strictly pro forma and without hearing. So the case is before us for the determination of both fact and law; and, the proposition for a view of the premises made by one party since the hearing not being acceded to by all the parties, it becomes necessary for us to settle the facts without the benefit of the inspection contemplated by the original agreement.

The bill alleges ownership of a water privilege on Enirfax Falls under deeds from Dan- title. January 14, 1828, Daniel Wilkins con-

Appeal in Chancery, Franklin County; | iel Wilkins and successive grantors, concerning which it is stated that the defendants claim inaccuracies of description; and alleges that the defendants are about to destroy the power by a removal of rocks that will change the channel, and prays for an injunction in that behalf and a quieting of the orators' title. The answer denies that the title remained in Wilkins' grantees until they made conveyance, and alleges that, if the title did remain in them and pass by their conveyance, it has since been lost by adverse possession; denies that there is any inaccuracy of description in the Wilkins deed, but alleges that it is now impossible to locate the grant; denies that the defendants have made or contemplate making any change in the channel, and alleges that natural alterations in the bed of the stream have destroyed the power in question. Before taking up the orators' chain of title, it will be well to refer to some earlier conveyances. Prior to May 25, 1803. Asa Wilkins became the owner of a large tract of land which included Fairfax Falls. On that day he conveyed to Louis Sherrill a privilege on or adjoining the falls, a little above the old sawmill, for the purpose of a carding machine, with the privilege of a road to and from said machine, and the privilege of drawing what water might be necessary for carrying on the business of said machine. December 1, 1803, Asa Wilkins executed to Daniel Wilkins a warranty deed of one-third of the farm and mills. October 6, 1809, said Asa conveyed to William Crane one-half of certain carding machines, carding machine house, and road thereto, with the privilege of drawing water to carry said machines or to carry on any business that could be done in said house, the water privilege to revert if the carding machines should be removed or not kept in repair, which deed recited that the machines and house were the same built by Louis Sherrill and sold by Sherrill to the grantor. April 2, 1816, Asa Wilkins quitclaimed to Daniel Wilkins the entire tract and falls, with mills and other buildings thereon. April 10, 1816, Daniel Wilkins conveyed to William Crane a piece "beginning at a notch in the rocks at the southwest corner of the carding machine house, * * * thence north thirty three degrees east forty-four feet, thence west thirty three degrees north forty feet, thence south forty four feet, thence east thirty three degrees south thirty two feet to the first mentioned bounds," with the privilege of drawing water to carry on the business of carding wool and the clothiers' works, or water to carry on any other business drawing the same quantity as the carding and cloth dressing business. January 22, 1822, Daniel Wilkins conveyed to W. B. Parker and I. A. Webster a site for a gristmill describing it as beginning about two rods and one-half southeast from the southeast corner of the Crane mill, with the privilege of taking water from the dam.

We come now to a statement of the orators'

veyed by warranty deed to David Nichols and side, and one equal undivided half of which Allen L. Nichols, for an expressed consideration of \$75, property described as follows: dated January 6, 1833, meaning hereby to

"Beginning northeasterly of Crane's carding works, at a rock notched N, thence southerly, or south, thirty degrees west forty feet to a cross in a rock, thence making a right angle and running westerly fourteen feet, thence making an ight angle and running southerly ten feet, thence making another right angle and running easterly fifty feet, be the same more or less, to the road leading to Crane's carding works, thence on said road fifty feet to a stake and stones, from thence making a right angle and running westerly to the first mentioned bounds, with the privilege of taking and using from the flume now occupied by said Crane, or any other Jume which may be there erected, sufficient water to carry two tub bellows for a blast furnace, reserving to said Crane the right of water sufficient for his carding and clothing works."

On the same day the grantees of the premises mortgaged them to the grantor to secure a promissory note for \$75, to be paid in hollow ware or iron castings on or before October 1, 1829, with interest. The mortgage was recorded before the maturity of the note, and has not been discharged of record. Nothing appears regarding the payment or possession of the note. November 10, 1848, David Nichols and Allen L. Nichols quitclaimed the premises to Andrew J. Soule; the signature of David having but one witness. August 22, 1865, Soule executed to Hiram Bellows a quitclaim that was evidently intended to convey the same property. In the last two deeds the course of the first line was given as 39° west instead of 30°, and in the last deed the place of beginning was put northwesterly from Crane's mill instead of northeasterly, and the call for a right angle in running the third line was omitted. Bellows died in 1876 without having conveyed the title, and the oratrix, Margaret, claims the property under his will and the will of his wife, Susan B., who died in 1880. Privileges upon the falls other than the ones above described were subsequently granted by those who took the remainder of Daniel Wilkins' right; and there have been many conveyances of the different interests, as shown by the 84 deeds introduced by the defendants. For the purposes of this inquiry, it may be assumed that all the rights, except the one claimed by the orators, are now united in the defendants by written evidences of title. It will be necessary to trace the main line of these conveyances.

January 8, 1833, Daniel Wilkins conveyed to Erastus Cross by warranty deed "one equal undivided haif of 28 acres of land of the original right of Frances Panton or Fanton, which 28 acres covers the grant in Fairfax on the river Lamoille, together with the water privileges and mills thereon standing," in which deed exceptions were made of the gristmill privilege deeded to Parker and Webster, the carding and cloth dyeing privileges deeded to William Crane, and certain parcels not connected with water rights. March 12, 1833, Wilkins quitclaimed to Erastus Cross as follows: "All my right " " in the whole of the let of land on which I now re-

I conveyed to said Cross by deed * dated January 6, 1833, meaning hereby to convey the other equal undivided half of said lot," referring to the record of said deed for further particulars. Erastus Cross had previously become the owner of the gristmill property by deed from Isaac N. Soule dated December 8, 1832; and on the 23d of December, 1833, he quitclaimed certain land to Joseph Cross by the following description: "Being the same deeded to me by Isaac N. Soule and Daniel Wilkins A. D. 1832, also all right and title I have in a grist mill, saw mill, and shingle mill, all deeded me by said Soule and Wilkins, for a more particular description of which reference being had to said deeds." April 3, 1834, Joseph Cross quitclaimed to Erastus Cross as follows: "Being the same land mills and machinery and the whole of the estate that the said Erastus deeded to me * * December 23, 1833"referring to the record of said deed for a more particular description, and excepting the gristmill property and the shingle machine. On the same day Erastus Cross guitclaimed to John Warner and Silas W. Brush, describing the property as all the estate deeded him by Daniel Wilkins by his deeds of January 8 and March 12, 1833, and referring to the records. May 24, 1834, Brush quitclaimed to Warner as follows: "All the right, title and interest I have in and to * * the Fairfax Falls, meaning hereby to convey all the land I ever owned in the town of . Fairfax." October 27, 1836, William Crane quitclaimed to Warner and Brush the following: "All my right * * * in the water privilege at Wilkins Falls so-called * * * with my other privileges appertaining to said water privilege." February 3, 1840, Warner conveyed to Silas Smith property described substantially as follows: All the real estate deeded me by Erastus Cross April 3, 1834, and a certain other piece deeded me by William Crane, being the same land deeded him by Daniel Wilkins April 10, 1816-referring for further description to the records of all the deeds mentioned, with the privilege of erecting a gristmill or other machinery on the last-described premises, with the right to use the quantity of water specified in Wilkins' deed to Crane. March 22, 1845, Smith quitclaimed to Warner, describing the property as the same deeded to him by Warner, with reference to the record. In the meantime Solomon Bradley had become the owner of the gristmill property by deed from Joseph Cross. January 10, 1846, Warner deeded to Blinn and Barstow a piece extending from the bridge above the dam northerly to the April 6, 1852, Warner gristmill property. conveyed to Samuel N. Gant by metes and bounds a tract on both sides of the river, which is further described as follows:

not connected with water rights. March 12, 1833, Wilkins quitclaimed to Erastus Cross as follows: "All my right * * in the whole of the lot of land on which I now re- Blinn and Barstow, also the old grist mill privi-

lege, also the privilege deeded to Daniel Nichols | and Allen L. Nichols by Daniel Wilkins the 14th day of Jan. 1828."

January 31, 1881, Gant quitclaimed the property to Harriet G. Minot, bounding it by adjoining owners, and describing it further as all the land he owned at or about Fairfax Falls and the water privileges connected therewith; and on the same day Mrs. Minot quitclaimed an undivided half of this to Susan E. Gant. June 3, 1902, Mrs. Minot and the heirs of Mrs. Gant quitclaimed the entire tract to certain of these defendants.

The general course of the Lamoille river through the section involved in our inquiry is about north. The fall consists of an irregular descent, covering about 30 rods and amounting to nearly 90 feet. All the mills and mill sites mentioned in the exhibits and testimony are on the easterly bank. mills now existing are located at the head of the falls, and are supplied from the dam. Prior to 1873 there were mills just below the falls which took their power from a lower point hereinafter described. The questions of location to be determined are confined to the section between these upper and lower millsites. The highway runs a few rods from the river in the same general direction, but makes the first part of the descent from the upper level with a slight bend towards the stream, after which it runs in a straight line a little east of north. Irregular ledges corresponding with the upper section of the falls run diagonally across the space between the river and the road in a northeasterly direction, striking the road at the lower part of the bend. Running beneath these upper ledges, from a point in the highway at the lower end of the bend to a small level space near the edge of the falls, in a line nearly straight, is a natural path, much used in later times by parties visiting the falls. few feet from the highway on the northerly edge of this path is a large flat rock, which is of importance in our inquiry. From this path beneath the upper ledges, and from the westerly line of the straight road north of the bend, there is a steep and rocky descent toward the stream. The narrowest place between the road and the river is in an east and west line crossing the flat rock, and south of this line the rocky descent extends to the edge of the stream. The marks upon the rocks called for by the orators' deeds have not been found. The other objects mentioned in the description are Crane's carding mill, the road leading to it, and the flume supplying it. So the first point of inquiry is the location of Crane's carding mill. This building was carried off by a flood in the early 30's. It was without artificial stone foundation, and no vestige of it remains. But the parties are agreed that some part of the building stood on the flat rock above mentioned, marked "H" on the orators' plan: and all the evidence indicates that the rear the building stood on timbers resting on

no satisfactory evidence of the size and shape of the building. Without presenting in detail the evidence upon which our conclusion is based, we locate the northeasterly corner of the Crane mill on the westerly part of the flat rock with the easterly face of the building extending upon and along the edge of the path as it is indicated on the orators' plan.

The power which supplied Crane's mill, as well as the mills below, came from a point more than half way down the falls, where a large rock standing a few feet from the edge of the river separated some of the water from the main body of the stream, and caused it to flow for a short distance in a separate channel, divided from the main channel by a ledge of rocks. The rock first referred to in connection with rocks in the bank opposite to it formed a natural frame, in which a structure was placed to control the flow, and from which a flume conducted water to the mill. This gorge in the rocks, where the Crane bulkhead was located, is nearly opposite the spot before described as the lower terminus of the path now used by parties visiting the falls. The orators claim that this path marks the location of the old road referred to in their deeds. The defendants insist that there never was a road here, and that, if there was, it could not be called a road leading to Crane's mill. The distance from the flat rock to the end of the path is about 9 or 10 rods. We conclude from the evidence that neither the grade nor the adjacent rocks were such as to make the location impracticable for teams. The defendants introduced some testimony as to indications of an old road that left the highway at a point a little distance north of the flat rock and came down towards the river in the rear of the Crane millsite, but we do not find that there was such a road. It is true that the road claimed by the orators must have ended at the spot described as the end of the path. The evidence precludes the possibility of its being a section of a road coming down the rocks from the south. But the terminus described is at the top of a steep slope that goes down to the gorge where the bulkhead was located. There is no suggestion that the vicinity of the bulkhead was accessible to teams coming up the bank of the stream from the flat below. The testimony of witnesses who in their youth worked in the lower mills, and assisted in the work of maintaining the bulkhead at this point, gives us a general understanding of the timbers required in its construction, and the frequency with which they were carried out by flood, wood and ice; and we can judge from this what was going on in the earlier period concerning which no testimony can be had. The Crane carding mill had been in operation 25 years when the deed to the Nicholses was given, and it may easily be conceived that this line of approach to the bulkhead had then become known as a road used in connection with the carding mill, and rocky slope before described. There is that a surveyor running a line from the bulk-

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head to the end of it might describe it as the road leading to Crane's mill. The description in the orators' deeds, taken as it reads, requires that the lot be located northerly from the Crane millsite. The orators read the direction governing the starting point "southwesterly," instead of "northeasterly, as given in the first deed or "northwesterly," as given in the deed to Bellows, and so bring the lot southerly from the Crane millsite. This enables them to locate the westerly lines of the lot on the stream with the easterly line resting on the lower part of the path or road above described. This location lacks the confirmation of the artificial marks used to designate the main westerly line; but the defendants claim, and their evidence tends to show, that rocks from the bank of the stream in this vicinity have been carried out by floods. We have seen that the lot as plotted has at its southwesterly corner a projection 14 feet long by 10 wide. length of this projection is such that, when the main westerly line of the lot is brought upon the margin of the stream, the projection spans the gorge before described, bringing the end line of the projection on the outer rock. The witnesses are agreed that the lower line of the projection as surveyed crosses the gorge about where Crane's dam and gate were located. It may be that the lot can be located substantially as claimed by the orators if the court is justified in rejecting the starting point as given, a question which is left for further consideration.

The Nicholses must be treated as obtaining a good title to the premises covered by their deed, for the parties claim from a common source. Ames v. Beckley, 48 Vt. 395. There is no evidence that they ever went upon the land, but they are to be treated as having received the possession with their deed. Davenport v. Newton, 71 Vt. 11, 42 Atl. 1087. There is no presumption that the mortgage note was paid at maturity, and under our holdings the legal title passes to the mortgagee on condition broken. But the mortgagee holds the title thus received only for the purpose of security, and the burden is on him and those claiming in his right to show anything done in enlargement of the title. There is no evidence that Wilkins or his grantees took possession under the mortgage within the statutory period, and it is only in support of an actual possession that the law will presume a conveyance or other relinquishment of the mortgagor's interest to the mortgagee. Appleton v. Edson, 8 Vt. 239; Brown v. Edson, 23 Vt. 435, 450. The lapse of 15 years without payment or other recognition, and without an enforcement of the security in any manner, will defeat the mortgagee's right. Whitney v. French, 25 Vt. 663. Nor will the law of abandonment avail the defendants. A failure to occupy land for an indefinite time does not constitute an abandonment of title or possession. 2 Wash. Real Prop. 453, 457; Perkins v. Blood, 36 Vt. 273, 283; Langdon v. Templeton, 66 Vt.

71 Vt. 11, 17, 42 Atl. 1087. The water power covered by the deeds has not been lost by nonuser. Adams v. Barney, 25 Vt. 225. It is generally said that real property, corporeal or incorporeal, held by grant, cannot be lost by abandonment. 1 Cyc. 6; note 40 Am. Dec. 466. But, if the law is otherwise, there can be no abandonment without an intention to abandon. Moon v. Rollins, 36 Cal. 833, 95 Am. Dec. 181; Dyer v. Sanford, 9 Metc. (Mass.) 395, 43 Am. Dec. 399. And most authorities hold that this intention cannot be inferred from nonuser alone. 1 Cyc. 5. But, if not precluded by legal rule, we should not draw the inference from an omission to use property of this character. Nor will an abandonment be inferred from the nonpayment of taxes. Mayor of Philadelphia v. Riddle, 25 Pa. 259; Keane v. Cannovan, 21 Cal. 291, 82 Am. Dec. 738; Davis v. Perley, 30 Cal. 630. We cannot find the fact of abandonment from the few indefinite statements regarding the business and personal history of the Nicholses. It is not necessary at this time to consider the effect of a deed having but one witness. The deed to Soule was properly executed on the part of Allen L. Nichols, and so conveyed an undivided half of the property. Defendants also claim from the evidence that the changes in the process of manufacturing iron ware have been such that tub bellows are no longer used, and contend that the power can be applied to nothing else. It is not necessary to inquire as to the fact, for we construe the words of the deed to be a measure of the power granted, and not a restriction of its use. So the orators have at least an undivided half of whatever land and power were conveyed by the Wilkins deed, if the property can be located with sufficient certainty, and has not been lost by adverse possession.

If the lot lies where the orators have located it, it has not been lost by adverse possession, actual or constructive. The man who had charge of the adjacent property under Gant put up two lengths of fence where they were sufficient in connection with a ledge to keep hogs on a small tract which included this parcel, and occupied the parcel in this manner from 1852 to 1862. The evidence does not carry the occupancy further, but, if it did, the continuance would be of no avail to the defendants, for the grant to the Nicholses was excepted from the conveyance to Gant, and there is nothing in the evidence to indicate that this use was under a claim of right. There is no evidence of any other actual occupancy of the piece surveyed, except in connection with the water rights pertaining to the mills below. Nor can the occupancy of other parts of the grant avail here. The doctrine that the possession of any part will be considered a possession of the whole applies to possession under a deed which gives definite and certain boundaries. Spaulding v. Warren, 25 Vt. 316, 322. The defendants' title has already been stated. 173, 180, 28 Atl. 866; Davenport v. Newton, It originated in a deed of an undivided half

language affords no certain indication that the 28 acres was all of the allotment, and. if it was not all, the description leaves the part conveyed undesignated. Nothing appears to show what the proprietors' records would have disclosed in this regard. The further statement that the 28 acres covers the grant on the river together with the water privileges and mills is no more definite as regards boundaries. The only further element introduced by the deed of the remaining half is the fact that it was the whole of the lot on which the grantor resided. grantee in the above deeds conveyed property deeded him by the grantor in 1832-a reference which would lead the inquirer to nothing if his inquiry was confined to that year. The next grantor used the same description by reference. The next returned by reference to the original description. The succeeding deed was of all the grantor's interest in the falls and land without reference. The two subsequent conveyances were by references which led back to the first description. This brings us to Warner's deed to Gant in 1852, and thus far no boundaries have been found sufficiently definite to support a claim of constructive possession. Warner's deed to Gant was by metes and bounds, but the grant in question was excepted. Gant's deed to Mrs. Minot in 1881 bounded the premises conveyed by the lands of certain persons named, and described them further as all the lands and privileges he owned at the falls, but without referring to his deed. A description by a general reference to the lands of others cannot meet the requirement of definite and certain boundaries.

In reaching our conclusions of fact we consider all the evidence introduced by the defendants, and exclude from consideration the testimony of the orator E. A. Sowles. the objection to which is insisted upon. We return to a further consideration of the description in the orators' deeds. The description as a whole is such that the change from "northeasterly" to "northwesterly" in the language which determines the starting point in the final deed of the series is immaterial. The other variations from the first description may be treated as errors. So the courses are to be taken as found in the first deed. The expression "southerly or south," used in fixing a definite course so many degrees west, must be read "south," unless the course is controlled by an ascertained monument. If the direction governing the starting point is correct, the lot is located north of the Crane millsite. There is no patent obstacle in the way of this location. The reservation in favor of the Crane privilege does not necessarily require that the lot be located above the Crane mill. If a location north of the Crane property is accepted, several things follow with certainty.

of 28 acres of a certain original right. This as leading to Crane's mill is the highway running past it. The lot lies wholly on the westerly side of the road. The entire length of its easterly line rests on the road. The northerly line of the lot is at a right angle with the road. The first and main line of the westerly side of the lot is S. 30° W., and the lines forming the projection and southerly side of the lot are run by right angles from the end of that line. So the course of the southerly line of the lot is definitely determined by the course above given. line, called 50 feet, more or less, must be taken to be of the length stated, unless the distance is controlled by other calls. Johnson v. Pannel, 2 Wheat. 206, 4 L. Ed. 221; Cutts v. King, 5 Me. 482. See Blaney v. Rice, 20 Pick. (Mass.) 62, 32 Am. Dec. 204. For present purposes this line may be assumed to strike the highway one rod north of the point represented on the orators' plan as the junction of the beaten path with the highway. Then, if the southerly and westerly lines of the survey are run in reverse order, the surveyor will be brought to the near vicinity of the points where the description locates the cross in the rock and the distinctive mark designated as the place of beginning—the letter N. An examination extending along narrow strips running through the places thus located in a direction parallel with the highway will adapt the test to any north or south variation of the assumed starting point. It is to be presumed that a description of this character represents an actual survey. The case affords some indications that the rocks in this locality have remained undisturbed. The court would not be justified in disregarding the direction of the starting point as given in the deeds without some definite information concerning this location; and the case will be remanded for the taking of testimony covering a plotting of the survey on the highway north of the Crane millsite, a search for the designated marks on the lines above indicated, and distances, levels, and other facts bearing upon the feasibility of the location for the use of power to be taken from the flume which supplied Crane's mill. There need be no inquiry upon the issue of adverse possession as applied to the territory described until the case upon the question of location is completed.

> NOTE.—This opinion was read at the January term, 1909, and the case has since been held at the request of counsel, who now file a stipulation which provides for an affirmance of the decree, and a mandate in accordance therewith is sent down.

> > (82 Vt. 336)

CARPENTER v. GIBSON.

(Supreme Court of Vermont. Caledonia. Aug. 25, 1909.)

Depositions (§ 92*) — Admissibility as Evidence—Return of Citation. the road described tion served in this state to take depositions be

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actually returned to the officer issuing it if it is received by the officer taking the deposition properly served, so that where a citation was sent to plaintiff's attorneys in this state after service, and was mailed by them to plaintiff in New York, and returned with plaintiff's depositions in a sealed envelope subscribed as required by statute, it will be presumed that the citation was in the hands of the notary who took the depositions when they were taken, and the the depositions when they were taken, and the failure to return it to the officer signing it before sending it to New York did not make the depositions inadmissible.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 266, 267; Dec. Dig. § 92.*]

2. DEPOSITIONS (§ 92*)—AUTHORITY OF OFFICER—PRESUMPTION OF AUTHORITY.

In view of P. S. 1609, 1612, 1613, providing that an officer authorized by the laws of his ing that an officer authorized by the laws of his own state shall have the same power as a justice in this state to take depositions, and that the depositions of nonresident witnesses shall be allowed if taken according to the laws of this state, and the provision providing that the acts of a notary shall be effectual without his official seal, the failure of a notary, taking depositions in another state to be used here, to affix his seal opposite his signature at the end of the caption, did not affect the admissibility of such depositions in evidence; it being presumed that the notary had authority to take depositions. depositions.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 266-267; Dec. Dig. § 92.*]

3. EVIDENCE (§ 317*)—HEARSAY.
In an action for the value of legal services rendered, testimony of plaintiff as to a conversation with his stenographer as to the delivery of a message which the stenographer testified he had received from defendant with instruc-tions to communicate it to plaintiff was proper-ly received, and was not objectionable as hear-Say.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.*]

4. WITNESSES (§ 248*) - EXAMINATION - RE-

SPONSIVENESS OF QUESTIONS.

In an action for the value of legal services, the answer to a question to a witness as to the reasonable value of plaintiff's services that he should consider a certain sum a reasonable charge according to the current charges for legal services in N. was responsive; the reference to the fees in N. merely being one of the matters on which the opinion was based, and being proper.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 861-863; Dec. Dig. § 248.*]

ATTORNEY AND CLIENT (§ 166*)—ACTIONS-SUFFICIENCY OF EVIDENCE.

In an action for the value of legal services, evidence held to sustain the auditor's finding that the services were rendered and plaintiff's opinion given within a reasonable time after his employment.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 368-372; Dec. Dig. §

6. REFERENCE (§ 99*) - REPORT - CONSTRUC-TION.

In an action for the value of legal services, where defendant claimed that plaintiff did not give his opinion within a reasonable time after he was employed, the auditor's report referred to defendant's conduct from which plaintiff might have inferred that no immediate opinion was expected, and also stated that "there is no evidence as to plaintiff's engagements during the time, nor * * as to the cause of plaintiff's delay in sending the opinion." Held that it would not be inferred that the auditor considered the absence of the evidence men-tioned as favorable to plaintiff in the face of the

an action for legal services, the auditor-stated in his original report that all the testi-mony as to the value of plaintiff's services was contained in the depositions of plaintiff and three others, and that his findings upon that ' question were based solely upon their evidence. This was excepted to as not based on all the evidence in the case, and the report was re-manded for a determination of the value of the services without considering two of the deposimanded for a determination of the value of the services without considering two of the depositions, and the auditor reported that he made the same findings without the two depositions. Held, that it was not necessary to renew the exception in order to save it, as the additional finding was on the same basis with the two of the denositions eliminated. the depositions eliminated.

[Ed. Note.—For other cases, see Cent. Dig. § 168; Dec. Dig. § 100.*] see Reference,

8. REFERENCE (§ 99*) - REPORT - CONSTRUC-TION.

In an action for the value of legal services, the auditor stated in both his original and additional reports that defendant introduced no evidence as to the value of plaintiff's services, and that the findings were made upon the evidence contained in depositions introduced by plaintiff Hold that the report did not more plaintiff. Held, that the reports did not mean: that the auditor took the depositions as conclusive upon the value of the services without considering the circumstances of the case, such as the assistance afforded plaintiff by defend-ant's other attorneys, his delay in furnishing, his opinion, and the fact that it was of no value to defendant.

[Ed. Note.—For other cases, see Reference, Dec. Dig. § 99.*]

Exceptions from Caledonia County Court; Alfred A. Hall, Judge.

Action by Philip Carpenter against Martin H. Gibson. Judgment for plaintiff, and defendant excepts. Affirmed.

Argued before MUNSON, WATSON, HAS-ELTON, and POWERS, JJ.

Dunnett & Slack, for plaintiff. Hill & Hovey, for defendant.

MUNSON, J. The plaintiff is an attorney whose office is in New York City, and his evidence consisted of depositions taken in New York on notice issued and served in this state, and without an appearance by The depositions were objected defendant. to because the citation was not filed in any court, nor returned to the official who issued it, before it was sent to New York. The defendant cites in support of his objection Parker v. Meader, 32 Vt. 300. The citation in that case was signed by an Orange county justice, and the service was in Caledonia county by a deputy sheriff of Orange. That officer had no authority to serve the citation outside his county unless it was a process returnable in that county. The court considered that the citation was a returnable process, and that the official who issued it was the one to whom it was returnable, and therefore held that it was legally serv-

presented here. It may well be held that the citation is a process returnable to the official who signs it, as determining what officers are entitled to serve it, without its being held that a failure to return it will make the deposition inadmissible. The statute contains no requirement that makes its actual return to the official signing it of any importance, if it comes to the hand of the official who takes the deposition, properly served. It appears that this citation was sent to the plaintiff's attorneys in this state after service, and was mailed by them to the plaintiff, and was returned with the plaintiff's deposition in a sealed envelope superscribed as required by the statute. was evidence that the citation came into the hands of the notary who took the depositions, and it will be presumed that it was in his hands when the depositions were taken. See Barron v. Pettes, 18 Vt. 385. The failure to return it to the official who signed it before it was sent to New York did not make the depositions inadmissible.

It was also objected that the notary who took the depositions had not affixed his notarial seal opposite his signature at the end of the caption, and that the notarial seal affixed to the certificate of oath was not sufficient to prove that the authority taking the depositions was, in fact, a notary public. This objection is groundless. The same section of our statute which authorizes notaries public to take depositions provides that the acts of a notary shall be effectual without his official seal. Other sections provide that an officer authorized by the laws of the state in which he resides to take depositions to be used in that state shall have the same power to take depositions that is given to a justice in this state, and that the depositions of witnesses living without the state shall be allowed if taken agreeably to the laws of this state. P. S. 1609, 1612, 1613. It has long been the settled practice in this state to receive depositions taken in any of the United States which purport to have been taken by competent authority and are not impeached; it being presumed that the officer taking the deposition is lawfully entitled to the official character which he assumes, and that he had authority to take depositions. Crane v. Thayer, 18 Vt. 162, 46 Am. Dec. 142.

Defendant objected to certain answers in plaintiff's deposition in which he testified to a conversation had with his stenographer. It is urged that the conversation was not in the presence of the defendant, and was hearsay. The evidence was properly considered. It was merely evidence of the delivery of a message which the stenographer had testified to as having been received from the defendant with instructions to communicate it to the plaintiff.

Deponent Ufford, who was associated with

ed. This is not conclusive of the question of the matter submitted and the services rendered, was asked to give his opinion as to the reasonable value of plaintiff's services, and said in reply: "I should consider \$250 a reasonable charge, according to the current charge for legal services rendered in New York City." It is urged that the answer is not responsive, and is based solely upon the deponent's knowledge regarding current charges for legal services in New York City. The objection is not tenable. The witness gave his judgment as to the reasonable value of the services, mentioning one of the matters on which his judgment was based; and the thing mentioned was an element proper to be considered.

> The defendant excepts to the finding of the auditor that the services were rendered and the opinion given within a reasonable time after the employment. It is urged that the question of reasonable time is a question of law on the facts reported, and that the court should hold that the work was not done within a reasonable time. It is said that different inferences cannot reasonably be drawn from the facts detailed in the report; and we are referred to the language used by the court in Sessions v. Newport, 23 Vt. 9, that: "Where the inference is one which admits of no doubt, so that it will strike all minds alike, the court may determine the question as matter of law." true that cases have arisen in which the question of reasonable time has been disposed of by the court, and the defendant's claim requires some reference to the facts reported.

Defendant's brief says it appears from the report that defendant stated his case to the plaintiff on the 28th day of January, and told him he would call for his opinion the next day; that he called the next day and found the plaintiff was out, and left word for the plaintiff to write him the result of his examination; and that the opinion was mailed him on the 10th day of March-41 days after he applied for it, and long after the business was disposed of. But this is not all that is shown by the report. It appears, further, that, after the defendant had stated his case, plaintiff gave him an offhand opinion that he was entitled to recover the full contract price, but said it would be necessary for him to examine the law before giving a final opinion; that defendant then told the plaintiff he wanted him to make all the examination necessary. that he wanted to be sure what his rights were, and that he would call the next day for the opinion; that, when he called the next day and found the plaintiff was out, he said he could not wait, that he was returning to Vermont that night, and wanted the plaintiff to write him the result of his examination and tell him how much he would charge to take care of the case if he decided to bring suit in New York; that at the time defendant applied to the plaintiff the plaintiff in business, and had knowledge he was in New York with an arbitrator for

nothing to the plaintiff about this, and gave no reason for wanting the opinion the next day; that the award was published on the 30th, and that defendant received a part of the sum awarded the same day and the balance within a week; that defendant never informed the plaintiff that the business had been disposed of, but left the matter standing on what he had said at the office the 29th. It is obvious that this is not a showing on which the court can say as matter of law that the opinion was not furnished within a reasonable time.

It is argued that, although the burden upon this question was on the plaintiff, the auditor has based his conclusion upon the absence of evidence rather than upon the facts appearing. But most of the negative matters referred to in support of this view have reference to conduct of the defendant from which the plaintiff might suppose that no immediate report was expected. It is true that following these matters the report says: "There is no evidence • • as to the plaintiff's engagements during the time, nor is there any evidence as to the cause of the plaintiff's delay in sending the opinion. * * *" But the court will not infer from this that the auditor gave the want of such information a bearing favorable to the plaintiff. The other claims made in connection with the subject are covered by our disposition of the main question. The auditor says in his original report that all the testimony in the case as to the value of plaintiff's services is contained in the deposition of the plaintiff and in those of Ufford, Hitchcock, and Miner; that there was no other evidence in the case tending to show what the customary or reasonable charges are for the professional services of lawyers in New York City; and that his finding as to the value of plaintiff's services is made solely upon the evidence contained in these depositions. The defendant excepted to the report because this finding was based solely upon the evidence contained in the depositions, and without considering the other evidence. The report was recommitted for the auditor to find and report what the plaintiff's services were fairly and reasonably worth without considering the evidence of Miner and Hitchcock. In his additional report the auditor says: "As stated in the original report, the defendant introduced no evidence" as to what the plaintiff's services were fairly and reasonably worth, but that the depositions of plaintiff and Ufford contained evidence upon this question. The auditor then makes the same finding as that contained in the original report, excluding from consideration the evidence of Miner and Hitchcock, and says that the finding is made upon the evidence contained in the depositions of the plaintiff and Ufford.

an adjustment of his claim, but that he said | exception was taken to the additional report in regard to this finding as therein contained, and the plaintiff claims that this further finding destroys the force of the exception based on the finding as originally made. But the finding as repeated in the additional report is upon the same basis as the original finding with the testimony of Miner and Hitchcock eliminated, and we think it was not necessary to renew the exception to save the question.

> As evidence bearing upon the question of value not contained in the depositions, defendant's brief points to the evidence of the defendant as to the circumstances of the employment, the information furnished the plaintiff, the assistance afforded him by the written opinion of defendant's Vermont attorneys, plaintiff's delay in furnishing his opinion, and the fact that it was of no value to the defendant. But the court does not understand from the above statements of the report that the auditor divested his mind of all the circumstances surrounding the transaction in accepting the estimates of value given in the depositions, or that he looked upon the estimates as evidence that was to be accepted as conclusive without any exercise of his own judgment.

Judgment affirmed.

(105 Me. 166)

BODFISH et al. v. BODFISH et al.

(Supreme Judicial Court of Maine. Feb. 26, 1909.)

1. Wills (§ 689*)—Construction—Rules of Interpretation—Life Estate—Power of DISPOSAL.

It is a well-established rule in Maine that, when a testator gives to the first taker an estate for life only by certain and express words, the question whether a power to dispose of the remainder is annexed to the conventional life estate depends upon the construction of the instrument under which the power is claimed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1650; Dec. Dig. § 689.*]

2. Wills (§ 439*)—Construction—Intention OF TESTATOR.

In construing a will, the intention of the testator is to have a controlling influence in the interpretation of the clause or phrase es-pecially involved in the inquiry, provided no settled rule of law or principle of sound pub-lic policy is thereby violated.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 955; Dec. Dig. § 439.*]

3. WILLS (§ 470*)—Construction—Intent of TESTATOR.

TESTATOR.

In construing a will, the intention of the testator must be collected from the language of the whole instrument interpreted with reference to the avowed or manifest object of the testator; and all parts of the will must be construed in relation to each other, so as to give to every provision its proper field of operation, and to every word its natural and appropriate meaning. meaning.

No Dig. \$ 988; Dec. Dig. \$ 470.*] see Wills, Cent.

Tor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. WILLS (§ 488*)—Construction—Ambiguous Provision.

In case of ambiguity, it is well settled that all the surrounding circumstances of the tes-tator, his family, the amount and character of his property, may and ought to be taken into consideration in giving a construction to the provisions of his will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1024, 1034; Dec. Dig. § 488.*]

5. WILLS (\$ 689*)—ESTATE CREATED—LIFE ESTATE—POWER OF DISPOSITION.

A testator's will contained the following

provisions:

"First. I give, bequeath and devise unto my wife Lydia A. Bodfish of said Elliottsville all the property, real, personal and mixed which I shall own or be possessed of at the time of my decease, for and during the term of her natural ·life.

"Second. After the decease of said Lydia A. Bodish, I give, bequeath and devise unw my son, John I. Bodish, lot number (1) in the

son, John I. Bodfish, lot number (1) in the third range of lots in the Vaughan Tract in said Elliottsville, and called the Major Sawyer lot, and containing one hundred acres more or less. "Third. After the decease of said Lydia A. Bodfish I give, bequeath and devise unto my son Samuel C. Bodfish, lot number six (6) in said third range of lots, in said Vaughan Tract and called the Wilbur lot. "Fourth. I give and bequeath unto my daughter Marion A. White, widow of Flavius E. White the sum of two hundred dollars, to be paid to her within one year after the decease

ter Marion A. White, widow of Flavius E. White the sum of two hundred dollars, to be paid to her within one year after the decease of my said wife, Lydia A. Bodfish.

"Fifth. I give, bequeath and devise to my son, Rodney R. Bodfish and my daughter Sarah E. Bodfish in equal shares in common and undivided all the rest, residue and remainder of the property which shall be left after the decease of my said wife. And should either my said daughter Sarah E. Bodfish or my son Rodney R. Bodfish die before the decease of my said wife, Lydia A. Bodfish, then his or her part of the property described in this fifth clause of my will shall go to the husband or the wife of the said Sarah E. Bodfish or Rodney R. Bodfish if the said Sarah E. Bodfish or the said Rodney R. Bodfish shall have a husband or wife living at the time of their decease, if not then the whole property described in this fifth clause of my will shall go to the survivors of the said Sarah E. Bodfish or Rodney R. Bodfish upon the death of either. This bequest and devise to said Sarah E. Bodfish and Rodney R. Bodfish is made on the condition that they remain at home and care for said Lydia A. Bodfish while she shall live and that they pay to said White the two hundred dollars bequeathed to her by the fourth clause of this will." queathed to her by the fourth clause of this will."

Held, that the testator intended to give to his wife, Lydia A. Bodfish, a simple life estate in all his property with the further provision for her care and comfort contained in the fifth paragraph of the will, and that it was not his purpose to annex to this life estate the power to dispose of any part of the property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1650; Dec. Dig. § 689.*]

(Official.)

Appeal from Supreme Judicial Court, Piscataquis County, in Equity.

Bill by Lydia A. Bodfish and others against Samuel C. Bodfish and others to obtain a judicial construction of the will of Nymphas Bodfish. Decree for plaintiffs, and defendants appeal. Reversed, and new decree rendered.

Argued before EMERY, C. J., and WHITE-HOUSE, SAVAGE, PEABODY, and BIRD, JJ.

Hudson & Hudson, for appellants. J. S. Williams, for appellees.

WHITEHOUSE, J. This is a bill in equity brought to obtain a judicial construction of the following will of Nymphas Bodfish, of Elliottsville, in the county of Piscataquia, dated April 19, 1904:

"First. I give, bequeath and devise unto my wife Lydia A. Bodfish, of said Elliottsville, all the property, real, personal and mixed, which I shall own or be possessed of at the time of my decease, for and during the term of her natural life.

"Second. After the decease of said Lydia A. Bodfish, I give, bequeath and devise unto my son John I. Bodfish, Lot No. One in the Third Range of lots in the Vaughan tract in said Elliottsville, and called the Major Sawyer lot, containing one hundred acres more or less.

"Third. After the decease of said Lydia A. Bodfish, I give, bequenth and devise unto my son Samuel C. Bodfish lot No. Six in said Third Range of lots in said Vaughan tract, and called the Wilbur lot.

"Fourth. I give and bequeath unto my daughter Marion A. White, widow of Flavius E. White, the sum of two hundred dollars, to be paid to her within one year after the decease of my said wife, Lydia A. Bod-

"Fifth. I give, bequeath and devise unto my son Rodney R. Bodfish and my daughter. Sarah E. Bodfish in equal shares, in common and undivided all the rest, residue and remainder of the property that shall be left after the decease of my said wife, and should either my said daughter, Sarah E. Bodfish, or my said son, Rodney R. Bodfish, die before the decease of my said wife Lydia A. Bodfish, then his or her part of the property described in this 5th clause of my will, shall go to the husband or the wife of the said Sarah E. Bodfish, or the said Rodney R. Bodfish, if the said Sarah E. Bodfish, or the said Rodney R. Bodfish shall have a husband or wife living at the time of their decease; if not, then the whole property described in this 5th clause of my will shall go to the survivor of the said Sarah E. Bodfish, or the said Rodney R. Bodfish upon the death of either. This bequest and devise to said Sarah E. Bodfish and Rodney R. Bodfish, is made on the condition that they remain at home and care for said Lydia A. Bodfish while she shall live, and then they pay to the said White the \$200 bequeathed to her by the Fourth clause of this will.

"Sixth. I appoint Edmund F. Drew executor of this my last will and testament."

•For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The testator died June 17, 1904, at the age of 82 years.

The plaintiffs in this bill are Lydia A. Bodfish, the widow, Rodney R. Bodfish, one of the sons, Sadie E. (Bodfish) Drew, the younger daughter of the testator, and Edmund H. Drew, husband of Sadie E. Drew and executor of the will. The defendants are Samuel G. Bodfish and John I. Bodfish, sons, and Marion A. White, the elder daughter, of the testator.

The homestead of the deceased was situated on Long Pond stream in Elliottsville, Piscataquis county, distant about 12 miles by the highway from Monson village, and five miles across Onawa Lake to Onawa station on the Canadian Pacific Railway.

The estate of the deceased was appraised as follows:

Home farm consisting of 200 acres of land and buildings	\$2 000	00
400 acres of timber land	800	00
100 acres of timber land, called the		
Wilbur lot	200	w
Sawyer lot	200	00

\$3,200 00

Personal estate consisting principally of household furniture and farming \$438 55 implements With rights and credits appraised 212 00

It is admitted that the amount of the debts left by the testator, as shown by the executor's first account, is \$223.01.

It appears from the bill and answer, and is not controverted in testimony, that, by consent of the widow, the executor of the will and husband of Sadie E. Drew, one of the residuary devisees in the will, gave to one Gilbert a permit to cut the lumber from the Wilbur lot devised to Samuel G. Bodfish in paragraph 3 of the will, by virtue of which lumber of the value of \$400 was taken from that lot by Gilbert, and that this stumpage is claimed both by the widow and by the defendant Samuel G. Bodfish.

The plaintiffs contend that, by the terms of the will, the widow, Lydia A. Bodfish, took a life estate with a power of disposal of all the property, real and personal, including the Sawyer lot and the Wilbur lot. specifically devised in items 2 and 3 of the will, and hence had an undoubted right to cut the wood and lumber or sell stumpage from any or all of the timber lands which belonged to the estate at the death of the testator. On the other hand, the defendants earnestly contend that, when all the provisions of the will are considered together and viewed in the light of the nature and value of the property, the testator's relations to the several beneficiaries, and all of the conditions which may fairly be supposed to have been in his mind at the time of the execution of the will, the conclusion is irresistible that his will." he did give her in clear and explicit terms the testator made his will, as to his property,

in the first paragraph of the will, viz., "all of his property, real, personal and mixed," "for and during the period of her natural life," with the further provision in the fifth paragraph, devising the remainder, after the termination of the life estate, to his two children Rodney and Sarah, on condition that they remain "at home and care for said Lydia A. Bodfish while she shall live," and then pay to Mrs. White the \$200 bequeathed to her in item 4 of the will. The defendants accordingly claim that the widow's life estate was not coupled with a power of disposal as to any part of the property, and that, if it should be held otherwise, they insist that such power of disposal could not in any event extend to the Sawyer and Wilbur lots specifically devised in paragraphs 2 and 3 of the

The presiding justice sustained the plaintiffs' contentions, and entered a decree that the power of disposal was annexed to the widow's life estate as to all of the property belonging to the estate at the death of the testator. The case comes to this court on the defendants' appeal from that decree.

It is undoubtedly an established rule in this state, uniformly recognized by the decisions of this court from Ramsdell v. Ramsdell, 21 Me. 288, to Young v. Hillier, 103 Me. 17, 67 Atl. 571, 125 Am. St. Rep. 283, that, when the testator gives to the first taker an estate for life only by certain and express words, the question whether a power to dispose of the remainder is annexed to the conventional life estate depends upon the construction of the instrument under which the power is claimed. In construing wills for the purpose of determining this question as well as all others, the intention of the testator is to have a controlling influence in the interpretation of the clause or phrase especially involved in the inquiry, provided no settled rule of law or principle of sound public policy is thereby violated. This intention must be collected from the language of the whole instrument interpreted with reference to the avowed or manifest object of the testator; and all parts of the will must be construed in relation to each other so as to give to every provision its proper field of operation, and to every word its natural and appropriate meaning. Wentworth v. Fernald, 92 Me. 282, 42 Atl. 550; Shaw v. Hussey, 41 Me. 495; Young v. Hillier, 103 Me. 17, 67 Atl. 571, 125 Am. St. Rep. 283. Furthermore, in case of ambiguity "it has long been settled, and, indeed, it is a principle so consonant to reason that the only wonder is that it should ever have been questioned, that all the surrounding circumstances of a testator, his family. the amount and character of his property, may and ought to be taken into consideration in giving a construction to the provisions of Postlewaite's Appeal, 68 Pa. 477. he intended to give the widow precisely what "In view of the circumstances under which be plain when otherwise it would be uncertain." Follweiler's Appeal, 102 Pa. 583.

In the case at bar it has been seen that after giving to his wife a simple life estate in all of his property, and then specifically devising to his son John the Sawyer lot and to his son Samuel the Wilbur lot after the decease of the widow, and giving to the elder daughter a legacy of \$200 payable in one year after the death of the widow, the testator uses the following language in the fifth paragraph of the will, viz.: "I give, bequeath and devise to my son Rodney R. Bodfish and my daughter Sarah E. Bodfish in equal shares in common and undivided, all the rest, residue and remainder of the property which shall be left after the decease of my said wife • • on condition that they remain at home and care for said Lydia A. Bodfish while she shall live and that they pay to said White the \$200 bequeathed to her by the fourth clause of the will."

It is not claimed by the plaintiffs that elther by force of this language in the fifth paragraph or that of any other provision of the will, a power of disposal is expressly annexed to the life estate. But it is claimed that by the use of the words "rest, residue and remainder of the property that shall be left after the decease of my said wife," interpreted with reference to the other parts of the will and to existing circumstances, a power of disposal is given to the widow by implication. It is not contended, however, that this devise of the "remainder of the property that shall be left" necessarily creates a power of disposal in favor of the widow as a matter of law. On the contrary, it is conceded that whether or not such a result will follow from the use of the language quoted must depend upon the intention of the testator as disclosed by all of the provisions of the will examined in the light of such attending circumstances and manifest objects as may reasonably be supposed to have been in the contemplation of the testator at the time of making the will, such as the condition of his family and the situation and amount of his property.

There are several familiar cases in this state and Massachusetts in which it has been held that language of similar import to that used in the residuary clause in the case at bar, considered in relation to the peculiar facts and circumstances existing in each instance, justified the inference that the intention of the testator was to give the widow a life estate coupled with a power of disposal. But in the examination of each case that arises it must be remembered that it is not the function of the court to substitute its judgment for that of the testator in determining what is a suitable and sufficient provision for the widow, but to disclose what the real purpose of the testator was with respect to that question.

or his family, the meaning of his words may | Me. 22, 48 Am. Dec. 470, the testator gave to his wife all of his property to be used and disposed of by her for her convenience and comfort during her life, "and divided among his children" "what may remain" after the decease of the wife. Here the use of the words "to be used and disposed of by her" left no uncertainty as to the intention of the testator in the use of the words "what may be left" in the residuary clause.

In Shaw v. Hussey, 41 Me. 495, a leading case in this state, the testator placed all of his personal property at the disposal of the wife, and provided that at her decease "all of the real estate that may be unexpended by her" should be divided among the devisees named. The court held that the power of disposal extended to the real estate, and for the purpose of explaining the significance of the words "that may be unexpended by her" quoted from the opinion of the court in Harris v. Knapp, 21 Pick. (Mass.) 412, as follows:

"The words 'whatever shall remain' necessarily mean that portion of the property bequeathed which shall be undisposed of at her decease; but there is no allusion in the will to any mode by which the sum thus given is to be diminished, excepting the disposition thereof, to be made by Mrs. Harris, and therefore the implication is inevitable."

So also in Warren v. Webb, 68 Me. 133. the testator gave all of his property to his wife during her life "for her proper use, benefit and support, and after her decease" said property, or the residue and remainder thereof, "to be divided among his children." The court said: "This language necessarily implies the liability of the estate to be diminished while in the hands of the devisee; and, as there is no provision in the will for its diminution except through her agency, her right of control, and even of disposal, is inescapable."

It has been seen that in this respect there is a vital distinction between the cases last cited and the case at bar, for in the latter case the property comprised in the life estate given to the wife was to be diminished by the two specific devises of the Sawyer lot and of the Wilbur lot to the sons John and Samuel, respectively, and the legacy of \$200 to the daughter, Mrs. White.

In McGuire v. Gallagher, 99 Me. 334, 59 Atl. 445, the testator gave all of his property to his wife during her life "to be used by her according to her desire," and then directed that "all the property remaining" be divided among her brothers and sisters. language was interpreted in connection with the terms of the first clause and with the fact that the income of the estate was "manifestly insufficient for her support." Again, in the recent case of Young v. Hillier, 103 Me. 17, 67 Atl. 671, 125 Am. St. Rep. 283, where the testator gave to his wife all of his property, real and personal, "for her use during life," and to his daughter "whatever In the early case of Scott v. Perkins, 28 may remain of said estates," there was no reference to any other mode of diminishing the "estates" except by the wife's use of the property, and, inasmuch as the income of the estate was palpably insufficient for the support of the widow and she was possessed of no other means, the court reached the conclusion that the testator intended to give her a power of disposal.

In the case at bar the property of the testator was appraised at \$3,850. In addition to the home farm, consisting of 200 acres of land with the buildings, the estate embraced '600 acres of timber lands, and its market value was doubtless in excess of the appraisal. It includes highly productive intervale land which is enriched by the fertilizing deposits of the adjacent hills, and in the year 1907 cut 40 tons of hay, a product which has a ready market, and commands high prices for lumbering operations in that vicinity. But, in view of the limited right of a life tenant to cut timber from the life estate, the testator did not wish to leave his widow dependent for her maintenance solely upon the rental of the property, but made what he evidently considered a further very important provision to insure her support and comfort during her life by devising "all the rest, residue and remainder of the property that shall be left" at the termination of the life estate to the two younger children Sarah and Rodney "on condition that they remain at home and care for the said Lydia A. Bodfish while she shall live." true that they were not required to give any bond for the support of their mother. But the testator had lived on the home farm for 78 years, and by the fruits of his labor had supported a wife and five children, and added 600 acres of timber lands to his possession. His wife was then 63 years of age, and it probably never occurred to his mind that such an obligation was necessary. He undoubtedly believed that the residuary devisees would be willing and glad to accept 600 acres of land with the house in which he and his family were then living and the other buildings which he was then occupying for the sole consideration of remaining at home and caring for "their own mother during the few years of life remaining to her." As tending to show, also, a desire and purpose on his part to keep the entire property in the family at least during the lifetime of his wife and to provide a home for her on the premises, there is great significance in the care with which he explicitly provides in the same paragraph of the will, that, in the event of the decease of the daughter before the death of her mother, her share of the property shall go to her husband, and, in the event of the death of Rodney before the decease of his mother, his share of the property should go to his wife, but, if Sarah should leave no husband or Rodney no wife, then upon the death of either the whole property devised to them should go to the survivor.

But it is said that the buildings were in a dilapidated condition, and that a large amount must be expended in repairing the house and rebuilding the barn. Here again the situation must be considered from the standpoint of the testator. He knew the style of life to which his wife had been accustomed, and knew that her wants would be few and simple. He knew that there was an abundance of timber in the 400-acre lot not devised to John and Samuel that would be available for all necessary repairs, and understood that by agreement between the mother and the children Sarah and Rodney stumpage could be sold from the 400-acre lot without objection from the other heirs to procure all the material required for such repairs and improvements.

It is conceded that there is clearly discernible through the several provisions of the will a purpose on the part of the testator not only to make a suitable and sufficient provision for the support of the widow, but to place the devisees and bequests to his children on a basis of equality as far as practicable. He gives to the elder daughter a legacy of \$200, and to John and Samuel each a lot of land of the value of \$200, and all that is left of the property, after taking out this legacy and the specific devises, he gives to Sarah and Rodney on the conditions specified. But it is obvious that if an unqualified right to dispose of all the property is vested in the widow, as claimed by the plaintiff, she would have the power to defeat these specific devises and the legacy to Mrs. White at her discretion, and nullify these explicit provisions of the will. It has been seen that she and the residuary devisees have already attempted to exercise such a power by selling the stunipage from the Wilbur lot. Such a construction of the will would also render its provisions contradictory and inoperative in another respect. A general power of disposal in the widow would enable her to sell and convey the homestead to a stranger, and thus prevent Sarah and Rodney from remaining at home and caring for their mother, and wholly deprive them of the opportunity to perform the condition upon which the remainder of the property was devised to them.

When, therefore, all parts of the will are considered with reference to each other so as to give to every phrase and clause the meaning and effect which it was clearly designed to have, and the instrument is critically examined in the light of the situation and the amount of the testator's property, the thoughtful provisions actually made for the care and comfort of the widow on the homestead farm, his manifest desire and purpose to make just and equal devises and bequests to his children, and all of the memories and associations connected with the history of this property, it is impossible to resist the conclusion that the testator intended to give to his wife, Lydia A. Bodfish,

a simple life estate in all of his property with the further provision for her care and comfort contained in the fifth paragraph of the will, and that it was not his purpose to annex to this life estate the power to dispose of any part of the property.

It is accordingly the opinion of the court that the certificate must be:

Appeal sustained.

Decree below reversed.

New decree in accordance with the opinion.

(105 Me. 184)

INHABITANTS OF KINGMAN V. PENOB-SCOT COUNTY COM'RS.

(Supreme Judicial Court of Maine. Feb. 26, 1909.)

1. HIGHWAYS (§ 19*)—PROCEEDINGS TO ESTABLISH—RETURN—STATUTORY PROVISIONS.

When a highway has been laid out by county commissioners, they must state in their return when the work of building the same shall be done. The language of the statute (Rev. St. 1903, c. 23, § 4), "shall state in their return when it is to be done," is mandatory, not simply directory.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 28; Dec. Dig. § 19.*]

2. HIGHWAYS (§ 53°)—Proceedings to Establish—Return.

When a highway has been laid out by county commissioners, but their return contains no statement when the work of building the same shall be done, such record would form no legal basis for proceedings under Rev. St. 1903, c. 23, § 39, to cause the work to be done by an agent when it was not done by the town within the time prescribed therefor.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 53.*]

3. Highways (\$ 53*)—Proceedings to Establish—Return.

Where a highway located partly in a town and partly in a plantation was laid out by county commissioners, but there was an entire absence of any statement or provision in the return of the commissioners showing that any decision was made respecting the time within which that portion of the road in the plantation should be completed, held, that this omission was a failure to comply with a mandatory requirement of the statute, and an error which materially concerned the town.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 53.*]

4. CERTIORABI GRANTED.

A petition for a writ of certiorari was filed in behalf of the plaintiff town against the county commissioners of Penobscot county to quash their records for errors alleged to have been committed in laying out a highway located partly in the plaintiff town and partly in Drew plantation in that county. Held: That the writ should issue.

5. EVIDENCE (§ 28*)—JUDICIAL NOTICE—LEG-ISLATIVE RESOLVES.

Ordinarily courts do not notice legislative resolves unless produced in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 43; Dec. Dig. § 28.*]
(Official.)

Report from Supreme Judicial Court, Penobscot County.

Certiorari by the Inhabitants of Kingman against the County Commissioners of Penobscot County. Case reported to the law court for determination. Writ granted.

Petition for a writ of certiorari in behalf of the town of Kingman against the county commissioners of Penobscot county to quash their records and proceedings for errors alleged to have been committed in laying out a highway located partly in the town of Kingman and partly in Drew Plantation in said county. By agreement of the parties the certified copy of the record of the doings of the county commissioners in the premises was taken as the answer of the defendants.

The matter was heard before the justice of the first instance without a jury, and at the conclusion of the evidence, and by agreement of the parties, the cause was reported to the law court for determination upon so much of the evidence as was "legally competent and admissible."

The case is stated in the opinion.

Argued before EMERY, C. J., and WHITE-HOUSE, SAVAGE, PEABODY, SPEAR, and BIRD, JJ.

Hugo Clark, for plaintiffs. H. H. Patten, County Atty., for defendants.

WHITEHOUSE, J. This is a petition for a writ of certiorari in behalf of the town of Kingman against the county commissioners of Penobscot county to quash their records and proceedings for errors alleged to have been committed in laying out a highway located partly in the town of Kingman and partly in Drew Plantation in that county. By agreement of the parties the certified copy of the record of the doings of the county commissioners in the premises is to be taken as the answer of the defendants. This record consists of a copy of the original petition for the road, the order of notice thereon, and the return of the commissioners of their doings in attempting to locate and establish a way. The petitioners allege eight causes of error, the fifth and sixth of which are as follows, namely:

"Fifth. Because it appears by the said return of the said commissioners and by the records thereof that said commissioners state that a term of one year from the 24th day of September, 1907, is allowed to the town of Kingman, through which said road is located, to open and make the same, without stating, adjudging, or designating in said return, or the records thereof, that any portion whatsoever of said county road or highway is to be opened, or that any portion whatsoever of the work or expense thereof is to be done or borne by said Drew Plantation, and without limiting the portion of the same to be done by your petitioner, the said town of Kingman, to that portion of said county road or highway situate within its territorial lim-

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

its, although it appears by the said return and the records thereof on the files and records of said commissioners in said matter in the custody of their said clerk, and it is a fact, that a considerable portion of said county road or highway passes through and is situate in said Drew Plantation.

"Sixth. Because said commissioners do not state in their said return of their said doings, nor does it appear by the records thereof, when said way is to be done."

In the return of their doings the commissioners say: "We proceeded to locate and establish said highway as prayed for by metes and bounds as follows, namely: Commencing at Sprague's mill in said Drew Plantation on the northwest bank of the Mattawamkeag river at a hemlock stake marked C. R.," etc. Thereupon they continue to give numerous courses and distances of the way as located throughout its entire length both in Drew Plantation and in the town of Kingman, and, respecting the metes and bounds and time for opening the way, conclude their return as follows:

"And we do further adjudge that said road shall be four rods wide, all the monuments at the angles thereof in the foregoing description named being the center of said road; and a term of one year from the twenty-fourth day of September, 1907, is allowed to the town of Kingman, through which said road is located, to open and make the same.'

It is provided by section 4, c. 23, Rev. St., that the county commissioners "shall make a correct return of their doings, signed by them, accompanied by an accurate plan of the way and state in their return when it is to be done, the names of the persons to whom damages are allowed, the amount allowed to each and when to be paid"; and section 9 of the same chapter declares that "a time not exceeding two years shall be allowed for making and opening the way."

It requires no argument to show the wisdom and necessity of this provision requiring the commissioners to state in their return when the work of building the road shall be done. It may obviously be of great consequence to all who are likely to have occasion to use the projected way for travel and transportation. Important contracts for the transportation of lumber and other merchandise would naturally be made with reference to the time fixed for the opening of such a road. It is also important that towns having the burden of contributing to the expense of building the road should have definite information in regard to the time of performing the work in order to make seasonable tax levies and appropriations for that purpose. The language of the statute is imperative: Commissioners "shall state in their return when it is to be done." The requirement is not simply directory, it is mandatory.

It has been seen that the county commissioners in the case at par made an adjudica- of the county commissioners would form no

tion as shown by their return that "a term of one year from the 24th day of September, 1907, is allowed to the town of Kingman, through which said road is located, to open and make the same."

It is contended in behalf of the town of Kingman that, strictly construed, this statement in the return requires Kingman to build the entire road as located, including that portion of it in Drew Plantation as well as that within its own limits, and that the doings of the commissioners must for that reason be held unauthorized and void.

On the other hand, it is contended by the county attorney in behalf of the commissioners that "it ought to be plain that Kingman had one year to build that part of the road located in the town of Kingman." He further insists "that it ought to be assumed that the part of the road located in Drew Plantation had some provision for the construction of the same, or it would have appeared in the record of the county commissioners"; and he cites chapter 36 of the Resolves of Maine for 1907, being a "Resolve in favor of Kingman and Drew Plantation." -This resolve provides "that the sum of \$2,000 be and hereby is appropriated to aid in building a road from Kingman village to Sprague's mill in Drew Plantation. Said sum to be drawn by and expended under the direction of the county commissioners of Penobscot county." But this private legislation was not pleaded by the defendants or introduced or offered in evidence, and "ordinarily courts do not notice resolves, unless produced in evidence." Simmons v. Jacobs, 52 Me. 158. But, even if it be assumed that the court can properly take judicial notice of this resolve, it is manifest that it contains nothing either to supply the deficiency in the proceedings of the commissioners or to aid the return of their doings respecting the time within which the work of building that portion of the road located in Drew Plantation must be completed. In order to effectuate the intention of the commissioners, the language of their return may properly be construed to require the town of Kingman to build only that portion of the way located within its own territorial limits. There is then an entire absence of any statement or provision in the commissioners' return showing that any decision was made respecting the time within which that portion of the road in Drew Plantation should be completed. This omission is clearly a failure to comply with a mandatory requirement of the statute, and an error which materially concerns the interests of the town of Kingman. There would be no justice or propriety in compelling Kingman to build its part of the road in one year, and at the same time give Drew Plantation an indefinite time subject only to the limitation of two years allowed by section 9 of chapter 23.

Furthermore, such a record of the doings

legal basis for proceedings under section 39 essary to prove the actual existence of the of the same chapter to cause the work to be done by an agent when it is not done by the town within the time prescribed therefor.

It is accordingly the opinion of the court that the proceedings of the county commissioners are invalidated by this error and must be quashed. This conclusion in regard to the fifth and sixth errors above considered renders it unnecessary to pass upon the other errors assigned. The certificate must therefore be:

Writ of certlorari to issue.

(6 Pen. 24)

EXCELSIOR REFINING CO. ▼. MURPHEY. (Superior Court of Delaware, New Castle. Feb. 28, 1906.)

1. PRINCIPAL AND AGENT (\$ 100*)—AS TO THIRD PERSON HOLDING OUT. -Agency

If a principal holds out a person as his agent, and places him in such a position that he is apparently authorized to deal with persons as such agent, without any known restrictions or limitations on his authority, it will bind the principal as to third persons doing business with him in the particular business in which he is engaged which he is engaged.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. \$\$ 262-273, 345, 364, 368-373; Dec. Dig. \$ 100.*]

2. PRINCIPAL AND AGENT (\$ 116*)—AUTHOB-ITY OF AGENT—SECRET INSTRUCTIONS.

A principal, holding out an agent as having general authority to act in a particular business or employment, cannot limit his authority by secret instructions.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 377, 377½; Dec. Dig. § 116.*]

Action by Franklin J. Murphey against the Excelsior Refining Company. Verdict for plaintiff.

Argued before LORE, C. J., and SPRU-ANCE and BOYCE, JJ.

Reuben Satterthwaite, Jr., for plaintiff. Samuel H. Baynard, Jr., for defendant.

LORE, C. J. (charging the jury). In this action Franklin J. Murphey claims from the Excelsior Refining Company the sum of \$157.01, with interest from November 1, 1905, for goods which he alleges he sold to the Excelsior Refining Company. The amount is not disputed, nor is it disputed that the goods charged were delivered to one George W. Green, who the plaintiff claims was the agent of the said company, but the defendant company denies that he was such agent. So that the question for you to decide is as to whether George W. Green was the agent of the Excelsior Refining Company, or was so held out to be the agent by the said company as to bind it.

agency, in order to bind the parties; but the proof of an actual agency existing and its extent is not absolutely necessary, where the principal is dealing through an agent with third persons. For it is well-settled law that if a principal holds out a person and places him in such a position in the community that he is apparently authorized to deal with persons as the agent of the company or person, without any known restriction or limitation upon his authority, he may be so held out as to bind the principal. And the courts in this state have well said that, if a person is held out to third persons or to the public at large by his principal as having a general authority to act for him in a particular business or employment, he cannot limit his authority by private or secret instructions. So that whether Green was in this case actually the agent and clothed with all the authority, or not, still the defendant would be liable if you should believe from the evidence that he was so held out by this company in dealing with the business people of this or any other community, and that any private or secret restrictions as to the extent of his agency were not known to the people with whom said agent was dealing.

It is for you to say in this case whether the Excelsior Refining Company did so hold out said George W. Green as their agent to this community and that the people dealing with him in the ordinary course of trade had reason to believe that he was their agent and dealt with him as such. So that if you find that Green either was the actual agent with authority, or that he was so held out by the defendant company, you should find for the plaintiff for the amount agreed upon. If you find that he was not their agent, or that he was not held out by the defendant company in such a way as to induce the belief that he was such, in that event your verdict should be for the defendant.

Verdict for plaintiff for \$160.01.

(6 Pen. 570)

ELLIOTT v. WILMINGTON CITY RY. CO. (Superior Court of Delaware. New Castle. Feb. 13, 1908.)

1. CARRIERS (§ 803*)—STREET RAILBOAD—LET-TING OFF PASSENGERS—CARE REQUIRED.

A street railway company, in letting off passengers, is bound to stop at usual stopping places, and wait a reasonable time for passengers to alight, and use reasonable care to secure their safety.

[Ed. Note.—For other cases, see Carriera, Cent. Dig. §§ 1216, 1218, 1224–1243; Dec. Dig. § 303.*1

2. Cabriers (§ 303*)—Street Railroad—Setting Down Passengers—Sudden Start.

If this suit was between Green and the defendant company itself—that is, between the agent and the principal—it would be nectional.

If a street car slows up or stops at an unusual place, so as to clearly invite a passenger to alight, and the passenger attempts to do so, the agent and the principal—it would be nectionally as the carrier's duty not to

suddenly start the car, so as to endanger the in the future, or any expenses incurred for passenger's safety.

[Ed. Note.—For other cases, see Carrier Cent. Dig. §§ 1228-1229; Dec. Dig. § 303.*] see Carriers, 8. Carriers (\$ 280*)—Passengers—Care Re-QUIRED.

A carrier of passengers is bound to exercise great care and diligence in their safe transportation, but is not an insurer of their safety under all circumstances, being responsible only for negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085-1092, 1098-1106; Dec. Dig. § 280.*]

4. Carriers (§§ 823, 825*) — Passengers DUTY.

A passenger is bound to act with prudence and use the means provided for transportation with reasonable care, and if his negligent act causes or contributes to the injury of which he complains he cannot recover.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1346, 1348; Dec. Dig. §§ 323, 325.*]

5. CARRIERS (§ 333*)—PASSENGERS—ALIGHT-ING FROM CAR—"REASONABLE CARE."

"Reasonable care," which a street car pas-senger is required to exercise in alighting from a car, is such care as a person of ordinary pru-dence would exercise under similar circumstan-ces; such care being proportioned to the risk incurred. incurred.

[Ed. Note.—For other cases, see Carl Cent. Dig. §§ 1385-1397; Dec. Dig. § 333.*

For other definitions, see Words and Phrases, vol. 7, pp. 5954-5956; vol. 8, p. 7779.]

6. CARRIERS (§ 325°) — STREET RAILEOADS Passengers-Knowledge.

A street car passenger, familiar with the railway at the place of the accident and the operation of cars there, is bound to avail himself of such knowledge.

[Ed. Note.—For other cases, see Cent. Dig. § 1348; Dec. Dig. § 325.*] Carriers.

7. CABRIERS (\$\frac{1}{2}\$\$ 316, 344*)—INJURIES TO PAB-SENGER—NEGLIGENCE—PRESUMPTIONS. No presumption of negligence, either of plaintiff or defendant, arises from the fact that plaintiff was injured while alighting from de-fendant's street car, on which she was a passenger.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1261, 1262, 1283-1294, 1399; Dec. Dig. §§ 316, 344.*]

8. NEGLIGENCE (§\$ 121, 122*) - BURDEN OF PROOF.

The burden of proof of negligence, whether plaintiff or defendant, rests on the party alleging it.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 217-234, 271; Dec. Dig. §§ 121, 122.*]

9. NEGLIGENCE (§§ 80, 98*) — CONCUR NEGLIGENCE—DEGREES OF NEGLIGENCE. CONCUBRENT

Where an injury was occasioned by plaintiff's negligence, or the concurrent negligence of both parties, plaintiff cannot recover, as the law will not measure degrees of negligence attributed to each.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \$\$ 84, 165; Dec. Dig. \$\$ 80, 98.*] 10. Damages (§ 80°) - Personal Injuries -

ELEMENT. In an action for injuries, plaintiff is en-titled to such sum as would reasonably com-pensate her for her injuries, including past pain and suffering, and such as may come to her in future from the injuries sustained, and also for medical or surgical services in endeavoring to effect a cure.

[Ed. Note.—For other cases, see Cent. Dig. § 222; Dec. Dig. § 30.*]

Action by Clara M. Elliott against the Wilmington City Railway Company to recover damages for personal injuries. verdict.

Argued before SPRUANCE and BOYCE, JJ.

J. Frank Ball, for plaintiff. Walter H. Hayes and Herbert H. Ward, for defendant.

SPRUANCE, J. (charging the jury). This action is brought by the plaintiff, Clara M. Elliott, against the defendant, the Wilmington City Railway Company, a corporation of this state, to recover damages for personal injuries of the plaintiff alleged to have been occasioned by the negligence of the defendant. The plaintiff contends that on the night of July 16, 1906, she was a passenger on one of the electric cais of the defendant, going westward on Fourth street in this city. and that near the intersection of the easterly side of Market street, while attempting to alight from said car after the same had come to a stop, the said car was negligently and suddenly started or jerked, whereby she was thrown from the car to the bed of the street and seriously injured. The defendant contends that it was guilty of no negligence whatever, that at the time the plaintiff attempted to alight from the car the car was in motion, and that her falling or being thrown from the car was solely due to her own negligence.

A street railway company, in letting its passengers on and off its cars, is bound to stop at its usual stopping places, and to wait a reasonable time for passengers to get off or on, and also to use all reasonable care to secure the safety of its passengers. If a car slows up or stops at an unusual stopping place in such a manner as clearly to invite a passenger to alight, and the passenger under such circumstances attempts to alight, using due and proper care, it is the duty of the person or persons having charge of the car not to suddenly start the car in such a manner as to endanger the safety of the alighting passenger.

It is admitted that the defendant at the time of the said accident was a common carrier engaged in the business of transporting passengers for hire. A common carrier of this character is held to the exercise of great care and diligence in the safe transportation of its passengers, but it is not an insurer of their safety under all circumstances; it being responsible only for its negligence. It is the duty of a passenger to act with prudence, and to use the means provided for his transportation with reasonable discretion and care; and if his negligent any impairment to her ability to earn a living act causes or contributes to the injury of

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which he complains he cannot recover. It from the circumstances under which it has is the duty of the passenger to exercise all reasonable care in alighting from a car. Reasonable care is such care as a person of ordinary prudence would exercise under similar circumstances: such care being proportioned to the risk incurred. A passenger, familiar with the railway at the place of the accident and the operations of the cars there, is bound to avail himself of such knowledge.

This action is based upon the negligence of the defendant, and to entitle the plaintiff to recover you must be satisfied by a preponderance or greater weight of the evidence that the negligence of the defendant which caused the plaintiff's injuries was the negligence described in the plaintiff's declaration, viz., the sudden moving or jerking of the car while the plaintiff was in the act of alighting from the car. No presumption of negligence, either on the part of the plaintiff or defendant, arises from the mere fact that the plaintiff was injured while alighting from a car of the defendant. To entitle the plaintiff to recover, you must be satisfied from a preponderance of the evidence that the injuries to the plaintiff were caused by the negligence of the defendant.

The hurden of proving negligence, whether on the part of the defendant or the plaintiff, rests upon the party by whom such negligence is alleged. If the injury complained of was occasioned by the negligence of the plaintiff, or by the concurrent negligence of both the plaintiff and the defendant, the plaintiff cannot recover, as the law in such case will not attempt to measure the degree of negligence attributable to each party.

Your verdict should be given in favor of that party for whom is the preponderance or greater weight of the evidence. Where, as in this case, the testimony is conflicting, the jury should reconcile it if they can; but, if they cannot do so, they should give credence to that part of it which they deem most worthy of belief. If your verdict should be for the plaintiff, it should be for such a sum of money as will reasonably compensate her for her injuries, including therein her pain and suffering in the past, and such as may come to her in the future, resulting from her injuries, and also for any impairment of ability to earn a living in the future and any expenses she has incurred for medical or surgical services in endeavoring to be cured of her injuries.

The jury disagreed.

(6 Pen. 446)

STATE v. DREDDEN.

(Court of General Sessions of Delaware, New Castle. Sept. 24, 1907.)

1. LARCENY, (§ 16*)-FINDING LOST GOODS-CONVERSION-INTENT.

been found, the owner may be reasonably as-certained, fraudulent conversion of the article to the finder's use is sufficient to justify an inference of felonious intent, constituting larceny.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 45; Dec. Dig. § 16.*]

2. LARCENY (§ 16*) - LOST GOODS - CONVER-BION

Where defendant was not the actual finder of lost money, but at the time he received it from his son he knew, or had reasonable cause to believe, that prosecutor was the owner of the money, and notwithstanding such knowledge he feloniously appropriated it to his own use without the owner's consent, he was guilty of larceny.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 45; Dec. Dig. § 16.*]

3. LARCENY (§ 1°)—DEFINITION.

Larceny is the felonious taking and carrying away of the personal property of another, with intent to convert it to the taker's use and deprive the owner of its use without his consent.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 5, pp. 3991-4003.]

4. LARCENY (§ 3*) — CONVERSION OF LOST GOODS—FELONIOUS INTENT.

Felonious intent is a material element of the crime of larceny.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 8-10; Dec. Dig. § 3.*]

James Dredden was indicted for larceny. Verdict of guilty.

Argued before LORE, C. J., and PENNE-WILL, J.

Daniel O. Hastings, Dep. Atty. Gen., for the State. William G. Jones, for defendant.

At the trial the state produced evidence to the following effect: That on the evening of May 27, 1907, while returning from the plant of the Davis Pressed Steel Company, where he was employed, Louis Echrich lost his pay envelope, upon the outside of which was written in typewriting his name, the number of hours he had worked during the week, and the amount inclosed, \$10. prosecuting witness did not miss the money until he reached home, and shortly thereafter was told that the 14 year old son of the defendant had found the money. Echrich returned to Taylor and Buttonwood streets, where the money had been picked up, and demanded the money from the boy. The latter denied finding the money; but a Mrs. McLloyd stated that she saw him pick it up, and also saw him tear the envelope up into small pieces, which Mrs. McLloyd procured, and, placing the scraps together, discovered the name of the loser, and informed Echrich, who then accused the colored boy. The excitement about the place brought the father of the boy, the defendant, to the scene. He demanded of his son whether he had found the money, which the latter at first denied, If a finder knows who is the owner of a the money, which the latter at first denied, lost chattel, or if from any mark on it, or but later admitted, taking the money from

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

his shoe, in which he had concealed it, and on a street in this city; that very soon after turning it over to his father. The prosecuting witness, Echrich, demanded the return of the money from the defendant; but the iatter refused to turn over the money, unless promised a reward. He was told to have the money changed and he would be given a reward; but he went away and did not return the amount. The state also proved by Mrs. McLloyd that she said to the elder Dredden, when the money was handed to him by his son and demanded by Echrich, "You know it is that young fellow's money, and you ought to give it to him," and that Dredden said: "You have not anything to do with it. You keep your mouth out of it."

Subsequently a warrant was sworn out for the defendant on the charge of larceny; he having again refused to turn over the money to Echrich, on the demand of the latter, in company with a police officer.

When the state closed, Jones, for the defendant, moved the court to instruct the jury to return a verdict of not guilty on the grounds, first, that there was no proof of a felonious taking; second, that there was no sufficient identification of the property when it came into the possession of the defendant to justify him in the belief that it was the property of Echrich, and he was therefore entitled to hold it for the rightful owner.

PENNEWILL, J. We decline to take the case from the jury.

After the testimony of the defendant had been heard, counsel for the defendant prayed the court to charge the jury as follows:

"First. If the jury believe that, at the time the defendant came into possession of the money, he did not know the owner, their verdict should be not guilty.

"Second. If the jury believe that, at the time the defendant came into possession of the money, there were no marks upon it indicating who the true owner was, their verdict should be not guilty.

"Third. That, before the jury can convict, they must be satisfied beyond a reasonable doubt that, at the time the money came into the hands of the defendant, he had a felonious intent to appropriate the same to his own use; and that, if at that time his intent was not felonious, no subsequent acts of concealment or appropriation would constitute the crime of larceny."

PENNEWILL, J. (charging the jury). The prisoner at the bar, James Dredden, is charged in this indictment with the larceny of certain paper money of the value of \$10, on the 27th day of May of the present year; the money being alleged to have been the property of Louis Echrich. The state claims that the prosecuting witness, Louis Echrich, on the day mentioned, lost the said money

the loss the money was found upon the street by the son of the defendant, and within an hour or two after the finding, the son gave it to his father upon the demand of the latter. It is contended by the state that at the time the prisoner received the money from his son he knew that the money had been found by the son, and that it was the property of the prosecuting witness, or at least that the circumstances existing at the time were such as to reasonably apprise the prisoner that the money belonged to the prosecuting witness. It is contended, therefore that the retention of the money by the father was, under the circumstances, larceny in contemplation of law.

The law applicable to the finder of lost property has been very clearly stated by this court in the case of State v. Stevens, 2 Pennewill (Del.) 486, 49 Atl. 174, as follows: "If the finder knows who is the owner of the lost chattel, or if, from any mark upon it, or from the circumstances under which it was found, the owner could reasonably have been ascertained, then the fraudulent conversion of it to the finder's use is sufficient evidence to justify the jury in finding the felonious intent constituting a larceny." In the case before you the defendant was not the actual finder of the money, and yet if, at the time he received the money from his son, he knew, or the circumstances then existing were such as to reasonably inform him, that the prosecuting witness, Louis Echrich, was the owner thereof, and notwithstanding such knowledge, or means of knowledge, he feloniously appropriated the money to his own use without the consent of the owner, he would be guilty of larceny.

Larceny is the felonious taking and carrying away of the personal property of another, with the intent to convert it to the taker's use and deprive the owner of the use thereof, without the consent of the owner. You will observe, therefore, that the felonious intent is a material element of the crime charged, and must be proved beyond a reasonable doubt. We say to you, however, that in order to determine whether the prisoner knew to whom the money belonged, and feloniously intended to appropriate it to his own use at the time he received it, you may consider all that was said or done by the prisoner, or by others in his presence or hearing, and any other circumstances which would indicate what his actual knowledge and intentions were.

If, after a careful consideration of all the evidence, you are not satisfied beyond a reasonable doubt that the prisoner feloniously intended to appropriate the money to his own use, your verdict should be not guilty.

Verdict: "Guilty."

(78 N. J. L. 158)

REED V. SASLAFF.

(Supreme Court of New Jersey. Sept. 24, 1909.) CONTRACTS (§ 116*)-LEGALITY-PUBLIC POL-ICY-UNIFORM RATES.

An agreement between certain rolling chair proprietors in Atlantic City to maintain a fixed schedule of rates for service is not void as contrary to public policy, where it appears that such schedule of rates is exactly the same as the maximum rates fixed for such service by the ordinance of the city, and that such rates are reasonable, and where it does not appear that the parties to the agreement have a monopoly of the business in that community.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 547-549; Dec. Dig. § 116.*] (Syllabus by the Court.)

Appeal from District Court of Atlantic City.

Action by David C. Reed, trustee, etc., against Marcus Saslaff. Judgment for defendant, and plaintiff appeals. Reversed.

Argued February term, 1909, before REED, TRENCHARD, and MINTURN, JJ.

Eli H. Chandler, for appellant. Joseph B. Perskie, for appellee.

The plaintiff below TRENCHARD, J. brought this action in the Atlantic City district court against Marcus Saslaff to enforce payment of the sum of \$250, being the penalty in an agreement entered into between the plaintiff and the defendant. The trial before the judge, sitting without a jury, resulted in a judgment for the defendant, which judgment is now here for review.

Upon the trial it appeared that the plaintiff as well as the defendant and others were severally the proprietors and owners of roller chairs in Atlantic City, and that they, on the one part, and the plaintiff, as trustee, on the other part, entered into a written agreement wherein the defendant covenanted to pay the sum of \$250 to the plaintiff as trustee for the Atlantic City Hospital in the event that the defendant failed to "faithfully observe, maintain and carry out, without any equivocation, reservation or rebates, secret or otherwise," the fixed schedule of rates of fare therein set forth for the hire of roller chairs in Atlantic City. The breach of this covenant was established at the trial by proof, but the learned trial judge gave judgment for the defendant upon the theory that the covenant in question was contrary to public policy and void. That was the sole defense interposed at the trial, and none other is suggested here. We think the view of the trial judge was erroneous. He seems to have regarded the case as controlled by Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612, in that the agreement was one between independent and unconnected owners of rolling chairs looking to the control of rates for

specified rates, and so against public policy. But we think that case is not applicable to the case at bar for the reasons we will now state.

At the trial there was admitted in evidence an ordinance of Atlantic City entitled "An ordinance regulating and prescribing the fees to be charged persons carried in invalid or rolling chairs within the limits of Atlantic City," approved July 17, 1905. This ordinance by its terms fixed the maximum rates for hire of the various kinds of rolling chairs. It appears that the maximum rates thus fixed by ordinance are exactly the same as the rates provided for in the agreement between the plaintiff and defendant. The power of Atlantic City to pass the ordinance fixing such maximum rates is not challenged. The city charter of Atlantic City (P. L. 1902, p. 293) authorizes the city council by ordinance to license and regulate carriages and vehicles used for the transportation of passengers, and to fix fees for such licenses. Moreover, the power to fix the fares to be charged was abundantly conferred upon city council by various statutes, viz., by a supplement to the original charter approved March 13, 1866, by another supplement, approved March 22, 1871, and by a general act applicable to all cities approved May 16, 1894 (Gen. St. 1895, p. 2236, § 532). Fonsler v. Atlantic City, 70 N. J. Law, 125, 56 Atl. 119. And by section 115 of the present charter (P. L. 1902, p. 341) such power was expressly reserved. over v. Atlantic City, 73 N. J. Law, 596, 64 Atl. 146. The trial judge found as a fact that the maximum rates fixed by the ordinance and adopted in the agreement "were reasonable rates of fare, and that a maintenance of such rates would result in the acquirement of but reasonable benefit for the services performed." Under these circumstances, it is not perceived how the covenant in question is against public policy. It is too plain for argument that the policy of the law is not violated by an agreement whereby some (not all) of the owners of such vehicles in Atlantic City contracted to maintain rates which were permitted by the lawmaking power and which are found to be reasonable as a matter of fact. In Raritan River R. R. Co. v. Traction Co., 70 N. J. Law, 732, 58 Atl. 832, the Court of Errors and Appeals had under review section 15 of the general railroad law of 1873 (Gen. St. 1895, p. 2643), which, in effect, vested in the railroad company an uncontrolled discretion to establish such rates of freight and fare as its own interests from time to time required, subject only to the maximum rates prescribed by the section, and to the reserved right of repealer and modification by the Legislature, and the court held (1) that the courts have no general supervisory jurisdiction over the question service by an express agreement to maintain of freight and passenger rates; and (2) that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date. & Reporter Indexes

an agreement made between a railroad company and a competitor that during a limited period the former company "will not reduce its present rates of fare unless required by law" is not contrary to public policy as established in this state. In that case Mr. Justice Pitney (the present Chancellor), speaking for the court, said: "Public policy is to be sought for in the rules of the common law as modified by the acts of the Legislature. It is for the lawmaking authority, and not for the courts, to declare it. Certainly the courts have no general supervisory authority over the question of freight and passenger rates. Their concern in the matter is confined to cases where the question of 'reasonable rates' is raised incidentally in the ordinary course of judicial inquiry. Railroad companies, as common carriers, pursuing a public calling under such circumstances that the public must of necessity deal with them, are limited by the rules of the common law, in the absence of any statute, to the imposition of reasonable rates of fare and toll. On the additional ground that their property is devoted to a public use, they are subject to the like limitation, and their use of the property is subject to be controlled by the public for the common good within limits fixed by the Constitution. Where controversies arise inter partes, the courts judicially determine what are reasonable rates. In so doing they follow common-law rules in the absence of statute. Where there is a statute, the courts follow the rule of law thus prescribed. Where the statute violates the Constitution, as by prescribing rates so low as to be unremunerative, so as to amount to a taking of property without compensation or without due process of law, the courts follow the Constitution, disregarding the statute [citing cases]. But the power to require a public service to be performed for a limited rate is but a branch of the power to regulate, in the public interest, property that is devoted to the public use. This is primarily the function of the lawmaking body. The courts may in a given instance be called upon to decide, in the course of litigation, whether a certain rate is reasonable or unreasonable, or to declare that a given statutory limitation is confiscatory, but the courts have no power to declare in general what rates shall not be exceeded. In view of the positive statutory declaration contained in section 15 of the general railroad law, construed as we construe it, we are unable to conceive on what rational ground the court can properly declare that any public policy requires that the rates shall be maintained below the maximum rates fixed in the statute. That limitation and the discretion that is conferred upon the company with respect to lesser rates are the deliberate expression of the lawmaking power, and the measure of its regulation in this behalf of property devoted to public use under the issue, and the other that the plaintiff ought

general railroad law. That statute binds the court unless it transcends some constitutional limitation. Nothing of the sort is suggested." We think the decision of that case, and the reasoning by which it is supported, decisive of the case at bar.

The contention of the defendant that the effect of the agreement in question is to create a monopoly, and that it thus contravenes public policy, is not supported either by the terms of the agreement itself nor by the evidence. It does not appear that the parties to this contract are in control, or anything like control, of the rolling chair business in Atlantic City. There is nothing to show that they comprise more than the most insignificant part or fraction of those engaged in the business in that community. It does appear that others are engaged in the business there. We are not at liberty to indulge in inferences which would restrict rights under a contract. Parties are to be given the widest latitude to make contracts with reference to their private interests and the invalidity of such contracts is never to be inferred, but must be clearly made to appear. What the effect would be upon the agreement in question of proof tending to show control of the business in that community it is unnecessary now to decide because, as we have pointed out, there is no such proof.

The agreement in question not being contrary to public policy, the judgment of the court below must be reversed, and a venire de novo awarded.

(78 N. J. L. 170)

WILLIAMS V. PUBLIC SERVICE RY. CO. (Supreme Court of New Jersey. Sept. 24, 1909.) PLEADING (§ 81*)—DEFENSES—MATTERS SINCE SUIT BEGUN.

Matters arising after the commencement of an action and before plea may be pleaded against the further maintenance of the suit.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 163; Dec. Dig. § 81.*]

(Syllabus by the Court.)

Action by Alexander Williams against the Public Service Railway Company. On motion to strike out plea. Motion denied.

Argued February term, 1909, before REED, TRENCHARD, and MINTURN, JJ.

Abner Kalisch and Samuel Kalisch, Jr., for the motion. Leonard J. Tynan, opposed

TRENCHARD, J. This is a motion to strike out a plea. On December 23, 1908, Alexander Williams issued a summons out of the Supreme Court in an action in tort against the Public Service Railway Company, which summons was returnable January 4, 1909. On January 21, 1909, he filed his declaration. On February 6, 1909, the defendant company filed two pleas, one the general

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

not to further maintain his action because of a general release under seal given to the defendant by the plaintiff after the commencement of the action, to wit, January 23, 1909. The plaintiff now moves to strike the last-mentioned plea from the record as having been improperly filed.

As we understand the argument of counsel for the plaintiff, it is that the plea is bad because he asserts that the plaintiff was a minor at the time suit was brought. Whatever the fact may be in that regard, there is no indication of infancy of the plaintiff on the face of the summons. Nor is there in the declaration any allegation to that effect which the defendant is bound to negative. In its commencement by way of recital it is said that the plaintiff, being a minor, sues by his next friend. But there is no substantive allegation that he is a minor either there or elsewhere in the declaration. If he was an infant at the time suit was brought, still he might well have been of full age when he subsequently executed the release. If of full age, the release, being a matter of defense arising since the commencement of the action, but before plea, may be pleaded against the further maintenance of the suit. Hutchinson v. Hendrickson, 29 N. J. Law, 180; Dryer v. Lewis, 57 Ala, 551; Kimball v. Wilson, 3 N. H. 101, 14 Am. Dec. 342; Wisheart v. Legro, 33 N. H. 177; Clark v. Fox, 9 Dana (Ky.) 193. If the plaintiff was an infant at the time of the execution of the release, that fact would not make the release void. It would only render it voidable. If the plaintiff desires to avoid the release on account of his alleged infancy, he should file a replication setting up his infancy.

The plea being good, the motion to strike it out is denied.

(78 N. J. L. 150)

JAMES LEO CO. v. JERSEY CITY BILL POSTING CO.

(Supreme Court of New Jersey. Sept. 24, 1909.)

FIXTURES (§ 14*)—LANDLOBD AND TENANT—FENCES.

An innocent purchaser, without notice, of land to which a fence has been annexed, is not affected by an agreement between the tenant of his grantor and the owner of the fence at the time of annexation, by the terms of which the latter was to have the right of removal. In such case the fence became a part of the realty and passed by the deed to the purchaser.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. § 22; Dec. Dig. § 14.*]

(Syllabus by the Court.)

Appeal from District Court of Jersey City. Trespass by the James Leo Company against the Jersey City Bill Posting Company. Judgment for plaintiff for nominal damages, and plaintiff appeals. Reversed, and new trial ordered.

Argued February term, 1909, before REED TRENCHARD, and MINTURN, JJ.

Peter & John Bentley, for appellant. John J. Mulvaney, for appellee.

TRENCHARD, J. The plaintiff in this suit seeks damages for a trespass alleged to have been committed by the defendant's servants in entering upon the plaintiff's lands, and tearing down and carting away a fence, and to recover the value of the fence. At the trial in the First district court of Jersey City the evidence showed that, prior to the purchase of the lands in question by the plaintiff, the defendant had erected a fence thereon, pursuant to a license given by a written agreement with the tenant then in occupa tion of the premises, which permitted the defendant to erect and maintain a fence for advertising purposes, conditioned upon its vacating on 30 days' notice from the tenant; the defendant having the right upon such notice to remove its property. The plaintiff took title to the lands without notice of the license respecting the fence. About two weeks after the term of the tenant under whom the defendant held this advertising privilege had expired, and after having failed to come to terms with the plaintiff for the retention of the fence privilege, the defendant, by its servants, went to the premises in question and removed the fence, and carted it away. The learned trial judge, sitting without a jury, rendered judgment for the plaintiff for nominal damages only, and the plaintiff appeals.

The trial judge was of the opinion that under the facts stated the title of the fence was in the defendant, but he rendered judgment for the plaintiff upon the theory that the defendant in recovering its property committed a technical trespass. We think the judge was in error in his finding that the title of the fence was in the defendant. As a general proposition, a fence is a part of the freehold, and the ownership of it is determined accordingly. 12 A. & E. E. L. (2d Ed.) 1059. This is so as between vendor and vendee. Ruckman v. Outwater, 28 N. J. Law, 581. It is, of course, true, as pointed out by Chief Justice Beasley in Ivins v. Ackerson, 38 N. J. Law, 220, 222, that a fence is not "out and out" a part of the land, but may, as between the owner of the land and the owner of the fence before annexation, retain its character as personalty by an express agreement between them to that effect.

We are thus brought to a consideration of the main question in this case: Whether a subsequent innocent purchaser of the land without notice is affected by such an agreement. Most of the cases presenting the question of the right of a third party to chattels which have been annexed to the soil arise as between conditional vendors or chattel mortgagees and purchasers or mortgagees of

[•]For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the realty. Our own courts have recognized the title of the conditional vendor or chattel mortgagee as against a mortgage upon the realty executed before the personal property was affixed to the soil (Palmateer v. Robinson, 60 N. J. Law, 433, 38 Atl. 957; General Electric Co. v. Transit Equipment Co., 57 N. J. Eq. 460, 42 Atl. 101; Campbell v. Roddy, 44 N. J. Eq. 244, 14 Atl. 279, 6 Am. St. Rep. 889), but thus far, as far as we know, they have not been called upon to decide as to the rights acquired by a bona fide purchaser without notice after the fixture is upon the premises (Palmateer v. Robinson, 60 N. J. Law, 433, 436, 38 Atl. 957). In other jurisdictions the weight of authority is to the effect that a subsequent purchaser of the land, without notice, is not affected by an agreement between the owner of the land and the owner of an article at the time of annexation that the article shall retain its personal character and be subject to removal at the pleasure of the owner of the article. Hobson v. Gorringe, 66 L. J. Ch. 114, (1897) 1 Ch. 182; McDonald v. Weeks, 8 Grant, Ch. (U. C.) 297: Porter v. Pittsburg Bessemer Steel Co., 122 U. S., 267, 7 Sup. Ct. 1206, 30 L. Ed. 1210; Prince v. Case, 10 Conn. 375, 27 Am. Dec. 675; Joliet First Nat. Bk. v. Adam, 138 Ill. 483, 28 N. E. 955; Binkley v. Forkner, 117 Ind. 183, 19 N. E. 753, 3 L. R. A. 33; Bringholff v. Munzenmaier, 20 Iowa, 513; Rowand v. Anderson, 33 Kan. 264, 6 Pac. 255, 52 Am. Rep. 529; Ridgeway Stove Co. v. Way, 141 Mass. 557, 6 N. E. 714; Stevens v. Rose, 69 Mich. 259, 37 N. W. 205; Climer v. Wallace, 28 Mo. 557, 75 Am. Dec. 135; Arlington Mill, etc., Co. v. Yates, 57 Neb. 286, 77 N. W. 677; Haven v. Emery, 33 N. H. 69: Brennan v. Whitaker, 15 Ohio St. 446; Muir v. Jones, 23 Or. 332, 31 Pac. 646, 19 L. R. A. 441; Forrest v. Nelson, 108 Pa. 481; McCrillis v. Cole, 25 R. I. 156, 55 Atl. 196, 105 Am. St. Rep. 875; Hutchins v. Masterson, 46 Tex. 551, 26 Am. Rep. 286; Davenport v. Shants, 43 Vt. 546; Wade v. Donau Brewing Co., 10 Wash. 284, 38 Pac. 1009; Frankland v. Moulton, 5 Wis. 1. As a reason for this rule, it has been said: "To hold otherwise would contravene the policy of the laws requiring conveyances of interests in real estate to be recorded, seriously endanger the rights of purchasers, afford opportunities for frauds, and introduce uncertainty and confusion into land titles." Hunt v. Bay State Iron Co., 97 Mass. 279. See, also, Haven v. Emery, 33 N. H. 66; Powers v. Dennison, 80 Vt. 752, 756.

We have not overlooked the fact that in dice Reed in C. Alabama, Maine, and New York the rule appears to be otherwise; their cases seeming to hold that a subsequent purchaser cannot claim the chattels, though ignorant of the novo awarded.

agreement by which they were to retain their personal character. But with regard to the cases in the last-named jurisdictions we make the following observations: In the Alabama cases of Warren v. Liddell, 110 Ala. 232, 20 South. 89, and W. T. Adams Mach. Co. v. Interstate Building Ass'n, 119 Ala. 97, 22 South. 857, the rights of a vendor of chattels, under an agreement that they should remain personalty until paid for, were held to be superior to those of a subsequent mortgagee of the land to which they were annexed, as intended, though such mortgagee has no notice of the rights of the vendor of the chattels. But the decision was based chiefly upon the rule which there applies to the case of bona fide purchasers of chattels from a conditional vendee, who, by the rule there obtaining, do not take title to the chattels as against the original vendor. In Maine, in a late case, the court said: "Russell v. Richards, 10 Me. 429, 25 Am. Dec. 254, Hilborne v. Brown, 12 Me. 162, and Tapley v. Smith, 18 Me. 12, establish the principle that a building erected by one man on the land of another by his permission remains the personal property of him who erects it, and does not pass by a conveyance of the land to a third person, although from its character, purpose, and mode of use it appears to be a part of the realty, and the conveyance is to a bona fide purchaser without notice. These decisions have never been overruled in this state, although it must be admitted that they have been somewhat discredited by the comments of our own court in more recent decisions, and the rule established by them is contrary to the great weight of authority relating to this question." Peaks v. Hutchinson, 96 Me. 530, 53 Atl. 38, 59 L. R. A. 279. With respect to the state of New York, it is sufficient to say, as was pointed out by Mr. Justice Reed, speaking for our Court of Errors and Appeals in Campbell v. Roddy, 44 N. J. Eq. 244, 250, 14 Atl. 279, 6 Am. St. Rep. 889, that their cases on this question "seem to be in confusion."

We hold, therefore, in accordance with the weight of authority, that the plaintiff, being an innocent purchaser without notice of the lands to which the fence had been annexed, is not affected by the agreement between the tenant of his grantor and the owner of the fence, by the terms of which the latter was to have the right of removal. In such case the fence became a part of the realty and passed by the deed. So to hold puts this case in accord with the obiter dictum by Mr. Justice Reed in Campbell v. Roddy, 44 N. J. Eq. 244, 250, 14 Atl. 279, 6 Am. St. Rep. 889.

The result is that the judgment of the court below must be reversed, and a venire de novo awarded.

(76 N. J. E. 52)

ZELMAN et al. v. KAUFHERR. (Court of Chancery of New Jersey. Aug. 6, 1909.)

1. VENDOR AND PURCHASER (§ 130*)—MARKETABLE TITLE.

A doubt about a title to render it not marketable must be a rational doubt, or real and not fanciful.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 245, 246; Dec. Dig. § 130.*]

2. COVENANTS (§ 84*)—Breach—Persons Who MAY BE SUED.

An action at law for damages for breach of restrictive building covenant can only be brought against the person by whom broken, and not against a subsequent grantee.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 91; Dec. Dig. § 84.*]

3. Injunction (§ 113*)—Breach of Cove-NANT-LACHES.

An application for a mandatory injunction to protect a restrictive building covenant must be promptly made.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 198, 199; Dec. Dig. § 113.*]

4. Injunction (§ 62*)—Breach of Covenant—Building Covenants.

To warrant a mandatory injunction to pro-tect a restrictive building covenant, the common scheme of building must have been actually

preserved. [Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 124-127; Dec. Dig. § 62.*]

5. COVENANTS (\$ 108*)-RESTRICTIVE BUILD-ING COVENANTS - BREACH - PERSONS ENTI-TLED TO COMPLAIN.

Adjoining owners who not only stood by while a building was erected in violation of a restrictive building covenant, but have themelves violated such covenant, are not in a position to complain.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 180; Dec. Dig. § 108.*]

Specific performance by Sophie Zelman and others against Henryette Kaufherr, Decree for complainants.

Adrain Riker, for complainants. Samuel F. Leber, for defendant.

STEVENS, V. C. This is a suit for specific performance of a contract to purchase real estate in Newark. The only defense made is that in the deed from Emily Martin, the complainants' grantor, to the complainant, there is a restriction "that dwellings are the only buildings to be erected on the front portion of said lots, * * * and shall be kept back ten feet from the street line." averment of the answer is that the complainant erected buildings six feet from the street line, and that it would, therefore, be hazardous for her to accept a conveyance. It is not averred in the answer that Mrs. Martin owns any other land in the neighborhood for the benefit of which the restriction was imposed, or that she is herself under any obligation to her grantor to see to it that no building is erected within the prohibited space. Ιt to show that the erection of the buildings | C., refused relief on the ground that the

within the 10-foot line has caused any substantial injury to Mrs. Martin. The evidence, however, took a somewhat wider range, and I will discuss the case from the wider standpoint.

It appears that in 1887 Kate B. Carter purchased a tract of land having a frontage on Hillside avenue of about 285 feet and a depth of 260 feet. She conveyed lots on Hillside avenue, out of this tract, to different grantees, and in the several conveyances imposed, among others, the restriction above mentioned. In every instance of a conveyance of lots on Hillside avenue this restriction has been violated. All the lots have been built upon, and some part of each building is three or more feet over the line. The complainant's buildings are four feet and a fraction over it. All the buildings have been put up at least two years ago and some of them longer. The complainant erected hers two years and a half ago. If, therefore, Mrs. Carter had a general building scheme, it has been disregarded and as far as appears without objection on her part.

The question is whether under these circumstances the complainant is able to give a marketable title; that is, a title that will not expose the purchaser to the hazards of a litigation in regard to it. Lippincott v. Wikoff, 54 N. J. Eq. 407, 33 Atl. 305; Fahy v. Cavanagh, 59 N. J. Eq. 278, 44 Atl. 154; Barger v. Gery, 64 N. J. Eq. 263, 53 Atl. 483. The doubt about the title must be a rational doubt (Barger v. Gery, supra); or, as it has been otherwise characterized, "real and not fanciful" (Methodist Epis. Church v. Robertson, 68 N. J. Eq. 433, 58 Atl. 1056). There must, it is said, be some debatable grounds on which the objection to the title can be justified. Vreeland v. Blauvelt. 23 N. J. Eq. 483. Thus tested, it would seem to be without substance. There is no doubtful question of law or fact present. The only conceivable litigation would be either an action at law for damages or a bill for mandatory injunction. The action at law could only be brought against complainant; for it was she, and she only, who broke the covenant. On a bill for mandatory injunction to protect restrictive building covenants, courts of equity have laid down two rules and applied them with much strictness: (1) The application must be promptly made. Lippincott v. Wikoff, supra; Leaver v. Gorman (N. J. Ch.) 67 Atl. 112; Sayers v. Collyer, 28 Ch. Div. 103. (2) The common scheme of building must have been actually preserved. Peek v. Matthews, L. R. 3 Eq. 575; Ocean City Ass'n v. Headley, 62 N. J. Eq. 322, 50 Atl. 78. Mrs. Carter would be met by both of these objections should she file a bill, and, as far as I can see, they would be unanswerable. The case differs in an important particular from would seem, therefore, that the answer fails | Fahy v. Cavanagh, supra, where Pitney, V.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tle, viz., the execution of a will defectively witnessed, might be made difficult, if not impossible by lapse of time. Here lapse of time would only make it still more difficult for Mrs. Carter to succeed. And, if she could not succeed, the case of the adjoining property owners is still more hopeless. Not only have they stood by while complainant was building, but they have themselves violated the same covenant. Sutcliffe v. Eisele, 62 N. J. Eq. 222, 50 Atl. 69.

I think, therefore, that the possibility of injury is so remote that it does not afford any just ground for refusing to perform the agreement.

(76 N. J. E. 177)

VON BERNUTH v. VON BERNUTH. (Court of Chancery of New Jersey. June 19, 1909.)

1. PLEADING (§ 247*)—SUPPLEMENTAL PLEAD-INGS.

Events happening after the bringing of the original suit are interjected into it by leave of the court by supplemental bill or answer, and, as to the facts set up therein, they relate to the dates of happening thereof.

[Ed. Note.—For other cases, see Plead Cent. Dig. §§ 684, 685; Dec. Dig. § 247.*]

2. Injunction (§ 32*)—Action in Another STATE.

A husband may be enjoined from maintaining in another state an action for separation instituted subsequent to the commencement in New Jersey of a suit for divorce by his wife and his appearance and answer therein, where his action is vexations and harassing to her, and, if the two causes are allowed to proceed, will undoubtedly be embarrassing to the courts of both states, and likewise on the general ground that the cause of action was within the jurisdiction of the New Jersey court before any attempt was made to compel the wife to submit to a foreign tribunal, and where such injunction will not contravene the public policy of such other state.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 69, 72, 73; Dec. Dig. § 32.*]

Petition for divorce by Pauline S. Von Bernuth against Frederick A. Von Bernuth, Jr. Complainant moves for an injunction to restrain defendant from prosecuting an action for separation in New York. Granted.

Thomas L. Raymond, for the motion. Clinton H. Blake, Jr., and Somer, Colby & Whiting, opposed.

HOWELL, V. C. This is a motion for an injunction to restrain the defendant from further prosecuting an action in the Supreme Court of New York. On October 5, 1908, the petitioner filed her petition in this court praying for a divorce against the defendant upon the ground of desertion. This petition was subsequently amended, and citation thereon was issued and returned by the sheriff not served. An attempt was then made to secure the appearance of the defendant, who was

proof of a fact material to complainant's ti-1 substituted service. The order for publication of the substituted notice was made on November 25, 1908, and the time for answer appointed thereby expired on January 26, 1909. On January 20, 1909, counsel for the defendant took an order that he have 20 days' additional time in which to file an answer or demurrer to the amended petition. On February 13, 1909, another order was made on motion of defendant's counsel extending the time to answer or demur 20 days further. On February 24th a general appearance was entered for the defendant by one of the solicitors of this court, and on the same day he filed an answer denying the allegations of the amended petition. On March 1, 1909, he again appeared by counsel to oppose a motion for alimony, and on May 5, 1909, he filed an amended answer and a cross-petition for an absolute divorce against the petitioner, alleging as the ground thereof her desertion of him. These are all the proceedings in the New Jersey suit which it is of importance to set out. On March 17, 1909, the defendant brought an action in the Supreme Court of New York against the petitioner by the issue of a summons out of that court directed to the petitioner herein and entitled "action for a separation." On March 23. 1909, that court made an order for substituted service on the petitioner. The summons with notice of the order was served upon her on March 24, 1909. This required her to file her answer in the New York suit on or before April 28, 1909. The petitioner moves upon petition and affidavits showing these facts to restrain the defendant in the New Jersey action from further prosecuting his action in New York upon the grounds (1) that this court having obtained jurisdiction of the matrimonial status of these parties, and of the causes of action between them, was entitled to proceed to a determination of the issue; and (2) that the action of the defendant in New York is vexatious and is designed only to hinder and harass the petitioner in her prior action in New Jersey, and to cause her the expense and labor incident to the trial of one issue in two separate actions.

The suit in this court in favor of the wife and the defendant's appearance and answer thereto were prior in date to the beginning of the New York action. The New Jersey suit relates to the situation as it was at the date of its beginning. The amendment to the petition relates back to that date, and the defense by way of answer speaks as of the same date. At the time of the filing of the etition herein the wife claimed that she had a cause of action against her husband for a desertion which began more than two years hefore. The husband by his cross-petition claims to have cause of action against the wife for a desertion which began more than then residing in the city of New York, by two years before the filing of the cross-peti-

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion. The evidence in each case must include all the acts and doings of both parties during the period of desertion alleged. To illustrate, on the issue made on the original petition and answer, it will be competent for the defendant to bring out matrimonial misconduct on the part of the petitioner as a bar to her action, and, if the New York suit were to be tried, the petitioner by way of defense would be permitted to set up a matrimonial offense committed by the defendant in bar of his New York suit. The fact that the original petition and the cross-petition in this court with their respective answers are heard together makes no difference as to the evidence. The adjudication in the New Jersey suit must be made on these pleadings, and, while the decree will settle the rights of the parties as of its date (Peck v. Goodberlett, 109 N. Y. 180, 16 N. E. 350; Randel v. Brown, 2 How. 406, 11 L. Ed. 318), no decree at all could be made unless the parties, respectively, had causes of action which related back to the earlier dates mentioned. Events happening after the bringing of the original suit are interjected into it by the leave of the court by supplemental bill or by supplemental answer, and, when these go in the adjudication as to the facts set up therein, will relate to the dates of the happening thereof.

The defendant in his cross-petition in this suit alleges that the petitioner without any cause or justification whatever, and without any fault on his part, wrongfully, willfully, and obstinately abandoned and deserted him, and that for more than two years then last past she had willfully, obstinately, and continuously deserted him, and he prays that he may be divorced from his wife and be awarded the custody of his children. In the complaint filed in New York the defendant alleges that the petitioner deserted him without any justification whatever and with intent not to return to him, and abandoned him, and that she had been willfully and continuously absent from him for a period of more than one year last past; and he prays for a judgment of separation from the bed and board of the petitioner, and that the court may award to him the custody of his children. The basis of the action in each case is the desertion. The relief prayed for in each case is founded on the allegation of the fact of desertion. This court obtained possession of that cause of action on the day of the filing of the original petition, and the petitioner insists that, for this reason, this court should continue to hold the cause, and should adjudicate every matter which might by the course and practice of this court be adjudicated between these parties. She likewise claims that the New York action is vexatious and is intended to hinder and harass her in the prosecution of her suit in this court. The defendant maintains that the cause is one governed by the ordinary rules, two suits pending for the same cause of action in two different states at the same time, and that the pendency of one cannot be pleaded in bar to the other. While there is nothing in the case to show that the defendant had in his mind any intent to embarrass the petitioner, his New York action has that effect. She is called upon in this court to defend a suit for an absolute divorce on the ground of desertion. She is called upon in New York to defend against a prayer for a limited divorce founded upon the same general cause of action. She is notified in the New Jersey case to defend against a desertion which is alleged to have taken place on March 19, 1907, and in the New York case to defend against a desertion which is alteged to have taken place on July 3, 1906. She is put to the expense and trouble of defending two actions, when the defendant might have all the relief to which he is entitled, and more than he asks for in New York, by litigating the cause pending in this court. This is undoubtedly vexatious and harassing to the petitioner, and, if the two causes are allowed to proceed, will undoubtedly be embarrassing to the courts of both states. If, therefore, there exists in the law any proceeding by which this vexations action of the defendant may be prevented, such proceeding should be applied to this case.

This raises the question of the power of this court to enjoin persons who are under its jurisdiction from prosecuting actions in the courts of foreign states. Almost the final word was said upon the subject by Lord Brougham in Portarlington v. Soulby (1834) 3 M. & K. 104, but the point has also received much attention in the courts of this state. In Home Insurance Company v. Howell (1873) 24 N. J. Eq. 238, the facts were these. The Home Insurance Company issued policies of fire insurance to the defendant Howell, a resident of Illinois, insuring his property in this state. The bill alleged that the defendant had procured the policies by fraud, and prayed that they might be declared void and be delivered up to be canceled and the defendant enjoined from bringing any action at law upon them. The defendant was actually served with process in this state, and so came within the jurisdiction of this court. He filed his answer, to which the complainant filed a replication. In the meantime the defendant brought a common-law action in a state court in Illinois upon the policies, which action the complainant removed to the United States Circuit Court upon the ground of diversity of citizenship, and then moved this court for an injunction to prevent the defendant from prosecuting his common-law action in the federal Circuit Court. Chancellor Runyon granted the injunction. The argument on the point was had on a motion to dissolve it. The Chancellor held the injunction upon the sole ground that this court had first obtained jurisdiction over and that it is entirely proper for him to have the controversy, and was therefore entitled to

hold possession of it for final disposition. | 153, in which Chancellor Pitney declares that Speaking of the subsequent suit in Illinois, he says: "If bringing the suit at law was not a contempt of this court under the circumstances, it surely was a proceeding which this court will discountenance." The case was cited subsequently with approval in New Jersey Zinc Company v. Franklin Iron Company, 29 N. J. Eq. 422. The next reported case is Kempson v. Kempson (1899) 58 N. J. Eq. 94, 43 Atl. 97, in which this court enjoined a husband whose residence was in New Jersey from prosecuting a suit for divorce against his wife in a foreign state upon a satisfactory allegation of fraud, which consisted of the husband's allegation that he was a resident of such foreign state, whereas as a matter of fact he was a resident of New Jersey. In this case the jurisdiction was exercised upon the ground of fraud, and upon the further ground that the wife was put to the trouble and expense of appearing in a foreign state to resist her husband's claim, thus making the foreign proceeding a vexatious one. In the same year occurs the case of Huettinger v. Huettinger (N. J. Ch. 1899) 43 Atl. 574, in which Vice Chancellor Grey. following Kempson v. Kempson, enjoined the husband from prosecuting a suit for divorce in a foreign state; the ground being the fraudulent representation by him of his residence in such foreign state. In both these cases this court claimed jurisdiction over the defendant upon the ground that he was a bona fide inhabitant of this state. A similar injunction was ordered in 1899 in Streitwolf v. Streitwolf, 58 N. J. Eq. 563, 41 Atl. 876, 78 Am. St. Rep. 630.

The next case that occupied the attention of this court is Margarum v. Moon (1902) 63 N. J. Eq. 586, 53 Atl. 179. In that case the court enjoined a resident of this state from prosecuting an attachment in a foreign state against his debtor, who was also a resident of this state, for the purpose of evading a law of this state, and obtaining in the foreign jurisdiction an advantage which he would not have under the New Jersey law. The opinion is by Vice Chancellor Reed. He cites the leading cases of Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538, and Keyser v. Rice, 47 Md. 203, 28 Am. Rep. 448, which has since been affirmed and extended by Miller v. Gittings, 85 Md. 601, 37 Atl. 372, 37 L. R. A. 654, 60 Am. St. Rep. 352, and places his judgment upon the ground of the unjust advantage gained by the creditor by the prosecution in the foreign state. In Standard Roller Bearing Company v. Crucible Steel Company of America, 71 N. J. Eq. 61, 63 Atl. 546, Chancellor Magie enjoined a proceeding in the courts of a foreign state upon the ground that such proceeding had the effect of harassing and oppressing the defendant therein. Finally there is the case of Bigelow v. Old Dominion Copper Mining & Smelting Company (N. J. Ch.) 71 Atl. 534, a citizen of Minnesota was restrained

the power of this court to restrain persons within the control of its process from prosecution of suits in other states is clear, but holds that upon grounds of comity it should be sparingly exercised. He denied the injunction in that case upon the grounds that there the foreign court, being a court of general jurisdiction, had full jurisdiction of the case in question, which it had acquired several years before the New Jersey action was begun.

Attention has been called to the foregoing New Jersey cases merely for the purpose of showing the grounds upon which the jurisdiction has been exercised in this state. An examination of the general subject will disclose the fact that the courts have exercised the jurisdiction in cases where the foreign action operates to the substantial detriment of the resident, not only where the claim is equitable, but also where it is legal. In Harris v. Pullman, 84 Ill. 20, 25 Am. Rep. 416, the jurisdiction was put upon the ground that it was inconsistent with interstate harmony that after a suit had been commenced in one of the states the prosecution thereof should be controlled or interfered with by the courts of another state. In Sandage v. Studebaker, 142 Ind. 148, 41 N. E. 380, 34 L. R. A. 363, 51 Am. St. Rep. 165, it was put upon the ground that the foreign suit could not be instituted for the purpose of evading the laws of the state in which the plaintiff lived. In Keyser v. Rice, 47 Md. 203, 28 Am. Rep. 448, it was put upon the ground of oppression and vexation. In this case the necessity for the exercise of the jurisdiction is very clear. The facts bring it within that class of cases which permit injunctions to issue to restrain foreign actions on the ground of oppression and vexation, and likewise upon the general ground that the cause of action was within the jurisdiction of the court appealed to before any attempt was made to compel the petitioner to submit to a foreign tribunal. In Miller v. Gittings, 85 Md. 601, 37 Atl. 372, 37 L. R. A. 654, 60 Am. St. Rep. 352, supra, an injunction was issued in favor of a resident of Maryland against his creditor, also a resident of that state, to restrain the creditor from pursuing the debtor in the New York courts by process of arrest, a remedy which he could not have in their home state. The case is thoroughly considered, and contains a valuable collection of cases on the subject. In Dehon v. Foster, 4 Allen, 545, the Supreme Court of Massachusetts enjoined a citizen of that state from prosecuting a debtor by attachment in Pennsylvania because the effect of allowing the attachment suit to go to judgment would be to give the attaching creditor a preference over other creditors, and so defeat the operation of the Massachusetts insolvent law. In Hawkins v. Ireland, 64 Minn. 339, 67 N. W. 73, 58 Am. St. Rep. from prosecuting an action in a foreign state | divest the right of the personal representative where it was necessary to prevent one citi- of insured to the payment expressly provided for where it was necessary to prevent one citizen from obtaining an inequitable advantage of another. In Vermont it was declared that the jurisdiction would be exercised in that state only when the ends of justice and not the convenience of parties required it. Bank of Bellows Falls v. Rutland Railroad Company, 28 Vt. 470. In Indiana an injunction issued where the attempt was made to enforce a claim in a foreign jurisdiction in such a manner as would deprive the debtor of his exemption under the laws of Indiana. Wilson v. Josephs, 107 Ind. 490, 8 N. E. 616. The same doctrine was held in Ohio in Snook v. Snetzer, 25 Ohio St. 516, and in Wisconsin in Griggs v. Doctor, 89 Wis. 161, 61 N. W. 761, 30 L. R. A. 360, 46 Am. St. Rep. 824. The restraint sought for by the petitioner does not impugn the policy of the state of New York, for the reason that the rule which prevails in New Jersey on this subject also prevails there. Indeed, Chancellor Runyon based his opinion in Home Ins. Co. v. Howell, supra, largely on the early New York Case of Mead v. Merritt (1831) 2 Paige, 402. The doctrine has since been applied in numerous cases. Newton v. Bronson, 13 N. Y. 587, 67 Am. Dec. 89; Gardner v. Ogden, 22 N. Y. 327; 78 Am. Dec. 192; Stevens v. Central National Bank, 144 N. Y. 50, 39 N. E. 68. See, also, Kittle v. Kittle, 8 Daly (N. Y.) 72. It therefore appears that the power which is invoked actually inheres in this court that the present case is one in which it should be exercised, and that its exercise will not contravene the public policy of the state of New York.

An injunction will therefore issue against the defendant to restrain him from the further prosecution of his suit in the Supreme Court of New York against his wife for a separation.

(76 N. J. E. 4)

METROPOLITAN INS. CO. ▼. CLANTON et al.

(Court of Chancery of New Jersey. July 31, 1909.)

1. INSURANCE (§ 586*)—LIFE POLICY—INTER-

EST OF BENEFICIARY.

The interest of a person designated as beneficiary of an industrial life policy is a vested property right, subject to the terms of the policy, construed as applying to such vested right.

[Ed. Note.—For other cases, see] Cent. Dig. § 1470; Dec. Dig. § 586.*] see Insurance.

2. Insurance (§ 587*)—Life Policy—Change

OF BENEFICIARY.

The fact that by the practice of the subordinate officers of a life insurance company, who received and forwarded to the company, who received and forwarded to the company a notice of change of beneficiary, the policy was not forwarded with it, as required by a printed condition on the back of the policy, and that an indorsement on the policy of the change of beneficiary, likewise required, was not supposed either by insured or by them to be necessary, will not avail to change the beneficiary, and icy, provided the policy is not then assigned,

in the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \$\$ 1469, 1470; Dec. Dig. \$ 587.*]

3. GIFTS (§ 10*)—LIFE POLICY.

A gift may be made of a policy payable to the representatives of insured, as of other choses in action.

[Ed. Note.—For other cases, see Gifts, Dec. Dig. § 10.*]

Bill of interpleader by the Metropolitan Insurance Company against Georgiana Clanton, administratrix of Morris Williams, deceased, and others. Finding for Clanton, administratrix.

McCarter & English, for complainant. W. A. Lord, for defendant Clanton. A. H. Seymour, for defendant Morgan.

EMERY, V. C. At the hearing of this cause it was directed that the money paid into court by complainant as due on policy No. 25797999 for \$112 should be paid to the defendant Clanton, as administratrix of Morris Williams, deceased, the insured. The defendant Morgan disclaimed in her anwer any interest in this policy. The question reserved was as to whether the defendant Rosella Morgan or Clanton, as administratrix, was entitled to the proceeds of the policy No. 21113295 for \$140, also paid into court. This policy is not a benefit certificate or certificate of membership in a benevolent association, but is a policy of life insurance of the kind known as "Industrial" insurance. The policy contains an express agreement to pay the amount upon receipt of the proofs of death of the insured, and upon surrender of the policy and all receipt books, and, as to the person or persons to whom the amount is payable or may be paid, a subsequent clause provides that "the company may pay the amount due under this policy to the beneficiary named below, or to the executor or administrator, husband or wife, or any relative by blood of the insured or to any other person appearing to said company to be equitably entitled to the same by reason of having incurred expense in behalf of the insured, or his or her burial, and the production of a receipt signed by either of them shall be conclusive evidence that all claims under this policy have been satisfied." In the policy "the name of the beneficiary and relationship to the insured" is given merely as "Estate." On the back of the policy, and under the title of "Privileges and Concessions to Policy Holders," are printed several privileges or conditions, but these are not either expressly referred to in the policy itself as so indorsed, nor are they expressly signed by the company. One of these relates to "change of beneficiary," and is as follows: "Subject to the approval of the company, the insured may at

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

change the beneficiary or beneficiaries, by written notice to the company at its Home Office, accompanied by this policy, such change to take effect on the endorsement of the same on the policy by the company. After endorsement the policy will be returned."

It has been settled by the decisions of this court as the general rule that, under provisions of this character as to change of beneficiaries in the benefit certificate of benevolent associations, the persons originally indicated as the beneficiaries have the right to insist upon a compliance with their terms, and that the provisions are not merely regulations whose enforcement is at the option of the company alone, and which are waived by the payment of the fund into court. Amer. Legion of Honor v. Smith, 45 N. J. Eq. 466, 472, 17 Atl. 770 (Van Fleet, 1889); Grand Lodge, etc., v. Connolly, 58 N. J. Eq. 180, 184, 43 Atl. 286 (Reed, V. Ch., 1899); Order of Heptasophs v. Dailey, 61 N. J. Eq. 145, 152, 47 Atl. 277 (Reed, V. Ch., 1900); Penn. R. Co. v. Warren, 69 N. J. Eq. 706, 708, 60 Atl. 1122 (Bergen, V. C., 1905). This general rule requiring the change of beneficiary to be made in the manner pointed out by the policy and by-laws of the association is subject to some exceptions (2 May, Ins. §§ 399, 400, and Lahey v. Lahey [1903] 174 N. Y. 146, 155, 66 N. E. 670, 61 L. R. A. 791, 95 Am. St. Rep 554), and these exceptions seem to be based on the essential character of the right of the beneficiary in such certificate and the essential character of the designation. The rights under these benevolent certificates are not vested property rights in the beneficiary, but are contractual rights only, depending on an appointment or designation. Golden Star Fraternity v. Martin, 59 N. J. Eq. 207, 215, 35 Atl. 908 (Err. & App. 1896); Anderson v. Supreme Council C. B. L., 69 N. J. Eq. 176, 179, 60 Atl. 759, Opinion affirmed on appeal. A change of beneficiary in these cases is in the nature of execution of a power. Such execution defective at law may in some instances be aided in equity, and most of the exceptions to the general rule come, I think, within the equitable principles applicable to such defective execution. Thus wrongful refusal of the original beneficiary to deliver up the possession of the certificate will not avail to defeat the change where its production is required by the provisions of the certificate. Polish National Alliance v. Nagrabski, 71 N. J. Eq. 621, 64 Atl. 471 (Bergen, V. C., 1906). In contracts of the kind now in question, which are pure life insurance contracts, the interest of a person designated as the beneficiary is, on the other hand, a vested property right, subject to the terms of the policy, construed as applying to such vested right. And, if any distinction is to be made between the different contracts in the matter of the construction or application of the terms of the policy as to a change of beneficiary, it should be in the direction of a stricter construction of the life insurance con-

change the beneficiary or beneficiaries, by tract than of the benefit certificates where no written notice to the company at its Home divesting of property occurs.

The policy in question on the face of it is a policy payable on the insured's death to his executors or administrators, and, if the "Privileges and Concessions" printed on the back of the policy (before they are acted on) be considered as in fact part of the policy, although not referred to in it, then the right of the administratrix, so far as it depends on the policy itself, is to be divested only in the manner indicated, viz., "that the change shall take effect on the endorsement of the same on the policy by the company." application for change was made in this instance, but was not accompanied by the policy, nor was the change ever indorsed on the policy. The circumstance that by the practice of the subordinate officers of the company who received and forwarded the notice of change to the company the policy was not forwarded with it, and that the indorsement on the policy was not supposed either by the insured or by them to be necessary, will not avail to change the beneficiary, and divest the right of the representatives of the insured to the payment expressly provided for in the policy. In addition to her claim as beneficiary under the policy set up in her answer, it is claimed in the brief of counsel for defendant Morgan that she had title to the policy by gift or donation from the insured in his lifetime, and that the policy was in her possession at his death and was afterwards delivered by her to the insurance company. A gift may be made of a policy of insurance payable to the representatives of the insured as of other choses in action belonging to the insured. Travelers' Ins. Co. v. Grant, 54 N. J. Eq. 212, 33 Atl. 1060 (Pitney, V. C., 1896). This claim of delivery and possession of the policy is denied by the defendant Clanton, and her counsel in his brief claims that the policy for a long time previous to the death of the insured was in the possession of his son, who paid the premiums, and who delivered the policy to the administratrix after the death of his father. My notes of the evidence do not show any proofs on this contested point, as to the possession of this policy at the time of the application for change of beneficiary or at the time of the death. Neither is there any evidence tending to show that the insured made to Mrs. Morgan a gift of the policy, which was intended to confer on her an interest or right in the policy or its proceeds different from that which she would have as a beneficiary designated under the policy.

In the absence of proof on these points, the claim of Mrs. Morgan must be disposed of as resting solely on her right to the proceeds under the provisions relating to change of beneficiary, and for the reasons above given must be disallowed. If Mrs. Morgan, relying on the change having been made, paid the premiums subsequently accruing, an equity to the repayment of these may exist, and, be-

fore advising decree, I will hear counsel on this point. If, on examination of the stenographer's notes, it should appear that there was evidence as to the possession of the policy by defendant Morgan at the time of application for change of beneficiary, or at the time of the death of the insured, application may be made for a rehearing, if counsel de-

(76 N. J. E. 256)

McMILLAN et al. v. KUEHNLE et al. (Court of Chancery of New Jersey. Sept. 14, 1909.)

1. Injunction (§ 102*)—Nuisance (§ 72*)

SUNDAY BASEBALL.

The playing of baseball on Sundays will be enjoined if it be made to appear that the noise and disorderly conduct attendant upon the and disorderly conduct attenuant upon the games being held forth amounts to a nuisance in the neighborhood, whereby the peace and quiet of the Sabbath is disturbed, and the rest which the complainants are entitled to enjoy on that day is appreciably affected. Each case must stand or fall on the question of nuisance or no nuisance, as the Court of Chancery has no jurisdiction to enforce by injunction, the Sunday laws, so called.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 176; Dec. Dig. § 102; Nuisance, Cent. Dig. § 164–169; Dec. Dig. § 72.*]

2. Nuisance (\$ 65*)—Noises on Sunday. Noises which are not nuisances on a week day may be nuisances when made on a Sunday, if they have the effect of disturbing that quiet and rest which the citizen is entitled to have for his recuperation; and the fact that such noises are forbidden by the laws of the land (the Sunday laws) takes away any defense for the making of them on Sunday, even though they be but slight.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 171; Dec. Dig. § 65.*

For other definitions, see Words and Phrases, vol. 5, pp. 4855-4864; vol. 8, p. 7734.]

8. Nuisance (§ 84*) — Sunday Baseball Preliminary Injunction.

A preliminary injunction will issue to restrain Sunday baseball playing upon the affidavits of six or seven persons residing in the neighborhood where the games are held forth, which show a cause of nuisance, even though more than 40 persons similarly situated swear that the poises are out to insuppose the and not at all the noises are quite inappreciable and not at all disturbing, if there be no proof before the court that the complainants are morbidly sensitive; the case not being one turning upon the preponderance of evidence as to the extent and character of the noise so much as it does upon the question whether the affidavits on behalf of the defendants show the affiants on behalf of the complainants to be untruthful as to the existence of the noise; and, as it is notorious that many people are not disturbed by noises which affect some people similarly situated, in the absence of proof that the complainants and their witnesses are morbidly sensitive, it will be presumed that they are persons of ordinary sensibility, and are truthful concerning the existence of the nuisance as to themselves.

[Fid. Note.—For other cases, see Nuisance, that the complainants are morbidly sensitive;

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 198½; Dec. Dig. § 84.*]

(Syllabus by the Court.)

Bill for an injunction by John McMillan and others against Louis Kuehnle and another. Preliminary injunction granted.

Charles E. Sheppard and Edwin G. C. Bleakly, for complainants. George A. Bourgeois, for defendants.

WALKER, V. C. The bill is filed by John McMillan and John H. Goldsmith on behalf of themselves and other residents of Atlantic City; among them being those whose affidavits are annexed to the bill. Those making affidavits besides the two complainants are Mrs. Ellen Goldsmith, wife of one of the complainants, Robert Ingram and Harriet A. Ingram, his wife, Mrs. Frances Young, and Mrs. Mary Reynolds. The object sought by the bill is to restrain the defendants from holding forth baseball games at Inlet Park, Atlantic City, on Sundays, because of an alleged nuisance attendant thereon by way of noise and disorderly conduct which disturbs the peace and quiet of the Sabbath and interferes with the rest to which the complainants are of right entitled to enjoy on that day. The case stands or falls on the question of nuisance or no nuisance, as the Court of Chancery has no power to enforce, by injunction, the Sunday laws, so called. That jurisdiction belongs to another tribunal.

The complainant Mr. McMillan, who is a clergyman, swears that baseball games had been carried on at Inlet Baseball Park, Atlantic City, for some five or six Sundays before the making of his affidavit which was on August 25th ult. (1909); that his residence is about two squares from the park, and that large crowds attend the games; and that in going to and returning therefrom make loud noises, and sounds which are an annoyance to himself and the neighborhood, and a disturbance of the peace and quiet of the neighborhood, but he says nothing about sounds emanating from the grounds. He also says that quite a large number of the boys in his Sunday school absent themselves, and attend the games on Sabbath afternoons. With this last feature of his complaint the court has nothing to do.

The complainant Goldsmith swears that he lives about a block and a half, or 600 feet, from the park, and that on Sunday afternoons crowds of people in carriages. in automobiles, and on foot pass by, to, and from the games, making loud noises, and that during the progress of the games there is frequently heard very loud cheering and shouting, yelling, and screaming and stamping of feet on the stands, all of which is very plainly heard at his residence and is greatly annoying and interferes with the comfort of his house for himself and his family, and destroys the peace and quiet of the neighborhood during the time.

Mrs. Ellen Goldsmith swears that she has been greatly annoyed in her house and her peace and comfort greatly disturbed by the noise and confusion made by those going to and returning from the ball games at the park on Sundays, and by the cheering and | screaming, yelling, and hooting, and stamping of feet on the boards by those within the park attending the games.

Robert Ingram swears that he resides about one and a half squares or 200 yards from the park where baseball is played on Sundays, and that a large number of teams, automobiles, and carriages loaded with men and women, who with many others on foot going to and returning from the games, pass along the street in front of his residence, cheering, hooting, and shouting, and that during the progress of the games the cheering, shouting, and screeching of the crowds attending are plainly heard at his residence, and greatly annoy himself and his family.

Mrs. Harriet A. Ingram, wife of Robert Ingram, swears that since the baseball games have been carried on at the park on Sundays noise and confusion, screaming, cheering, and hallooing, of the crowds of people in the park while the games were on, and the stamping of feet on the stands by the spectators were plainly heard at their house and disturbed the peace and quietness of Sunday for them; that the crowds of people on foot and in carriages and automobiles, passing along in front and near to their residence, going to and returning from the games on Sundays, also greatly disturbed the comfort of their house and its peace and quiet.

Mrs. Frances Young swears that she lives with her husband and family of children about 11/2 squares from the park; that the cheering, hallooing, and shouting of persons attending the ball games on Sundays can be plainly heard at their residence, and is very annoying and disturbs the peace and quiet of their home; that the crowds going to the games and returning from them pass by their home in large numbers, many of them shouting and using profane and vile language, which can be plainly heard from their house, and is a great annoyance and nuisance to them.

Mrs. Mary Reynolds swears that she resides about two blocks or squares from the park where the games of baseball are carried on on Sundays, and that teams, automobiles, and foot people go by her house to and from the games, and make a loud noise, disturbing herself and the neighborhood.

The proofs on the part of the defendants, who admittedly control and operate the Inlet Baseball Park, show that lands near or adjoining the park are used as a terminal of the trolley line (which extends from Longport to the Inlet) where its terminal building and waiting room and also a hotel and restaurant, around which is a two-story pavilion and another hotel are situate; also, nearby is a pier from which approximately 100 salling yachts of various sizes make daily or hourly excursions or trips down Absecon Inlet and out upon the Atlantic Ocean, which yachts daily carry great numbers of people,

trips, great numbers of people taking those trips on Sunday afternoons; that great numbers of people visit the hotels, or one of them, especially on Sundays, and enjoy the refreshments that may be purchased; that there are automobile lines running from various parts of the city to the Inlet, and that large numbers of busses carry people to and fro, and that the majority of the people who go to the Inlet from the Board Walk along the Atlantic Ocean reach it by automobiles and busses, the trolley line not touching the Board Walk except at two points. fidavits of over 40 people living near to the park were produced many of them living much nearer than those whose affidavits are annexed to the complainants' bill, who swore that none or very little noise or applause was heard coming from the baseball park while games were held forth there, and that what was heard was no annoyance whatever to people living in its vicinity nor was the conduct on the part of the crowds going to or returning from the Inlet on Sundays of the character mentioned by the complainants' witnesses; in fact, that it was not annoying. If the issue were as to a certain well-defined physical fact presumably within the knowledge of all of the affiants, such as did a certain sound occur at midday or midnight, the defendants would prevail upon the clear weight and preponderance of the evidence; but the issue is as to facts not so clearly defined, but is as to facts which different people see and hear differently, according to their different natures.

The criterion for determining whether or not a particular use of property is a nuisance is its effect upon persons of ordinary health and sensibility, and ordinary modes of living, and not upon those who, on the one hand, are morbid or fastidious or peculiarly susceptible to the thing complained of, or, on the other hand are unusually insensible thereto. 21 Am. & Eng. Ency. of L. (2d Ed.) p. 689. There is no evidence before the court on this hearing to the effect that the complainants and affiants are morbidly sensitive as to the sounds that form the gravamen of the complaint, except that it may be inferred that such is the fact because of the overwhelming proof of those residing in the same neighborhood that the noises spoken of by the complainants are quite inappreciable, and not at all disturbing. This feature of the case may perhaps be gone into on final hear-

The question, as I understand it, does not turn upon the preponderance of the evidence as to the extent and character of the noises so much as it does upon the question whether the affidavits on behalf of the defendants show the affiants on behalf of the complainants to be untruthful as to the existence of the noises. Because innumerable witnesses living in the vicinity of the ball grounds say that they are not annoyed, either by persons passextending into the thousands, on sailing ing their houses to and from the park or by the

the stands, that does not necessarily show that others, comparatively few though they be, may not be annoyed and suffer great inconvenience, amounting to a nuisance, from the facts to which I have just adverted. It is notorious that many people living near railroads and factories become so accustomed to the noises emanating therefrom as not to notice them, while, on the contrary, some people similarly situated can never be oblivious to them.

The law governing the matter under consideration is to be found in the three cases in this court of Cronin v. Bloemecke, 58 N. J. Eq. 813, 43 Atl. 605, decided by Vice Chancellor Emery in 1899; Gilbough v. West Side Amusement Co., 64 N. J. Eq. 27, 53 Atl. 289, decided by Vice Chancellor Pitney in 1902, and Seastream v. New Jersey Exhibition Co., 67 N. J. Eq. 178, 58 Atl. 532, decided by Vice Chancellor Pitney in 1904. The decision in the Seastream Case went upon the ground that some five or six of the complainants who resided in the neighborhood of the park were disturbed by the noise of the shouts and applause from the grounds on Sundays when ball games were played, and that several others of the complainants suffered from the noise and unruly conduct of the great crowds alighting from and boarding trolley cars in front of their residences and in going to and from the park and the trolley. 67 N. J. Eq. 181, 58 Atl. 532. In the case before me seven affiants swear to a state of facts tending to show that a nuisance is created by the holding forth of the ball games at the Inlet Park, Atlantic City, on Sundays, two of them, the Reverend Mr. McMillan and Mrs. Reynolds speaking only to the question of noise and unruly conduct by the crowds going to and returning from the games, while the other five testify to a nuisance created upon and about the park at the playing of the games. The question whether those suffering from one or the other of two kinds of annoyance, namely, that on the highways leading to and from the baseball grounds, and that emanating from the grounds while games are in progress, may join in the same bill of complaint was raised in the Seastream Case, but was left undecided, as no demurrer was filed, and the defendant had not been embarrassed in presenting its defense. 67 N. J. Eq. 187, 58 Atl. 532. The question of misjoinder was not even raised upon the argument of this cause, and will therefore not be considered.

A parallel to be found in the Seastream Case is that the defense was there made that the ball ground was not the only place to which people resorted who went by the premises of the complainants and annoyed them. It was shown that Newark Bay was only a slight distance from the ball grounds and that people were attracted to its shores for amusements on Sundays, consisting of boating, crabbing, fishing, and picnicking, and that, independent of the baseball playing,

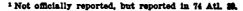
demonstrations of those in the park and upon a large crowd on Sundays habitually resorted to the neighborhood by means of the trolley, alighting at the very same part of the avenue and creating precisely the same nuisance as was complained of on account of the baseball crowds. 67 N. J. Eq. 185, 58 Atl. Vice Chancellor Pitney did not think that that state of affairs estopped the complainants from asserting their rights against the defendants.

> The case of Gilbough was also a Sunday baseball case. The fact of nuisance was disputed. In that case (Gilbough) affidavits produced by the defendant made by persons who lived near the grounds were to the effect that the noise, although heard by them, did not annoy them. 64 N. J. Eq. 35, 53 Atl. 289. In the case now being considered, some of the numerous witnesses for the defendants said that they heard noises, but that they were slight and not disturbing, and others of them said they heard no noises at all. In the Gilbough Case Vice Chancellor Pitney said that the noises, if loud enough to appreciably disturb complainants' rest, constituted a nulsance against which they were entitled to relief in this court. 64 N. J. Eq. 30, 53 Atl. 289.

> In the Cronin Case, which was a case of disorderly baseball games played on week days and on Sundays, Vice Chancellor Emery says that the protection of one's dwelling house against nuisances which render it uncomfortable is a right which has been constantly protected in this court by preliminary injunction, even when the existence of the nuisance is disputed. 58 N. J. Eq. 317, 43 Atl. 605. In the unreported case of Rausch v. Glazer (May term, 1903),1 which was a nuisance case heard before me, and in which the question was as to stenches emanating from a rendering establishment, I took occasion to observe that, the nuisance being established by satisfactory testimony, the evidence was not overcome by testimony of a negative kind; that testimony of some of the neighbors that they were not annoyed did not disprove that the complainant and his family were annoyed.

> Another phase of the case under consideration was dealt with by Vice Chancellor Pitney in the Gilbough Case. He said that noises which would not be declared to be nuisances on a week day are held to be nuisances if made on a Sunday, because they have the effect of disturbing that quiet and rest which the citizen, wearied with six days of labor, is entitled to have for his recuperation; and that the fact that such noise is forbidden by the laws of the land (the Sunday laws) takes away from the producer any excuse therefor (64 N. J. Eq. 29, 30, 53 Atl. 289); that is, as I understand it, takes away his defense. so far as that defense may be any justification for the making of disturbing noises at the given time, even though they be but slight.

> In the earlier cases of Cronin and Gilbough the court dealt with the character of the



injunction that should go for the relief of the complainants. In the Cronin Case the restraint went against the use of the park for the purpose of baseball games so that a nuisance might be occasioned to the annoyance and injury of the complainant and his family at his residence; the games not being prohibited entirely (58 N. J. Eq. 316, 317, 43 Atl. 605); and in the Gilbough Case the injunction went restraining the defendant from permitting any noise or noises to be made upon its premises on Sunday which should disturb the complainants or their families, there being no prohibition of the games themselves (64 N. J. Eq. 36, 53 Atl. 289); but in the Seastream Case, the law having previously been so well settled, the injunction went restraining the playing of baseball on Sundays altogether (67 N. J. Eq. 187, 58 N. J. Eq. 532).

Now, applying the law, as I understand it, to the facts of this case, as I understand them, I am constrained, following the last and culminating decision, to advise the issuance of an injunction against the playing of baseball games on Sundays at the Inlet Park. Atlantic City, until the final hearing of this cause, and until the further order of the court to the contrary. It may not be amiss to state again that an injunction does not issue in a cause like this upon any theory of enforcing observance of the Sunday laws. It goes only to protect the citizen against a nuisance which appreciably affects him. If the question before me had not already been passed upon by this court. I should feel inclined to do no more than advise an injunction restraining the defendants from holding forth baseball games in such way or manner as to disturb and annoy the complainants at their residences, but, as already remarked, I feel bound to follow the Seastream Case, which appears to be a good deal like this one, and to grant an injunction restraining the games altogether. If this decision be erroneous, there is a court above me to which the defendants may resort for correction of the

The order to show cause will be made absolute, with costs to abide the event of the suit.

GOTTLIEB v. ABRAHAM LINCOLN MUT. LIFE INS. CO.

(Supreme Court of Pennsylvania. May 24, 1909.)

INSUBANCE (§ 349°)—LIFE POLICY—PREMIUMS
—PAYMENT—GRACE—FORFEITURE.
Where a life policy provides that, after pay-

Where a life policy provides that, after payment of the first premium, 30 days' grace shall be allowed on subsequent premiums, and insured died after paying the first premium, without paying the second, and within 30 days after it became due, bis failure to pay the second premium within the days of grace did not authorize a forfeiture of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 913; Dec. Dig. § 349.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Bernhard Gottlieb, as administrator of Joseph Gottlieb, deceased, against Abraham Lincoln Mutual Life Insurance Company, on a life policy. From an order making absolute a rule for want of a sufficient affidavit of defense, defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, ELKIN, and STEW-ART, JJ.

T. Elliott Patterson, for appellant. Bernard Harris, for appellee.

ELKIN, J. This is an action in assumpsit on a policy of insurance. The suit was brought by the administrator of the estate of the deceased insured person. The only question raised by the pleadings is whether the insurance contract was in force at the time of the death of the insured. The contract of insurance was what is known as a "20-payment life policy." One of the conditions or privileges written into the contract is the following: "After the first premium shall have been paid a grace of thirty days, during which the contract shall remain in force, will be allowed in the payment of premiums by the insured or by any one for him." The first annual premium was paid. and the second was due August 5, 1908, but was not paid upon that date, nor at the time of the death of the insured, August 28, 1908. Under these circumstances appellant contends that failure to pay the annual premium when due, or at least prior to the death of the insured, relieves the company from liability on the insurance contract. The theory is that failure to pay the premium on the date specified worked a forfeiture of the right to recover, and that the 80 days of grace in which to pay only constituted a privilege by which the insured could reinstate his forfeited insurance, but that the delay was at the risk of the insured, and no liability attached to the company until the premium was paid and accepted. Some cases are cited in support of this contention; but they are easily distinguished on their facts from the case at bar. The line of cases referred to had to deal with policies of fire insurance for definite fixed periods, or with life insurance contracts in which no provision had been made that the policy should remain in force during the period, called "days of grace," in which the insured could pay the overdue premium. In no case called to our attention—and indeed it seems impossible to believe there could be any such case—has it ever been held that, when the policy in express terms provides that it shall remain in force during the 30-day period, it would be construed to mean that it did not remain in force. Such a construction would do violence to the rights of contracting parties. When the contract shall begin and end.

[•]For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
73 A.—67

how long and under what conditions it shall to furnish safe machinery with which to remain in force, and when it shall be forfeited, all depend upon the terms of the contract itself. When the terms and conditions are plain and unambiguous there is nothing requiring judicial interpretation. In the case at bar the contract provides that the policy shall remain in force during the 30day period, and there is no room for construction. When the person insured died, the policy by its own terms was in force, and the appellant company, is bound thereby.

Judgment affirmed.

(225 Pa. 100)

McLEAN v. A. SCHOENHUT CO. (Supreme Court of Pennsylvania. May 24, 1909.)

1. MASTER AND SERVANT (§ 264*)—INJUBIES TO SERVANT—ISSUES AND PROOF.

Where, in an action for injuries to a minor

servant, the only negligence alleged was defend-ant's failure to adequately instruct plaintiff as to the operation of a stamping machine, the question of the defectiveness of the machine as a possible basis of recovery is not in issue.

[Ed. Note.-For other cases, see Master and Servant, Cent. Dig. \$ 865; Dec. Dig. \$ 264.*]

2. MASTER AND SERVANT (§ 264*)—INJURIES TO SERVANT-PLEADING AND PROOF.

In an action to recover for injury to a servant, the burden is on plaintiff to plead and prove the particular negligence complained of [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861–876; Dec.Dig. § 264.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Allen G. McLean, by his father and next friend, Allen McLean, and by Allen McLean in his own right, against the A. Schoenhut Company, for injuries to the plaintiff, Allen G. McLean. Judgment for plaintiff Allen G. McLean for \$5,000 and for plaintiff Allen McLean for \$1,056, and defendant appeals. Reversed, and judgment entered for defendant.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and ELKIN, JJ.

F. B. Bracken, for appellant. Howard A. Davis and John T. Murphy, for appellee.

ELKIN, J. The injuries for which damages are sought to be recovered in this case resulted by accident from the operation of a stamping or pressing machine. The injured boy was between 15 and 16 years of age, and had been employed in the factory for 6 months immediately preceding the accident and for several months at various times prior to his last employment. The only negligence charged in the statement of claim was failure to give adequate instructions as to the method of operating the machine. It is true that, in the recital of the duties with which the appellant company was charged, which the appellant company was charged, it was alleged in general terms that it became its duty to provide a safe place to work, railroad company for flooding plaintiff's land by

work, and to properly instruct young and inexperienced employés in the use of dangerous machinery. It is not seriously contended that the machine in question was either complicated or dangerous. It was a very simple device and not difficult to operate. There is no pretense that the place was unsafe, or that the machine was not suitable for the purpose intended. Nor is it averred in the statement of claim that appellant had failed to perform its full duty in all of these respects, save only in the matter of giving adequate instructions. The issue is therefore narrowed by the pleadings to the single question, namely, was there a failure of duty on the part of appellant to properly instruct the boy in the use of the machine at which he was working when the accident occurred? The learned trial judge instructed the jury that the evidence was not sufficient to sustain this allegation, and unless this court should hold that this was error there can be no recovery. The burden was on the plaintiffs not only to charge the particular negligence complained of, but to prove it by sufficient testimony. The parties are bound by the pleadings, and the courts cannot disregard them. It will not do to allege one ground upon which to sustain a recovery of damages for failure to perform a duty, and at the trial prove, or attempt to prove, failure to perform a different kind of duty, the breach of which was not alleged. The only negligence alleged in the case at bar was failure to adequately instruct, and the case went to the jury on the question of a defective machine. We agree with the view taken by the learned trial judge that the evidence did not sustain the allegation as to inadequate instructions, and this should have been the end of the case. It was error to allow the case to go to the jury on an entirely different theory and upon a ground not set up in the pleadings. The accident was unfortunate, and the consequences serious; but there can be no recovery in this or any other similar case except negligence be shown. The burden is always on the complaining party to allege the negligent act or acts relied on to sustain a recovery and at the

feats the right to maintain the action. Judgment reversed and is here entered for defendant.

trial to establish by sufficient evidence the

facts alleged. This was not done in the pres-

ent case, and failure to meet this burden de-

(225 Pa. 76)

MULLIGAN v. PENNSYLVANIA R. CO. (Supreme Court of Pennsylvania. May 20, 1909.)

WATERS AND WATER COURSES (§ 171*)—OB-STRUCTION OF SURFACE WATERS—SEWERS—

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

an alleged defective or deficient sewer, it appearing that the injury occurred at the time of an extraordinary flood, plaintiff could not recover without proving that, notwithstanding the extraordinary character of the water, defendant's failure to maintain a sewer of sufficient capacity and condition to carry off ordinary water was the actual producing cause of the injury.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 216, 218, 219; Dec. Dig. § 171.*]

Appeal from Court of Common Pleas, Luzerne County.

Trespass for injury to land by E. W. Mulligan and others against the Pennsylvania Railroad Company. From an order denying plaintiff's motion to take off a compulsory nonsuit, he appeals. Affirmed.

The action is trespass for damages inflicted upon plaintiffs by alleged negligence in construction and maintenance of a certain sewer, causing obstruction in the same and consequent overflow of water upon plaintiffs' property. Upon conclusion of plaintiffs' testimony a motion for compulsory nonsuit was made on the grounds (1) that the plaintiffs failed to prove any negligence on the part of the defendant which produced the damage and injury complained of in their declaration or statement filed; (2) the evidence on the part of the plaintiffs shows that their damage or loss was caused by extraordinary flood or storm, for which the defendant is not responsible; (3) the plaintiffs failed to show that their sewer was built in an improper, defective, or unworkmanlike manner or of improper materials; (4) the plaintiffs failed to show that the sewer was blocked, choked, or obstructed, and that by reason thereof the water was cast upon their premises at the time of the flood. The court, per Fuller, J., said:

"This case presents three fundamental questions, viz.: (1) Was the sewer sufficient in capacity and condition at the time of the injury, February 28, 1902, to carry off what we will designate 'ordinary water'? (2) If it was not sufficient to carry off ordinary water, then was the water on February 28, 1902, extraordinary? (3) If the water was extraordinary, then, notwithstanding its extraordinary character, did defendant's negligence in failing to maintain a sewer of sufficient capacity and in proper condition to carry off ordinary water concur with the extraordinary water as an actual producing cause of the plaintiffs' damage?

"The testimony adduced by the plaintiffs establishes the fact that the water which caused the plaintiffs' injury on February 28, 1902, was extraordinary in its character. therefore devolved upon the plaintiffs to show that, notwithstanding the extraordinary character of the water, the defendant's failure to maintain a sewer of sufficient capacity and in condition to carry off ordinary water

ducing cause of the plaintiffs' damage. I am of the opinion that the plaintiffs have failed to sustain this burden of proof by sufficient evidence to submit to the jury, and I must therefore sustain the motion for a compulsory nonsuit. Plaintiffs concede that the water was extraordinary in character. and that, therefore, the burden of proof did devolve upon them as above stated, but contend that this burden was fully sustained.

"Careful consideration of the testimony confirms the conclusion reached upon the trial, and therefore now, November 11, 1907, the motion to take off nonsuit is denied."

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and ELKIN, JJ.

James L. Morris, for appellant. F. W. Wheaton, for appellee.

PER CURIAM. The judgment is affirmed on the opinion of the court below refusing to take off the nonsuit.

(225 Pa. 66)

In re MICHENER'S ESTATE. Appeal of RUMSEY et al.

(Supreme Court of Pennsylvania. May 20, 1909.)

EXECUTORS AND ADMINISTRATORS (§ 509*) — SETTLEMENT OF ESTATE—SECURITY FOR AN-NUITIES-OBJECTION-LACHES.

Certain annuitants, represented at the audit of the executors' account, acquiesced through their attorney in a decree setting apart a mortgage in the hands of the executors to secure payment of their annuities. The annuitants acceptable ed the income for four years and nine months without objection, during which they suffered no loss, and incurred no risk by the court's action. Held, that they were barred by laches to complain that their annuities were not charged on the whole residuary estate, as provided by the will will.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2223-2225; Dec. Dig. § 509.*]

Appeal from Orphans' Court, Philadelphia County.

Petition for bill of review by beneficiaries under the will of Israel Michener, deceased. From a decree dismissing the petition, petitioners appeal. Affirmed.

The following is the opinion of Ashman, P. J., of the court below:

"The petitioners are entitled under the will of the testator to the income of \$15,000 each for life; on the death of the testator's wife or daughter, to the income for life to each of an additional sum of \$5,000. The testator died December 30, 1893. In February, 1903, the petitioners with other parties in interest authorized by a writing in the nature of a power of attorney counsel to represent them at the audit of the executors' account. By the adjudication of that account which was confirmed by agreement of counsel for all parties on April 7, 1903, the on February 28, 1902, was the actual pro-sum of \$30,000 invested in a certain mortgage

eFor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the executors to secure the payment of the aforesaid income to the petitioners, and the income has ever since been regularly paid. The petitioners aver that they received no notice of the audit nor of the award, and that their earliest knowledge of the action of the court was had in January, 1908. They aver that the income payable to them and the principal out of which it arises are, by the terms of the will, charged upon the residuary estate, and that it was error to award to them the security in question; and they pray that a sum shall be secured to them upon the residuary estate sufficient to yield an assured income free from all contingen-

"Assuming the facts set up by the petitioners to be true, and their conclusions of law to be correct, their unexplained delay of four years and nine months, and their continuous receipt of income under the will during that period, are an acquiescence in the acts of the executors and of the court, which of itself effectually bars them from the relief prayed for. Scott's Appeal, 112 Pa. 427, 5 Atl. 671. They have not shown that they have suffered any loss nor incurred any risk by the acts now complained of. On the contrary, it is quite probable that the mortgage will yield a larger return than the income from the investments of the estate, which the testator directed to be averaged, and paid according to that average, to the cestuis que trust.

"For the reasons stated, the petition for review is dismissed."

Argued before MITCHELL, C. J., and FELL, MESTREZAT, ELKIN, and STEW-ART, JJ.

Horace M. Rumsey, for appellants. John G. Johnson and Maurice Bower Saul, for appellee.

PER CURIAM. The decree is affirmed on the opinion of the court below.

(225 Pa. 91)

COOK v. ERIE ELECTRIC MOTOR CO. (Supreme Court of Pennsylvania, May 20, 1909.)

1. TRIAL (§ 132*)—MISCONDUCT OF COUNSEL-CURING ERROR.

Plaintiff's counsel in argument to the jury, referring to defendant, said: "This great millionaire company don't deny that." On objection the remark was withdrawn, and the court instantly cautioned the jury to disregard it en-tirely. Held, that the court's denial of defend-ant's application to withdraw a juror was not reversible error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 315; Dec. Dig. § 132.*]

2. STREET RAILROADS (§ 117*) — COLLISION WITH TEAM—CONTRIBUTORY NEGLIGENCE.

In an action for injuries to plaintiff in a

of that amount was set aside in the hands the track, whether plaintiff was negligent in of the executors to secure the payment of attempting to cross in front of the car held for the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 249, 257; Dec. Dig. § 117.*]

Appeal from Court of Common Pleas, Eric County.

Action by R. A. Cook against the Erie Electric Motor Company. Judgment for plaintiff, and defendant appeals. Affirmed.

In addition to the facts stated in the opinion of the Supreme Court it appeared that the accident happened on the night of December 4, 1906, when it was dark, and that the electric car was running at a high rate of speed. The court submitted the case to the jury. Verdict and judgment for plaintiff for \$1,750. Defendant appealed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, and POT-TER, JJ.

S. A. Davenport and J. M. Sherwin, for appellant. A. P. Howard and L. G. Peck, for appellee.

PER CURIAM. In the argument to the jury counsel for plaintiff in commenting on the evidence in the case and the damages that should be awarded the plaintiff said: "This great millionaire company don't deny that." Defendant's counsel objected to this remark, and asked that a juror be withdrawn. The plaintiff's counsel at once withdrew the remark, and the judge said: "We say to the jury that you should entirely disregard that remark. There is no evidence to base it on, and you should disregard it entirely. The counsel having withdrawn it, we decline to grant the request of the defendant, but will seal them an exception."

It has been frequently held that in this class of cases no irregularities should be permitted which tend to inflame the prejudices of the jury against the defendant, and in a flagrant case this court will reverse for such error. But so much depends on the immediate circumstances and what may be called the atmosphere of the trial that a large discretion must be allowed to the trial judge. In the present case the action of the judge in cautioning the jury was so prompt and the withdrawal of the improper remark by counsel was so frank and unreserved that we cannot say that the judge did not use a wise discretion in refusing to withdraw a juror.

On the main question of plaintiff's negligence we adopt the language of the judge in refusing a new trial: "Plaintiff was not attempting to cross defendant's track at a street intersection, but was driving along at the side of the track in the street and attempted to cross the tracks where the track makes a slight curve in the street. He was collision with a street car running at a high makes a slight curve in the street. He was rate of speed at night, as he attempted to cross driving so nearly parallel with the track

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that, when his horses got within five feet of the track in front of them, the track would not be over eighteen inches from the horses at right angles to them. As a car projects nearly that distance outside of the track, it would appear from plaintiff's evidence that, when he looked for an approaching car, he was as near the track as it was practical to go without looking. We cannot say that the jury were not justified in finding that he looked at the edge of the track, and, as that was the place where the evidence tended to show the public generally crossed the track, we cannot say that the plaintiff was negligent in attempting to drive over the track at that curve. We are still of the opinion that the case was for the jury." Judgment affirmed.

(225 Pa. 79)

In re HUGHES' ESTATE. Appeal of LANDY.

(Supreme Court of Pennsylvania. May 20, 1909.)

1. WILLS (§ 497*) — CONSTRUCTION — "CHILDREN."

A child not of testator's blood, whom he designated in his will as "an adopted daughter" and "my daughter," was not entitled to take with children of testator's blood under a direction in a codicil dividing certain money in a bank among all "his children."

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1084; Dec. Dig. § 497.*

For other definitions, see Words and Phrases, vol. 2, pp. 1115-1140; vol. 8, p. 7601.]

2. Adoption (§ 8*)—Parol.

A child may not be adopted by parol. [Ed. Note.—For other cases, see Adoption, Cent. Dig. § 12; Dec. Dig. § 8.*]

Appeal from Orphans' Court, Luzerne County.

Judicial settlement of the estate of Henry L. Hughes. From an order dismissing exceptions to an adjudication declaring Annie Griffith Landy not entitled to take under a clause in a codicit to testator's will bequeathing certain money in bank to children, she appeals. Affirmed.

Freas, P. J., filed the following opinion in the court below:

"Henry L. Hughes, the testator, left to survive him three children, and three grandchildren, the latter being children of a daughter, Margaret Lamoreaux, who died previous to the time of making his will. He had taken to raise when she was 16 months a girl named Annie Griffith, and he always treated her precisely as he did his own daughters. She addressed him as father and his wife as mother, and he spoke of her as his daughter. She was in fact not related to him in any way. It is claimed on behalf of the grandchildren and Annie Griffith that they are included in the term 'children' as mentioned in the codicil, and are therefore entitled to

share with the living children of his blood in the distribution of his money in bank.

"The pertinent parts of the will and codicil read as follows:

"'I will and bequeath to my daughter, Sarah Eldred, one hundred acres of land, it shall be the south end of the William Hyde tract, and to my son, Henry H., the use of one hundred acres of the same tract lying on the north side of the piece devised to Sarah, and to my son, Lewis, I will the remainder of the homestead including the north portion of the William Hyde survey. I will to my daughter, Jane Cease, and my daughter's children of Margaret Lamoreaux, now dead, and Annie Griffith, an adopted daughter, the remainder of my property which consists of house and lot in the city of Wilkes-Barre, and two houses and lots in West Nanticoke and mountain tract in Huntington Township known as the Lewis Richards tract, my daughter Annie Griffith shall not be debarred from remaining on the homestead during the lifetime of my widow.

"'My son, Lewis, shall have the use of the hundred acres set apart for him but not to sell, convey the same, it shall fall to his helrs at his death, and I further appoint my son, Henry H. Hughes, to be guardian of the children of my daughter, Margaret Lamoreaux, in their minority, also guardian of my son, Lewis, providing that Lewis does not hold and occupy the land designed for him."

"Codicil No. 2:

"'Know all persons that I, Henry L. Hughes, of Plymouth Township, Luzerne County, and State of Pennsylvania, does this day alter my former will by reason of the death of my son, Lewis, and I hereby bequeath the homestead to my daughter, Sarah, during her lifetime, and at her death it shall fall to her heirs, and the money that I hold in the bank shall be equally divided among all of my children.'

"It is well-settled rule of law that a bequest to children, where there are children to take, does not include grandchildren unless it be the apparent intention of the testator, clearly disclosed by his will, to provide for the children of a deceased child. Hunt's Estate, 133 Pa. 260, 19 Atl. 548, 19 Am. St. Rep. 640. There is nothing in this will which by necessary implication permits a construction differing from the ordinary rule of law. and we find that the grandchildren are not comprehended in the word 'children,' and consequently they do not share in the bequests to his children of the money in bank. They, however, will take of testator's estate, not disposed of by his will, the same share their mother would take if living.

way. It is claimed on behalf of the grand-children and Annie Griffith that they are included in the term 'children' as mentioned as his daughter and his adopted daughter in the codicil, and are therefore entitled to

April 2, 1872 (P. L. 31). Whether the will | is in compliance with that act we need not say, for it is held in Carroll's Estate, 219 Pa. 440, 68 Atl. 1038, 123 Am. St. Rep. 673, that in Pennsylvania there is no authority for the proposition that a child may be adopted by parol. We have no evidence of her adoption by decree of court, and we must, therefore, conclude that she was never legally adopted by testator. It is further contended on behalf of Annie Griffith that the testator intended to include her in the term 'children' as found in the codicil, as manifested by the language employed in the body of the will. He makes devises to her as 'Annie Griffith, an adopted daughter,' and as 'my daughter, Annie Griffith.' These words are merely descriptive of the person intended. They did not, in fact, make her a daughter or an adopted daughter, for she was neither. Line's Estate, 221 Pa. 374, 70 Atl. 791, 19 L. R. A. (N. S.) 293. There being children of his blood to take, no necessity arises to extend the term beyond its natural import. Hunt's Estate, 133 Pa. 267, 19 Atl. 548, 19 Am. St. Rep. 640. The language employed by testator in his revoked will, if it is evidence of his intention, does not sustain her contention. It follows that Annie Griffith is not to share in the distribution of the money in bank, nor does she share in the part of testator's estate which passes under the intestate laws."

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and ELKIN, JJ.

Evan C. Jones and Thomas Butkiewicz, Jr., for appellant. Granville J. Clark and P. W. McKeown, for appellee.

PER CURIAM. The decree is affirmed on the opinion of the court below.

(225 Pa. 62)
PHILLIPS et al. v. WESTMINSTER
CHURCH.

(Supreme Court of Pennsylvania. May 20, 1909.)

RELIGIOUS SOCIETIES (§ 20*)—CHUBCH BUILD-ING—SALE—REMOVAL TO MOBE CONVENIENT LOCALITY.

A religious corporation, in the absence of countervailing statute or charter provision, may sell its church building to rebuild in another more convenient locality, notwithstanding the contributors to the fund from which the original church was built intended that it should stand in its present location.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 130-132; Dec. Dig. § 20.*]

Appeal from Court of Common Pleas, Philadelphia County.

Bill by one Phillips and others against the Westminster Church of Broad Street, Philadelphia, to restrain a sale of the church. From a decree dismissing the bill for want of equity, plaintiffs appeal. Affirmed.

Sulzberger, J., filed the following opinion in the court below:

"The principles that govern the adjudication of this case are quite simple. The corporation known as the Westminster Church owns the building on Broad street, and has at common law the right to sell it if the same is no longer suitable for its business, and with the proceeds build or buy another. This common-law right exists unless taken away by statute or charter, and no provision of either statute or charter has been pointed out which abridges the right. On the contrary, article 16 of the charter of 1859 expressly provides, in strict conformity with the act of April 26, 1855 (P. L. 328), that 'all property, real and personal whatsoever now pertaining or that shall hereafter be devised, bequeathed or conveyed to said corporation shall be taken and held by said trustees and shall inure subject to the control and disposition of the lay members of the said church.' Here there is a church corporation vested with full power to hold and dispose of all its property subject to but this one condition. It is incorporated as a Presbyterian church. It has no power to divert its revenues, or to expend them, for any other purpose than the worship of God and to maintain the building as a place of worship. Unless, therefore, it shall be clearly shown by the terms of a specific gift constituting an appreciable portion of the fund that raised the church that a trust had been fastened upon the corporation expressly to remain forever in the particular location designated, no question of the right of removal can arise. There is, however, nothing in the evidence to show that this church was erected for any other purpose than as a place of worship. No neighborhood was specially sanctified by the terms of any gift or other provision. Probably a number of persons subscribed and paid their money toward the erection of the Broad street church because it was in a neighborhood which they thought adapted for efficient gospel work. The building was erected undoubtedly where the people who gave the money wanted it to be placed. If this constituted a condition, express or implied, it was fulfilled.

"Complaint, however, is now made that it is about to be broken, and this necessitates an examination of the meaning of such a condition. Upon this point the language of Mr. Justice Dean, in Cushman v. Church of the Good Shepherd, 188 Pa. 438, 41 Atl. 616, is controlling. He there held that such a condition cannot mean that through all the mutations of time a church will be perpetually maintained at a particular spot, but that, on the contrary, it must be assumed that both the corporation and the contributions made the condition, subject to the law of the church, that, if the congregation became depleted in numbers and substance by reason

•For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion, this particular church might be disposed of and all the associations connected with it should, as nearly as possible, be transferred to a successor, wisely located in a new field. That it was forever to remain in that place, even though not a single worshiper entered its doors, is an unreasonable interpretation. The facts as found show that the great majority of the congregation and the corporators are agreed that the removal from the Broad street site is wise, and this conclusion is affirmed by the supervisory tribunal of the church. That it is disagreeable to some who have the welfare of the church at large and of this particular congregation at heart cannot alter the matter. Unanimity of thought and conduct is a goal which, even if it were desirable to be reached, will forever remain unattainable. In practical questions the legally constituted majority must rule. There is, of course, a class of church disputes, concerning which there is a long line of cases, in which the minority triumph over the majority. These are all cases in which religious questions give rise to a schism, and in these the law operates to prevent a diversion of trust funds, whether by a great majority or a small minority. The case before us is entirely void of this element. It is, as viewed by the law, a merely practical business question. This corporation thinks it can in another place carry on its business more advantageously than in its present building. It therefore intends to sell its old place, and with the proceeds buy a new one which will be better adapted. The right to do this is so obvious and necessary that in no ordinary business corporation could a man be found to question it. In a mere business question like this, however, the church corporation stands before the law exactly like any other corporation. It has the right to exercise its business judgment.

"Applying these principles, we find that on the night of February 28, 1906, when the corporation authorized the removal of the congregation temporarily to the Greenway church, West Philadelphia, with a view to building a union church for the enlarged congregation, the removal was legally effected, and that the same, if it needed confirmation, was validly approved by the act of the Presbytery of March 5, 1906. We find, further, that the sale approved on April 17, 1906, and on October 31, 1906, was approved at meetings validly called. The objection that the call was read from the Westminster pulpit in what had formerly been Greenway church is of no force. When the removal was properly sanctioned on February 28th and March 5th, it became lawful to reduce into act the resolution to remove, and when the session did, on the first Sabbath in April, 1906, actually remove the Westminster Church to

of death and removals or shifting of popula- the pulpit of the Westminster Church from which notices were to be read."

Argued before MITCHELL, C. J., and FELL, MESTREZAT, ELKIN, and STEW-ART, JJ.

William H. Burnett and William H. Wood, for appellants. M. Hampton Todd, T. Elliott Patterson, and Robert H. Hinckley, for appellee.

PER CURIAM. The judgment is affirmed. on the opinion of the court below.

(225 Pa. 82)

SCRANTON v. LAUREL RUN TURN-PIKE CO.

(Supreme Court of Pennsylvania. May 20, 1909.)

TUBNPIKES AND TOLL ROADS (§ 36*)—USE BY AUTOMOBILES—"OTHER CARRIAGE OF BUR-DEN OR PLEASURE."

Act April 29, 1874, under which defendant turnpike company was organized, provides on page 86, cl. 6, \$ 30, that it may appoint toll gatherers to collect from every person using the road tolls and rates mentioned for any coach, sulky, chaise, phaeton, wagon, or any other carriage of burden or pleasure, and clause 9 deriage of burden or pleasure, and clause y declares that, if any person owning, riding in, or driving any sulky, chaise, or other carriage of burden or pleasure shall pass through the toll gate with intent to defraud the company, they shall be liable to a penalty. Held, that since by Act April 19, 1905 (P. L. 217) § 1, automobiles and motor validles are recognized as "carriages." and motor vehicles are recognized as "carriages of burden or pleasure," the act providing that they shall not be operated on any street or highway until the operator shall have procured a license, defendant turnpike company could not exclude automobiles from passage over its road.

[Ed. Note.—For other cases, see Turnpikes and Toll Roads, Cent. Dig. § 101; Dec. Dig. **§** 36.**₹**

For other definitions, see Words and Phrases, vol. 6, p. 5412.]

Appeal from Court of Common Pleas, Luzerne County.

Application for mandamus by W. W. Scranton against the Laurel Run Turnpike Company to compel defendant to permit the use of its turnpike for the passage of automobiles. From a judgment sustaining a demurrer to defendant's return to an alternative writ, defendant appeals. Affirmed.

The following is the opinion of Halsey, P. J., of the court below.

"The petitioner alleges: That he is a resident of the state of Pennsylvania, and as such is entitled to the free and uninterrupted use and passage over and upon the public highways in the state. The defendant is a corporation chartered under the act of April-29, 1874 (P. L. 73), for the purpose of constructing and maintaining a turnpike road. That under and in pursuance of its charter it has constructed and is now maintaining aturnpike road between the city of Wilkes-Barre and the township of Bear Creek, in West Philadelphia, the new pulpit became the county of Luzerne, and has established

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

a toll gate on said turnpike road, and has toll gatherers as they shall think proper 'to been collecting tolls from persons using and traveling on the same. That the petitioner is the owner of an automobile of which H. D. Warner, of said city of Scranton, is the operator and driver. That the said driver has been licensed by the highway department of the commonwealth to operate a motor vehicle upon the public highways of the state for the year 1907, which license is dated January 1, 1907. That the said turnpike road is a public highway. That upon October 5, 1907, said Warner while operating said automobile, which had displayed in a conspicuous place on the front and back of it said license number, accompanied by the petitioner, arrived at the toli gate of said turnpike company and found the same closed, and the plaintiff requested the toll gate keeper to permit them to pass through said gate and over said turnpike road in said automobile, and offered and tendered the toll keeper any toll that the turnpike company might demand for the use of the road. The toll keeper, following the instructions of the defendant, refused to permit the plaintiff's automobile the privilege of passing through the said gate. It is further alleged that the said defendant company by refusing and prohibiting the use of the turnpike road by automobiles and by refusing to allow your petitioner to pass through said toll gate and over and upon said turnpike road in said automobile on October 5, 1907, and by allowing teams and wagons the use of the same, is unjustly and unlawfully discriminating and did unjustly and unlawfully discriminate, against the petitioner and against others who may desire to pass over said turnpike in automobiles; that the said turnpike road is a public highway, and the defendant has no legal or equitable right to prevent the petitioner's automobile and others who are duly licensed from driving and operating automobiles thereon upon the payment of a just and reasonable toll.

"All the essential averments of the plaintiff's petition are admitted or not denied with the exception of that contained in section 15 of the defendant's return, viz.: 'We say that there is no remedy at law by this proceeding or otherwise to compel us to allow the passage of automobiles over our said turnpike, and we further say that the law fixes no lawful and reasonable toll for automobiles.' The defendant company was incorporated under Act April 29, 1874 (P. L. 85) \$ 80. The said defendant company has finished more than five miles of its road. Said road is a public highway. It has erected toll gates upon the said road and exacted tolls under and in pursuance of the said act and its supplements. It has refused to permit automobiles to use said road. $\mathbf{B}\mathbf{v}$ clause 6, p. 80, of said act, when such corporation is licensed, it shall and may be Where land is so situated that access to it lawful for it to appoint such and so many from the highway cannot be had except over clause 6, p. 80, of said act, when such cor-

collect and receive of and from all and every person or persons using said road the toll and rates hereinafter mentioned. * * * for coach * * * sulky * * * chaise, phaeton * * wagon or any other carriage of burden or pleasure.' By clause 9 it is further provided: 'If any person or persons owning, riding in or driving any sulky, chaise • • or other carriage of burden or pleasure shall pass through the toll gate with intent to defraud the company, they will be subject to a penalty of \$10.00.' In Act April 19, 1905 (P. L. 217) § 1, automobiles and motor vehicles propelled by steam, gas, or electricity are recognized as among those denominated in the corporation act as 'any other carriage of burden or pleasure,' or as 'other carriage of burden or pleasure,' by providing that they shall not be operated or driven upon any public street or highway in any city, borough, county, or township in this commonwealth until the operator shall have procured a license. The defendant's turnpike is a public highway. The vehicle which the plaintiff was driving on October 5, 1907, must be included in the general designation of the act of April 29, 1874, as other carriage of burden or pleasure,' and 'every other carriage of pleasure under whatever name it may go.' We cannot concur with the allegation of the defendant that 'the law fixes no lawful and reasonable toll for automobiles.

"The relator's demurrer to the return of the Laurel Run Turnpike Company is sustained, and a peremptory writ of mandamus commanding it, the said Laurel Run Turnpike Company, to perform the duties prayed for in the petition in this case, is allowed."

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and ELKIN, JJ.

Paul Bedford and Geo. R. Bedford, for appellant. W. Alfred Valentine, for appellee.

PER CURIAM. The judgment is affirmed on the opinion of the court below.

(225 Pa. 98)

COMMONWEALTH V. BURFORD. (Supreme Court of Pennsylvania. May 20, 1909.)

TRESPASS (§ 81*) - WAY OF NECESSITY -

POSTED LAND—STATUTES.
Act April 14, 1905 (P. L. 169), prohibiting trespass on land posted as private property, does not apply to customary or private ways on land leading to highways from property on which the owner had built tenement houses, to which the only access was over such ways, and hence a tradesman using such ways to deliver goods to the house of one of the tenants was not lisble to the penalty imposed as for a trespass on posted land.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 171; Dec. Dig. § 81.*]

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

other land of the grantor or lessor, the grantee [or lessee is entitled to a way of necessity over such intervening land of the grantor or lessor.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 50-55; Dec. Dig. § 18.*

For other definitions, see Words and Phrases, vol. 8, pp. 7418, 7419.]

8. EASEMENTS (§ 17*)—RIGHT OF WAY GRANT. Where a conveyance contains no express grant of a right of way appurtenant to land, and no words are used from which such grant may arise by implication, a right of way may arise from the circumstances surrounding the grant

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 45-49; Dec. Dig. § 17.*]

4. LANDLORD AND TENANT (§ 124*)—PREMISES
—RIGHT OF WAY—USE.

The right of way appurtenant to a leased house includes not only the right of the lessee to use it, but a right of use by any other person who, with the tenant's permission, visits the house for a lawful purpose.

[Ed. Note.—For other cases; see Landlord and Tenant, Dec. Dig. § 124.*]

Appeal from Superior Court.

Isaac H. Burford was convicted in justice's court of a willful and unlawful entry on land on which notices against trespassing had been posted by the owners, and from a judgment of the Superior Court reversing a judgment of the court of sessions, affirming the justice's judgment, the Commonwealth appeals. Affirmed.

Porter, J., filed the following opinion in the court below:

"The defendant having, in a proceeding before a justice of the peace, been convicted of and fined for a willful and unlawful entry upon lands upon which the owners had caused to be prominently posted printed notices that the said land was private property, and warning all persons from trespassing thereon under the provisions of the act of assembly approved April 14, 1905 (P. L. 169), entitled, 'An act making it unlawful to trespass upon land posted as private property, and providing the penalty therefor,' the court of quarter sessions allowed an appeal from said judgment. The parties entered into a written agreement as to the facts, which was filed in the court below in the nature of a case stated, and upon the facts thus brought upon the record the court adjudged the defendant guilty and affirmed the judgment of the justice. The defendant appeals, and the only question presented is: Are the facts embodied in the case stated sufficient to sustain the judgment? title of the act of April 14, 1905, above quoted, clearly indicated that it was the legislative intention to deal with the subject of trespasses upon land posted as private property, and to provide the penalty therefor. The subject was not new. Trespass upon land which was private property had for very many generations been recognized by the common law as unlawful, a private in-

3, c. 12, p. 209) thus: It signifies no more than an entry on another man's ground without lawful authority, and doing some damage, however inconsiderable, to his real property. For the right of meum and tuum, or property in lands, being once established, it follows as a necessary consequence that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil. Every entry, therefore, thereon without the owner's leave, and especially if contrary to his express order, is a trespass or transgression." And again on page 214 of the same chapter: 'Every trespass is willful, where the defendant has notice and is especially forewarned not to come on the land.' The injury or wrong was a private one, and the remedy was in an action of trespass by the owner.

"The first section of the act declares that: 'It shall be unlawful for any person willfully to enter upon any land, * * * where the owner or owners of said land has caused to be prominently posted upon said land printed notices that the said land is private, property, and warning all persons from trespassing thereon.' It requires no resort to artificial rules of construction to arrive at the conclusion that what the Legislature here declared to be unlawful was a willful trespass upon land which had been posted by the owner in the manner indicated by the statute. It certainly was not the legislative intention to prohibit every entry, whether with or without right, upon land which had been thus posted; and give to the soil a sacred character. In seeking the legislative intention, it would not be reasonable to confine the inquiry to the one clause of the section made up of these words, 'it shall be unlawful for any person willfully to enter upon any land,' which has been posted. To do this would be to hold that the owner could not enter upon his own land, nor make any contract permitting any person else to so enter. The notices which the act requires to be posted must warn 'all persons from trespassing' upon the lands. Considering the section as a whole its meaning is free from doubt. When the owner has posted upon the land notice warning all persons against trespassing thereon, an intentional trespass shall render the trespasser subject to the penalty imposed by the statute. When thus read, the statute contains nothing of which its title did not give that notice required by the Constitution. The statute certainly contains nothing from which could be implied a legislative intention to do anything but make subject to a penalty such things as were and always had been trespasses upon land. The effect of the statute was to declare to be a public wrong and subject to a penalty a thing which had until that time been a private wrong for which jury or wrong. Blackstone defines it (Book | the party injured had a remedy by private

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

action. This act did not change the rights of the owner of the land, nor deprive him of any power to enter into contracts giving to other persons the right to enter upon his holdings, nor can it have any effect upon the rights acquired under any contract with regard to said lands into which he may enter. There was not concealed in the body of this statute any provision which could by any reasonable intendment be held to take away from any person having an interest in land, which under the existing law entitled him to enter thereon, the right to so enter. Had such a provision been concealed in the body of the act, the title of the statute gave no notice of it and the constitutional provision would have rendered it invalid.

'Fitzgerald and Lenhart were the owners in fee simple of a large tract of land in Fayette county upon which they had caused notices to be posted in the manner provided for by the act of April 14, 1905. They operated upon this tract a coke works at which they employed a large number of men. On this land were located about 85 tenement houses, in which the employes of said coke works reside; said houses being arranged in rows or streets, which had no outlet to the public road except over the private property of Fitzgerald and Lenhart. The village is traversed by private and customary ways and paths used by said tenants and the other employes of the proprietors. There has been no dedication by deed or plot of the streets or ways of said coke village to public use, but the same are private ways over the lands of the proprietors in which no other than the proprietors and their employés have any interest or property, but there are no other means of ingress or egress to and from the residences of said tenants than over said private ways. The owners leased the several houses to various tenants. The written lease in each case was for the term of one month, it designated the lessee, the amount of rent to be paid, the number by which the house was known, provided for the payment of the rent punctually, and that, in case of a holding over, the tenancy should be for another month and from month to month. The written lease contained no reference to any public or private way. Burford, the defendant, was a dealer in merchandise in the borough of Uniontown, and, having received orders for certain specified goods from certain tenants of the aforesaid houses, upon the property of Fitzgerald and Lenhart, with directions that the goods be delivered at said residences of the persons so ordering the same, he attempted to make delivery of the goods in accordance with such orders. While delivering said goods and at the time he was arrested, the defendant traveled on foot and used only the private ways or paths customarily used by the tenants of said houses in going to and from their daily employment and in going to and from the public road. He

could not have delivered said goods at said houses in any other way. While in the act of delivering such merchandise so ordered he was arrested. Upon these facts and no others he was convicted.

"When Fitzgerald and Lenhart leased a house in the village to a tenant, that necessarily involved a demise of the land upon which the house stood and the lot, if any. used in connection therewith. The property leased was entirely surrounded by other lands of the lessors, and was not accessible from any highway in any manner save over such other lands. The written lease contained no express grant of a right of way, from the house to the public highway, nor did the mere words of the lease embody anything from which such a grant could be implied. When a conveyance contains no express grant of a right of way appurtenant to lands, and no words are used from which such grant arises by implication, such right of way may, however, arise from the circumstances of the grant itself. The most marked right of way arising in this manner is the way of necessity. Where land is sold or leased and is so situated that access to it from the highway cannot be had except by passing over other land of the grantor or lessor, the grantee or lessee becomes entitled to a right to pass over the land of his grantor or lessor for the purpose of reaching the highway, and returning to his own land. Wissler v. Hershey, 23 Pa. 333; Ogden v. Grove, 38 Pa. 487, and note to Atkyns v. Bordman; 4 Leading Cases in the American Law of Real Property, Sharswood & Budd. p. 191. Had there been no recognized private customary way leading from the houses in the village to the highway, the tenants of those houses would have been entitled to a way of necessity from their houses over the other land of the lessors to the highway. The facts agreed upon in the case stated. however, established that the village was traversed by private and customary ways and paths used by the tenants in passing through the village 'and in going to and from the public road'; and, further, that the tenants could only have access to their houses over such 'private and customary way.' An owner of land may in Pennsylvania arrange it as he pleases, doing no injury to others, and may provide ways or other privileges necessary for the convenient use of the different parts of his land. When he has thus provided ways for the specific use of particular parts of his land and conveys the different parts of the tract, by deed or lease, in fee or for a definite term, the grantees or lessees take the several parts subject to the servitude of such ways or with the right to the use of such ways appurtenant to their land, as the case may be, in the absence of an express reservation or agreement on the subject. In such a case justice requires that the grant should be construed against the grantor so far as to pass the privileges annexed by himself to the property conveyed. Kieffer v. Imhoff, 26 Pa. 438; Eby v. Elder, 122 Pa. 342, 15 Atl. 423; Zell v. Universalist Society, 119 Pa. 390, 13 Atl. 447, 4 Am. St. Rep. 654; Geible v. Smith, 146 Pa. 276, 23 Atl. 437, 28 Am. St. Rep. 796; Held v. McBride, 3 Pa. Super. Ct. 155; Church v. Vonneida, 6 Phila. 557. When Fitzgerald and Lenhart leased the several houses, they, the owners of the land, knew of the existence of these private customary ways, and they knew, also, that these ways were the only means of access to the houses which they were leasing. These private and customary ways, therefore, passed by the lease as appurtenant to the house, and the fact that the lease contained no express grant is wholly immaterial. The ways being appurtenant to the house, the title to the latter carried with it the right to the use of the way. The right being appurtenant to the house, it included not only the right of the lessee to the use of it, but that it might be used by his family and others who with the permission of the tenant visited his home for any lawful purpose. 'It needs no citation of authority to show that such a right of way, appendant or annexed to an estate, may be used and enjoyed by those who own or lawfully occupy any part of the dominant tenement for any purpose to which it may from time to time be legitimately applied. Only those who may be properly regarded as trespassers on the dominant tenement can be excluded.' Gunson v. Healy, 100 Pa. 42.

"The appellant was using the customary private way leading to the houses of the tenants upon the tract of land in question under the right of such tenants, to whom and upon whose express orders he was at the houses delivering necessary family supplies. The right of the tenants justified his entry, and he was not a trespasser.

"The judgment is reversed and the appellant discharged."

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and ELKIN, JJ.

W. J. Johnson and D. W. Henderson, Dist. Atty., for the Commonwealth. W. C. Mc-Kean, for appellee.

PER CURIAM. Judgment affirmed on the opinion of the Superior Court.

(225 Pa. 113)

COMMONWEALTH v. RACCO. (Supreme Court of Pennsylvania. May 24, 1909.)

1. WITNESSES (\$ 380*) — CROSS-EXAMINATION OF ACCUSED—PRIOR CONVICTION.

Where accused becomes a witness in his own behalf, he may be asked on cross-examination, to test his credibility, if he has not been convicted and sentenced for larceny, assault and better and wounding and obtaining money unconvicted.

the commonwealth may show by other witnesses that he has made contrary declarations, in order to impeach him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1211; Dec. Dig. § 380.*]

2. CRIMINAL LAW (§ 1153*)—APPEAL—CROSS-EXAMINATION OF ACCUSED—DISCRETION.

Since the statute permitting accused to testify in his own behalf does not limit his crossexamination, the scope of cross-examination will not be reviewed, in the absence of a showing of abuse of discretion by the trial judge amounting to substantial injury to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3064; Dec. Dig. § 1153.*]

3. WITNESSES (§ 359*)-PRIOR CONVICTION-BEST EVIDENCE.

Where prior conviction arises merely collaterally, as affecting the credibility of accused, he may testify concerning it, though the record is the best, and sometimes the only, competent evidence thereof.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1161; Dec. Dig. § 359.*]

4. WITNESSES (§ 391*) - CREDIBILITY - PRIQE CONVICTION.

Admissions by accused of the commission of other crimes, while inadmissible to establish his guilt of the offenses in question, may be shown to affect his credibility as a witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1248; Dec. Dig. § 391.*]

Appeal from Court of Over and Terminer. Lawrence County.

Rocco Racco was convicted of murder in the first degree, and he appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, and POT-TER, JJ.

H. K. Gregory and A. W. Gardner, for appellant. Charles H. Young, Dist. Atty., and S. L. McCracken, for the Commonwealth.

BROWN, J. We have discovered no reversible error in this record, and but 2 of the 7 questions raised by the 19 assignments call for any discussion. One of these is as to the right of the commonwealth to ask the prisoner on cross-examination whether he had not been previously convicted of various crimes. He was asked, under objection, whether he had not been convicted and sentenced to prison for larceny, assault and battery and wounding, and for obtaining money under false pretenses. When he offered to testify in his own behalf, his credibility as an intensely interested witness became at once a question for the jury. It was proper that they should learn whatever might aid them in determining what credit should be given to his testimony, and no one was so able to enlighten them as himself. Under our statute permitting him to testify. no restriction was placed upon the limit of his cross-examination. It was, therefore, largely within the discretion of the trial judge, and, unless that discretion was so abused that substantial injury has resulted battery and wounding, and obtaining money up. abused that substantial injury has resulted der false pretenses; and, if he answers "No," to the prisoner, the judgment will not be re-

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1997 to date, & Reporter Indexes

of the offenses stated, no one knew so better than himself, and it is not to be pretended that his affirmative answers would not have affected his credibility. If he had answered untruthfully in the negative, the way would have been open to the commonwealth to impeach his testimony by competent evidence of his convictions. Though courts'in other furisdictions and text-writers differ as to the right to ask a witness whether he had been convicted of a crime for the purpose of affecting his credibility, the rule as followed by the lower courts in our state, since defendants in criminal cases have been made competent witnesses, has been, according to the observation and experience of every member of this court, to allow such questions to be put to a defendant as were asked this prisoner on his cross-examination.

The only exception now to be recalled is Com. v. Pioso, 19 Lanc. Law Rev. 145, in which the court of quarter sessions of Lancaster county, following an expression of Paxson, J., in Buck v. Com., 107 Pa. 486, held that it was improper to ask the defendant whether he had not, a short time before, been convicted of a crime. In Buck v. Com. the question asked the witness was held to have been improper, because, if he had been convicted of embezzlement, the proper evidence of that fact was the record. We do not now approve what was there said, and, if it is to be regarded as an expression of the law, it is overruled. If the matter in issue is a conviction, as it is on a plea of autrefois convict, the best and only competent evidence is, of course, to be produced; but when the matter about which a witness is asked, though one of record, is merely collateral to the main issue, and arises in it only as affecting the credibility of the witness, he may testify to it, especially when, of all others, he knows the exact truth, without regard to the record. The proper rule, followed by the court below, is laid down in Underhill on Criminal Evidence, §§ 60, 61: "The accused, when testifying in his own behalf, waives many of the peculiar constitutional privileges which belong to him as one accused of crime. It is usually provided by statute that he may be examined and cross-examined 'as any other witness,' and, where such is the case, he will not be permitted to claim any privilege while he is a witness that is not enjoyed by other witnesses. In other words, the rule then is that he cannot claim as a witness the privileges which belong to him solely as the accused. He cannot complain if considerable latitude is allowed on his cross-examination, and, generally, he may be asked on his cross-examination the same questions as any witness. In states where the cross-examination of the accused is not by statute expressly limited to matters brought out on his direct exam-

versed. If he had been formerly convicted ination, he may be cross-examined, not only upon matters strictly relevant to the issue, but upon those which are collateral and apparently irrelevant, and which are calculated only to test the credibility and weight of his testimony. * * * He may be questioned as to specific facts calculated to discredit him. Thus his previous arrest or indictment, his conviction of a felony, a previous imprisonment in a penitentiary or house of correction, his prior contradictory statements, disorderly actions, or the commission of offenses similar to that charged, attempts to bribe witnesses, or simulation of insanity, may all be brought out by questions put to him on his cross-examination, to show what credit-his evidence should receive." If the record of the conviction of a crime by a witness is the only evidence to be received of that fact to affect his credibility, in many cases, of which the present is an illustration, his credibility could not be impeached, though it ought to be; for the record may be in a foreign state or country, and not obtainable in time to be used when found to be needed at the trial.

The second question raised by the appellant, which needs brief notice, is as to the admissibility of the testimony of the detective, Dimaio, that the prisoner had confessed to him the commission of other crimes. Such testimony, if offered for the purpose of establishing his guilt under the indictment on which he was being tried, would clearly have been inadmissible. Com. v. Wilson, 186 Pa. 1, 40 Atl. 283. But the offer was for no such purpose. It was to impeach the credibility of the appellant. He had been asked whether he had not been convicted of certain offenses, and, having denied that he had been, Dimaio was called to contradict him, by showing his admissions to the contrary. The ruling of the court was, in permitting Dimaio to testify, that the witness would have to testify to other convictions than those admitted by the accused on the trial. He admitted but three, and denied the rest.

The assignments of error are all overruled, the judgment is affirmed, and the record remitted to the court below for the purpose of execution.

(225 Pa., 136)

In re ATLDORFER'S ESTATE. Appeal of KRONMAIER.

(Supreme Court of Pennsylvania. June 22, 1909.)

1. WILLS (§ 458*) — CONSTRUCTION — REPETITION OF WORDS AND PHRASES.

While the repetition by testator of the same words or phrases to which he has previously given a definite meaning will be presumed prima facie to carry the same meaning in the second use, yet such presumption must give way to any indication of a different intent by testator.

[EV] Note—For other green — Wills Cont

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 977; Dec. Dig. § 458.*]

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Testator, after giving his entire estate to his wife, stated: "It is my wish that my nearest relatives, brother, sister or their children shall inherit one-half of all the estate my wife may possess at the time of her death the other half shall come to the nearest relatives of my wife or if the water to make a tives of my wife, or if she wants to make a will to anyone else, she can dispose of one-half of all she may leave just as she pleases." Held, that "nearest relatives," as applied to the wife's half, did not carry the same meaning as in the case of the husband's half, but that the presumption was that testator meant such relatives as should be properly defined as nearest, and that a sister of the wife took to the exclusion of children of a deceased sister.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1070; Dec. Dig. § 502.

For other definitions, see Words and Phrases, vol. 5, p. 4692.]

Appeal from Orphans' Court, Philadelphia County.

Petition for partition in the estate of Johann Christen Atldorfer. From a decree dismissing exceptions to confirmation of inquisition, Anna Katharina Kronmaier ap-Reversed.

From the record it appeared that the court decreed that the children of a deceased sister of the half blood of testator's wife were entitled to share with a sister of the whole blood of the wife in the portion of the estate over which the wife had power of disposition. The wife died intestate after surviving the testator.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Gustavus Remak, Jr., for appellants. William Drayton, for appellees.

MITCHELL, J. While the repetition by a testator of the same words or phrases to which he has previously given a definite meaning will prima facie be presumed to carry the same meaning in the second use, yet this presumption must give way to any indication of a different intent on the part of the testator. In the construction of this will complicated as it is by a want of familiarity with the accurate use of the English language, we cannot ignore a diversity in the circumstances and the apparent intent under which the similar words were used.

After leaving his whole estate to his wife. adding "she has helped to make it, therefore she shall enjoy it" the testator wrote: "It is my wish * * * that my nearest relatives, brother, sister or their children, may they yet live at Kircheim (clearly meaning if they should be living), • • • shall inherit one-half of all the estate my wife may possess at the time of her death * * * the other half shall come to the nearest relatives of my wife or if she wants to make a will to any one else she may name she can dispose of one-half of all she may leave just as versed.

2. WILLS (§ 502°)—CONSTRUCTION—"NEAREST | she pleases." The prominent thought here RELATIVES." is that the testator considered the estate as belonging equitably at least to himself and to the wife who had helped him make it and intended that it should finally go equally to the nearest relatives of each. As to his own share he names definitely the relatives, brothen, and sister, and establishes the right of representation among them by adding "or their children." As to these the devise is absolute, and, except for what she may have consumed during her life he asserts his wish positively, it is beyond her control by will or otherwise. He defines not only the property he is disposing of, but also the persons who are to take it.

As to her share, however, the conditions are different. She has an unlimited power of disposition of it by will, and her relatives get nothing except through her gift or her intestacy. Testator had in mind no special or defined persons who should ultimately take, but only the general idea that they should be such as would represent her. He therefore used only the general words "nearest relatives" without defining them as he had in his own case. Under such circumstances, the presumption is that he meant such relatives as should properly be defined as nearest. To give effect to this word it was held in White's Estate, 27 Wkly. Notes Cas. 253, that sisters excluded nephews and nieces, citing and following Locke v. Locke, 45 N. J. Eq. 97, 16 Atl. 49, and the decision has been generally acquiesced in.

Decree reversed, and partition directed to be made on the principles of this opinion.

(225 Pa. 52)

SLOAN v. PHILADELPHIA & R. RY. CO. (Supreme Court of Pennsylvania. May 20, 1909.)

RAILBOADS (§ 850*)—CROSSING ACCIDENT— QUESTIONS FOR JURY.

Where, in an action for damages at a grade crossing, plaintiff testified that on approaching the track he stopped and got out of his carriage, walked to the track, and looked in both directions, and, the track being perfectly clear, went back and drove forward, looking and listening as he did so, he is entitled to go to the jury, even though subsequent portions of his testimony are at variance with such statement.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1169-1176; Dec. Dig. § 350.*]

2. TRIAL (§ 140*)—QUESTIONS FOR JURY.

The credibilty of testimony in general is for the jury, and the remedy for a verdict against the weight of the evidence is by new trial after verdict, and not by nonsuit at the trial.

[Ed. Note.—For other cases, see T Dig. §§ 834, 335; Dec. Dig. § 140.*] Trial, Cent.

Appeal from Court of Common Pleas, Philadelphia County.

Action by John J. Sloan against the Philadelphia & Reading Railway Company. Judgment of nonsuit, and plaintiff appeals. Re-

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Argued before MITCHELL, C. J., and | making absolute rule for judgment for want FELL, MESTREZAT, POTTER, and EL-KIN, JJ.

Augustus Trask Ashton and Maurice V. Daniels, for appellant. W. C. Mason and Gavin W. Hart, for appellee.

PER CURIAM. The plaintiff testified that on approaching the track he stopped, and, his view being partially obstructed in one direction, he got out of his carriage, walked forward to the track, looked north and south, and saw the track perfectly clear. He then went back, got into the carriage, and drove forward, looking and listening as he did so. Having thus affirmatively made out a case by testimony which, if believed, showed it clear of contributory negligence, whether it was rebutted or not by other testimony was for the jury. Even if subsequent portions of plaintiff's own testimony were at variance with this account, the question of credibility between them was for the jury.

It is strongly urged that the plaintiff's account was so improbable as to be unworthy of belief, and it would seem that the trial judge was of that opinion. But the credibility of testimony in general is for the jury. and the remedy for a perverse verdict, or one against the weight of the reasonable and properly credible evidence, is a new trial-a remedy that ought to be freely applied whenever the verdict, in the opinion of the court, is perverse in the sense that it goes beyond the limits of a reasonable difference of opinion upon the facts as proved or admitted. But the remedy in this form is not the same as that by nonsuit, and care should be taken to avoid confusing them.

reversed, and procedendo Judgment awarded.

(225 Pa. 139)

WILSON v. BRYN MAWR TRUST CO. (Supreme Court of Pennsylvania. June 22, 1909.)

1. WILLS (§ 671*)—DEVISE—CONSTRUCTION—

A devise of real estate to a niece "to and for her separate use" creates a separate trust for her benefit, though the word "sole" is not used in connection with the word "separate."

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1586; Dec. Dig. § 671.* For other definitions, see Words and Phrases,

vol. 7, p. 6417.] 2. WORDS AND PHRASES - "SOLE" - "SEPA-

The word "separate," as used in creating a trust, has a fixed and technical meaning, and excludes the marital rights, whereas the same meaning is not attributable to "sole."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 6543, 6412.]

Appeal from Court of Common Pleas, Montgomery County.

Action by George B. Wilson against the

of a sufficient affidavit of defense, defendant appeals. Affirmed.

See, also, 73 Atl. 1071.

The following is the opinion of Swartz, P. J., of the court below:

"This was an action of assumpsit brought upon a policy of title insurance. plaintiff's statement it was averred that on April 18, 1907, the plaintiff purchased from Charles Henry, Jr., upon terms stated, a tract of land situated in Haverford township, Delaware county, Pa., containing some 32 acres; that on the same date the defendant company, in consideration of a premium paid by him, issued to the plaintiff a policy of title insurance 'insuring the said plaintiff from all loss or damage not exceeding the sum of \$34,000, which the said plaintiff might sustain by reasons of defects or unmarketability of the title of the plaintiff as owner in fee to' the premises purchased by him; that the title to the said premises was defective and unmarketable, and the defect therein was not excepted in the policy; that Charles Henry, Jr., who conveyed to plaintiff, had acquired title from John J. Pinkerton and Sallie, his wife, and that the said John J. and Sallie Pinkerton were not the owners in fee of the land conveyed, with the exception of about a quarter of an acre; that Emily T. Thomas had owned the said tract of land in fee and had devised the same 'unto my niece Sallie Pinkerton to and for her own separate use forever'; that no trustee was ever appointed for the said Sallie Pinkerton, who was incapable of aliening the same; and that consequently the deed from her and her husband to Charles Henry. Jr., plaintiff's grantor, passed no title whatever. The statement further averred notice to and demand upon the defendant company and damages alleged to have been sustained by the plaintiff in excess of \$34,000.

"In the affidavit of defense the issuing of the policy of title insurance and the conveyances recited in the statement were admitted, but the statement that Sallie Pinkerton was not the owner in fee of the entire premises insured was denied, and it was averred that the will of Emily T. Thomas vested in the said Sallie Pinkerton an absolute estate in fee.

"The court made absolute the rule for judgment for \$11,240.99 for want of a sufficient affidavit of defense."

Argued before FELL, BROWN, MESTRE-ZAT, POTTER, and STEWART, JJ.

E. H. Hall, Montgomery Evans, and Henry M. Brownback, for appellant. John G. Johnson, Maurice Bower Saul, and Nicholas H. Larzelere, for appellee.

POTTER, J. The single question raised Bryn Mawr Trust Company. From an order by this appeal is whether the devise to Mrs.

Fer other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Sallie Pinkerton in the will of Emily T. Thomas created a separate use trust. If it did, then the subsequent conveyance by herself and her husband of the land in question was obviously void. The clauses of the will to which appellant particularly directs attention are the following:

"Second. I give and bequeath to my sisters Jane Wilson and Susan Downing, each the sum of five thousand dollars, unto nephews John A. Wilson, Joseph M. Wilson, Henry Wilson, I. H. Downing and nieces Emily Baldwin, Sallie H. Wilson and Susan D. Wilson each the sum of three thousand dollars: and unto my niece Sailie Pinkerton I give and devise my farm, Situate in Delaware County to and for her own separate use forever. • • •

"Sixth. I give, devise, and bequeath all the rest, residue and remainder of my estate whatsoever and wheresoever unto my before named two sisters for their own use forever.

"Seventh. And lastly I nominate and appoint my nephew John J. Pinkerton and friend Samuel Elliott, Executors hereof, and authorize and empower them or the survivor to dispose of any real estate of which I may die seised, either at public or private sale, when and as may be deemed expedient, and to make, execute and deliver all such deed or assurances in the law as may be required to properly vest the title thereof, without any purchaser being liable to see to the application or for the misapplication of the purchase money paid or consideration given therefor."

It will be noticed that the words here used were, "and unto my niece Sallie Pinkerton I give and devise my farm situate in Delaware County, to and for her own separate use forever." The words are plain, and upon their face indicate an intention to create a separate use for the benefit of Mrs. Pinkerton. The usual form of expression in such cases is "sole and separate use," but as set forth in Bispham's Equity, § 100: "No particular form of words is necessary to create a trust for the benefit of a feme covert. According to the modern English authorities, the most apt word to create such a trust is 'separate,' which has a fixed and technical meaning, and which will of itself exclude the marital rights; whereas the same fixed and technical meaning is not attributable to 'sole.'" In Massy v. Bowen, L. R. 4 Eng. & Ir. App. 288, the Lord Chancellor (Lord Hatherly) said (page 294): "The common form used by all conveyancers with reference to a separate estate is to use the words 'sole and separate use.' That is the common form, which appears in all the books of precedent. The word 'separate' is sometimes used alone; but, if the word 'sole' is used, it is never used alone that I can find in any book or precedeut." The present Chief Justice, in Scott loss is represented by the consideration paid.

"The only reasonable interpretation therefore of the testator's use of the words 'her own separate estate,' is that he intended to create the estate technically known as one in trust to her separate use."

In the present case we agree with the learned judge of the court below that the language of the will clearly indicated an intent to create a separate trust, which is not made doubtful by anything within the four corners of the will. The opinion of the trial judge is a demonstration of the soundness of the conclusions reached.

The assignments of error are overruled, and the judgment is affirmed.

(225 Pa. 148)

WILSON v. BRYN MAWR TRUST CO. (Supreme Court of Pennsylvania. June 22, 1909.)

APPEAL AND ERROB (§ 842*)—REVIEW—AFFI-DAVIT OF DEFENSE—ORDER DISCHARGING RULE.

The ruling of the trial court on a rule for judgment for want of a sufficient affidavit of defense will only be disturbed where the clear statement of claim and affidavit of defense raise a pure question of law, and clear error has been committed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3319; Dec. Dig. § 842.*]

Appeal from Court of Common Pleas, Montgomery County.

Action by George B. Wilson against the Bryn Mawr Trust Company. From an order discharging rule for judgment for want of a sufficient affidavit of defense, plaintiff appeals. Affirmed.

See, also, 73 Atl. 1070.

The facts relating to this appeal were thus stated by Swartz, P. J., who heard the case in the court below:

"The damages claimed are as follows:

Purchase money paid, less \$87.50... \$11,186 35 Interest on same from April 18, 1907. Examination of title and recording 50 00 deeds . Road tax \$55.33, county tax \$97.26, interest on mortgage. 610 56 Loss because of increased value of 23,970 75 12,325 40 farm . Loss on sale of Hagy farm.....

"The interest of the insured which was covered by the policy was that of owner in fee of the property. As the grantee received no title or interest of any value, the basis of his loss is the true value of the property insured. Foehrenbach v. Title & Trust Co., 217 Pa. 331, 66 Atl. 561, 12 L. R. A. (N. S.) 465, 118 Am. St. Rep. 916. The plaintiff, however, can recover nothing beyond the face of his policy, and his damages are confined to the actual loss sustained. If he paid \$34,000 for the property and the farm had no value beyond the amount so paid, his v. Bryan, 194 Pa. 41, 46, 45 Atl. 135, 136, said: Only one-third of the consideration was paid,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and the balance is represented by a mort-idefense was entered for the sum of \$11,240. gage given by Mr. Henry. Plaintiff claims as part of his loss this one-third of the consideration which he paid in cash. He had the use of the farm, and we do not see how he can claim as part of his loss the taxes and interest on his investment, unless he furnishes us with an account of the income of the farm. If the income exceeded the sum paid out for taxes, interest, and expenditures, he sustained no loss on this branch of his claim. We cannot assume that the use of the farm has no value.

"The claim for damages for the excess of the market value of the farm over the price paid is disputed, not because the item is not a proper element of damages, but because no such excess in fact it is averred can be shown. The averments of the affidavit of defense are not as specific upon this point as they should be, but an allegation that the sum of \$1,050 per acre is a full price for the farm is in effect an averment that such price is its market value. When we say that an owner received a full price for his property, we mean ordinarily that he sold it at its fair market value. When an affidavit of defense discloses facts sufficient to indicate a good defense, we are not in the habit of entering judgment without an opportunity to file a supplemental affidavit. This question of market value is eminently one for the jury and not for the court.

'The defendant denies that it had any knowledge of the alleged agreement between the plaintiff and Joseph J. Baughman for the sale of the Pinkerton farm at the time the policy of insurance was issued. think the affidavit of defense is sufficient for all the claim of the plaintiff other than the sum of \$11,186.86 and the item for conveyancing, \$50, and on this latter item the plaintiff is entitled to interest from April 18, 1907.

"Judgment is accordingly entered for the plaintiff for the sum of \$11,240.99, with leave to proceed to trial before a jury for the balance of his claim."

Argued before FELL, BROWN, MESTRE-ZAT, POTTER, and STEWART, JJ.

John G. Johnson, Maurice Bower Saul, and Nicholas H. Larzelere, for appellant. E. H. Hall, Montgomery Evans, and Henry M. Brownback, for appellee.

POTTER, J. We have here the appeal of the plaintiff from the same judgment as that from which we have just considered the appeal of the defendant, the Bryn Mawr Trust Company. Upon the motion of the plaintiff, judgment for want of a sufficient affidavit of judgment is affirmed.

99, the amount of the purchase money paid by the plaintiff and his conveyancing expenses, with leave to proceed to trial before a jury for the balance of the claim. This would involve the determination of questions of fact, and the rule for judgment seems to us to have been properly disposed of by the court below. We have often said that the ruling of the trial court in a case of this kind will only be disturbed in cases where the statement of claim and the affidavit of defense raise a pure question of law, and clear error has been committed.

In Ætna Ins. Co. v. Confer, 158 Pa. 598, 604, 28 Atl. 153, 154, Justice Dean said: "It must be a very plain case of error in law if we sustain appeals in such cases as this from the decree of the common pleas discharging the rule. The decree being interlocutory, no injury can result to the complaining suitor other than delay of final judgment. Besides, it is doubtful whether the act of assembly authorizing these appeals has not on the whole aggravated delay. Paine v. Kindred, 163 Pa. 638, 643, 30 Atl. 273, 274, Justice Green, after quoting the above language, said: "We do not mean to interfere where rules for judgment have been discharged in the lower courts in doubtful and uncertain cases, but only in such as are very clear and free of doubt, as we have frequently said." In Security S. & L. Ass'n v. Anderson, 172 Pa. 305, 307, 34 Atl. 44, 45, it was said, per curiam: "We are all of opinion that the rule for judgment was rightly discharged. But, assuming for argument sake that the action of the court was at least doubtful, the result is the same. As was said in Griffith v. Sitgreaves, *81 Pa. 378, the act referred to was 'intended to reach only clear cases of error in law, and thus prevent the delay of a trial.' Much valuable time is lost and expense incurred in endeavoring to convict the court below of manifest error in cases where at most there is merely a doubt as to the correctness of its decision. In such cases it is useless to insist on a reversal." In Kidder Elevator Interlock Co. v. Muckle, 198 Pa. 388, 390, 48 Atl. 272, 274, it was said, per curiam: "An order discharging a rule for judgment for want of a sufficient affidavit of defense will not be reversed by the Supreme Court in doubtful and uncertain cases, but only such as are very clear and free of doubt."

In the present case we cannot say that the right of the plaintiff to recover a larger sum than that for which judgment was entered is clear, or free from doubt. The assignment of error is therefore overruled, and the (82 Vt. 465)

HEMENWAY v. LINCOLN.

(Supreme Court of Vermont. Windham. Oct. 9, 1909.)

1. New TRIAL (§ 102*)—GROUNDS—SURPRISE.

A new trial on the ground of surprise will
not be granted, when the party applying therefor failed to apply for a continuance to prepare to meet an unexpected issue raised early in the trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 207; Dec. Dig. § 102.*]

Cent. Dig. § 207; Dec. Dig. § 102.*]

2. New Trial (§ 168*) — Grounds — Newly Discovered Evidence.

A petition for new trial for newly discovered evidence, which avers that petitioner, since the affirmance of the judgment in the Supreme Court, has been diligent in the search for new evidence, is insufficient as an allegation of fact, and also because it relates to what took place since the trial, and does not show what effort the petitioner made before the trial to put herself in possession of the evidence.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 168.*]

2. New Trial. (§ 168.*) — Grounds— Newly

3. New Trial (§ 168*) — Grounds — Newly Discovered Evidence.

A petition for new trial for newly discovered evidence must be supported by the affidavit of the petitioner that the evidence is newly discovered, and that petitioner had no knowledge of it before or at the trial, and ordinarily the affidavit of counsel that he was ignorant of it at the trial must be attached.

[Ed. Note—For other seems and Nor Couls.]

Note.—For other cases, see New Trial, Dec. Dig. § 168.*]

New Trial (§ 168*) — Grounds — Newly Discovered Evidence.

A petition for new trial for newly discovered evidence relating wholly to facts which took place in petitioner's presence must be dismissed, in the absence of anything excusing petitioner's ignorance of it.

-For other cases, see New Trial, [Ed. Note .-Dec. Dig. # 168.*]

Petition by Nancy A. Hemenway against Mary E. Lincoln for a new trial on the ground of surprise and newly discovered evidence, brought to Supreme Court and heard on pleadings and affidavits. missed.

For former opinion, see 80 Vt. 530, 69 Atl. 153.

Argued before ROWELL, C. J., and MUN-SON, WATSON, HASELTON, and POW-ERS. JJ.

Gibson & Waterman, for petitioner. Herbert Barber and Frank Barber, for petitionee.

POWERS, J. This is a petition for a new trial on the ground of surprise and newly discovered evidence. The first ground is not available to the petitioner; for if, as she says, she was surprised to have Miss Lincoln deny that a note was given for the original loan, she should have applied for a continuance, that she might have had time and opportunity to prepare for this unexpected issue. This denial came early in the trial, and, having chosen to go along without

bound by her election, there being nothing in the case to take it out of the general rule. Taylor v. St. Clair, 79 Vt. 536, 65 Atl. 655; Briggs v. Gleason, 27 Vt. 114; Coolidge v. Taylor, 79 Vt. 528, 65 Atl. 582; State v. White, 70 Vt. 225, 39 Atl. 1085.

Nor can the petitioner prevail on the second ground. The petition contains no allegation of due diligence—sets forth no facts from which an inference to that effect can be drawn. The petitioner says, in effect, that since the affirmance of the judgment in Supreme Court she "has been diligent in her search for new evidence." This is not only insufficient as an allegation of fact (May v. State, 77 Vt. 830, 60 Atl. 1; Comoli v. State, 78 Vt. 423, 63 Atl. 186), but it relates to what took place since the trial; while the real question is: What effort did the petitioner make before the trial to put herself in possession of the evidence necessary to maintain her defense? She says that she was unable to produce evidence sufficient to substantiate her claim, but does not specify the reason. Such a petition must be supported by the affidavit of the petitioner that the evidence is newly discovered—that is to say, that the petitioner had no knowledge of it before or at the trial (Bradish v. State, 35 Vt. 452)—and ordinarily must have attached to it the affidavit of counsel that they, too, were ignorant of it at the trial (Reynolds v. Hassam, 80 Vt. 501, 68 Atl. 645; Taft v. Taft. 82 Vt. 64, 71 Atl. 831).

Not only is the affidavit of counsel wholly wanting here, but the petitioner does not deny that she knew all about the evidence now alleged to be newly discovered-except a part of that of Mary Wilcox, her mother. and Arthur Munroe, her son, both of whom were witnesses in her behalf at the trial. The issues were all fairly developed before these witnesses testified; and it is safe to assume that they were in frequent consultation with the petitioner and her counsel, at least during the time the plaintiff was putting in her evidence. The testimony which they now give, so far as the petitioner denies knowledge of it at the trial, relates wholly to facts and incidents which took place in the petitioner's presence. Nothing appears to excuse her ignorance of it, and she is not entitled to a retrial on the strength of it.

Petition dismissed, with costs.

(82 Vt. 390)

CUSHMAN & RANKIN CO. v. BOSTON & M. R. R.

(Supreme Court of Vermont. Caledonia. Oct. 9, 1909.)

APPEAL AND ERROR (§ 863*) — REVIEW — GENERAL DEMURRER.

Where a demurrer is general, and the exceptrial, and, having chosen to go along without tions do not show the particular point or points requesting a continuance, the petitioner is raised in the lower court, the general practice

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in the Supreme Court is to hear any question presented within reach of the demurrer.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 863.*]

2. INSUBANCE (§ 606*)—FIRES—ACTIONS—PAB-TIES—INSUBER OF DESTROYED PROPERTY.

In an action against a railroad company for destruction of property by fire, an insurer who had paid the amount of a policy thereon was not a necessary party, its right against the railroad not resting upon any relation of contract or privity between them, but resting upon a contract of indemnity derived from the insured alone, which could only be enforced in his right. [Ed Note—For other cases see Insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1504-1516; Dec. Dig. § 606.*]

3. INSURANCE (§ 603*)—RELEASE.

Where when plaintiff, the owner of buildings destroyed by fire from a railroad locomotive, executed a release to the railroad company, the company knew that plaintiff had received insurance thereon, which constituted an equitable assignment to that extent, and authorized the insurer to sue in the name of the plaintiff for its own benefit, the release did not bar the action.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1499; Dec. Dig. § 603.*]

4. Damages (§ 64*) — Insurance (§ 606*) — Fires — Damages — Deduction for Insurance Paid.

In an action by an insured for damages for loss by fire no deduction in damages will be made on account of insurance paid the owner, but, when compensation is received on recovery, the insured stands as trustee for the insurer to the extent of the part of the loss paid by it, while when, after payment by the insurer, it sues in insured's name, generally the railroad must respond for the full damages caused by the negligence, and, if only part of the loss has been paid by the insurer, insured is entitled to the residue, but, as to the division between them, the wrongdoer has no concern; the right of recovery in insured's name for benefit of the insurer not depending upon allegations in the declaration other than or different from those necessary for a recovery by the owner of the property for his own benefit.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 113; Dec. Dig. § 64;* Insurance, Cent. Dig. § 506.*]

5. Pleading (§ 180*)—Replication—Depar-

In an action by the owner of buildings destroyed by fire from a locomotive for the benefit of an insurance company which had paid the loss, where defendant pleaded in bar a release from the owner, a replication that, after the fire and before the excution of the release, the insurance company had been forced to pay the insurance, and thereupon became subrogated to that extent to plaintiff's right of recovery for the loss, of which defendant had knowledge at the time of the execution of the release, and that the suit was brought for its benefit to recover its payment, did not constitute a departure, since the rights of the insurer could not be defeated by any transaction between defendant and the nominal plaintiff after defendant has notice of the true state of the case.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 358-384; Dec. Dig. § 180.*]

Exceptions from Caledonia County Court; Wm. M. Taylor, Judge.

Action by the Cushman & Rankin Company against the Boston & Maine Railroad. A demurrer to the replication was overruled, and defendant excepted. Affirmed, and cause remanded.

Argued before ROWELL, C. J., and MUN-SON, WATSON, HASELTON, and POW-ERS, JJ.

Young & Young, for appellant. Hawe & Hovey, for appellee.

WATSON, J. The exceptions do not show the particular objections made below and there passed upon, by reason whereof it is urged that there are no questions before this court, referring to Jenness v. Simpson, 81 Vt. 109, 69 Atl. 646. In State v. Schoolcraft, 72 Vt. 223, 47 Atl. 786, the exceptions stated the respects in which it was claimed in the court below the defects existed. In this court those points were not presented in argument, but new ones not before raised were urged. It was held that the new points could not be considered. In Jenness v. Simpson the demurrer was special, assigning two causes. The exceptions did not show that any other ground was relied upon below. In this court the demurrant undertook to take advantage of a third claimed defect reachable by the demurrer as general in form. It was considered that the assignments in the demurrer showed the questions raised below, nothing appearing otherwise in the exceptions, and it was held that, as the record did not show the third claimed defect to have been there raised and passed upon, it was not before us. When the demurrer is general and the exceptions do not show the particular point or points raised below, the general practice in this court has been to hear any question presented within reach of the demurrer.

This is an action on the case to recover for loss sustained by the destruction of the plaintiff's buildings and contents by fire alleged to have originated by fire communicated by defendant's locomotive engines. Pleas the general issue, and special that, after the cause of action accrued and before the commencement of this suit, the defendant received of the plaintiff a release executed by him under seal, releasing and discharging it from all liability for loss, etc., sustained by him on account of or in consequence of the destruction of his said property. In reply, it is said that before and at the time of the fire the said buildings, etc., and leather board stock, in the declaration mentioned, were insured to the plaintiff against all direct loss or damage by fire (except as in the policies stated) by two contracts of insurance, one on the buildings, etc., and the other on the leather board stock by the Union Mutual Fire Insurance Company, a corporation organized and doing business under the laws of this state, and that, after said fire and before the execution of the release pleaded, the said insurance company was forced and obliged to and did necessarily pay to the plaintiff the sum of \$1,500 in satisfaction of its liability under said contracts of insurance by reason

*For other cases see same topic and section NUMBER in Dec. & Am. Digs; 1907 to date, & Reporter Indexes

of the plaintiff's loss caused by said fire, and that the said insurance company, upon making said payment, to the extent thereof became subrogated to all right of recovery by the plaintiff for the loss aforesaid, of all which the defendant had knowledge at and before the time of the execution of said release; that the insurance company has never received any payment or compensation for its loss occasioned as aforesaid, and this suit is instituted by it and for its benefit, for the purpose of recovering the amount of its said payment. The case is here on the question of the sufficiency of the replication.

It is urged that the owners of the property destroyed and the insurance company were jointly interested in the cause of action against the defendant, and both should be parties to the suit. But we think it clear that the action is properly brought. On the record the defendant is the wrongdoer, and is primarily liable for the damages. fire policies are contracts of indemnity, and, to the extent that the insurer was obliged to pay on account of the loss, it was put in the place of the insured, and may recover of the defendant in the name of the insured. The right of the insurer against the defendant does not rest upon any relation of contract or privity between them. The legal title is in the plaintiff, and, though after payment the insurer had the right to bring suit in the plaintiff's name, its rights are to be worked out through the cause of action which the plaintiff has against the defendant, and can be enforced in his rights only. In Mason v. Sainsbury, 3 Doug. 60, 26 E. C. L 50, the action was on the riot act to recover damages sustained by the demolition of a house in the riots of 1780. The loss had been paid by the insurers, for whose benefit the action was brought in the name of the insured by his consent. The defendant said it was impossible that a plaintiff could recover in respect of that for which he had already received a satisfaction. Lord Mansfield said: "The question, then, comes to this: Can the owner, having insured, sue the hundred? Who is first liable? the hundred, it makes no difference. If the insurer, then it is a satisfaction, and the hundred is not liable. But the contrary is evident from the nature of the contract of insurance. It is an indemnity. Every day the insurer is put in the place of the insured. In every abandonment it is so. The insurer uses the name of the insured." In St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co., 139 U. S. 223, 11 Sup. Ct. 554, 35 L. Ed. 154, it is said that the right of the insurer "arises out of the nature of the contract of insurance as a contract of indemnity, and is derived from the assured alone, and can be enforced in his right only. By the strict rules of the common law it must be asserted codes, it may be asserted by the insurer in ing the promises, etc., the plaintiff be-

his own name; but in any form of remedy the insurer can take nothing by subrogation but the rights of the assured." Rockingham Mut. Fire Ins. Co. v. Bosher, 39 Me. 253, 63 Am. Dec. 618; Home Mut. Ins. Co. v. Oregon Ry. & N. Co., 20 Or. 569, 26 Pac. 857, 23 Am. St. Rep. 151.

Nor is the release pleaded a bar to this suit. The replication shows that before and at the time of the execution thereof, the defendant had knowledge that the plaintiff had received the amount of the insurance from the insurance company. The acceptance of payment by the plaintiff from the insurer constituted an equitable assignment to that extent, which authorized the latter to sue in the name of the insured for his own bene-This right a court of law will profit. tect, and the release subsequently given by the insured to the defendant having knowledge of such payment is not a bar to this action. Payne v. Rogers, 1 Doug. 407; Hart v. Western R. R. Corp., 13 Metc. (Mass.) 99, 46 Am. Dec. 719; Conn. Fire Ins. Co. v. Erie Ry. Co., 73 N. Y. 399, 29 Am. Rep. 171; Monmouth Mut. Ins. Co. v. Hutchinson, 21 N. J. Eq. 107.

It is further contended that the replication departs from the declaration. In actions brought by the insured to recover damages for loss of property destroyed by fire so originating, no deduction in damages will be made on account of insurance having been paid to the owner. Mason v. Sainsbury, cited above; Clark v. Hundred of Blything, 2 Barn. & C. 254, 9 E. C. L. 77; Yates v. White, 4 Bing. N. S. 272, 33 E. C. L. 349; Harding v. Townshend, 43 Vt. 536, 5 Am. Rep. 304. But when compensation is received on recovery, the insured stands as trustee for the insurer to the extent of the part of the loss paid by it. Randall v. Cockran, 1 Ves. 98. When, after payment by the insurer, suit is brought by it in the name of the insured, generally the wrongdoer must respond in such action for the full damages caused by its negligence, and, if only part of the loss has been paid by the insurer, the insured is entitled to the residue, but as to the division between them, the wrongdoer has no concern. Mobile, etc., R. Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527. Thus it is seen that the right of recovery in the name of the insured for the benefit of the insurer does not depend upon allegations in the declaration other than or different from those necessary for a recovery by the owner of the property and for his own benefit. In the case before us a release from the insured being pleaded in bar, facts are replied which in law show that notwithstanding such release a recovery may be had for the benefit of the insurer to the extent of its right under the equitable assignment. In Winch v. Keeley. in the name of the assured. In a court 1 T. R. 618, the action was indebitatus asof equity or of admiralty, or under some state sumpsit, plea that after the day of makcame a bankrupt, etc., and that his commissioners assigned his effects to the assignees, by virtue of which defendant is
specially to now the sums of money menchargeable to pay the sums of money mentioned to the assignees. The plaintiff replied that, before he became a bankrupt, in consideration of the matters and things set forth, he bargained, sold, assigned, and transferred the demand in question to one Joseph Searle, and that the writ in suit was sued out in his name for and on behalf of said Searle. On demurrer the replication was held sufficient. This case is referred to with approval in Strong v. Strong, 2 Aik. 373, also in Day v. Abbott, 15 Vt. 632, wherein it is said that when the interest of the assignee cannot be given in evidence under the general issue, and can be protected in no way except by a replication setting forth the transfer and assignment, such replication is good. In Timan v. Leland, 6 Hill (N. Y.) 237, it is said that the rights of persons beneficially interested in the demand, who necessarily sue in the name of another, cannot be defeated by any transaction between the defendant and the nominal plaintiff, after the former has notice of the true state of the case; and, if the defendant pleads a release or other matter of defense, the plaintiff replies, setting up the assignment and notice, or such other answer to the plea as the nature of the case may require. By reason of the defendants' pleas the new facts replied become material. They do not depart from the declaration. but consist with and support it. Carpenter v. McClure. 38 Vt. 375; Long v. Jackson, 2 Wils. 8; Hallett v. Slidell, 11 Johns. (N. Y.) 56; Fowler v. Macomb, 2 Root (Conn.) 888; Breck v. Blanchard, 22 N. H. 303.

Judgment affirmed, and cause remanded.

(82 Vt. 898)

JOHNSON v. ADAMS et al. (Supreme Court of Vermont. General Term. Oct. 6, 1909.)

1. INTERPLEADER (§ 11*)-RIGHT TO MAIN-

Where an agent is sued by his principal or a bailee by his bailor, and at the same time a third person asserts a title adverse to that of the principal or the bailor, a bill of interpleader cannot be maintained against the conflicting claims, but where the claim of the third person is under a title derived from that of the principal or the bailor, and acknowledges and does not deny that title, a bill of interpleader does not deny that title, a bill of interpleader is maintainable.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. \$\$ 18-19; Dec. Dig. \$ 11.*] 2. INTERPLEADER (§ 11*)-RIGHT TO MAIN-

the third person was a mere agent or bailed, and the administrator's title must be treated as adverse and paramount to the title claimed by the daughter.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. §§ 18-19; Dec. Dig. § 11.*]

Appeal in Chancery, Windham County; Geo. M. Powers, Chancellor.

Bill of interpleader by Emma L. Johnson against Minnie E. Adams and A. W. J. Wilkins, administrator of Coane's estate. From a decree of interpleader defendant A. W. J. Wilkins, administrator, appeals. Reversed and remanded.

Argued before ROWELL, C. J., and MUN-SON, WATSON, and HASELTON, JJ.

Arthur P. Carpenter, for orator. Clarke C. Fitts and Harold E. Whitney, for defend-

ROWELL, C. J. This is a bill of interpleader. It alleges that on such a day the defendant Adams placed in the hands of the oratrix \$1,100, \$100 of which she soon returned to said Adams, and deposited the balance in a savings bank in her own name and that of another, and took a book therefor, which she still retains; that the defendant Adams is a daughter of the intestate, who died two days before the money was placed in the hands of the oratrix; that the defendant Wilkins is the administrator of the intestate's estate, that Adams claims that the money was given to her by her father when in life, and therefore belongs to her in her own right, and has demanded it of the oratrix, while Wilkins claims that it belongs to the intestate's estate, and has also demanded it of the oratrix, and cited her before the probate court for examination concerning it, and that she is informed and believes that each of the defendants will sue her for the money if not restrained. She disclaims all interest in the money, alleges her indifference between the defendants, and avers her readiness and willingness to pay the money into court, and prays that the defendants be required to interplead. The defendant Adams filed what is denominated a cross-bill, which alleges that her father delivered the money to her as a gift, to have and to hold to her own use forever. The defendant Wilkins demurred to this cross-bill for want of equity, and also answered it, denying that the money was given to the defendant Adams TAIN.

Where a daughter two days after the death of her father placed money in the hands of a third person, who returned to her a part of it, and deposited the balance in a savings bank, and the daughter claimed that the money had been given to her by her father and demanded the return of it, and the administrator of the father.

TAIN.

As she claims, and alleging that her rather is to her to be held in trust for his benefit, and to be returned to him or his assigns or legal representatives on demand, and that her father demanded it of her, but that she refused to return it to him, but, on return of it, and the administrator of the father. as she claims, and alleging that her father

eFor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

father, and insisting that the matter in dispute between him and the said Adams is properly cognizable only at law, and not in The defendant Wilkins also answered the original bill, to which no replication was filed. The view we take of the case renders it unnecessary to state the substance of this answer.

The case was tried below on the pleadings, which are somewhat irregular, and a decree of interpleader rendered, from which the defendant Wilkins appealed. It has been presented here as it was there, and is ruled upon as presented. The oratrix claims that all the facts necessary for a bill of interpleader are present; that the appellant's answer traverses no material fact alleged in her bill, and therefore admits and establishes them; and that consequently her bill should be maintained. The appellant objects, among other things, that on the statements of her bill the oratrix must be treated as an agent or a bailee, and therefore cannot maintain her suit; that the crossbill of the defendant Adams, being but a dependency of the original bill, must fall with it, and, besides, that it shows no ground for equitable relief. It is true that on the statements of her bill the oratrix must be treated as a mere agent or bailee. It is also true that the title claimed by the appellant must be treated, not as derived from the defendant Adams, but as adverse and paramount to the title claimed by her. These things being so, she cannot maintain her bill, for it is settled law that if an agent is sued by his principal or a bailee by his bailor, and the like, and at the same time a third person asserts a title adverse and paramount to that of the principal or the bailor, a bill of interpleader cannot in general be maintained against the conflicting claimants, because from the very nature of the relation there is an independent personal liability of the agent to his principal and the bailee to his bailor in respect of the subjectmatter of the litigation, and, in order to maintain a bill of interpleader, the orator must have incurred no independent liability to either of the defendants. But when the claim of the third person, instead of being under an adverse, paramount title, is under a title derived from that of the principal or the bailor, and acknowledges, and does not deny, that title, a bill of interpleader is maintainable. 3 Pom. Eq. 44 1326, 1327.

Judge Story says that the true ground on which the doctrine stands that a bill of interpleader cannot be maintained in such cases lies deeper than the mere statement of as may be there determined.

fraudulently and against the right of her it indicates, and is not so much an independent rule as a necessary consequence of all interpleading, and is essentially founded in privity of rights or contract between the parties, independent of the title to the property or to the debt or duty in question, and which may not depend upon the question of title at all. 2 Story's Eq. (Redf. Ed.) § 817b. Lord Cottenham says the same thing in Crawshay v. Thornton, 2 Myl. & Craig, 1. So in Pearson v. Cardon, 2 Rus. & Myl. 606, Lord Brougham says it is quite clear that to a party in the situation of an agent having no claim against his principal no bill of interpleader will lie if there is nothing to qualify his agency, and no privity between the principal and the other party claiming, so as to make them in a manner joint bailors. In Third National Bank v. Skillings, etc., Lumber Co., 132 Mass. 410, the bill alleged that Babson delivered to the plaintiff a draft on New York for collection, which it collected and credited to Babson, that the Skillings Company contended that the draft was held by Babson as its agent and was its property, and that the proceeds belonged to it, while Babson's executrix contended that the proceeds belonged to his estate. The court said that the bill did not present a proper case for a bill of interpleader, for that there was no privity between the plaintiff and Skillings Company, as it did not claim the fund through any privity with Babson, but by a title paramount and adverse to his; that the plaintiff was not a mere stakeholder, but was the debtor of Babson, standing in privity with him alone. The court said that the authorities support the rule that in such a case a bill of interpleader will not lie, but that the remedy is at law; that such a bill will lie only when two parties claim of a third the same debt or duty by virtue of some privity existing between them. It illustrated the proposition by saying that if one deposits property or money in the hands of another, not as a stakeholder for both parties, but as his agent or bailee, and the deposit is claimed by a third person under an independent title, neither the agent nor the principal can maintain a bill of interpleader. So an attorney cannot maintain a bill of interpleader to settle the claim to the money he has collected for his client when a mere stranger claims the money on the ground that the security on which it was collected was originally obtained by the client wrongfully. Marvin v. Ellwood, 11 Paige (N. Y.) 365.

> Decree reversed and cause remanded, with directions to dismiss the bill, with costs in this court and with or without costs below



(82 Vt. 365)

Ex parte ALLEN.

(Supreme Court of Vermont. Lamoille. Oct. 6, 1909.)

1. CONSTITUTIONAL LAW (§ 309*)—DUE PROCESS OF LAW—POWER TO RESTRAIN INSANE PERSON.

At common law an insane person, if dangerous, may be temporarily restrained without legal process preliminary to the institution of judicial proceedings for the determination of his mental condition, but, where the confinement is permanent, the person confined is deprived of his liberty, which, if lawful, must be in pursuance of a judgment of a court of competent jurisdiction, after such person has had sufficient notice and an adequate opportunity to defend as guaranteed by Const. c. 1, art. 10, and the fourteenth amendment to the federal Constitution tion.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929-930; Dec. Dig. § 309.*]

2. Constitutional Law (§ 309*)—Due Process of Law—Restraint of Insane Per-SON.

P. S. 3716-3718, providing for a court of inquiry for the commitment of insane poor to the state hospital for the insane, must be construed in the light of the common law which requires notice to the alleged insane, and an opportunity to be present at the inquiry and defend, and, when so construed, the statute is not violative of Const. c. 1, art. 10, and the four teenth amendment to the federal Constitution.

[Ed. Note.—For other cases, see Constitution-Law, Cent. Dig. §§ 929-930; Dec. Dig. § 309.*1

8. CONSTITUTIONAL LAW (§ 809*)-DUE Pro-

CESS OF LAW.

Where one's right to a hearing depends on the favor or discretion of the tribunal deciding the question at issue, he is not protected in his constitutional right to due process of law, for the law must require notice to him, give him a right to a hearing, and an opportunity to be

[Ed. Note.—For other cases, see Constitution-Law, Cent. Dig. §§ 929, 930; Dec. Dig. § 309.*1

4. Insane Persons (§ 2*) — Constitutional Law (§ 255*)—Inquisitions—Evidence.

The certificate of physicians prescribed by P. S. 3753-3756, providing for physicians' certificates of insanity for the admission of persons to insane hospitals, etc., is given in a proceeding devoid of due process of law, for the physicians are not commissioned by any court or public authority to act in that capacity, and their examination may be made without notice to or knowledge by the alleged insane person, and they may base such certificate solely on such examination without hearing any evidence offered by the alleged insane person, and such offered by the alleged insane person, and such a certificate when used before a court of in-quiry under sections 3716 and 3718, providing for a court of inquiry for the removal of insane paupers to the state hospital for the insane, cannot have the force of a judicial determination by which the condition of the alleged insane person is fixed, but is only prima facie evidence of insanity.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 4-10; Dec. Dig. § 2:* Constitutional Law, Cent. Dig. §§ 736-745; Dec. Dig. § 255.*]

physicians' certificates of insanity for admission of persons to insane hospitals, is essential to the jurisdiction of the judge of probate in proceedings under sections 3716 and 3718, providing for a court of inquiry for the commitment of insane paupers to the state hospital for the

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 78; Dec. Dig. § 49.*]

6. INSANE PERSONS (§ 49*) — INQUISITION — POWER OF COURT—STATUTES.

The judge of probate in proceedings under P. S. 3716-3718, to determine the mental condition of state paupers, and providing that where the judge finds that such insane person is liable to be supported by the state, and the insanity of the person is certified in writing by two legally qualified physicians, "he shall issue an order for the removal of such insane person." an order for the removal of such insane person to the" hospital, acts judicially, and he cannot issue the order of removal without having found the facts requisite as a basis therefor, and he must find on competent evidence not only that the alleged insane person is destitute and with-out relatives bound by law to support him, but he must also find that such a person is insane and is dangerous, since section 3759 provides that demented persons who are not dangerous shall not be confined in a hospital for the insane.

[Ed. Note.—For other cases, see Insane Persons, Dec. Dig. § 49.*]

INSANE PERSONS (§ 26*)—Inquisition of

LUNACY—PRESONS (§ 26°)—INQUISITION OF LUNACY—PRESUMPTIVE EVIDENCE.

An inquisition of lunacy is only presumptive evidence of insanity, and is traversible as a matter of right by the alleged lunatic, and may be sent to a court of common law to be tried by jury.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 35, 36; Dec. Dig. § 26.*]

8. CONSTITUTIONAL LAW (§ 311*)—INQUISITIONS—PRESUMPTIVE EVIDENCE—POWER OF

TIONS—PRESUMPTIVE EVIDENCE—FUMBLE OF LEGISLATURE.

The Legislature may provide that the certificate of physicians prescribed by P. S. 3753—3756, providing for physicians' certificate of insanity as a condition for admission of insane persons to insane hospitals, shall be received as a condition of insane persons to insane hospitals, shall be received as a conditions of insane persons to insane hospitals. persons to insane hospitals, shall be received as evidence of insanity in proceedings to determine the question of insanity, but it has no power under the pretense of prescribing rules for the presentation of evidence to preclude the alleged insane person from establishing his rights in opposition thereto.

[Ed. Note.-For other cases, see Constitutional Law, Cent. Dig. \$ 932; Dec. Dig. \$ 311.*]

CONSTRUCTION IN FAVOR OF VALIDITY.

Where two constructions of a statute are equally obvious, the court must adopt the one which is in harmony with the Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

10. INSANE PERSONS (§ 49*)-INQUISITIONS-

JURISHIE PERSONS (§ 49*)—INQUISITIONS—
JURISHICTION OF COURT.

The judge of probate has no power to act
under P. S. 3716-3718, providing for a court
of inquiry before the judge of probate for the
removal of insane paupers to the state hospital
for the insane, etc., before reasonable notice has
been given to the allocated increases. been given to the alleged insane pauper.

[Ed. Note.—For other cases, see Insane Persons, Dec. Dig. § 49.*]

11. INSANE PERSONS (§ 49*)—INQUISITIONS— JURISDICTION OF COURT.

5. Insane Persons (§ 49*)—Inquisition—Ju-BISDICTION.

The presence of the certificate of physicians prescribed by P. S. 3753-3756, providing for of inquiry for the removal of insane paupers

•For other cases see same topic and section NUMBER in Dec. & Am. Dign. 1907 to date, & Reporter Indexes

to the state hospital for the insane, only by strictly conforming to the statute, and an order for the removal of a pauper to the hospital must show the jurisdictional facts.

[Ed. Note.—For other cases, see Insane Persons, Dec. Dig. § 49.*]

12. INSANE PERSONS (§ 49*)-INQUISITIONS-

JURISDICTION OF COURT.

Where the record in proceedings under P.
S. 3716-3718, culminating in an order of removal of a pauper to the insane hospital, showed that two of the questions of fact essential to the issuing of the order were not heard and determined by the court of inquiry under the statute, and did not show that the hearing had was on required notice to the alleged insane person, the order of removal was void.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 78; Dec. Dig. § 49.*]

13. Insane Persons (§ 49*)-Inquisitions APPEAL-STATUTES.

The right of appeal given by Laws 1908, p. 81, No. 94, amending P. S. 3757, from the decision of the physicians certifying to the insanity of a person to the insane person or to any next friend or relative to the probate court with the right to a trial by jury, and providing that any person detained at any hospital when the amendatory act took effect shall be entitled to such appeal, has no application where before the passage of the act an insane person was removed to the hospital for the insane as an insane pauper by order of a judge of probate, in proceedings under sections 3715 and 3719, for in such a case the commitment and detention are not on the certificate of physicians, but by virtue of an order of the judge of probate.

[Ed. Note.—For other cases, see Insane Persons, Dec. Dig. \$ 49.*]

14. Insane Persons (\$ 50*)-Jurisdiction of

Where a person illegally confined in the hospital for the insane is insane and is dangerous, the court may restrain him until resort can be had to orderly means to place him under permanent legal restraint.

[Ed. Note.—For other cases, see Insane Persons, Dec. Dig. § 50.*]

15. HABEAS CORPUS (§§ 100, 109*)-JURISDIO-TION OF COURT-INSANE PERSONS.

Where, in habeas corpus for the discharge of a person illegally confined in the state hos-pital for the insane, the record affords no inpital for the insane, the record alrons no in-formation as to his mental condition, the court under its common-law jurisdiction over luna-tics may determine on its own information whether such person is insane and dangerous, and, on finding him insane and dangerous, it may temporarily restrain him pending regular proceedings to place him under permanent legal restraint.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 85, 97, 98; Dec. Dig. §§ 100, 109.*]

Habeas corpus for the discharge of Lydia Ann Allen from the state hospital for the insane. Writ granted.

Argued before MUNSON, WATSON, HAS-ELTON, and POWERS, JJ.

F. S. Rogers, for relator.

WATSON, J. It appears from the complaint and the respondent's return that Lydia Ann Allen was committed to the Vermont State Hospital for the Insane at Waterbury on the 17th day of October, 1906, the judge of probate for the district in which she lives, as an insane state pauper, and the certificate of two physicians as to her insanity was left with the respondent as superintendent of said hospital by the authorized person executing the order and in connection therewith, and that by virtue of said order and the certificate of the physicians, and not otherwise, she hitherto has been and now is there detained. It is alleged in the complaint that the said Lydia Ann has never had any hearing nor notice of any hearing on the question of her insanity, nor on the question of her removal and commitment to the hospital and confinement therein, and that all proceedings under which she was thus committed and is now detained are illegal, unconstitutional, and void. No claim is made but that the certificate of insanity was made by legally qualified physicians and upon an examination made by them in accordance with the specific provisions of the statute under which they acted; but it is said that those provisions do not answer the requirements of due process of law guaranteed by the Constitutions of this state and of the United States.

By P. S. 3753, no person except as provided in chapter 167 shall be admitted to or detained in a hospital for the insane as a patient or inmate except upon the certificate of such person's insanity made by two legally qualified physicians, residents of this state. The certificate shall contain a statement that the physicians making the same are each legally qualified to practice as a physician in the state and the reasons for adjudging such person insane. By section 3754 the physicians shall subscribe and make oath to the certificate before a magistrate authorized to administer oaths. The magistrate shall append thereto his jurat, and certify therein that the physicians are of unquestionable integrity and skill. By section 3755 the certificate shall be made and sworn to not more than 10 days before the admission of the insane person to the hospital for the insane unless a longer time is required to dispose of an appeal taken from the decision of the physicians as provided by law, and shall be in the hands of the proper officer of the hospital at the time the insane person is received therein. By section 3756 the certificate of the physicians shall be given only after a careful examination of the supposed insane person made not more than five days previous to making the certificate. As seen this statute requires the physicians to make a careful examination of the supposed insane person within a specified time before giving a certificate, but it contains no provision for prior notice to such person, and there would seem to be no difficulty in making an examination requisite to by virtue of an order of removal made by a certificate in compliance with the require-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ments of the statute without any knowledge | of the state. The statute is silent regarding or suspicion by the one under examination as to what is being done, or the purpose of it. An appeal from the decision of the physicians to the board of supervisors of the insane could be had by the next friend or relative of the person whose insanity was so certified (P. S. 3757), but no right of appeal was given to such person, nor was there any provision explicitly requiring the examination of the case by the appellate board to be on notice to him, nor in his presence, when an appeal was taken by one having such right. No appeal was taken in this instance, consequently that particular portion of the statute is material here only as it is a part of the whole involved and necessarily examined in the proper solution of the constitutional question presented. By P. S. 3715, insane persons in a town destitute of means to support themselves, and without relatives in the state bound by law to support them, shall while in a hospital for the insane be supported by the state. By section 3716 the selectmen of such town shall on application of the overseer of the poor ascertain whether such insane person is liable to be supported by the state, and may institute a court of inquiry before the judge of probate of the district in which the town is situated, giving at least 10 days' notice thereof to the state's attorney of the county. By section 3717 the state's attorney, or, in case he is unable to attend, an attorney appointed by the probate court, shall investigate the case; and, if he finds that the insane person is not liable to be supported by the state, he shall attend the court of inquiry, and produce, at the expense of the state such witnesses and testimony as he deems advisable for the protection of the rights of the state. By section 8718, if the judge of probate finds from the evidence that such insane person is liable to be supported by the state, as aforesaid, and the insanity of such person is certified in writing, duly sworn to, by two legally qualified physicans, residents of this state, "he shall issue an order for the removal of such insane person to the Vermont State Hospital for the Insane at Waterbury, or to the Brattleboro Retreat at Brattleboro, to be there supported." By section 3719 an officer or other person appointed by the judge of probate shall remove such insane person to said hospital or retreat, and leave with the superintendent or one of the trustees thereof a copy of such order, with his return thereon, and also the certificate of the two physicians as to the insanity of such person, which shall be a sufficient warrant for receiving him therein.

It will be observed that, when a court of inquiry is instituted under the statutory provisions above given, the only notice in terms required is to the state's attorney of the county, and his duties in the premises pertain solely to the protection of the rights

notice to the alleged incompetent, than whom, from a legal point of view, no one can have a greater interest in the matters and things there to be heard and determined. Thus securing his confinement in the hospital for the insane, as an insane state pauper, may be at the request of loving friends and relatives prompted by honest intentions and by considerations looking to the most humane and beneficial treatment that can be given to an unfortunate of that class, or it may be part of a scheme by those seeking to get rid of him personally, or to deprive him of his just property rights, or as relatives to avoid the statutory liability for support, concerning the facts of which his knowledge would to them be most damaging and perhaps sufficient to thwart their sinister intent and purpose altogether if he be given sufficient notice and an adequate opportunity to defend. At common law an insane person may be temporarily restrained without legal process, and, if need be, in an asylum, if his going at large would be dangerous to himself or to others, preliminary to the institution of judicial proceedings for the determination of his mental condition, and such a restraint does not violate any constitutional provision. Colby v. Jackson, 12 N. H. 526; Keleher v. Putnam, 60 N. H. 30, 49 Am. Rep. 304; Porter v. Ritch, 70 Conn. 235, 39 Atl. 169, 47 L. R. A. 353; Look v. Dean, 108 Mass. 116, 11 Am. Rep. 323. When, however, as in the case at bar, the confinement is permanent in nature, the person thus confined is deprived of his liberty which, in order to be lawful, must be in pursuance of a judgment of a court of competent jurisdiction after such person has had sufficient notice and an adequate opportunity to defend. It is no answer to say the person is insane and consequently notice to him will be useless, for that is assuming as a fact the very thing in question and which is presumed to be otherwise until proved. Such notice and opportunity are required by the Constitution of this state (chapter 1, art. 10) wherein it reads: "Nor can any person be justly deprived of his liberty except by the laws of the land, or the judgment of his peers." And by the fourteenth amendment to the federal Constitution that no state shall "deprive any person of life, liberty, or property, without due process of law." Louisville & Nashville R. R. Co. v. Schmidt, 177 U. S. 230, 20 Sup. Ct. 620, 44 L. Ed. 747; Simon v. Craft, 182 U. S. 427, 21 Sup. Ct. 836, 45 L. Ed. 1165; McCurry v. Hooper, 12 Ala. 823, 46 Am. Dec. 280; In re Lambert, 134 Cal. 626, 66 Pac. 851, 55 L. R. A. 856, 86 Am. St. Rep. 296; Supreme Council R. A. v. Nicholson, 104 Md. 472, 65 Atl. 820, 10 Am. & Eng. Ann. Cas. 213; Chase v. Hathaway, 12 Mass. 222; Hathaway v. Clark, 5 Pick. (Mass.) 490; Evans v. Johnson, 39 W. Va. 299, 19 S. E. 623, 23 L. R. A. 787, 45 Am. St. Rep. 912;

State v. Billings, 55 Minn. 467, 57 N. W. 206, 794, 43 Am. St. Rep. 525; Doyle, Petitioner, 16 R. I. 537, 18 Atl. 159, 5 L. R. A. 359, 27 Am. St. Rep. 759.

As before seen, the statute in question contains no specific provision for notice to the alleged insane person of the institution of proceedings for a court of inquiry to ascertain whether he shall be removed to the hospital for the insane as a state charge. Yet it does not follow that the statute is wanting in due process of law. In Rex v. Benn, 6 T. R. 198, Lord Kenyon, C. J., said: "It is an invariable maxim in our law that no man shall be punished before he has had an opportunity of being heard." And the same principle is stated in Harper v. Carr, 7 T. R. 270, and Reg. v. Simpson, 10 Mod. 375. In Mead v. Deputy Marshal, 1 Brock. 824, Fed. Cas. No. 9,372, Chief Justice Marshall said: "It is a principle of natural justice, which courts are never at liberty to dispense with, unless under the mandate of positive law that no person shall be condemned unheard, or without an opportunity of being heard." And Mr. Bishop in his work on the Written Laws, after stating this same common-law rule, says: "Therefore a statute will not be interpreted, unless its words are specific requiring it, to authorize judicial proceedings without notice to the party to be affected by them." case of Chase v. Hathaway, to which reference has been made, was an appeal from the decree of the judge of probate appointing Hathaway to be guardian of Chase, found to be a person non compos mentis. The proceedings of the judge of probate were founded upon a return of an inquisition, made by the selectmen of the town of which the incompetent was an inhabitant. The inquisition was taken pursuant to a commission from the judge of probate, issued according to a certain statute. There was no provision in the statute for notice to the party in such proceedings, and he had none from the selectmen of the time and place appointed by them to make their inquiry, for from the probate office of the return of the commission, or of the time assigned by the judge for considering and acting upon it. The want of notice was among the reasons assigned for the appeal. Thereon the court said that, notwithstanding the silence of the statute in regard to notice to the party, no decree of a probate court so materially affecting the rights of property and the person can be valid, unless the party to be affected has had an opportunity to be heard in defense of his rights. "It is a fundamental principle of justice, essential to every free government, that every citizen shall be maintained in the enjoyment of his liberty and property unless he has forfeited them by the standing laws of the community, and has had opportunity to answer such charges as, according to those laws, will justify a forfeiture or suspension of them. And whenever the Legislature has

fortune, the public safety or convenience demands a suspension of these essential rights of the individual, and has provided a judicial process, by which the fact shall be ascertained, it is to be understood as required that the tribunal to which is committed the duty of inquiring and determining shall give opportunity to the subject to be heard in support of his innocence or his capacity." Evans v. Johnson, 39 W. Va. 299, 19 S. E. 623, 28 L. R. A. 737, 45 Am. St. Rep. 912, it is said: "Often if given notice he (the alleged insane person) will be prompt to attend, and in his person be the unanswerable witness of his sanity; often, if not given notice, those interested in using or robbing him of his property will effectuate a corrupt plan. Almost as well might we convict a man of crime without notice. There is abundant authority for this position. Even though the statute be silent as to notice, as ours as to appointment of committees by county courts is, though that as to circuit court appointment requires notice, yet the common law steps in and requires it." That this rule is commonly thus applied in the construction of statutes similar in nature to the one under consideration is seen from the following cases: Hathaway v. Clark, 5 Pick. (Mass.) 490; Matter of Blewitt, 131 N. Y. 541, 30 N. E. 587; Supreme Council R. A. v. Nicholson, 104 Md. 472, 65 Atl. 320, 10 Am. & Eng. Ann. Cas. 213; Holman v. Holman, 80 Me. 139, 18 Atl. 576; Eddy v. People, 15 Ill. 386; Dutcher v. Hill, 29 Mo. 271, 77 Am. Dec. 572; Hutchins v. Johnson, 12 Conn. 376, 80 Am. Dec. 622. And it is the party's privilege to be present. Cranmer, Ex parte, 12 Ves. 445; In re Vanauken, 10 N. J. Eq. 186; Fiscus v. Turner, 125 Ind. 46, 24 N. E. 662. See, also, Simon v. Craft, before cited. Further citation of authorities is unnecessary. We think it clear that the provisions for a court of inquiry, as contained in P. S. 3716-3718, should be construed in the light of the requirements of the foregoing principles of the common law, and that so construed the alleged insane person is entitled by law to proper notice of such proceedings and an opportunity to be present and defend. This is all that due process of law requires, and consequently the statute in this respect is not in violation of the Constitution of the state, nor of the fourteenth amendment to the Constitution of the United States. In some states it is held that notice to the alleged lunatic may be dispensed with by special order of court in cases of peculiar circumstances, such as confirmed and dangerous madness, rendering it improper or unsafe to give such notice (see Matter of Blewitt, cited above), but, as that question is not involved in the matter before us, it is not considered.

the community, and has had opportunity to answer such charges as, according to those laws, will justify a forfeiture or suspension of them. And whenever the Legislature has provided that, on account of crime or mis-

record shows that the judge of probate did | not pass upon the question of her insanity. but, instead thereof, left it without consideration as the two physicians had placed it in their certificate. The order, after stating the court's finding that she has no relatives within this state, bound by law to support her, and is destitute of means of supporting herself, continues: "And it appearing that the insanity of the said Lydia Ann Allen is certified in writing, sworn to, by two physiclans legally qualified and residents of this state, as provided by law. Whereupon, the said judge of probate, doth hereby order and decree," etc. For the purpose of making such a certificate, any two legally qualified physiclans residents of the state may be selected by those interested in having the person confined in an asylum as insane, regardless of their actuating motives. The physicians are required to make their examination of the person within five days before making the certificate, and to make oath to their certificate, but they are neither designated, nor appointed, nor commissioned by any court or public authority to act in that capacity. The examination may be made by them anywhere and under any circumstances permitting it, without notice to, or knowledge by, the supposed insane person, and solely upon such examination their certificate may be based. They are not obliged to hear other evidence, even though offered by the person examined or in his behalf to show his sanity, and, if they do hear evidence so offered, it is as a mere matter of favor on their part. Such a proceeding is entirely devoid of the essential elements of due process of law. Moreover, if a person's right of hearing depends upon the grace, favor, or discretion of the persons, board, or tribunal whose duty it is to decide the question at issue, he is not protected in his constitutional right. The law must require notice to him, give him a right to a hearing, and an opportunity to be heard. Durkee v. City of Barre, 81 Vt. 530, 71 Atl. 819; Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; Underwood v. People, 32 Mich. 1, 20 Am. Rep. 633; In re Lambert, 134 Cal. 626, 66 Pac. 851, 55 L. R. A. 856, 86 Am. St. Rep. 296; State v. Billings, 55 Minn. 476, 57 N. W. 206, 794, 43 Am. St. Rep. 525. Such a certificate of physicians, when used before a court of inquiry under section 3718, cannot, therefore, have the force of a judicial determination by which the state of the person's mind is fixed, nor does the law contemplate that it shall have such effect. By that section if the court finds from the evidence that the person is liable to be supported by the state, and the insanity of such person is thus certified with the formallties required by law, the court shall issue an order for the removal of the insane person to the hospital for the insane, etc. The presence of such a certificate, however, is essential to the jurisdiction of the judge of probate. Without it he has no power to determine the matters and things coming before portunity for a trial would substantially de-

him as a court of inquiry authorized by section 3716. The clause immediately following. that "he shall issue an order for the removal of such insane person to the" hospital, means no more than he shall issue his order in the due course of proceedings according to law. His acts are judicial, and he cannot issue an order of removal without having found the facts requisite as a basis therefor. See Painter v. Liverpool Oil Gas Co., 3 Ad. & El. 433, Patterson, J.; Cleveland v. Hopkins, 2 Aik.

Just what force as evidence the statute contemplates that the physicians' certificate shall have in hearings of this character is a question not entirely free from doubt. The examination by the physicians is made under certain provisions of the statute, but it is not of a public nature and made under competent authority on behalf of the public to ascertain a matter of public interest. The certificate is not, therefore, a return of the physicians' proceedings and findings to a court to be there acted upon in affirmance or disaffirmance, as is generally done when an investigation has been made by an inquisition by virtue of competent authority. 1 Stark, Ev. pt. 2, §§ 94, 96, 97. Yet an inquisition of lunacy is only presumptive evidence of insanity, and is traversable as a matter of right by the alleged lunatic, and may be sent to a court of common law to be tried by jury. Matter of Bridge, 1 Cr. & Ph. 338; Shumway v. Shumway, 2 Vt. 339; In re Cummings, 1 De G., M. & G. 537. The certificate is not by law returned by the physicians to any court, public officer, or public office. It is not a warrant, nor a binding order on any one, to commit to an asylum, or to restrain, the person certified to be insane. It is but the written opinion under oath of the physicians that the person is insane, and a proper subject for treatment and custody in some asylum or other institution for those so afflicted. It is, however, within the power of the Legislature to prescribe that such a certificate, made in full compliance with the provisions of the statute authorizing it, shall be received as evidence of insanity, and the effect of it, before a court of inquiry, like the one here under consideration, with the modification that it has no power under the pretense of prescribing rules for the presentation of evidence, to go so far as altogether to preclude the alleged insane person from establishing his rights in opposition thereto. In Board-of Commissioners v. Merchant, 103 N. Y. 143, 8 N. E. 484, 57 Am. Rep. 705, the court said: "The general power of the Legislature to prescribe rules of evidence and methods of proof is undoubted. While the power has its constitutional limitations, it is not easy to define precisely what they are. A law which would practically shut out the evidence of a party and thus deny him the op-

prive him of due process of law. It would | the construction of section 102, c. 44, p. 358, not be possible to uphold a law which made an act prima facie evidence of crime over which the party charged had no control and with which he had no connection, or which made that prima facie evidence of crime which had no relation to a criminal act and no tendency whatever by itself to prove a criminal act. But so long as the Legislature, in prescribing rules of evidence, in either civil or criminal cases, leaves a party a fair opportunity to make his defense and to submit all the facts to the jury to be weighed by them, upon evidence legitimately bearing upon them, it is difficult to perceive how its acts can be assailed upon constitutional grounds." In Vega Steamship Co. v. Cons. Elevator Co., 75 Mlnn. 808, 77 N. W. 973, 43 L. R. A. 843, 74 Am. St. Rep. 484, it was held that a certificate of a public weighmaster cannot be made conclusive evidence. State v. Thomas, 144 Ala. 77, 40 South. 271, 2 L. R. A. (N. S.) 1011, 113 Am. St. Rep. 17, 6 Am. & Eng. Ann. Cas. 744; State v. Beach, 147 Ind. 74, 46 N. E. 145, 86 L. R. A. 179; Meadowcroft v. People, 163 Ill. 56, 45 N. E. 303, 35 L. R. A. 176, 54 Am. St. Rep. 447; Cooley's Const. Lim. 526. In order to issue an order of removal under P. S. 3718, the court must find upon competent evidence before it not only that the alleged insane person is destitute of means to support himself, and without relatives in the state bound by law to support him, but it must also find that such a person is insane, and is dangerous. The last, since the statute provides that neither idiots and persons non compos, nor demented persons, who are not dangerous, shall be confined in a hospital for the insane. P. S. 3759. We think the statute respecting the use of the certificate may reasonably be so construed as to make it, like an inquisition of lunacy when traversed, prima facie evidence of the person's insanity, with which construction the statute will be At the same time a construction might reasonably be had giving the certificate conclusive effect, thereby rendering the statute invalid. The court will assume that the Legislature did not overlook the provisions of the Constitution, and intended that the statute in this respect should be effective. Two constructions being equally obvious, it is the duty of the court to adopt the one which is in harmony with the provisions of the Constitution. Grenada County Supervisors v. Brown, 112 U. S. 261, 5 Sup. Ct. 125, 28 L. Ed. 704; Knights Templars & Masons Life Indemnity Co. v. Jarman, 187 U. S. 197, 23 Sup. Ct. 108, 47 L. Ed. 139. We hold, therefore, that in the trial of the issues before a court of inquiry under the provisions of P. S. 3716-3718, the physicians' certificate, if made in compliance with the law, is prima facie evidence of insanity.

A case very much in point is Shumway v. Shumway, before cited, which involved and she was committed thereon—all within

Laws Vt. 1825, that the probate court of any district shall have power, "on request of any friend, or relation, of any idiot, non compos, lunatic or distracted person, residing in such district, to issue a commission to the selectmen and civil authority of the town, in which such person resides, to make inquisition in the premises; and if said person shall be found by them, or a major part of them, on being notified and examined by them, to be incapable of taking care of him or herself, they shall certify the same on such commission and return the same to such court; and said court shall thereupon appoint some suitable person or persons to be guardian of such person so long as he or she shall remain incapable of taking care of him or herself." The case was an appeal from a decree of the judge of probate, assigning a guardian over the appellant, by virtue of this statute. A commission was issued to the selectmen and civil authority. They made inquisition in the premises, and made their return to the judge of probate, on which they certified that the notice had been given to the appellant, but it did not appear when or how, whereupon, the judge assigned a guardian without causing notice to be given to the appellant to appear before him, who did not appear. It was contended, among other things, that the selectmen and civil authority were made the judges of the ability of the appellant, whether he was capable of taking care of himself, and that their proceedings, when returned to the court of probate, were conclusive, and the judge was not to have any hearing before him, but on the return of the inquisition was to assign a guardian without further proceedings. It was further contended that the case was not appealable. The court said: "We consider the duty of a judge of probate under our statute to be very plain and easy. When application is made to him for a commission of lunacy, accompanied with affidavit, he should issue it with directions on the same for notifying the pretended lunatic. The selectmen and civil authority are then to notify agreeably to directions, and make inquisition, after which they are to make return to the judge of probate of all their doings, who is then to give the supposed lunatic reasonable notice of time and place, and a full hearing before him; and, if upon such full hearing he is satisfied the case requires it, he is to assign a guardian, but must give opportunity and grant an appeal if requested." It appears from the record that the certificate was made October 16, 1906; that on the following day application was made to the judge of probate for a court of inquiry to ascertain whether the said Lydia Ann should be committed to the hospital for the insane at the expense of the state. hearing was had before that court, an order made by it for her removal to the hospital,

the day of the application. It further ap- | for the insane in this state when said amendpears that notice was given to the state's attorney of the county, and that he was present and conducted the examination in behalf of the state. The statute (P. S. 3716) provides that at least 10 days' notice of such proceedings shall be given to the state's attorney. Thus notified, it is made the duty of that official to investigate the case, and, if he finds the alleged insane person not liable to be supported by the state, he shall attend the court of inquiry, producing such evidence as he deems advisable for the protection of the rights of the state. This liability to support by the state is made to depend upon the coexistence of the facts of the insanity of the person, the dangerousness of him if at large, his destitution of means to support himself, and the lack of relatives in the state bound by law to support him. Hence the state, as well as the alleged insane person, has an interest in all of these constituent questions. Whether the state's attorney can waive the length of notice required by statute, and thereby anticipate the time of hearing before the court of inquiry so far as the interests of the state are concerned, we do not decide; for certain it is that he cannot by waiver or otherwise materially interfere with the rights and interests of the alleged insane person in this respect. Adverting to what we have before said regarding the requirement of notice to such person, the length of notice being unfixed, it must be such as is reasonable in the circumstances of the particular case; and thus measured it can in no event be less than that required by due process of law, namely, such as gives him an adequate opportunity to be present and to be heard in defense of his rights. The judge of probate has no authority to act before such notice has been given. The court is one of special and limited jurisdiction, and it can proceed in hearings of this nature only in strict conformity with the statute. And, since the record shows that two of the questions o fact essential to the issuing of the order of removal here under consideration were not heard and determined by the court of inquiry, and since it does not appear from the record that the hearing there had was upon the required notice to the alleged insane person, on the face of the record the court proceeded in a manner not authorized by law, and its order of removal is void. Hendrick v. Cleaveland, 2 Vt. 329; Inhabitants of Winslow v. Troy, 97 Me. 130, 53 Atl. 1008; Behrensmeyer v. Kreitz, 135 III. 591, 26 N. E. 704; Morton v. Sims, 64 Ga. 298.

At the last session of the Legislature section 3757 of the Public Statutes was so amended as to give the right of appeal from the decision of the physicians to the person certified to be insane, or to any next friend or relative of such person, to the probate court, with the right there of a trial by jury; and that any person detained at any hospital at Waterbury for a reasonable time, or for

atory act took effect shall be entitled to such appeal and trial thereon. Laws 1908, p. 81, No. 94. It is sufficient for the case at bar to say that the right of appeal given by this amendment can have no application where before the passage of that act the insane person was removed to the hospital for the insane as an insane state pauper by order of a judge of probate under the provisions of P. S. 3715-3719. In such a case the commitment and the detention are not upon the certificate of physicians, but by virtue of an order of the judge of the probate; and, since his jurisdiction is special and limited an order of this character issued by him, to be legal, must show such facts as are jurisdictional. Holden v. Scanlin, 30 Vt. 177. For this purpose, the certificate is by statute to be left with the superintendent or trustee of the hospital by the officer executing the order and in connection therewith, thus making it part of the order.

The result is that the proceedings of the court of inquiry are a nullity, and the confinement of the said Lydia Ann in the hospital for the insane on the order of that court is illegal and without authority of law. She will therefore be discharged from such confinement on said order, yet, if she is insane and her going at large would be dangerous to herself or to others, she will not be set at liberty on habeas corpus. In such circumstances it is the duty of the court and within its common-law power resting upon public necessity to restrain her until resort can be had to regular and orderly means to place her under permanent legal restraint. In re Shuttleworth, 9 Ad. & El. (N. S.) 651, 58 E. C. L. 650; Ex parte Greenwood, 1 Jur. (N. S.) 522; In re Boyett, 136 N. C. 415, 48 S. E. 789, 67 L. R. A. 972, 103 Am. St. Rep. 944; Ekiu v. United States, 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146. If the court has reason to believe the person insane and dangerous, this power should be exercised. For this purpose, the condition may be sufficiently ascertained from the respondent's return, from the evidence in the case, or by any other legitimate method to enable the court to determine whether such temporary restraint would be justifiable. In the case at bar the record affords no information, but, as the person whose discharge is sought is in the custody of the court, its common-law jurisdiction over infants, idiots, and lunatics enables it to act with reference to this question from its own conscience and on its own information, acquired in such a way as it deems best. See 2 Stephen's Com. 511; King v. McLean Asyium, 64 Fed. 331, 12 C. C. A. 145. Touching this question the court's information is such that upon an order to be issued by it for this purpose she will be placed under the care and custody of the superintendent of the Vermont State Hospital for the Insane

such specified time as may be named in said | mistake by counsel would entitle his party order, to the end that the necessary proceedings may be had to determine her state of mind, and, upon that being found, to be dealt with as the law directs.

MUNSON, J., concurs in the result.

(80 R. I. 192)

McKEOUGH v. GIFFORD.

(Supreme Court of Rhode Island, Oct. 11, 1909.)

JUDGMENT (§ 148°) - DEFAULT - OPENING -

MISTAKE.
Failure of counsel to remember the provisions of the statute relating to assignment days in the superior court for cases from district courts, in consequence of which he neglected to be present or represented when the case was assigned for trial, and failed to ascertain that it had been assigned, whereby default was taken, was not a mistake of fact, but of law, not entitling one to new trial under Court and Practice Act 1905, § 471.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 282; Dec. Dig. § 143.*]

Action by Margaret J. McKeough against Harry E. Gifford. Defendant petitions for a trial under Court and Practice Act 1905, 471. Denied and dismissed.

Mendell W. Crane, for plaintiff. Amasa M. Eaton and Henry Marsh, Jr., for defendant.

PER CURIAM. The defendant in the above-entitled case, which was originally brought in a district court and therefrom to the superior court on claim of jury trial, against whom judgment by default was rendered in the superior court, petitions this court for a trial under the provisions of Court and Practice Act 1905, § 471, alleging that said default was obtained against him surreptitiously and unfairly, and that the default was caused by accident and mistake.

There is no evidence to support the first allegation, and the accident and mistake relied upon consisted in the failure of his counsel to remember the provisions of the statute relating to assignment days in the superior court for cases from district courts. in consequence of which he not only neglected to be present or represented on the proper assignment day when the case was duly assigned for trial, but also to ascertain that the case had been so assigned, although he did attend the court on subsequent assignment days. The mistake relied upon is not a mistake of fact, and mistakes of law cannot be corrected in this manner. As this court said in Bassett v. Loewenstein and Hahn, 23 R. I. 26, 49 Atl. 42: "In Howard v. Capron, 3 R. I. 182, it was decided that a mistake of law was not of the character which entitles a party to a new trial under the statute. Obviously this must be so,

to a new trial."

The petition is therefore denied and dismissed.

BENZ v. GIFFORD.

(Supreme Court of Rhode Island. Oct. 11, 1909.)

Action by Jennie D. Benz against Harry E. Gifford. Defendant petitions for a trial under Court and Practice Act 1905, § 471. Denied and dismissed.

Mendeil W. Crane, for plaintiff. Amasa Eaton and Henry Marsh, Jr., for defendant. Amasa M.

PER CURIAM. For the reasons contained in the case of Margaret J. McKeough v. Harry E. Gifford, supra, the petition is denied and diamissed.

EISWALD T. NAUTICAL PREPARATORY SCHOOL.

(Supreme Court of Rhode Island. Oct. 18 and 29, 1909.)

On motion for reargument. Denied. For former opinion, see 73 Atl. 317.

PER CURIAM. On motion for reargument filed on behalf of the bondholders (so-called).

The full court has carefully considered the reasons for a reargument in the above cause, as set forth in the motion filed June 22, 1909. and finds therein no sufficient grounds for such reargument.

1. As to paragraph 1 of the motion: Such Incorrectness or inconsistency as might at first sight have appeared to exist in the master's report was explained to the full satisfaction of the court at the oral arguments of the case, and was made to disappear upon consideration of the entire master's report and of the testimony after the oral arguments were concluded.

2. As to paragraph 2 of the motion: We do not find that there is any such lack of evidence in the record as to warrant any such statement as is now made; nor do we find that these parties reserved any exception to the master's report based upon such lack of evidence, or that these parties, in their oral arguments, urged any such lack of evidence as to the matter of the disbursements from day to day out of the fund derived from the payment of moneys by the patrons for tuition fees, etc. In view of the fact disclosed by the record that the Nautical Preparatory School had no complete accounts of any kind after these payments by patrons began, and that the expert accountant had to get his information as to receipts and disbursements during the period covered under this specification from paid bills, receipts, check books, and all such sources of information as he could find in the hands of since otherwise almost any wrong advice or the receiver, and that the master had the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

opportunity to make such computations as and the complainant's exceptions to said report he did make from the same sources, we cannot find that the statements in this paradismissing the bill, with costs. graph are in any way warranted or supported by the record of the case.

3. As to paragraphs 3, 4, and 5 of the motion, relating to the application by the master of certain rules of law, we have again considered the same, and the cases referred to in said motion, and see no reason to change our former conclusions as set forth in our rescript filed June 15, 1909.

The motion for a reargument is denied.

On Further Motion for Reargument.

The motion for reargument filed October 21, 1909, by leave of court, on behalf of the bondholders (so-called), is denied.

GREENE v. TAYLOR.

(Supreme Court of Rhode Island, 1909.) Oct. 11,

Exceptions from Superior Court, Providence

and Bristol Counties.

Action by Joseph W. Greene against Olin P.

Taylor. Verdict for plaintiff, and defendant excepts. Exceptions overruled, with direction to enter judgment on the verdict.

Mumford, Huddy & Emerson (George H. Huddy, Jr., of counsel), for plaintiff, William J. Brown, for defendant.

PER CURIAM. There is nothing in this case to take it out of the general rule laid down in Wilcox v. Rhode Island Co., 29 R. I. 292, 70 Atl. 913. The rulings and charge of the court were correct, and the exceptions thereto are without merit.

The defendant's exceptions are therefore over-ruled, and the case is remitted to the superior court, with direction to enter judgment on the

verdict.

HARRIS v. SPEZIANO.

(Supreme Court of Rhode Island. Oct. 6, 1909.)

Petition of William M. Harris, Jr., against Marie Speziano, alias, etc., in a mechanics' lien case for leave to claim an appeal under Court and Practice Act 1905, § 473, for newly discovered evidence. Granted.

Waterman, Curran & Hunt, for petitioner. James J. McGovern, for respondent.

PER CURIAM. Petition for leave to claim an appeal granted. Petitioner may present form of order for allowance.

MANVILLE COVERING CO. v. BABCOCK. (Supreme Court of Rhode Island. Oct. 8, 1909.)

Action by the Manville Covering Company gainst Mattie P. Babcock. Heard on company of the Cartesian Company of the Cartesian Company Cartesian Car plainant's exceptions to master's report. ceptions overruled, report confirmed, and cause remanded.

Amasa M. Eaton, for complainant. Gardner, Pirce & Thornley (William W. Moss, of counsel), for respondent.

PER CURIAM. The findings of the master that the fair market value of the mortgaged property on January 7, 1904, was \$7,195, and that no damage was suffered by reason of the sale on October 29, 1903, are amply sustained by the evidence.

The master's report is therefore confirmed,

(105 Me. 189) HIGNETT V. INHABITANTS OF NOR-RIDGEWOCK.

(Supreme Judicial Court of Maine. Feb. 26, 1909.)

HIGHWAYS (§§ 197, 211, 213*)—DAMAGES (§ 130*)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY—SUFFICIENCY OF EVIDENCE—CONTRIBUTORY NEGLIGENCE—EXCESSIVE DAMAGES—PERSONAL INJURIES.

AGES—PERSONAL INJURIES.

The plaintiff brought an action against the defendant town to recover damages for personal injuries sustained by him while riding horse-back along a townway in the defendant town by reason of his horse stepping into a hole in the traveled part of the way, and recovered a verdict for \$441.67. The defendant town contended (1) that the plaintiff's proof located the alleged defect at another and different place in the way than that described as its location in his written notice to the defendant town after the accident; (2) that there was not sufficient proof of the 24 hours actual notice of the defect prior to the accident, as required by statute; (3) that the plaintiff was not in the exercise of due care at the time of the accident; (4) that the damages awarded were excessive.

Held: (1) that it was an issue of fact for the jury whether the plaintiff's injuries were caused by the defect described in the notice, and, the interval of the plaintiff's challent of the second.

caused by the defect described in the notice, and, the jury having found for the plaintiff on that issue, no sufficient reason is shown for disturb-

ing that finding.

(2) That the verdict shows that the jury must have found that the defect existed, and that the nave found that the defect existed, and that the person, acting as substitute for the road commissioner, has the necessary 24 hours' actual notice of the defect, and that such finding was justified by the evidence.

(3) That the jury were authorized by the evidence to find that the plaintiff was in the exercise of due care at the time of the accident.

(4) That the damages awarded were not excessive.

cessive.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 535, 536; Dec. Dig. §§ 197, 211, 213;* Damages, Cent. Dig. §§ 357-367, 370, 371; Dec. Dig. § 130.*]

(Official.)

On Motion from Supreme Judicial Court, Somerset County.

Action by Joseph B. Hignett against the Inhabitants of Norridgewock. Verdict for plaintiff, and defendant moves to set the same aside. Motion overruled. Judgment on verdict.

Action on the case to recover damages for personal injuries alleged to have been sustained by the plaintiff while riding horseback along a townway in the defendant town by reason of his horse stepping into a hole in the traveled part of the way. Plea, the general issue. Verdict for plaintiff for \$441. 67. The defendants then filed a general motion to have the verdict set aside.

The case is stated in the opinion.

The declaration in the plaintiff's writ is as

"In a plea of the case for that heretofore,

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to wit, on Monday, the 4th day of June, A. | D. 1906, there was a certain public highway, legally established, in said town of Norridgewock. Said highway is known as the River road, and leads from Norridgewock to Madison, on the south side of the Kennebec river, which said highway the said defendants were then and there bound by law to keep in repair so as to be safe and convenient for travelers with horses, teams, and carriages, and the plaintiff avers that on the said 4th day of June, A. D. 1906, he was lawfully traveling over and along said highway, riding upon a safe and kind horse, near the culvert at the foot of the Yoe Hill, so called, and the plaintiff says that said defendants did not keep said highway in repair so that it was safe and convenient for travelers with horses, teams, and carriages, but, on the contrary, said highway was unsafe, inconvenient, and defective; that there was a hole about a foot square and one and one-half feet deep in the traveled part of the road, occasioned by the dirt part of the road sinking into the drain of said culvert, at or near the foot of said Yoe Hill; that said culvert was defectively built and maintained, so that the road caved into the drain of the culvert, on the south side of the culvert, making a dangerous and unsafe place in the road, and that said highway at that point had been dangerous, unsafe, and defective for a long time prior to the said 4th day of June. A. D. 1906, to wit, for more than 24 hours. And the plaintiff says that while riding along said highway, upon said safe and kind horse, and while in the exercise of due care and caution, and when near said culvert at the foot of said Yoe Hill, the horse stepped into said hole in the traveled part of said highway on the south side of said culvert, and violently threw the plaintiff upon the ground, striking upon his shoulder and right side, all of which was due solely to the carelessness, negligence, and fault on the part of the said defendants, and with no fault, negligence or want of due care on the part of the plaintiff, and the plaintiff says that he was severely injured thereby, and received a sprained shoulder, that the edges of the bone of the right shoulder were broken, his hips and back were wrenched and strained, and he was injured internally, so that he has spit blood since the accident, and received other injuries, the full extent and nature of which cannot be ascertained at the present time, or specified more clearly; that he received a severe shock to his system, and was greatly lamed and hurt, and has suffered great bodily pain and mental anxiety and distress for a long period of time, and has been compelled to pay out large sums of money for medical attendance, care, and nursing, and that he is now incapacitated for performing his usual duties and labor. And the plaintiff further avers that within 14 days after receiving said injury, to wit, on the 17th day of June, A. D. 1906, he notified the municipal

officers of said town of Norridgewock, in writing, setting forth his claim for damages, specifying the nature of his injuries, and the nature and location of the defect which caused said injury, and the plaintiff further avers that the municipal officers and road commissioner of said town of Norridgewock had 24 hours' actual notice of the defective condition of said highway at said culvert, as heretofore specified, whereby and by force of the statute in such case made and provided an action hath accrued to the plaintiff to have and recover of said defendants, for the damage and injury so to him sustained as aforesaid, to the damage of said plaintiff (as he says) the sum of \$2,000."

Argued before EMERY, C. J., and WHITE-HOUSE, CORNISH, KING, and BIRD, JJ.

Forest Goodwin, for plaintiff. Le Roy R. Folsom and Augustine Simmons, for defendant.

KING, J. Action to recover damages for personal injuries alleged to have teen sustained by the plaintiff while riding borseback along a townway in the defendant town by reason of his horse stepping into a hole in the traveled part of the way. The case is before this court on defendant's riotion to set aside a verdict for the plaintiff.

1. The first, and perhaps chief, contention in support of the motion is that the plaintiff's proof located the alleged defect at another and different place in the way than that described as its location in the required written notice to the town after the accident.

The language of the written notice, as to the location of the defect, is: "The particular place on said road where I was injured was at or near the foot of the Yoe Hill, so called, at a culvert that runs across the water course at that point. There was a hole about a foot square and one and one-half feet deep in the traveled part of the road caused by the dirt part of the road sinking into the drain of said culvert. The culvert was defectively bullt and maintained, so that the road caved into the drain of the culvert on the south side, making a dangerous and unsafe place in the road." The record discloses the following facts and conditions:

The accident occurred at a culvert crossing the road between two hills—that on the north called Yoe Hill, and that on the south Hignett's Hill. These hills are neither very steep nor long. From the place of the accident to the top of Hignett's Hill is stated to be 753 feet, and to the top of Yoe Hill about 300 feet. There are two other culverts crossing the road at or near the bottom of these hills—one 213 feet north, and the other 203 feet south of this culvert.

It seems a fair conclusion from all the evidence that the middle culvert was at the lowest point between the hills, and that there was a slight decline from the northerly to the middle culvert.

tion of the defect described in the written notice was thereby necessarily limited to the northerly culvert, because that was the culvert "at or near the foot of the Yoe Hill." The plaintiff's evidence established the fact that his injuries were occasioned by a hole, such as described in his notice, located at the middle culvert. No claim was made that there was a similar hole at the northerly culvert.

It was therefore an issue of fact for the jury whether the plaintiff's injuries were caused by the defect—the same defect described in the notice—or, in other words, if the culvert described in the notice was the middle culvert. This issue was sharply tried out, and the jury decided it in the plaintiff's favor. A careful examination of the record fails to satisfy us that that finding was not justified by the evidence.

The jury may have found, and we could not say that such a finding would be manifestly wrong, that the location of the defect proved answered accurately the general descriptive words of the notice: "The particular * * * where I was injured was at or near the foot of the Yoe Hill." But this general description of the location is limited by the more specific words: "At a culvert that runs across the water course at that point."

Was the middle culvert the one "across the water course"? If it was, that fact necessarily determined in the plaintiff's favor the issue whether the defect at the middle culvert, which caused the injury, was the same defect described in the notice. Upon this question the evidence was somewhat conflicting. The defendants claimed that the northerly culvert ran across a water course also. But it fairly appears, we think, that the water course at the middle culvert was the larger, and at the lowest point between the hills; that it was the outlet of a well-defined stream, draining a large area, and that water flowed in it during the whole, or practically the whole, year. True, there was also a water course under the northerly culvert, through which water flowed in times of freshets and heavy rains, but, while it was claimed that this water course drained a small ravine or springy spot outside the highway, it was not shown that any well-defined stream of water passed through it, and it was admittedly dry during a considerable portion of the year.

It is of significance, we think, on this point, that two of the defendants' witnesses. Mr. Savage, the selectman, and Mr. Tuttle, the substitute for the commissioner, spoke of the middle culvert as the "bridge."

We think the evidence preponderated in support of the conclusion that the water course over which the middle culvert crossed was "the water course"-the only natural and well-defined water course between those hills. But this was a question of fact for the jury to pass upon. They have passed upon | back. He and all the witnesses who saw

The defendants contended that the loca-lit, after seeing and hearing the witnesses, and must have found, under appropriate instructions, that the middle culvert was the one mentioned in the written notice "that runs across the water course at that point." We find no reason to disturb that finding.

2. The defendants further urge that there was not sufficient proof of the 24 hours' actual notice of the defect prior to the accident as required by statute. The plaintiff claimed that Mr. Tuttle, who was at the time acting as a substitute for the road commissioner, had such notice. Mr. Tuttle denied it. It was claimed by the defendants that the plaintiff's horse broke through the road, and the hole was thereby made. The plaintiff testified that he did not see the hole when his horse fell, as he was then looking at some men plowing nearby, but saw it after he got up. There was, however, sufficient evidence to justify the jury in finding that there was a hole prior to the accident at the place in question. Several witnesses so testified. Mr. Gillin stated that prior to the accident his horses broke two holes at this middle culvert, one on each side of the road; that he personally notified Tuttle of the holes several times; that they were not fixed; and that on the 31st day of May, four days before the accident, he saw the same hole on the east side of the road at the place of the accident. Mr. Creighton testified that he notified Tuttle, prior to the accident, of a hole at this culvert on the east side of the road. Mr. Williams testified that he passed over the culvert on the 31st of May and saw a hole at the point of the accident. He said: "I had to get off the democrat and walk the horse one side to get by the hole." This witness stated that he was in the field nearby looking at the plaintiff when his horse fell, and that he saw the horse step his off forward foot into this hole. He went to the plaintiff's assistance, and found the hole into which the horse stepped was at the same place as the one he saw and avoided a few days before. The jury heard and considered all the evidence upon this disputed point.

No question is raised that they were not fully and explicitly instructed as to the requirements of the statute relating to the proof of actual notice of the particular defect. Their verdict shows that they must have decided that the defect existed, and that Tuttle had the necessary twenty-four hours' actual notice of it. We think their decision was justified by the evidence.

3. The jury were authorized by the evidence to find that the plaintiff was in the exercise of due care at the time of the accident. He said he had no knowledge of the defect or of any other hole in the road. He had a right to assume, with no knowledge to the contrary, that the traveled part of this townway, was in the month of June or would be safe for driving thereon on horsehim at the time his horse fell testified that the amount of damages awarded by the jury he was not driving immoderately.

4. Excessive damages. The verdict was \$441.67. It will serve no useful purpose to incorporate here any extended statement of the evidence introduced to establish the plaintiff's damages. The defendants contended that his injuries were very slight, and the resulting disabilities limited. But, on the other hand, it appeared that the plaintiff received a very violent fall, being thrown over his horse's head on to the road. and the horse fell upon him, where he lay, dazed or partly unconscious, till assisted up by Mr. Yoe and Mr. Williams. In his notice to the town within 14 days after the accident he stated: "I received a sprained shoulder, the edges of the bone of the shoulder being broken, my hips and back wrenched and strained, and I was injured internally and have been spitting blood since the accident."

Dr. Smith, a witness for the defense, was called to the plaintiff the day of the accident, and could find "no dislocation or fracture" of the shoulder. He was notified again that night "that there was certainly something broken in his shoulder, and he wanted me to come back again. I went back, and went through as careful an examination as I could give him, and decided I couldn't find any fracture or dislocation. and told him so." On the 7th of June Dr. Dascombe was called in consultation, and no fracture or dislocation of the shoulder was found.

On July 24th Dr. Bean, who was at the plaintiff's house, made a slight examination of the shoulder, finding it "considerably swollen." "He said that there was great pain when I moved the arm." The plaintiff testified that he was in bed "about 10 days," and that he carried his arm in a sling "somewhere about five or six months"; that he spit blood "quite a little" after the accident; and that at the time of the trial, a year and a half after the accident, his shoulder still troubled him. Dr. Dascombe stated that in an examination of the plaintiff the night before the trial "I found restricted movement of the right arm, right shoulder joint, and at the acromial end of the clavicle a slight enlargement, more so than on the other side." The doctor further said: "Of course, it won't get well in one week, or may not in one year. He may never be able to extend the arm above the head as he can the other. The left arm he could raise up so that it came in close proximity to his head, the other one no nearer than six or eight inches, at the office last night."

From an examination of all the evidence bearing upon the nature of the plaintiff's injuries, and the extent of his resulting dis-

is not excessive. The entry will be:

Motion overruled.

Judgment on the verdict.

(105 Me. 196)

BURNHAM V. AUSTIN.

(Supreme Judicial Court of Maine. Feb. 28, 1909.)

1. WORDS AND PHRASES-"WAIVER."

'Waiver" is essentially a matter of intention, yet such intention need not necessarily be proved by express declaration. It may be inferred from the acts of the party, and most often is shown by his action or nonaction.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7375-7381, 7831, 7832.]

2. WORDS AND PHRASES-"WAIVER."

"Waiver" may be proved by express declara-tion, or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage, or by a course of acts and conduct, or by so neglecting and failing to act as to in-duce a belief that it was the intention and purpose to waive.

8. LOGS AND LOGGING (§ 3*)—BREACH OF PERMIT—WAIVER.

The defendant gave the plaintiff a written permit dated December 21, 1906, to enter upon certain lands owned by her and to cut and remove the property of permit dated December 21, 1906, to enter apon certain lands owned by her and to cut and remove therefrom wood to be manufactured into staves, expressly reserving all cedar and pine. The stave wood was to be all removed before April 1, 1907, at which time the agreement was to terminate. The plaintiff was to pay stumpage at the rate of \$1 per cord, the first payment to be made when 500 cords had been cut. The plaintiff entered and began operations, when on December 31, 1906, he was notified in writing by defendant that he had broken his contract; that his cutting after January 1, 1907, would be wholly at her sufferance; and that all his crews must leave the premises on or before January 10, 1907, unless they confined themselves to cutting and hauling fir, and such spruce as her agent Clark might designate. This notice the plaintiff read to his crews, and from that time on he operated in compliance with these restrictions. Payments for stumpage were made by the plaintiff to the defendant as each 500 cords were cut, as provided in the contract; the last payment being in March, 1907. September 24, 1907, the plaintiff brought an action against the defendant for breach of the contract.

Held. that if on December 21, 1906, the plaintiff brought. the contract.

the contract.

Held, that if on December 31, 1906, the plaintiff had any right of action, the evidence so clearly shows a waiver on his part that a recovery is precluded. The things that the plaintiff did and the things that he failed to do can be reconciled on no other theory than that either he claimed no right of action or voluntarily relievabled it linquished it.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 8-12; Dec. Dig. § 3.*] (Official.)

Exceptions from Supreme Judicial Court, Hancock County.

Action by Edwin G. Burnham against Mary C. Fretz Austin. Verdict for defendant, and plaintiff excepts. Exceptions overruled.

Action of assumpsit to recover damages for an alleged breach of a written contract in the form of a logging permit. Plea the abilities, it is the opinion of the court that general issue, with brief statement setting

eFor other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

up certain alleged equitable defenses. At the conclusion of the evidence, the presiding justice directed a verdict for the defendant, and thereupon the plaintiff excepted.

The case is stated in the opinion.

Argued before EMERY, C. J., and WHITE-HOUSE, SAVAGE, PEABODY, CORNISH, and BIRD, JJ.

John A. Peters, for plaintiff. Deasy & Lyman, for defendant.

CORNISH, J. In this action of assumpsit the plaintiff seeks to recover damages for breach of a written contract in the form of a logging permit dated December 21, 1906. At the close of the testimony, the presiding justice directed a verdict for the defendant, and the case comes before this court on plaintiff's exceptions to this ruling.

The permit in question gave the plaintiff the right to enter upon certain lands owned by defendant in the town and county of Hancock, and "to cut and remove therefrom wood to be manufactured into staves. * * All cedar and pine wood growing upon said land was expressly reserved. Said stave wood was to be all removed before April 1, 1907, at which time the agreement was to terminate. The plaintiff was to pay stumpage at the rate of \$1 per cord, the first payment to be made when 500 cords had been cut. This written agreement was the result of certain prior conversations between the parties, and at the time of its execution the plaintiff had already placed his crews upon the defendant's land and had commenced the operation. He continued cutting both spruce and fir for 10 days after the contract was signed, when on December 31, 1906, he was notified in writing by the defendant that he had broken his contract, that his cutting after January 1, 1907, would be wholly at her sufferance, and that all his crews must leave the premises or on before January 10, 1907, unless they confined themselves to cutting and hauling fir, and such spruce as her agent. Willard Clark, might designate. This notice the plaintiff read to his crews, and from that time on he operated in compliance with these restrictions. Payments for stumpage were made by the plaintiff to the defendant as each 500 cords were cut, as provided in the contract; the last payment being in March, 1907.

This suit for breach of contract was brought September 24, 1907. The legal rights of parties under such contracts have been frequently defined by this court. A permit of this sort constitutes an executory contract for the sale of the wood or timber after it shall have been severed from the soil and converted into chattel property, together with a license in the permittee to enter upon the land for the purpose of cutting and removing it. This license is revocable on the part of the landowner as to the wood or timber not severed from the land, but such revocation without legal cause works

At a breach of the contract. Emerson v. Shores, 95 Me. 237, 49 Atl. 1051, 85 Am. St. Rep. 404; Pierce v. Banton, 98 Me. 553, 57 Atl. 889.

The defendant in the case at bar sets up as her reason for revocation an agreement on the part of the plaintiff not to cut any spruce suitable for manufacture into long lumber, and his violation of this agreement by cutting all spruce in the path of his operation.

In her plea the defendant alleged that this provision was omitted from the written contract by mistake and inadvertence, and asked to have the contract reformed so as to embrace that condition, but this equitable defense is not now insisted upon.

Instead, while admitting that the written contract allows the cutting of all spruce, the defendant relies upon the same parol agreement as existing independent of and collateral to the written agreement, and provable under and enforceable through the rules of law. The plaintiff replies that the contract between the parties was reduced to writing, and that parol evidence cannot be introduced to vary or contradict it.

Whether such an independent agreement was made was a question of fact for the The defendant and her husband testify positively to its existence. The plaintiff fails to remember accurately what was said in regard to the spruce. Were this the only point in defense, we should hesitate to say that the case should have been taken from the jury, and that a verdict in favor of the plaintiff on this issue would not be allowed to If such collateral agreement was stand. made, its legal effect would be for the court, and we are not inclined to extend the doctrine of independent collateral agreements as expressed in Neal v. Flint, 88 Me. 72, 33 Atl. 669, beyond its legitimate sphere. See Chaplin v. Gerald, 104 Me. 187, 71 Atl. 712. But, upon another point raised in defense, the plaintiff fails, and that is the question of waiver. If on December 31, 1906, he had any right of action, the evidence so clearly shows a waiver on his part that recovery is precluded. Waiver is essentially a matter of intention, yet such intention need not necessarily be proved by express declaration. It may be inferred from the acts of the party and most often is shown by his action or nonaction. Peabody v. Maguire, 79 Me. 572, 12 Atl. 630; Stewart v. Leonard, 103 Me. 128, 68 Atl. 638. It is the voluntary relinquishment of a known right, which but for such waiver the party would have enjoyed. "It may be proved by express declaration; or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage; or by a course of acts and conduct, or by so neglecting and failing to act, as to induce a belief that it was his intention and purpose to waive." Farlow v. Ellis, 15 Gray (Mass.) 229-231.

The things that the plaintiff here did and

the things that he failed to do can be reconciled with no other theory than that either he claimed no right of action or voluntarily relinquished it. When the defendant wrote him the letter of revocation ten days after the contract was executed, he seemed to accept the situation, for he went at once to his different crews, read the notice to them, and explained that thenceforth the work must be done under the direction of Clark, the defendant's agent. From that time without objection on his part the spruce was cut as Clark dictated. The plaintiff did not leave the work and claim damages for breach of contract but saw fit to remain and operate under the new arrangement. The work continued without a day's suspension and without a word of protest from the plaintiff. He saw the defendant and her agent several times, but never claimed or intimated that the contract of December 21st was subsisting. or that she had broken the same and that he claimed damages therefor. His first demand was the service of this writ. He made payments and settlements with her under the new régime without a murmur of dissent.

But his own letter written to the defendant soon after the revocation is conclusive on this point. In this he pleads for the privilege of continuing work and practically admits the justice of the defendant's position. He says: "No matter what is being told you, I am using every effort to cut just as you want it done. * * * I think about all the spruce that has been hauled was cut before we had the men shown just how they should cut. I have been with Willard among the crews, and I thought they all talked as though they would do the right thing, and I want to have it done, but, of course, they never around here cut timber only just as they had a chance to cut all before them. I am willing to go at all times with Willard or any one you designate, and we will do all we can to further your interest."

Such language gives color to the defendant's contention as to the contract itself, and is utterly inconsistent with the existence of a legal claim which the writer intends to enforce. "A waiver is indeed the intentional relinquishment of a known right; but the best evidence of intention is to be found in the language used by the parties. The true inquiry is what was said or written and whether what was said indicated the alleged intention. The plaintiff had a right to act on the natural interpretation of the correspondence, and the defendant's conduct in reference to it. The secret understanding or intent of the defendants or their agents could not affect his rights." West v. Platt, 127 Mass. 367. In the case at bar the evidence of even a secret intent is lacking, for not even at the trial did the plaintiff state that he had such intent nor did he attempt to explain his words and acts tending to show the contrary.

Under such circumstances, the ruling of the presiding justice in directing a verdict for defendant was correct, as the evidence presented was insufficient to support a verdict for the plaintiff. Day v. B. & M. R. R., 97 Me. 528, 55 Atl. 420.

Exceptions overruled.

(105 Me. 207)

STATE v. MORRILL.

(Supreme Judicial Court of Maine. Feb. 27, 1909.)

1. CRIMINAL LAW (§ 977*)—Conviction—Sentence.

Rev. St. c. 135, § 26, as amended by chapter 106, p. 112, Pub. Laws 1905, provides that "sentence shall be imposed upon conviction, either by verdict or upon demurrer, of a crime which is not punishable by imprisonment for life, although exceptions are alleged." Held (1) that the verdict of guilty, or the decision overruling the demurrer, is the conviction meant by the statute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2482, 2489; Dec. Dig. § 977.*]

2. CRIMINAL LAW (§ 978*)—SENTENCE—STAT-UTORY PROVISIONS.

That the statute so construed is constitutional, and, if the exceptions are overruled, the sentence is to be executed.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 978.*]
(Official.)

Exceptions from Supreme Judicial Court, Cumberland County.

Frank Morrill was convicted of felonious assault, and brings exceptions. Exceptions overruled.

The defendant was indicted in the superior court, Cumberland county, for a felonious assault on a woman, and upon trial was found guilty. He then filed a motion for a new trial, which was overruled. He also filed a motion in arrest of judgment, which was also overruled, and to this ruling he excepted. The presiding justice then sentenced the defendant to imprisonment in the state prison for two years, and to the imposition of sentence before his prior exceptions were determined the defendant also excepted.

The case is stated in the opinion.

Rev. St. c. 135, § 26, as amended by Pub. Laws 1905, p. 112, c. 106, reads as follows: "Sec. 26. Sentence shall be imposed upon convictions, either by verdict or upon demurrer, of a crime which is not punishable by imprisonment for life, although exceptions are alleged. Questions of law may be reserved on a report signed by the presiding justice, and in such case, and where exceptions are allowed, the defendant may, when the offense charged is ballable, recognize with sureties, in such sum as the court orders, with conditions substantially as follows:

The condition of this recognizance is such

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- court, within and for the county of -, an indictment against the said for the offense of -, in the course of the proceedings upon which, questions of law requiring the decision of the justices of the supreme judicial court have arisen; now if said — shall personally appear before - court, to be held in and for said county, from term to term, until and including the term of said court next after the certificate of decision shall be received from said justices, and shall abide the decision and order of said court, and not depart without license, then this recognizance shall be void.' If he does not so recognize, the court, on request of the defendant upon whom sentence is imposed may allow stay of execution of sentence, in which case commitment shall be to await final decision: otherwise, such commitment shall be in execution of sentence. When a verdict of guilty is rendered against any person for an offense punishable by imprisonment in the state prison. or any person is committed pending decision on report or exceptions, as herein provided, and remains imprisoned after the adjournment of court, he shall be admitted to bail only by the justice trying him, by some person by him appointed therefor, or by some justice of the supreme judicial court. If a person shall be so admitted to bail after commitment in execution of sentence, as above provided, such admission to bail shall vacate the effect of the original commitment, and the full term of imprisonment shall commence from the date of commitment after final decision."

Argued before EMERY, C. J., and WHITE-HOUSE, SAVAGE, PEABODY, SPEAR, and BIRD, JJ.

Joseph E. F. Connolly, Co. Atty., for the State. D. A. Meaher, for defendant.

EMERY, C. J. The defendant was upon trial found guilty of felonious assault. He then filed a motion for a new trial, which was overruled. He also filed a motion in arrest of judgment, which was also overruled. To this latter ruling exceptions were filed and allowed. The court then, notwithstanding the exceptions allowed, sentenced the defendant to imprisonment in the state prison for two years, but allowed a stay of execution of sentence upon the defendant's recognizing to abide the decision of the court. To this imposition of sentence before his prior exceptions were determined the defendant also excepted. This latter exception is the only one argued; the former being abandoned.

Rev. St. c. 135, § 26, as amended by chapter 106, p. 112, Pub. Laws 1905, provides that "sentence shall be imposed upon conviction, either by verdict or upon demurrer, of a crime which is not punishable by im-

tbat, whereas there is now pending in the prisonment for life, although exceptions are court, within and for the county of alleged." The defendant contends that there can be no conviction until his exceptions are overruled. We think it evident, however, the proceedings upon which, questions of law requiring the decision of the justices of meant by the statute.

The defendant further contends that the statute so construed is unconstitutional. No provision of the Constitution is cited which forbids such legislation, and we have found none. The statute therefore must be adjudged constitutional. Commonwealth v. Brown, 167 Mass. 144, 45 N. E. 1.

Exceptions overruled. Mittimus to issue in execution of sentence.

(105 Me. 201)

WALKER v. FOLLETT'S ESTATE. (Supreme Judicial Court of Maine. Feb. 28, 1909.)

1. EXECUTORS AND ADMINISTRATORS (§ 329*)— REAL ESTATE—SALE—POWER.

The will of Mercy Follett was proved and allowed October 4, 1852, and Robert Follett Gerrish, a nephew, was appointed executor on the same date. The inventory filed in March, Gerish, a nepnew, was appointed executor on the same date. The inventory filed in March, 1853, showed real estate appraised at \$7,050, and personal estate appraised at \$3,620. The executor's first and only account, allowed in October, 1853, showed a balance of \$911.14 of personal estate in his hands. By the terms of the will, after the payment of all debts and funeral charges, and "with such exceptions and bequests" as the testatrix thereinafter made, Robert Follett Gerrish was given a life estate in all the property, both real and personal, "to have, use and enjoy the income and profit thereof during his, the said Robert's natural life." The will then further provided, among other things, that at "my said executor's decease I hereby give and bequeath of my said property or estate one thousand dollars to be invested in real estate or permanent and profitable stock, the income of which shall be annually appropriated for the support of Congregational stock, the income of which shall be annually appropriated for the support of Congregational preaching, for, and in the First Congregational Church and Parish," in Kittery "as long as said parish shall exist." On July 23, 1874, said Robert Follett Gerrish conveyed, by warranty deed and without license of court, to his wife, Sarah C. Gerrish, all the real estate left by said Marry Follett and on April 18 1831 said Mercy Follett, and on April 18, 1881, said Robert Follett Gerrish, and Sarah C. Gerrish Mercy Follett, and on April 18, 1881, said Robert Follett Gerrish, and Sarah C. Gerrish conveyed a part of the same to one Ichabod Goodwin. The balance of the real estate is still held by the heirs at law of Robert Follett Gerrish and Sarah C. Gerrish. Robert Follett Gerrish died October 25, 1882, and there was no further administration of the Mercy Follett estate until September 1, 1903, when the appellant, James H. Walker, was appointed administrator de bonis non with will annexed upon the petition of the said First Congregational Church and Parish of Kittery. On October 6, 1903, the said administrator filed an inventory in the probate court showing no personal property, but real estate appraised at \$10.532.66, being the identical parcels enumerated in the original inventory filed in 1853. After a futile demand upon the heirs of Robert Follett Gerrish for any property in their possession belonging to the estate of Mercy Follett, the administrator filed a petition in the probate court for license to sell all the real estate inventoried, for the purpose of paying the legacy of \$1.000 to the said First Congregational Church and Parish, which said legacy

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

nad never been paid. The probate court re-fused to grant the license and the administrator | appealed.

appealed,

Held, that the appeal must be dismissed. The real estate is not in the custody or control of the administrator, but in that of third parties who hold under recorded deeds, and that no such power is given by statute to administrators de bonis non as is claimed in this case.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1351; Dec. Dig. § 329.*]

2. REMEDY BY BILL IN EQUITY.

If the title to the real estate is to be attacked, it should be by the party in interest, the Kittery Parish, and the remedy should be sought by a bill in equity.

WILLS (§ 826*) — DECREEING LEGACY CHARGE ON REAL FISTATE.

Whether the legacy created a charge up-on the real estate of the testator, which follows it into the hands of the present holders, and whether such a right, if once existing, has been whether such a right, if once existing, Las been lost through laches of the parish, are questions which cannot be determined in the present proceedings, but can be under a bill in equity. All the facts can then be presented to the court, and under its elastic procedure the court, if the bill is sustained, may also designate the particular real estate which shall in the first instance be reached, because the equitable rights of the present holders may vary. of the present holders may vary.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2130; Dec. Dig. § 826.*]

(Official.)

Report from Supreme Judicial Court, York

Petition by James H. Walker, administrator de bonis non with will annexed of the estate of Mercy Follett, deceased, to sell real Permission was refused, and the administrator appealed to the Supreme Court of Probate, where an agreed statement of facts was filed, and the case reported to the law court for determination. Decree of probate court affirmed.

The plaintiff, in his capacity as administrator de bonis non with will annexed of the estate of Mercy Follett, filed a petition in the probate court, York county, for license to sell certain real estate. License was refused. and the plaintiff appealed to the Supreme Court of Probate. When the cause came on for hearing in the appellate court, an agreed statement of facts was filed, and the case was reported to the law court to render such judgment as the law and the facts required.

Argued before EMERY, C. J., and WHITE-HOUSE, SAVAGE, PEABODY, CORNISH, KING, and BIRD, JJ.

The case is stated in the opinion.

Samuel W. Emery and Geo. F. & Leroy Haley, for plaintiff. Frank & Marvin and George C. Yeaton, for defendant.

CORNISH, J. The appellant is administrator de bonis non with will annexed of the estate of Mercy Follett, and appealed from a decree of the judge of probate dismissing his petition for license to sell real

ed and allowed October 4, 1852, and Robert Follett Gerrish, a nephew, was appointed executor on the same day. The inventory filed March 7, 1853, showed real estate appraised at \$7,050 and personal property appraised at \$3,620, a total of \$10,670. The executor's first and only account was allowed October 8, 1853, showing a balance of \$911.44 of personal property in his hands. By the terms of the will, after the payment of alldebts and funeral charges, and "with such exceptions and bequests" as the testatrix thereinafter made, Robert Follett Gerrish. was given a life estate in all the property. both real and personal, "to have, use and enjoy the income and profit thereof during, his, the said Robert's natural life." At his; decease, his oldest son, if any, was to have a similar life estate, and after various other. provisions designed to meet the possible contingencies of heirship, the estate was to vest; absolutely in the grandchildren, or, if nograndchildren, two-thirds was given to the, First Congregational Church and Parish in, Kittery, and one-third to the Maine Missionary Society.

Then follows this clause:

"The exceptions to the disposal of my estate as above named, willed and bequeathed are these, to wit. It is my will that, and I hereby give and bequeath annually after my decease the sum of twenty-five dollars. of the said profits or income of my said property for the support of an intelligent and; pious ministry of the Congregational denom-: ination, in and for the said Congregational Church and Parish, said twenty-five dollars. to be annually paid to the acting clergyman. of said parish by my said executor hereinafter named, during said executor's natural life. Then at his, my said executor's decease I. hereby give and bequeath of my said property or estate one thousand dollars to be invested in real estate or permanent and profitable. stock, the income of which shall be annually appropriated for the support of Congregational preaching, for, and in said First Congregational Church, and Parish, as long as said parish shall exist, and should said parish become extinct, I hereby will, give and bequeath, said one thousand dollars to the aforenamed Maine Missionary Society to be used by said missionary society for the. spread of the knowledge and glory of God. and the moral religious social and intellectual elevation of mankind. Said one thousand dollars to be disposed of in such a manner as the directors of said missionary society shall deem best adapted to the ends designed."

Robert Follett Gerrish died October 25, 1882, and there was no further administration of the Follett estate until September 1, 1903, when James H. Walker was appointed administrator de bonis non with will annexed estate. The will of Mercy Follett was prov- upon the petition of the First Congregational

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date. & Reporter Indexes

Church and Parish of Kittery. The case does not show whether the executor paid to the church the annuity of \$25 during his lifetime, but since his decease the legacy of \$1,000 has not been paid. On July 23, 1874, said Robert F. Gerrish conveyed by warranty deed, and without license of court, to his wife, Sarah C. Gerrish, all the real estate left by Mercy Follett, and on April 18, 1881, said Robert F. and Sarah C. Gerrish conveyed a part of the same to one Ichabod Goodwin. The balance of the real estate is still held by the heirs at law of Robert F. and Sarah C. Gerrish. On October 6, 1903, Mr. Walker, the administrator, filed an inventory in the probate court showing no personal property, but real estate appraised at \$10,532.66, being the identical parcels enumerated in the original inventory filed March 8, 1853. After a futile demand upon the heirs of Robert F. Gerrish for any property in their possession belonging to the estate of Mercy Follett, the administrator filed a petition in the probate court for license to sell all the real estate inventoried for the purpose of paying the legacy of \$1,000 to the First Congregational Church and Parish of Kittery. From the denial of that petition this appeal was taken.

We think the appeal must be dismissed. Whatever rights the parish may have can be secured in another form of proceeding. but not in this. The real estate in question is not in the custody or control of the appellant, but in that of third parties, who hold under recorded deeds, and we can find no such power given to administrators de bonis non by statute as is claimed here. The appellant asks for license to sell \$10,000 worth of real estate standing in the name of third parties in order to pay a legacy of \$1,000. This is far beyond his domain. If the title is to be attacked, it should be by the party in interest, the Kittery parish, and the remedy should be sought by bill in equity.

The appellant contends that the legacy of \$1,000 created a charge upon the real estate, which followed it into the hands of the present holders. This the respondents deny. The authorities would seem to favor the appellant. The general rule is that, after certain legacies are given without any express provision of means of payment, a residuary gift blending the real and personal property of the testator creates a charge of the legacles upon the entire estate. 3 Jarman on Wills, 426, 427; Reynolds v. Reynolds, 16 N. Y. 257; Addition v. Smith, 83 Me. 551, 22 Atl. 470. The respondents further say that if the legacy was originally a charge upon the land, the laches of the parish in not seeking to enforce its rights for the 21 years that elapsed between the death of the executor and the appointment of the administrator is a bar to recovery.

Whether or not such laches exists would

depend upon all the facts connected with the delay, and perhaps explanatory of it, none of which are before this court.

It is not necessary to decide either of these questions here. They can be met, if the case comes to this court, on a bill in equity, brought by the legatee against the present holders of the land, which has been held to be the proper form of remedy in such cases. This was decided in the early case of Bugbee v. Sargent, 23 Me. 269. In Merritt v. Bucknam, 78 Me. 504, 7 Atl. 383, the question was re-examined, and the court held the remedy to be in equity, and prescribed the method of enforcing it. See, also, Whitehouse v. Cargill, 86 Me. 60, 29 Atl. 924; Id., 88 Me. 479, 34 Atl. 276; 2 Red, Wills, p. 209; Harris v. Fly, 7 Paige (N. Y.) 421.

A court in equity cannot only decree the legacy to be a charge upon the real estate, if the will can be so construed, but with its elastic procedure it can also provide the method of securing the same, and designate the particular real estate which shall in the first instance be reached, because the equitable rights of the present holders may vary, 2 Red on Wills, p. 210; Aston v. Galloway, 38 N. C. 126.

It is clear that the license to sell should . not be granted, and the entry must be:

Appeal dismissed.

Decree of probate court affirmed.

(225 Pa. 132)

CUNNINGHAM et al. v. ROGERS et al. (Supreme Court of Pennsylvania. June 22, 1909.)

1. APPEAL AND EBROR (§ 728*)—Assignments of Error—Sufficiency.

Assignments of error not containing the answer to the question, admitted after objection, or copies of papers offered and admitted, violate rule 31.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3012; Dec. Dig. § 728.*]

2. LANDLORD AND TENANT (§ 167*)—BASEBALL PARK—LIABILITY FOR INJURY FROM FALLING STAND.

The landlords of a baseball park are not liable for an injury from the grand stand falling, where the stand was erected before the landlords took title and was owned by the tenant, and the tenancy continued after the change of ownership, and a new lease was made to the same tenant before the original term had expired, and the tenant continued in exclusive possession, and there was no time prior to the accident when the landlords were actually in possession, or could lawfully have taken possession.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 668-674; Dec. Dig. § 167.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by George L. Cunningham, by his next friend and mother, Mary E. Cunningham, and Mary E. Cunningham against John I. Rogers and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

Argued before MITCHELL, C. J., and and Reach; but the ball club continued as FELL, BROWN, MESTREZAT, POTTER, tenants, and, on December 31, 1891, Rogers ELKIN, and STEWART, JJ.

Isaac Hassler, for appellants. John G. Johnson, for appellees.

POTTER, J. This was an action of trespass, brought to recover damages for personal injuries sustained by plaintiff, on August 8, 1903, by reason of the fall of a portion of the grand stand at the Philadelphia Ball Park. Plaintiff, a minor, was seated beside his father on the upper row of seats at the back of the stand. A balcony or passageway in their rear, which overhung Fifteenth street, gave way under the weight of the crowd and fell into the street, carrying down with it the rear seats and those seated upon them. The father was killed and the son seriously hurt. This suit was brought by the mother and next friend, on behalf of the plaintiff, and also by the mother in her own right, against John I. Rogers and Alfred J. Reach, owners of the premises upon which the grand stand was erected, and it was sought to hold them liable in damages for the negligent construction of the grand stand, and its maintenance in an unsafe condition, to which causes the accident was attributed by plaintiff. Upon the trial the court below directed a verdict for the defendants, upon the ground that the evidence showed that the grand stand belonged to the lessees, and not to the owners of the ground, and also showed that the lessees were in uninterrupted possession of the premises from the date of the erection of the structure that fell until after it had fallen. Judgment was entered on the verdict, and plaintiff has appealed.

There are six assignments of error. The first and second assignments violate rule 31, for the reason that neither of them contains the answer to the question, admitted after objection. The third and fourth assignments also violate rule 31, for the reason that neither contains copies of the papers offered and admitted in evidence.

The fifth assignment is to the action of the trial judge in directing a verdict for the defendants, and raises the question of their liability as owners of the premises. It appears from the evidence that on January 4, 1886, Edward D. O'Kane, being the owner of a lot of ground situated between Broad and Fifteenth streets, and Huntingdon street and Lehigh avenue, in the city of Philadelptia, leased the same to the Philadelphia Ball Club, Limited, as a park for the exhibition of games of ball or other athletic sports, for a term of 10 years. The ball club went into possession under the lease, and graded the lot, and put up the fixtures necessary to fit it for a ball park. On January 11, 1886, Edward D. O'Kane conveyed the title to the premises to John I. Rogers and Alfred J. Reach, the defendants. The record does not show an assignment of the lease to Rogers

tenants, and, on December 31, 1891, Rogers' and Reach indorsed on the lease an agreement to renew for an additional term of 10 years from January 1, 1896, on the same terms and conditions. On August 4, 1894, alk the improvements on the ground were destroyed by fire, and new buildings, including the grand stand where the accident in question occurred, were erected and paid for by the lessees, the Philadelphia Ball Club, Limited. These buildings were insured by the lessees in their own name, and subsequently they claimed from the city damages to the buildings alleged to have been sustained by change of grade. On February 28, 1903, when the original lease had still nearly 3 years to run under its renewal. Rogers and Reach made a new lease to the Philadelphia Ball Club, Limited, for a term of 3 years from January 1, 1903, with the privilege of renewal for 10 years longer, and under this lease the ball club were in possession at the date of the accident. It appears that Rogers and Reach, the defendants, were never in actual possession of the premises from the time of the original conveyance to them by O'Kane to the date of the accident. defense upon which they relied was that as individuals they had no interest in or ownership of the grand stand, which broke down, and were in no way responsible for its condition. They were the owners of the ground, but the stands were erected and maintained by the Philadelphia Ball Club, Limited. It would seem, therefore, that suit should have been brought against the tenant, and not against the landlord.

The general principle is undisputed that, when a landlord lets premises in a dangerous condition, he is liable for the consequences which may result from the condition he permitted to exist. But in the case at bar the original lease was of a vacant lot, and the tenant erected the structure alleged to be dangerous. Although a new lease was made in February, 1903, the owners were never in actual possession of the ground, and there is no evidence that the ownership of the improvements passed to them. When the new lease was made, the original one had The landlord, nearly three years to run. therefore, had not at that time power, by giving notice, to regain possession of the premises. The new lease was simply substituted for the old one, covering its unexi pired term, and there was no time prior to the accident when the lessors were actually in possession, or could lawfully have taken possession. This fact, and the additional fact, above noted, that the improvements were not the property of the lessors, distinguishes the present case from those cited by the appellant, in which the improvements belonged to the owners of the ground, and where there was a reletting of the premises after dangerous conditions had arisen.

. The claim of the plaintiff in this case is based upon the alleged ownership by the defendants of the structure which fell, but no sufficient evidence in support of this claim was offered. "As regards the liability of handiords to third persons, it may be taken as a general rule that the tenant, and not the landlord, is liable to third persons for accident or injury occasioned to them by the premises being in a dangerous condition; and the only exceptions to this rule appear to arise where the landlord has either (1) contracted with the tenant to repair, or (2) when he has let the premises in a ruinous condition, or (3) when he has expressly licensed the tenant to do acts amounting to a puisance." 2 Woodfall on Landlord and Tenant (1st Am. Ed. 1890) *735. We see nothing in the evidence in this case to justify the inference that there was any intention to surrender the premises, when the tenant accepted a new lease, during the term of the former lease; and there is an equal lack of testimony to show that the improvements and grand stands ever became the property of the landlords. Upon the whole record it is apparent that the responsibility for the condition of the grand stands in this case rested upon the tenant.

The assignments of error are overruled, and the judgment is affirmed.

(25 Pa. 126)

In re OGONTZ AVE.

'(Supreme Court of Pennsylvania. June 22, 1909.)

1. Eminent Domain (§ 93*)—Opening Street —Right to Damages.

In order for an owner of land which does not abut on a newly opened street to recover damages under Ccnst. art. 16, § 8, the injury complained of must be proximate, immediate, and substantial.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 237, 238; Dec. Dig. § 93.*]

2. Eminent Domain (§ 93*) — Opening Streets—Damages.

A claim of a nonabutting owner for damages for the opening of a street alleging that, when the street is filled to the established grade, injuries may result, is too remote a possibility to sustain a present claim for consequential damages.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 237, 238; Dec. Dig. § 93.*]

Appeal from Court of Common Pleas, Philadelphia County.

In the matter of the opening of Ogontz Avenue. From an order dismissing exceptions to report of referee, the City of Philadelphia appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

James Alcorn, William J. Yorke, and J. Howard Gendell, for appellant. Bertram G. Frazier and John W. Frazier, Jr., for appellee.

ELKIN, J. The question to be determined on this appeal is whether the owner of land which does not abut on a newly opened street is entitled to damages under the constitutional provision requiring compensation to be made for property taken, injured, or destroyed before there has been any physical change of grade on the ground or any actual injury to the property for which damages are claimed. It must be conceded that the right of a property owner to recover damages in the nature of compensation for land taken, injured, or destroyed by the opening or widening of a public street has been sustained in a long line of cases, although the property injured did not abut on the street. While these cases hold that the property need not abut on the street, the principle announced is that the injury complained of must be proximate, immediate, and substantial. It is difficult, perhaps impossible, to reconcile all the cases in which a construction of article 16, § 8, of the Constitution has been involved. In the railroad cases it was held that the injuries must be actual, positive, and visible, and must be of such certain character as to be ascertained when the railroad was constructed. These cases decide that the injury in the constitutional sense must be in the nature of a legal wrong such as would be the subject of an action for damages at common law, and that the right of action only accrues to an abutting owner who complains. Consequential damages to nonabutting owners are not recoverable in this class of cases. This is the rule of Railroad Co. v. Lippincott, 116 Pa. 472, 9 Atl. 871, 2 Am. St. Rep. 618; Railroad Co. v. Zlemer, 124 Pa. 560, 17 Atl. 187; Jones v. Railroad Co., 151 Pa. 30, 25 Atl, 134, 17 L R. A. 758, 31 Am. St. Rep. 722; Insurance Co. v. Railroad Co., 151 Pa. 334, 25 Atl. 107, 31 Am. St. Rep. 762; Hartman v. Incline Plane Co., 159 Pa. 442, 28 Atl. 145; Willock v. Railroad Co., 222 Pa. 590, 72 Atl. 237. As hereinbefore indicated, the rule applicable to street opening cases is different, and, while to the writer of this opinion there does not seem to be any solid ground upon which to distinguish one class of cases from the other. yet the cases do make the distinction, and since both parties to the present proceeding recognize the principle of proximate, immediate, and substantial injury as applied to street opening cases, regardless of whether the complaining party is an abutting or nonabutting owner, it will not be necessary to consider broadly the underlying constitutional question. What constitutes a taking of, or injury to, or destruction of, private property by municipalities in opening, widening, and grading streets has been considered in numerous cases by this court. See Mellor v. Philadelphia, 160 Pa. 614, 28 Atl. 991; Ladd v. Philadelphia, 171 Pa. 485, 33 Atl. 62; In re Melon Street, 182 Pa. 397, 38 Atl. 482, 38

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

L. R. A. 275; In re Walnut Street Bridge, | consequential injuries must be proximate, ini-191 Pa. 153, 43 Atl. 88; In re Chatham Street, 191 Pa. 604, 43 Atl. 865; Lewis v. Homestead, 194 Pa. 199, 45 Atl. 123; Stork v. Philadelphia, 195 Pa. 101, 45 Atl. 678, 49 L. R. A. 600; Robbins v. Scranton, 217 Pa. 577, 68 Atl. 977.

It should be observed that even in the street opening and change of grade cases it was held that the injury to a nonabutting owner must be proximate, immediate, and substantial, else there could be no recovery. In every instance where damages were recovered some right of property, or easement or privilege enjoyed by the owner, or access to his property, was interfered with. A careful examination of these cases will show that, when a nonabutting owner claimed damages by reason of the street improvement, the burden always rested on him to show immediate and substantial injury occasioned thereby. Our attention has not been called to a single case in which a nonabutting owner was permitted to recover damages on the ground of an alleged injury to his property when in point of fact there had been no change in the surface conditions, or where access, or right of way or drainage. or some other existing right of property had not been disturbed. In this respect there is a valid distinction between abutting and nonabutting owners. As to abutting owners, the act of May 16, 1891 (P. L. p. 65), clearly contemplates that all damages shall be assessed in a single proceeding, and shall accrue to those persons entitled thereto at the time of the assessment, and not to subsequent purchasers. Sedgley Avenue, 217 Pa. 313, 66 Atl. 546. In that case the original owner claimed damages for land actually taken and recovered on the basis of the street being opened to the established grade, although it was not graded until he had parted with his title, and the subsequent purchaser was in possession. But this rule does not apply to a nonabutting owner whose claim for damages rests upon a different basis. The Constitution requires compensation to be made for property taken, injured, or destroyed. As to abutting owners there is an actual taking within the meaning of the law when the street is ordered to be opened and proper notice has been served upon the property owners affected thereby. The act of Assembly provides a method of procedure to determine all questions incidental to the taking of such property as may be necessary for the street improvement, including damages that may result by making or changing the street to the established grade. As to nonabutting owners there can be no claim for property actually taken, and the damages, if any, must be such as result from some consequential injury. If there be no injury, no compensation can be demanded. This is why our cases have held that all such to the board of directors of a railroad the de-

mediate, and substantial. An injury cannot be said to be immediate and substantial if there be none at all. In the case at bar the ordinance only provides for the opening, and not for the grading, of Ogontz avenue. The property of appellee does not abut on the avenue, and the opening of the street on the surface of the land belonging to an adjoining owner cannot in a legal sense injuriously affect the property in question, when the surface conditions remain unchanged. Indeed, it is not contended that the opening of the avenue causes any injury to the property of appellee, but it is alleged that, when filled to the established grade, injuries may or will result. This is too remote a possibility to sustain a present claim for consequential damages to a property not actually taken nor disturbed in any way by opening the street. There is no present injury of any kind, either proximate, immediate, or substantial, to the property of appellee, and hence no present claim for consequential damages. The appellee, therefore, did not meet the burden resting on him to show such actual injury to his property as is necessary to sustain a claim for damages in the present proceeding.

Judgment reversed.

(225 Pa. 152)

SCRANTON GAS & WATER CO. v. DELA-WARE, L. & W. R. CO.

(Supreme Court of Pennsylvania. June 22, 1900.)

1. EMINENT DOMAIN (§ 20*) - RAILBOADS -STRAIGHTENING LINE.

The reduction of total curvature of a railroad company's track from 473 degrees to 150 degrees brings the improvement within Act March 17, 1869 (P. L. 12), authorizing a railroad to straighten its line for the better securito straighten its line for the ofter security of persons and property, and to increase transportation facilities and for such purpose to appropriate lands, and it is of no consequence that the railroad had in mind other advantages, or that they were the controlling consideration, without which the improvement would not have been entered upon.

[Ed. Note.-For other cases, see Eminent Domain, Cent. Dig. §§ 59-67; Dec. Dig. § 20.*] 2. EMINENT DOMAIN (\$ 167*) - RAILBOADS-

STRAIGHTENING LINE.

Where, though the specific purpose in view was not declared in either the resolution of the executive committee of a railroad company, or of its board of directors, and though the change in its line was described as a relocation, that what was described as a relocation, it is yet evident what the purpose was, and that what was intended was such a change as is provided for by Act March 17, 1869 (P. L. 12), authorizing a railroad to condemn land to straighten its line, the proceedings were entirely regular and adequate.

[Fd. Note.—For other cases, see Eminent Donain, Cent. Dig. §§ 451-452; Dec. Dig. §

termination of the necessity of taking additional land to straighten its line, and its determination reached in good faith is conclusive, and the act does not intrust to the court any supervisory power.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 168-170; Dec. Dig. § 68.*]

'4. EMINENT DOMAIN (§ 48*)—PROPERTY WHICH MAY BE TAKEN—PROPERTY DEVOTED TO PUBLIC USE.

Property devoted to public use, including a franchise, is subject to eminent domain, and may be taken for other uses, but not without legislative authority expressed in clear terms or by necessary implication.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 103; Dec. Dig. § 48.*]

.5. EMINENT DOMAIN (§ 47*)—NECESSITY FOR TAKING — PROPERTY DEVOTED TO PUBLIC USE.

The necessity which will permit the condemnation of property devoted to a public use must be one that arises from the nature of things, over which the corporation has no control. It must not be a necessity created by the corporation itself for its own convenience, or for the sake of economy.

! [Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 107-120; Dec. Dig. § 47.*]

6. EMINENT DOMAIN (§ 47*)—PROPERTY WHICH MAY BE TAKEN — PROPERTY DEVOTED TO PUBLIC USE.

The mere possibility that land of a water company may at some future time become necessary to the exercise of its franchise does not exempt it from condemnation by a railroad company, nor does the fact that the property is at present employed, if the use is not necessary to the exercise of the water company's franchise.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 107-120; Dec. Dig. § 47.*]

7. Eminent Domain (§ 47*)—Property which may be Taken — Property Devoted to Public Use.

The condemnation of lands of a water company by a railroad was properly not restrained where the lands were not then employed by the water company in the exercise of its franchise, and there were other available sites for reservoirs adequate for the future of the company, and the improvement by the railroad would not result in increasing water pollution.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 107-120; Dec. Dig. § 47.*]

8. Appeal and Error (\$ 1009*) — Review — Findings of Chancellor.

The findings of a chancellor will only be disturbed as manifest error is shown.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §\$ 3970-3978; Dec. Dig. \$ 1009.*]

Appeal from Court of Common Pleas, Lack-awanna County.

Bill for an injunction by the Scranton Gas & Water Company against the Delaware, Lackawanna & Western Railroad Company. Decree for defendant, and complainant appeals. Affirmed.

Argued before FELL, BROWN, POTTER, ELKIN, and STEWART, JJ.

James H. Torrey, D. T. Watson, and M. J. Martin, for appellant. John G. Johnson and Willard, Warren & Knapp, for appellee.

STEWART, J. The Delaware, Lackawanna & Western Railroad Company, a corporation of this state, owning and operating a double-track line of railroad, and invested with right of eminent domain, instituted proceedings in the court of Lackawanna county for the condemnation of certain lands owned by the Scranton Gas & Water Company in The latter company, denying said county. the right of the former to appropriate the lands in question, filed its bill for an injunction to restrain the railroad company from entering upon and taking possession of said lands, or laying tracks or obstructing the gas and water company in any way in their use and occupancy of the same. No preliminary injunction was issued, inasmuch as the railroad company consented to proceed no further with its work until final hearing. Upon final hearing the bill was dismissed without prejudice. From this decree the gas and water company has appealed.

The railroad company claims the right to appropriate these lands under and by virtue of the provisions of the act of March 17, 1869 (P. L. 12), which, among other things, authorizes railroad companies "to straighten. widen, deepen, enlarge, and otherwise improve the whole or portion of their lines of railroad * * * when, in the opinion of the board of directors of any such company, the same may be necessary for the better security or safety of persons and property, and increasing the facilities and capacity for the transportation of traffic thereon, and for such purposes to purchase, hold, and use or enter upon, take and appropriate lands and mater-Except as authority can be derived ial." from this act, it does not exist. The change here proposed involves a departure from the line originally adopted and used since 1854 for a longitudinal distance of about four miles, the greatest departure from the old line at any one point being about 2,500 feet, with the result that the line of railroad will be shortened by a half mile and the total curvature reduced some 323°, with no individual curve exceeding 2°. We do not understand that it is any part of appellant's contention that the railroad company in making so wide a departure from its original location is exceeding its authority under the act, if in point of fact it is being done for the purpose of straightening the tracks, and if the action taken by the company in so ordering the improvement meets the requirements of the law. The contention is that the change attempted by the railroad company was projected and entered upon, not for the purpose of straightening or widening the company's tracks, but with a view to relocate its line; that the action taken by the company contemplated nothing beyond this; and that the fact that a reduced curvature and shortened line will result is but an incident which did not enter into the purpose.

. For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

These have been resolved in appellant's brief into three distinct questions, clearly and concisely stated, and to them we shall confine the discussion, observing, however, an inverse order.

1. The question first to be considered is thus stated in appellant's brief: "Were the proceedings of the defendant, the railroad company, for a condemnation of this land a valid and proper exercise of the power of eminent domain, particularly for the purposes covered by the widening and straightening act of 1869?" One manifest result of the proposed change, unchallenged, will be the straightening of the railroad tracks, and that too to a most marked degree. As we have seen, the reduction of total curvature will be from 473° on the present line to 150° on the new. The mere statement of such fact brings the improvement within the provisions of the act of 1869. It is of no consequence that the railroad company had in mind other advantages, or that these were the controlling considerations without which the improvement would not have been entered upon. Windsor Glass Company v. Carnegie Company, 204 Pa. 459, 54 Atl. 329; Rudolph v. Schuylkill Railroad Company, 166 Pa. 430, 31 Atl. 131; Gaw v. Bristol, etc., R. R. Co., 196 Pa. 442, 46 Atl. 372; Oliver v. Thompson's Run Bridge Company, 197 Pa. 344, 47 Atl. 230. The inquiry in all such cases must be, not into the conduct of the company, but into the rights conferred upon the company by law. If authorized by its charter to do the thing complained of, the authority of the court is at an end, no matter what latent design may be developed. The facts in regard to the proceeding taken by the railroad company as preliminary to the improvement are undisputed. In 1895 the president of the company caused various surveys to be made. A new alignment being made, the center line was marked on the ground by stakes. The map showing the location made by the engineers was submitted by the president to the executive committee of the company on May 1, 1906. The following is the minute of the action taken by that committee: "The president presented plans and estimates of cost of building new third track and relocating present main track between Moscow and Gouldsboro. On motion it was resolved that the change of alignment proposed and recommended be hereby approved, and authority be given to let the necessary contracts for relocation and building of the line as recommended and the building of a third track from Moscow to Gouldsboro, the total estimated cost of which is about \$485,443. Said change will eliminate 320° curvature and shorten the main line 517/1000 of a mile." On May 31st following, at a meeting of the board of directors, this minute of the executive committee was read, and the action of the committee approved. While the specific

The assignments of error are 26 in number, solution, and while the change in the line is described as a relocation, it is yet evident what the purpose was, and just as evident that what was intended was a change such as is provided for by the act of 1869, and by that act only. The minute of the executive committee's action admits of no other construction than that the plans submitted were approved for the reason that the proposed change would accomplish a reduction in curvature and shorten the main line about a half mile. If it included as well the laying of an additional track, that too was within the provisions of the act, for it would be improving a portion of the line by furnishing increased facilities and capacity for the transportation of traffic thereon. Every apparent purpose the company could have had, could have been accomplished under the provisions of the act of 1869, and there is no reason to doubt the company's good faith. We need not stop to inquire whether the action of the executive committee standing alone would be a sufficient expression of opinion as to the necessity of the proposed change, for it does not stand alone. Final action was taken at a meeting of the board of directors of the company before legal proceedings to condemn were begun confirmatory of all that had been done by the executive committee. By their sanction the board of directors made the action of the committee their own. The court finds that the proceedings were entirely regular and adequate, and in this we concur.

2. "Was the location of the additional line of the defendant company through the land in controversy necessary for the purpose of that railroad, not merely convenient or economical or more desirable, but necessary?" Here is introduced an element that can have no place in the inquiry. The location of the line is not a matter to be considered in determining whether a necessity exists for the improvement. A change of line may be necessary to better secure the safety of persons and property and increase the facilities and capacity for the transportation of traffic, and yet there may be no practical way of accomplishing it. The necessity remains all the same. It is the necessity for the purposes indicated in the act that gives the right. The particular location is a matter to be determined wholly by the party exercising the right. The fact that the land required for the line adopted is corporate property is of no consequence in itself; for corporate property is no more exempt from condemnation than the property of the individual, except as it is impressed with a public use. How far the property here taken is impressed with such public use will be for consideration when we reach the next inquiry. The law commits to the board of directors the determination of the question of the necessity in connection with the proposed change. In this case the board determined that the proposed purpose in view is not declared in either res- change is necessary for the purposes indicated in the act, and that is conclusive of the matter. Wilson v. Pittsburg, etc., Railroad Company, 222 Pa. 541, 72 Atl. 235. The fact that the board of directors has authorized an expenditure of \$400,000 to accomplish the proposed change is substantial evidence that they are acting in good faith. A finding by the court that a necessity existed for the change was not a condition precedent on which the right to make it depended. The act does not intrust to the court any such supervisory power.

3. "Was the land in controversy necessary , for the corporate uses, present or future, of the plaintiff, the water company?" was, then, except as expressed or implied statutory authority for the appropriation of it by the railroad company can be asserted, it may not be taken on the ground of convenience or necessity. The appellant company is also a public service corporation, of no secondary importance, whether measured by the character of the service it renders or the number of people it ministers to. It enjoys the right of eminent domain as well. It owns 12 parcels of land lying and adjacent to or close by Roaring Brook, a stream from which it derives the principal water supply for the city of Scranton both for domestic and manufacturing purposes. The railroad traverses the valley of the Roaring Brook, and follows closely the line or the stream. The condemnation proceeding contemplates , the appropriation of so much of these several parcels as may be necessary for the construction of the new line, consisting of three tracks. The bill filed in the case complains , (1) that all of the lands to be condemned are necessary for the corporate use of the plaintiff, were acquired for such purposes, and are already devoted to public use; (2) that the portion of the land proposed to be taken is necessary and essential to the plaintiff for present and future use for reservoirs for the accumulation and storage of water; (3) · that no necessity exists for changing the defendant's line from the southwest side of . Roaring Brook where now located to the northeast side so passing through the dam and reservoir sites of the plaintiff company, and that the change of defendant's line, if effected, will cause pollution of the water in its construction and operation to the detriment of the health of the inhabitants of the city of Scranton. A large amount of testimony was taken in the case covering not only the present situation with respect to these lands, the uses to which they are now put and their importance in that connection, but the probability of future requirements of the water company in connection therewith. There can be no ground for controversy with respect to the six parcels. It is admitted that the appellant acquired ownership of these subsequent to the railroad company's appropriation. When so acquired these parcels were already impress-

ed with a public use—the defendant's right of way having attached-which could not be interfered with by mere purchase of the property. The remaining parcels had long been the property of the appellant company, and, if devoted to public use and essential to the business of the water company, nothing short of express authority or one arising by necessary implication could justify their appropriation by another corporation. Property devoted to public use, including franchise, is subject to eminent domain, and may be taken for other uses; but it is equally settled that it cannot be taken without legislative authority expressed in clear terms, or by necessary implication. Groff's Appeal, 128 Pa. 621, 18 Atl. 431. On the other hand, in the absence of some statutory provision expressly or by implication forbidding it, property devoted to one public use may under general statutory authority be taken for another public use, when the taking will not materially impair or interfere with or is not inconsistent with the use already existing, and is not detrimental to the public. In re Rochester Water Commissioners, 66 N. Y. 413. In either case there must exist a neccessity for the taking, and this necessity, as was said ir. Penna. Railroad Company's Appeal, 93 Pa. 150, must be one that arises from the nature of things, over which the corporation has no control. It must not be a necessity created by the corporation itself for its own convenience or for the sake of economy. It is to be observed that these principles apply only where a franchise or public use is attempted to be brought under They have no application condemnation. where the property which belongs to a corporation is not in actual use or essential to the exercise of the corporate franchise. The railroad company does not assert anything but general statutory authority to condemn. Its right therefore depends in no sense upon its own necessity, but wholly upon what may be the necessities of the water company in connection with the lands which the former seeks to appropriate. The real question in the case is: Were those parcels devoted to public use by the appellant, and are they essential to the exercise of its franchise? If not, they stand on the same footing as lands owned by a private individual, and the question of necessity, so far as regards the railroad company is not in the case. In determining this main question, liberal consideration must be paid to the future as well as the existing needs of the water company; but the mere possibility that the land may at some future time become necessary to the exercise of the company's franchise will not operate to exempt them from condemnation, nor will the fact that the property is at present employed, if the use is not necessary to the exercise of the company's franchise. It is not contended that, when the proceedings in condemnation were begun, the lands in question

they were actually employed in such use. No established reservoirs or storage plants are within the condemnation. All that is asserted is that the lands were purchased and are being held with a view to their future employment in this way; that, if not now essential, they are sure to become so by reason of the rapidly increasing demands upon the water company. The learned judge who heard the case found adversely to the appellant's contention. His twenty-third finding is as follows: "No action appears to have been taken by the directors of the water company devoting any of the lands in question to public use. Those on which parcels 1, 2, 3, 4, 5, and 6 are located are believed to have been bought by plaintiff for some purpose connected with the control of the water shed and with an indefinite view on part of Mr. Scranton to the possible location of reservoirs at some future time. Whether the intervening lands acquired last December were bought with the intention of ultimately locating reservoirs there is under the circumstances doubtful. The president, who is the owner of 90 per cent. of the stock, disclaims definite intention at present, but declares his purpose to locate one or more reservoirs there whenever the city shows that more storage is required." His twenty-fifth finding is: "There appears to be no ground for the conclusion that the proposed railroad improvement will seriously interfere with the construction of all such reservoirs as the water supply will warrant; * * * hence the lands in question are not essential to the due performance of the water company's function as required by its charter." So, too, with respect to the complaint that pollution of the water will result from the proposed change. The finding with respect to this is: "(13) The alleged danger of pollution during the period of construction is undisputed, and is found to be a fact. But as between the new alignment and the addition of a new track along the old line such danger is not found to differ appreciably in degree in the one case from the other.

These were the controlling questions in the case. The court finds distinctly that the lands sought to be condemned are not now employed by the water company in the exercise of its franchise; that there are other available sites for reservoirs adequate for the future of the company; and that the improvement by the railroad company will not result in increasing water pollution when once established. Were the findings sustained by the evidence? We may concede that the case is in some respects disputable on its facts; but we are far from convinced that the learned judge has erred in any of his conclusions. Indeed, a full and careful examination of the evidence in the light of the exceptions taken has not only satisfied us

that his findings are well supported, but has they were actually employed in such use. No established reservoirs or storage plants are within the condemnation. All that is asserted is that the lands were purchased and are being held with a view to their future employment in this way; that, if not now essential, they are sure to become so by reason of the rapidly increasing demands upon the water company. The learned judge who heard the case found adversely to the appellant could ask for no more.

. The assignments of error are overruled, and the appeal is dismissed, at the costs of appellant.

(225 Pa. 147)

OLYPHANT BOROUGH v. DELAWARE & H. CO.

(Supreme Court of Pennsylvania. June 22, 1909.)

1. RAILROADS (§ 76*)—RIGHT OF WAY—POW-EB TO CONSTRUCT ADDITIONAL TRACKS.

A railroad company incorporated in another state was given power by Act March 24, 1870 (P. L. 554), to condemn or purchase lands not exceeding 60 feet in width, and to establish a railroad thereon with one or more tracks. Such a company acquired land of the width of 60 feet, and laid a single track thereon and across township roads in an unincorporated town or village. The town was thereafter incorporated, and the roads changed into borough streets. Held not to authorize an injunction, at the suit of the borough, to restrain the railroad company from laying additional tracks on its right of way.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 195; Dec. Dig. § 76.*]

2. STATUTES (§ 113*)—TITLE OF ACT—SUFFI-CIENCY.

Act March 24, 1870 (P. L. 554), authorizing foreign railroad corporations to condema or purchase lands, is not unconstitutional for failing to give notice in the title of the power of eminent domain conferred on railroad companies by the act; the purpose of the act as disclosed by the title being to authorize the construction of railroads.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 113.*]

Appeal from Court of Common Pleas, Lackawanna County.

Suit by the Olyphant Borough against the Delaware & Hudson Company. From an order dissolving a preliminary injunction, plaintiff appeals. Affirmed.

See, also, 73 Atl. 458.

Argued before FELL, BROWN, POTTER, ELKIN, and STEWART, JJ.

I. H. Burns, P. L. Walsh, Borough Sol., and A. A. Vosburg, for appellant. James H. Torrey and Joseph O'Brien, for appellee.

BROWN, J. The complaint of the borough of Olyphant is that the court below refused to enjoin the appellee from laying additional railroad tracks across Dunmore, Moosic, and Bell streets—public highways within the municipal limits. By Act March 24, 1870 (P. L.

554), the appellee, whose corporate title at | nicipal streets upon the incorporation of the that time was "the president, managers and company of the Delaware and Hudson Canal Company," was authorized to locate and construct a railroad from a point in the town of Olyphant, in Luzerne county, to the city of Carbondale, in the same county. The second section of the act conferred upon the company all the power, authority, and privileges given in the tenth section of the railroad act of February 19, 1849 (P. L. 83), and all damages in the location and construction of its railroad for right of way and land or materials taken were to be secured and assessed in the manner provided by the act of 1849 and the several supplements thereto. At that time the borough of Olyphant was not incorporated. As a town or village it formed a part of the township of Blakely in Luzerne county. In 1870 the appellee began the construction of a single track between the terminal points named in the act, and the same was completed in 1871. It traversed the section in controversy in this What are now Moosic and Dunmore streets were, in 1871, public roads in Blakely township. By a decree of the court of quarter sessions of Luzerne county the town of Olyphant was incorporated as the borough of Olyphant on December 18, 1876. In 1886 the appellee built an additional track between the same terminal points. This track was laid across the streets in question at grade without objection. In 1906, in pursuance of action by its board of directors, the appellee proceeded to lay two additional tracks for the purpose of making its road one of four tracks, with necessary switches and sidings, from Carbondale south to and through the borough of Olyphant. The third track had been laid across Dunmore street, and the third, fourth, and part of a fifth for switching purposes had been laid across Moosic street when the present bill was filed. Before laying these additional tracks across the said streets the company, without conceding anything as to its legal rights in the premises, made an unsuccessful effort to secure the consent of the borough to do so, but the municipal authorities rejected its proposals, and refused consent to the further occupation of the streets for grade crossings. The court found as a fact that the action of the borough, under all the circumstances, was somewhat unreasonable. At the crossings and on each side of them the appellee is in apparent possession, under claim of title, of a strip of land of a width nowhere less than 60 feet, and the proposed tracks will not fall outside of the line defining that width.

If the act of 1870 conferred upon the appellee the power to locate and construct its road from a point in the village of Olyphant to Carbondale, there went with that power the right to cross the township roads, and when such roads subsequently became mu-

borough of Olyphant, the right of the appellee to continue to cross them remained unimpaired; and, if the appellee was empowered to locate and construct its road through and across territory which afterwards became the site of the borough of Olyphant, no streets laid out and opened by that borough can interfere with the rights which were conferred upon the appellee by the act of 1870, for the site of the borough was selected with all those rights resting upon it, to exercise which municipal consent is not now needed. Northern Coal & Iron Co. v. Wilkes-Barre, 218 Pa. 269, 67 Atl. 352.

The right of the appellee with which the appellant would interfere was clearly conferred by the act of 1870. It is authorized to locate and construct a railroad between designated termini, and that it might construct the said road, it was expressly given the power of eminent domain as conferred upon railroad companies by section 10 of the act of 1849. Under a claim of title, acquired either by purchase or condemnation, it is in possession of a strip of land nowhere of a less width than 60 feet. Though it was a foreign corporation at the time the act of 1870 was passed, the power conferred upon it by our Legislature is to be judged by the same rules as if it had been actually incorporated here; and, so far as its road was originally constructed or is now being improved in this state under powers granted by our Legislature, it is a quasi Pennsylvania corporation, whose rights and powers are to receive from the courts no less protection than is accorded to our own corporations. New York & Erie R. R. Co. v. Young, 33 Pa. 175; Com. v. N. Y., L. E. & W. R. R. Co., 129 Pa. 463, 18 Atl. 412, 15 Am. St. Rep. 724.

It is urged that the act of 1870 is unconstitutional in that its title fails to give notice of the power of eminent domain conferred upon the appellee, or of its right to connect with the Jefferson railroad at Carbondale. Its right to connect with the Jefferson road is not involved in this proceeding. and the same is true of its power of eminent domain, for, as stated, the court has found that it is in possession under a claim of title of all the land it needs for its additional tracks; but, if the sufficiency of the title in giving notice that the power of eminent domain is conferred by the act is to be regarded as a question before us, we have no doubt that it meets the constitutional requirement. The purpose of the act, as disclosed in its title, was to authorize the appellee to construct a railroad. Such a road cannot be constructed without acquiring land for its construction, and it is a matter of common knowledge that, as a rule, railroads are constructed over land acquired under the power of eminent domain, without which they could not be constructed. This power was germane to the construction of the ap-

pellee's road, and notice of authority to construct it ought reasonably to have led to an inquiry into the body of the bill.

Though the appellee has acquired a right of way 60 feet in width between the terminal points named in the act of 1870, counsel for appellant contend that it cannot now use this right in laying additional tracks, because it exhausted its power to construct a railroad when it laid the first track. Section 10 of the act of 1849 is a quasi part of the charter of the appellee, and must be so regarded in passing upon its powers involved in this proceeding. By that section it was empowered "to lay down, erect, construct and establish a railroad, with one or more tracks," and that it might construct such a railroad it was empowered to acquire, either by condemnation proceedings or purchase, lands not exceeding 60 feet in width. There was no requirement that more than one track should be built by it when it began the exercise of the power conferred upon it, and at that time there was no reason why it should have built more: but it acquired the land needed for more, to be used whenever more might be needed. There was no limitation placed upon its power to construct a railroad of one or more tracks which compelled it to exercise its whole authority in the beginning, when the demands of business may have been few, and it would be a most unreasonable construction of its authority to require that it ought, in 1870, to have made provision for all the unknown wants of the When increased facilities are required by the public, growing out of increase of trade and business and changes taking place, the power conferred upon it can again be called into exercise. Philadelphia, Wilmington & Baltimore R. R. Co. v. Williams, 54 Pa. 103.

There is nothing in the 20 assignments of error which would justify any disturbance of the decree made, and it is therefore affirmed at appellant's costs.

(225 Pa. 164)

GOLDEN v. MT. JESSUP COAL CO., Limited.

(Supreme Court of Pennsylvania. June 22, 1909.)

1. Master and Servant (§ 265*)—Injuries to Servant—Negligence.

Maintaining a prop for the roof of a mine, where it allowed a clearance of no more than three or four inches for the cars ordinarily used, might well warrant an inference of negligence in an action for injury to an employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908; Dec. Dig. § 265.*]

2. MASTER AND SERVANT (§ 169*)—INJURIES TO EMPLOYE—INJURIES DUE TO FOREMAN REQUIRED BY LAW.

As by Act June 2, 1891 (P. L. 176), the state requires the employment by a mine oper-

ator of a certified foreman, and invests such foreman with the power to compel compliance with his directions, so far as they relate to the safety of employes, an employer cannot be held liable for the mistakes or incompetency of the state's representative.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 169.*]

3. MASTER AND SERVANT (§ 189*) - FELLOW

SERVANTS-WHO ARE.

A mine foreman is a fellow servant with the other mine employes of the same employer engaged in a common business, and the employer is not liable for injuries due to his negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 429, 443; Dec. Dig. § 189.*1

Appeal from Court of Common Pleas, Lackawanna County.

Personal injury action by Joseph Golden, a minor, by his next friend, Margaret Golden, against the Mt. Jessup Coal Company, Limited. From a judgment for defendant non obstante veredicto, plaintiff appeals. Af-

Argued before FELL, BROWN, POTTER ELKIN, and STEWART, JJ.

John P. Kelly and James J. O'Malley, for appellant. Albert L. Watson, W. W. Watson, and W. S. Diehl, for appellee.

STEWART. J. This case differs from Durkin v. Kingston Coal Company, 171 Pa. 193, 33 Atl. 237, 29 L. R. A. 808, 50 Am. St. Rep. 801, in minor and immaterial circumstances only. The controlling feature in the case is that the plaintiff's injury resulted from the car on which he was riding, while engaged in work, coming in contact with a prop which had been erected to support the roof of the mine. This prop had: been put in place some two or three weeks before the accident by a mine foreman, who: was duly certified as such under the law. The evidence shows that the body of the cars ordinarily used extended beyond the track at either side some 12 or 14 inches, while the distance of the prop from the nearest rail was at most not more than 18 inches. This evidence might well warrant the inference of negligence in maintaining the prop where it allowed a clearance of no more than 3 or 4 inches.

Here we have the proximate cause of the accident; but where did the responsibility rest? The accident occurred before the passage of the employer's liability act of June 10, 1907 (P. L. 523). In Durkin v. Coal Company, 171 Pa. 193, 33 Atl. 237, 29 L. R. A. 808, 50 Am. St. Rep. 801, a case which has never been questioned, but has repeatedly been recognized as sound in principle, it was held that, inasmuch as by the act of June 2, 1891 (P. L. 176), the state requires the employment by the operator of mines of a certified foreman, and invests such foreman with the power to compel compliance with his directions, so far as they relate to the

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ployer cannot be held liable for the mistakes or incompetency of the state's representative. And, further, it is there held, following the doctrine of the earlier cases, notably Waddell v. Simoson, 112 Pa. 567, 4 Atl. 725, that a mine foreman is a fellow servant with the other mine employes of the same master engaged in a common business and that the employer is not liable for injuries caused by the negligence of the foreman. principles apply here.

There was evidence in the case that the car on which plaintiff was riding was an old car, and swayed somewhat from side to side, and it is argued that but for this circumstance the accident would not have happened. But it nowhere appears that the car was defective in any of its parts, that it was any different from those generally employed, or that it was in any way unfit or insecure for the ordinary use to which it was put. However the fact that it swayed may have contributed to the accident, it was not the proximate cause. That is to be found in the placing of the prop so close to the track as not to allow sufficient clearance for cars ordinarily employed. A common-law duty rests upon the employer to provide a safe place for his employés in which to work; but if he has provided a safe place, which has been made unsafe by the act of the mine foreman, whose authority may not be questioned, and whose direction must be complied with under penalty, he has met the full measure of his duty, and he is not to be charged with civil responsibility for a condition which he did not bring about, and which he could not control.

The case called for judgment non obstante, and the judgment is affirmed.

(225 Pa. 198)

HOPKINS v. WEST JERSEY & S. R. CO. et al.

(Supreme Court of Pennsylvania. June 22, 1909.)

1. Ferries (§ 32*)—Injury to Passpugers —Contributory Negligence.

Where a passenger going on a ferryboat in the daytime enters on the gangway intended for wagons instead of using those intended for foot passengers, and falls into a coal hole, which he could have seen if he had looked, he is guilty

of contributory negligence.

[Ed. Note.—For other cases, see Ferries, Cent. Dig. \$ 84, 85; Dec. Dig. \$ 32.*]

2. Febbies (§ 32*)—Injury to Passengers
—Contributory Negligence.

Where a passenger on a ferryboat occupies place not intended for passengers, he assumes the risk of his location.

[Ed. Note.—For other cases, see Ferries, Cent. Dig. § 84; Dec. Dig. § 32.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by George S. Hopkins against the

safety of the employes in the mine, an em- | and another. From an order refusing to take off a nonsuit, plaintiff appeals. firmed.

> Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

> Francis M. McAdams, William H. Wilson, and Joseph P. Rogers, for appellant. John Hampton Barnes, for appellees,

> STEWART, J. The accident out of which this case arises occurred in that part of a ferryboat specially designed and appointed for the accommodation of horses and wagons in transport. It is located between the passenger apartments at either side of the boat, and is here called the horse or wagon gangway. The plaintiff entered the boat directly upon this gangway. Instead of going into one of the passenger apartments which were open to him as soon as he had boarded the boat, he attempted to reach the front of the boat by passing between the teams which were standing in the gangway. When he had reached about the middle of the boat, he encountered a coal cart which had been discharging coal into a hole immediately in rear of the engine house. He passed to the right of the cart, and because of other obstructions in his way, he concluded to return to the point where he boarded the boat, and there enter the left-hand passenger apartment. He pursued his way to the rear of the cart with a view of passing across to the left side of the boat through the narrow place between the cart and the engine room. While attempting this, the driver of the cart started toward the shore, leaving the coal hole exposed, and into this the plaintiff fell and was injured. The court below directed a nonsuit on the ground of plaintiff's contributory, negligence. In this we see no error.

However the defendant company may have tolerated the use of this gangway by passengers impatient to reach the front of the boat, it is so manifest to ordinary observation that such gangway is intended for a use which makes it dangerous for passengers that, except as safe and suitable accommodations for passengers are shown to have been lacking, the passenger who voluntarily takes his place in it must be held to have assumed the risk of injury. We have said with respect to street cars that the proper and assigned place for passengers is inside the car; that, unless he shows some valid reason to excuse, a passenger is bound to put himself in the appointed place, and, if he does not, he takes the risk of his location elsewhere. Thane v. Traction Company. 191 Pa. 249, 43 Atl. 136, 71 Am. St. Rep. 767. There is no reason why this rule should be limited in its application to railroads or street railways. It applies generally. West Jersey & Seashore Railroad Company | plaintiff attempted no excuse for pushing his

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

way between the teams occupying the gangway to reach the front part of the boat, except that others were doing the same thing. He admits that, when he boarded the boat, he could at once have entered either passenger way to the right or left. Through elther he could have reached the front, not as soon perhaps as by adopting the gangway, but by a way which would have insured to him protection of the highest care possible. By adopting the other, under no necessity for so doing, he took the chances. The case has another aspect quite as unfavorable to plaintiff's claim. The evidence affords no explanation of how he fell into the hole consistent with ordinary care on his part. The occurrence was in daytime. The plaintiff says nothing obscured or concealed the hole from his view but the cart, and that but for the cart he would have seen it. He was passing directly, he says, across the boat at the tail end of the cart, and immediately upon the moving of the cart he fell into the hole. The cart at the time was not over the hole, but at the side, and, if the plaintiff did not see it, it must have been because in his haste he did not look. The occurrence admits of no other explanation. The case calls for no inquiry as to defendant's negligence in leaving the hole unguarded. The court rested the nonsuit on plaintiff's contributory negligence, and for this there was sufficient warrant.

Judgment affirmed.

(225 Pa. 174)

KAUFFMAN v. NELSON.

(Supreme Court of Pennsylvania, June 22, 1909.)

1. MUNICIPAL CORPORATIONS (§ 705°)—INJURY TO PEDESTRIAN—AUTOMOBILES.

A passenger, alighting from a street car, is not free from contributory negligence, where, without looking, he steps from the car, and then, suddenly seeing an automobile approaching, stopped and was struck by it.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1515; Dec. Dig. § 705.*]

2. MUNICIPAL CORPORATIONS (§ 705*)—INJURY

TO PEDESTRIAN.

A person operating an automobile, seeing a street car standing at a regular stopping place, must exercise great care to avoid injuring persons entering or coming out of such

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1515; Dec. Dig. § 705.*]

Appeal from Court of Common Pleas, Franklin County.

Action by Marie Kauffman against Thomas M. Nelson. Judgment for plaintiff, and defendant appeals. Reversed.

Defendant presented the following points:

"(3) If the jury believe from the evidence
that when the plaintiff stepped from the car

she failed to look whether a vehicle was approaching, and that, with the automobile coming toward her plainly in her view, if she chose to look, she took the risk of getting across the street in front of it, she was guilty of such contributory negligence as will defeat her recovery in this case. Answer: That point is not affirmed as written. If, however, the plaintiff saw the vehicle coming, and by standing still could have avoided it, but chose to cross the street immediately in front of it, she was guilty of contributory negligence, and cannot recover.

"(4) If the jury believe from the evidence that when the plaintiff alighted from the car the automobile of the defendant was approaching her at a distance from her of 20 to 30 feet, or thereabout, and in her plain and unobstructed view, if she chose to look, it was negligence in her under such circumstances to attempt to cross the street in front of the automobile, if the jury further believe that by standing at the foot of the car steps the automobile would have passed her in safety. Answer: That point is affirmed. If you believe that she saw the automobile coming, and by standing still, when she saw it, it would have passed her without striking her, she was guilty of contributory negligence; but you will remember the testimony, what she says about it, and what the others say about it."

Verdict and judgment for plaintiff for \$4,666.95. Defendant appealed.

Argued before FELL, BROWN, MESTRE-ZAT, ELKIN, and STEWART, JJ.

O. C. Bowers, J. R. Ruthrauff, and W. O. Nicklas, for appellant. William S. Hoerner and Sharpe & Elder, for appellee.

FELL, J. This action was to recover for injuries alleged to have been caused by the negligence of the defendant in driving his automobile. The plaintiff got off the rear platform of a trolley car that was standing at a regular stopping place, but not at a street crossing, in Chambersburg. The distance between the car steps and the curb was 15 feet. What the plaintiff did after she had stepped from the car is left by the testimony in her behalf in some doubt. She testified that she left the car with a "swinging step" and walked directly towards the foot pavement; that she first saw the automobile after she had taken two steps in the street and was 5 or 6 feet from the car, and it was then 50 or 60 feet away and approaching the front of the car; that she would have reached the pavement in safety if the automobile had been kept in a straight course, but that it was turned towards the curb, and it struck her as she was stepping on the pavement. At one time she said that she did not look at all to see whether anything was coming on the street until she had

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes 78 A.—70

car, and at another time she said that she looked at the automobile and at the curb as she was taking these two steps to see whether she could get across. Her witnesses testifled that the automobile was within 20 or 30 feet of her as she stepped from the car, and that after taking two steps she halted or hesitated and looked back over her shoulder., They confirmed the defendant's account of the matter, which was that, when the plaintiff stepped from the car and advanced directly in front of his automobile, he turned towards the car in order to pass behind her, and that, when she hesitated and indicated by her movements that she was going back towards the car, he turned in the opposite direction towards the curb.

Under all the testimony the case was for the jury, and the only question to be considered is whether there was error in the instruction under which it was submitted. The points for charge, recited in the first and second assignments of error, raise the question of the duty of the plaintiff to look for an approaching vehicle when she stepped from the car to the street. The answers to the points relieved her from all duty to look, and made her chargeable with contributory negligence only if she saw the automobile and by standing still could have avoided injury. The answers of the court do not correctly state the law. It was the duty of the defendant, who knew the car was at a regular stopping place, to exercise very great care in passing it to avoid injury to persons going to or from it. A high degree of care is required of the driver of a vehicle in passing a car which has stopped to receive or discharge passengers, but others are not relieved from the obligation of attention and care. There rested also upon the plaintiff the duty to look where she was going and not to rush blindly into danger. The duty to look and to exercise care and vigilance rests at all times upon every one in the use of streets. Harris v. Commercial Ice Co., 153 Pa. 278, 25 Atl. 1133, it was said by the present Chief Justice: "People are not entitled to walk the streets with closed eyes and inattentive minds. There is no situation in life, involving danger, whether much or little, in which the law does not require a due and proportionate amount of care and attention. Even on a city street a man must heed what he is doing and where he is going, or he cannot complain of the consequences. This is the rule even on the sidewalk (Robb v. Connellsville Borough, 137 Pa. 42, 20 Atl. 564); and when he steps into the cartway he is equally bound to remember that horses and vehicles have also a right of way there, to which he must give due attention, or he will be barred of complaint as to the consequences." An instruction that relieves the plain-

taken two steps after alighting from the responsible only in case he saw, cannot be approved.

> The first and second assignments are sustained, and the judgment is reversed, with a venire facias de novo.

> > (225 Pa. 214)

MILLUM et al. v. LEHIGH & WILKES-BARRE COAL CO.

(Supreme Court of Pennsylvania. June 22, 1909.)

1. NEGLIGENCE (§ 32*)—INJURY TO LICENSEE
—UNPROTECTED MACHINERY.

Where an owner permits the public to use his land as a playground, he must protect it from dangerous machinery located thereon.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 42; Dec. Dig. § 32.*]

2. Negligence (§ 136*)—Injury to Licensee
—Unguarded Machinery.

Where an owner of ground permitted children to play thereon, and operated upon it machine for minima. chinery for raising coal without any barrier around it, and a boy 4½ years old is injured thereby, the question of the owner's negligence is for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 307-326; Dec. Dig. § 136.*]

Appeal from Court of Common Pleas, Luzerne County.

Action by Francis Millum, by his next friend Joseph Millum, and by Joseph Millum against the Lehigh & Wilkes-Barre Coal Company. From an order refusing to take off a nonsuit, plaintiffs appeal. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and ELKIN, JJ.

James L. Lenahan, for appellants. thur Hillman and A. H. McClintock, for appellee.

POTTER, J. The dividing line between the principle upon which Thompson v. B. & O. R. R. Co., 218 Pa. 444, 67 Atl. 768, 19 L. R. A. (N. S.) 1162, 120 Am. St. Rep. 897, was based, and that upon which Henderson v. Refining Co., 219 Pa. 384, 68 Atl. 968, 123 Am. St. Rep. 668, stands, may be a narrow one, but the distinction in principle between them may be readily traced. In the former case the child who was injured was considered as an intruder and a trespasser upon the property of the defendant company. In addition to this he was injured through the action of his playmates, rather than by reason of any machinery which the defendant company set in motion. Under the circumstances of that case it was held that the property owner was not liable for the injury to an intruder, caused not merely by the condition of the premises as they were, but chiefly by the carelessness of other children, who were also intruders and intermeddlers. Upon the other hand, in Henderson v. Refining Company, 219 Pa. 384, 68 Atl. 968, 123 Am. St. Rep. 668, it was contiff from the duty of looking, and holds him sidered that the child who was hurt by com-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing in contact with dangerous machinery, left unguarded, was lawfully upon the premises; that the defendant company in that case, which owned both the lot where the dangerous machine was erected and the dwelling houses on each side of it, had, by placing a gate in the fence upon one side, and a door in the house upon the other, each opening upon the lot in question, and in addition by permitting the lot to be used for passage between the two houses, and as a playground for the children living in them, thereby extended to tenants in the houses, to their families and guests, an implied permission to enter upon or cross the vacant lot.

At the time of the trial of the present case the decision in Henderson v. Refining Co., 219 Pa. 384, 68 Atl. 968, 123 Am. St. Rep. 668, had not been handed down, and therefore it could not have been brought to the attention of the court below. We consider that it is controlling as applied to the facts of the case at bar. Here the facts, as stated by counsel, are substantially as follows: The accident, by which a little boy only 41/2 years old was most severely injured, occurred in a field, some 50 or 60 acres in extent, owned by the defendant company, and lying on the outskirts of the city of Wilkes-Barre. The field was for the most part open and unfenced, and was used apparently as a common, and at times as a picnic ground, and for the purposes of a playground. At a certain point in the field was a bore hole, and to the west, about a quarter of a mile away, was an engine house of the defendant company. Between the engine house and the bore hole were a number of shieve wheels, placed on frames, about 50 feet apart, and varying in height. These wheels are of iron, about 2 feet in diameter, and with a flange to guide a wire rope, which passes over them from the engine house to the bore hole. The rope is used for raising and lowering coal, in the mining operations of the defendant. The accident occurred at the sixth pulley, or shieve wheel, from the bore hole, or about 300 feet from it. It appeared that this wheel was situated about 50 feet from the roadway, and the wire rope ran parallel with the roadway for a considerable distance. The moving wheels and the moving rope were uncovered, and were naturally dangerous to any one who might come in contact with them. The little boy who was injured lived with his parents, in a house some 500 feet away from the place of injury. No one saw the accident, but the child was found by two women fast in the One witness testifled that many children played on the premises, and held picnics there. He said children had been playing there for years; that the place was a regular common.

Where the owner of property invites or permits its use by the public as a common, or for a playground, or a picnic ground, it is certainly the duty of the owner to use reasonable precautions to protect the public from the operation of dangerous machinery located thereon. Under such circumstances a different duty is imposed upon the owner from that required of him towards those who are merely trespassers upon his property. The principle here involved was clearly set forth in Kay v. Penna. R. R. Co., 65 Pa. 269, 273, 3 Am. Rep. 628, where Justice Agnew pointed out that, while ownership of ground carried with it the right to use it in the way most convenient and beneficial to the owners, yet, as he said, "the case is altered when, by a license to others, they have devoted this ownership to a use involving their interests and their safety, and by sufferance permitted the public to enjoy a privilege of passage which might bring their persons into danger. Duties grow out of circumstances, the authorities tell us, and that which in one case would be an ordinary and proper use of one's rights may, by a change of circumstances, become negligence and a want of due care."

In the case at bar the question to be determined is, Would an individual of common sense and ordinary intelligence, placed in the position of the defendant company, and possessing the knowledge, which it must be assumed to have had, of the public use made of the premises, have seen that there was a likelihood of the uncovered machinery causing some injury to children resorting to the place and using it as a playground. and would he then under the circumstances have considered it a duty to put a stop to the public use of the ground, or to take ordinary precautions to prevent such an accident as that which occurred? We are of opinion that this case should have been submitted to the jury, under proper instructions from the court, for them to determine whether under all the circumstances the defendant company was negligent.

The judgment is reversed, with a procedendo.

(225 Pa. 178)

Appeal of PENNSYLVANIA STAVE CO. (Supreme Court of Pennsylvania, June 22, 1909.)

1. JUDGMENT (§ 342*)—SETTING ASIDE—POW-ER AFTER TERM.

An appeal from the decision of the county commissioners acting as a board of revision in the matter of an assessment for taxation to the common pleas was an adverse proceeding, and the order of the court thereon in the nature of a final judgment, though reached through agreement of the parties, was in its character adversary, and the common-law power of the court to set it aside ended with the term at which entered, and the fact that a petition was presented on the last day of the term for va-

^{*}For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

on does not change the situation.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \$\$ 668-671; Dec. Dig. \$ 342.*] 2. EQUITY (§ 7°)—GROUNDS OF RELIEF—IGNORANCE OF MISTAKE OF LAW.

Ignorance or mistake of law with a full knowledge of the facts is in no case per se a ground for equitable relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 15, 16; Dec. Dig. § 7.*]

Appeal from Court of Common Pleas, Bradford County.

From an order setting aside the judgment entered on appeal of the Pennsylvania Stave Company, from the assessment of its property, the company appeals. Reversed.

Argued before MITCHELL, C. J., and MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Chas. M. Culver and John C. Ingham, for appellant. M. E. Lilley, William Maxwell, and W. E. Lane, for appellee.

STEWART, J. The appeal of the Pennsylvania Stave Company from the decision of the county commissioners acting as a board of revision in the matter of the assessment of the company's property for taxation to the court of common pleas was unquestionably an adverse proceeding; and the order of the court therein in the nature of a final judgment, though reached through agreement of the parties, was in its character adversary, quite as much as would be a judgment on a verdict. With respect to their conclusiveness such judgments differ essentially from judgments entered by confession or upon default. The distinction between them is very clearly pointed out in a number of our cases, notably in Castle v. Reynolds, 10 Watts, 51, and King v. Brooks, 72 Pa. 363. Judgments by confession or upon default remain indefinitely within the control of the court, and upon proper cause shown may be opened up or vacated at any time; but not so with respect to judgments obtained adversely. The power committed to the discretion of the court with respect to the latter has a fixed limitation. The cases cited, and to these may be added, Stephens v. Cowan, 6 Watts, 511, and Fisher v. Railway Co., 185 Pa. 602, 40 Atl. 97, hold, in the most conclusive way, that at the expiration of the term at which it was entered the common-law power of the court to set aside a judgment regular on its face ends. In the present case we are concerned only with the common-law power of the court. The order setting aside the final adjudication in the matter of the assessment of appellant's land is not based on considerations of fraud in its procurement, or any other matter which could call into exercise the equitable power of the court. Therefore it can have no other warrant than can be found in the common law, and by this | that the agreement was entered into in ig-

cation of the order and that a rule issued there- | it must be judged. It was not made until after a whole term had intervened. fact that a petition had been presented on the last day of the term in which the original order had been made asking for its vacation, and that a rule had issued thereon, does not in any way change the situation. The authorities above cited are to the effect that the power of the court ends with the It would be strangely inconsistent to hold that the power of the court ended with the term, and yet hold that the court could by its own act prolong its power, and that, too, indefinitely by the issuing of successive rules.

> We have said that there was nothing in the case calling for equitable interference. If there had been, the ending of the term would not necessarily preclude relief. The learned judge very properly accompanied his order of vacation with a statement of his reasons, and we are left in no doubt as to the considerations which influenced the mind of the court. The whole controversy before the commissioners, and the only question raised on the appeal to the court, was whether certain property assessed against the stave company was real or personal. If the latter, it was agreed that it was not When the case came on to be heard in the common pleas, an adjustment was reached by agreement between the commissioners and the stave company involving a reduction from the assessment, and the court was asked to decree in accordance with the agreement. The only averment in the petition for vacation of the decree was that at the time the agreement of adjustment was made the commissioners and their counsel were of opinion that the stave company's assessment was upon property which the law regarded as personal, and that in a recent decision, unknown to them then, property of like character has been held to be real estate. The learned judge in the statement of his reasons assumes nothing with respect to the character of the property assessed, or as to the application of the decision relied upon to the facts here, but concludes that inasmuch as the decree was made without hearing the evidence and finding the facts, pursuant to an agreement which he holds to have been improvidently made, the decree should be set aside. Whether or not the agreement on the part of the commissioners was improvident was a matter that could not be inquired into. It is enough to know that the commissioners had the power to adjust the matter in dispute, and the court was within its power in deciding according to the terms agreed upon. The result reached was nothing more than the commissioners could have accomplished by their own action at any time without the court's intervention. Admitting

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

norance of the law-on no other ground can it be said to be improvident—this fact would not call for equitable interference. "In no case is ignorance or mistake of law with a full knowledge of the facts per se a ground for equitable relief." Norris v. Crowe, 206 Pa. 438, 55 Atl. 1125, 98 Am. St. Rep. 783. The facts with respect to the nature and location of appellant's property were just as well known to the commissioners when the agreement was made as at any time after, and they had the same opportunity to acquaint themselves with the law as the appellant. The case calls for no further discussion. The final order when set aside had ceased to be within the breast of the court; the term in which it was made having expired. Nor was there anything in the case calling for equitable interference by the court.

The order making absolute the rule for the opening, vacating, and setting aside the final decree entered in the appeal from the board of revision and appeal is reversed, at the cost of the appellee, and the original decree is reinstated.

(225 Pa. 197)

COMMONWEALTH v. RANDALL.

(Supreme Court of Pennsylvania. June 22, 1909.)

1. CONSTITUTIONAL LAW (§ 70*)—JUDICIAL FUNCTIONS—REVIEW OF LEGISLATIVE ACTS—WISDOM OF LAW.

Classification for purposes of taxation is a legislative question subject to judicial revision only to see that it is founded on real, and not artificial or irrelevant, distinctions used to evade the constitutional prohibition, and, if the distinctions are genuine, the courts cannot declare the classification void, though they may not consider it on a sound basis.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 131; Dec. Dig. § 70.*]

2. Taxation (§ 859*) — Inheritance Tax—Constitutional Requirements—Uniformity.

Act April 22, 1905 (P. L. 258), exempting stepchildren from a collateral tax on estates left them by stepparents, falls within the classifying power of the Legislature, and is not repugnant to the constitutional requirement of uniformity of taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1674; Dec. Dig. § 859.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action for a collateral inheritance tax by the Commonwealth against Washington West Randall. Judgment for defendant on case stated, and plaintiff appeals. Dismissed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, ELKIN, and STEW-ART, JJ.

M. J. O'Callaghan, and J. Lee Patton, for appellant. Joseph H. Taulane and Ernest E. Provost, for appellee.

STEWART, J. The power of the Legislature to classify subjects for purposes of taxation has long ceased to be a matter of controversy. It is subject to limitation, of course, and it is the limitation alone that concerns us here. We can do no better in this connection than repeat what was said by the present Chief Justice in Seabolt v. Northumberland County Commissioners, 187 Pa. 318, 41 Atl. 22: "Classification is a legislative question, subject to judicial revision only so far as to see that it is founded on real distinctions in the subjects classified, and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition. If the distinctions are genuine, the courts cannot declare the classification void, though they may not consider it on a sound basis. The test is, not wisdom, but good faith in the classification." The present case arises under the act of April 22, 1905 (P. L. 258), amending the general collateral inheritance tax of act of May 6, 1887 (P. L. 79). This latter act, as has been repeatedly held, is but a re-enactment of the previous laws reducing them into one harmonious whole. Commonwealth's Appeal, 128 Pa. 608, 18 Atl. 386. As under the previous laws estates passing upon the death of the party selsed, whether by deed, will or under the intestate law, to collateral kindred, were grouped in one class subject to taxation, so in the act of 1887. If this line of distinction had been strictly observed, estates passing to husband and wife, or to the wife or widow of the son of the person dying seised, would have been subjected to the tax; but by express terms, and for very obvious and just reasons these were put in the exempt class. The act of 1905 simply adds to this latter class estates passing to "children of a former husband or wife." The present case falls within its terms; the devise being to the stepson of the testatrix, the son of her husband by a former marriage. That a classification determined by character or degree of kinship with the person whose estate is transmitted is neither irrelevant nor artificial is too obvious to call for discussion.

The distinction between lineal and collateral kindred is not only reasonable, but it is natural as well, and has the merit of being so clearly defined that under it there can be no uncertain frontier. Whether one claiming is within a particular class can never be a debatable question; the fact in regard to his relationship once being determined. Whatever departure by way of exception there may be from the general line of distinction on which the classification is based, it too must be judged by the same test as is applied to the general scheme. If based on a genuine distinction, or some consideration which supplies a purpose other than an intention to evade the constitu-

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tional prohibition regarding uniformity in taxation, it will be upheld as within the legislative power and discretion. The primary distinction was disregarded in the case of husband and wife, yet it will hardly be contended that an artificial distinction was invented to bring those occupying this relation within the exempt class or that the Legislature showed either lack of wisdom or good faith in so classifying them. The · act of 1905 disregards the distinction and allows the exemption to stepchildren. The reasons for this particular legislation were not so cogent as those which prevailed to exempt property passing to husband and wife, yet the distinction here observed has still a basis in the marital and family relation, and it is upon this relation that the whole scheme of classification rests. With the wisdom of the legislation we have nothing to do. It is enough to know that it falls within the classifying power of the Legislature, and therefore does not offend against the constitutional requirement as to uniformity in taxation.

Appeal dismissed, at the costs of appellant.

(225 Pa. 188)

In re SWIRE'S ESTATE. Appeal of McGINLEY.

(Supreme Court of Pennsylvania. June 22, 1909.)

1. WILLS (§ 111*)—SIGNING—PLACE OF SIGNING—"END."

The statutory requirement that a will be signed "at the end thereof" means the logical end of the language used, which shows that the testamentary purpose has been fully expressed, and the position of the signature with regard to the bottom or end of the page is only evidence whether testator has completed the expression of his intention.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 268, 269; Dec. Dig. § 111.*

For other definitions, see Words and Phrases, vol. 3, p. 2387; vol. 8, p. 7649.]

2. WILLS (§ 111*)—SIGNING—PLACE OF.

The continuity of sense, and not the mere position on the page, must determine the statutory "end thereof" as the place for the signature, where it is manifest that the full substance of testatrix's intent is expressed, and the signature is at what she intended and regarded as the end of her will garded as the end of her will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 268, 269; Dec. Dig. § 111.*]

3. WILLS (§ 293°) — MARGINAL WRITING PAROL EVIDENCE. Parol evidence allowing marginal writing

to be counted as part of the text of the will where there is no reference in the will to identify or incorporate it, must be received caution, but to some extent is admissible.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 671; Dec. Dig. § 293.*]

Appeal from Orphans' Court, Philadelphia County.

From a decree refusing an issue devisavit vel non in estate of Hetty W. Swire, deceased, Samuel T. McGinley appeals. Affirmed.

The case turned upon whether the testatrix had signed the codicil to her will at the end thereof.

The codicil was as follows:

estate E SE a S o to James P. Cairns. sidue and remainder can and nephews of my dike. Nephew ä 2 (The McGinley Bible).

(The McGinley Bible).

give and bequeath the Swire Bible

give and bequeath all the rest resi

give and bequeath all the rest resi

y nieces and nephews and the nieces

syd Owen Swire share and share all bequeath bug Austin. ''10. I g Ginley (T ''11. I g ''11. I g ''12. I g unto my i Second Codicil to Will

Hetty Wharton Swire, hereby make and publish this Sec-ond Codicil to my last will and testament as follows:

"1. I give and bequeath unto Lily

McGinley my seal skin coat.
"2. I give and bequeath unto Edna Pennock my black and white check silk dress.

"3. I give and bequeath unto Mrs. William McGinley (Fortieth Street) my cut glass ware.
"4. I give and bequeath unto Liz-

sie Gibbs my cloth coat.

"5. I give and bequeath unto
James P. Cairns the large pictures of my husband, David Owen Swire, and myself.

"6. I give and bequeath unto Lewis E. Herring the ornaments on the mantel in the parlor of my residence No. 5000 Walton Avenue, Philadelphia.

"7. I give and bequeath unto the Misses Bradley and to Mrs. Clara Mitchell, my other dresses.

'8. I give and bequeath unto my Cousin Benjamin Bradley my Knit Slumber Robe.

"In Witness Whereof I hereunto set my hand and seal this Twentieth day of April, A. D. One thousand nine hundred and six (1906).

"Hetty W. Swire. [Seal] "Signed, sealed, published and declared by the above named Hetty W. Swire as and for a Second Codicil to her last will and testament in the presence of us who at her request in her presence and in the presence of each other have hereunto subscribed our names as witnesses.

"Edna Pennock "Alfred Moore."

Argued before MITCHELL, C. J., and MESTREZAT, POTTER, and ELKIN, JJ.

Clinton A. Sowers and John B. Rutherford, for appellant. Henry Spalding and David N. Fell, Jr., for appellees.

MITCHELL, C. J. The statute requires that a will shall be in writing, and signed by the testator "at the end thereof." The end meant by this provision is the logical end of the language used, which shows that the testamentary purpose has been fully expressed. The position of the signature with regard to the bottom or end of the page is only evidence on the question whether the testator has completed the expression of his intention. Prima facie that is the natural place for the signature to be placed to show the full expression of the testator's wishes and therefore is presumptively the right place for it, but it is only evidence and must give way to evidence of a different intent.

In Hays v. Harden, 6 Pa. 409, Chief Justice

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Gibson says: "Signing at the end of a will] was required by the statute to prevent the evasion of its provisions that followed the English statute of frauds, which the judges held to be satisfied wherever the testator's name, in his own handwriting, was found in the introductory or any other part of the instrument." In Helse v. Heise, 31 Pa. 246, Strong, J., says: "Nor should we lose sight of the mischiefs which existed at the time when it [the statute] was enacted, mischiefs which it was designed to remedy. Among these, none was more serious than the facility with which unfinished papers, mere inchoate expressions of intention, were admitted to probate as valid wills of decedents. Letters, memoranda, mere notes unsigned, which were entirely consistent with a half formed purpose, and which may have been thrown aside, and never intended to be operative, were rescued from their abandonment, proven as wills, and allowed to prevail as dispositions of property which there was much reason to believe the decedent never intended. It was to remedy this mischief that the act of 1833 provided that every will should be signed at the 'end thereof'; that thus, by his signature in that place, the testator should show that his testamentary purpose was consummated, and that the instrument was com-And in Knox's Estate, 131 Pa. 220, 18 Atl. 1021, 6 L. R. A. 353, 17 Am. St. Rep. 798, it was said: "The purposes of the act of 1833 were accuracy in the transmission of the testator's wishes, the authentication of the instrument transmitting them, the identification of the testator, and certainty as to his completed testamentary purpose. The first was attained by requiring writing instead of mere memory of witnesses, the second and third by the signature of testator, and the last by placing the signature at the end of the instrument. The first two requirements were derived from the English statute. The third was new (since followed by the act of 1 Vict. c. 26), and was the result of experience of the dangers of having mere memoranda or incomplete directions taken for the expression of final intention. Baker's Appeal, 107 Pa. 381, 52 Am. Rep. 478; Vernon v. Kirk, 30 Pa. 218."

In the present case the connected sense of the text is entirely clear, though it does not follow the usual order of arrangement. But it does not deviate from it more than many letters written in the style of the present day where the writing jumps from the first to the third page and then back to the second. The full substance of the testatrix's intent and its expression are there, and the signature is at what she intended and regarded as the end of her will. Where that is manifest, the continuity of sense and not the mere position on the page must determine the statutory "end thereof" as the place for the statutory "end thereof" as the place for [Ed. Note.—For other cases, see Courts, Cent. the signature. The unusual, and as it might Dig. §§ 86, 87; Dec. Dig. § 201.*]

be called irregular, arrangement of the several parts of the will is not so great as in Nikoff's Appeal, 15 Pa. 281, 53 Am. Dec. 597. There is no Pennsylvania case which conflicts with this view, though care must be taken to distinguish cases like Hays v. Harden, 6 Pa. 409, where an addition after the signature was held to be testamentary and therefore to invalidate the will; Nikoff's Appeal, 15 Pa. 281, 53 Am. Dec. 597, where the converse was held that a mere memorandum not testamentary in character did not have that effect; Heise v. Heise, 31 Pa. 246, where a testamentary clause after the signature but not signed, and shown not to have been on the will when the latter was executed, was held not to affect its validity. This was however, a fully executed will and plainly within the protection of the clause of the statute that no will shall be repealed otherwise than by some other will or codicil duly executed and proved, or by burning, cancelling, obliterating, or destroying the same, by the testator or by someone in his presence and by his express directions.

We are not unmindful of possible danger in allowing marginal writing to be counted as part of the text of the will. Certainly parol testimony to that effect where there is no reference in the will to identify and incorporate it must be received with caution. But to some extent parol testimony must always be admissible, as to prove signatures, show identity, etc. The exact point at which it must stop cannot be laid down in any hard and fast terms, but must depend on the necessity of the case. It will be observed that in Nikoff's Appeal, 15 Pa. 281, 53 Am. Rep. 597, and Heise v. Heise, 31 Pa. 246. the testimony was admitted apparently without objection. In the present case the question is purely theoretical as the good faith of the entire transaction is admitted.

Decree affirmed.

(225 Pa. 167)

In re CUTLER'S ESTATE. Appeal of STROUP.

(Supreme Court of Pennsylvania. June 22, 1909.)

1. Courts (§ 198*)-Orphans' Court-Juris-

The orphans' court is a court of limited jurisdiction, exercising only such power as is given it by statute, expressly or by necessary implication.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 472; Dec. Dig. § 198.*]

2. Courts (\$ 201*)-Orphans' Court-Juris-DICTION.

Where once the jurisdiction of the orphans' court attaches, it has full power to determine all questions standing directly in the way of a conversion and distribution of the property of decedent.

3. COURTS (\$ 2001/4*)-ORPHANS' COURT-JU-

Act June 16, 1836, § 19, par. 8 (P. L. 792), provides that the jurisdiction of the orphans' court shall extend to all cases wherein executors, etc., may be possessed of, or are accountable for, the estate of a decedent, and that such able for, the estate of a decedent, and that such jurisdiction shall be exercised as provided by law. A daughter received securities belonging to her father, receipting therefor as his agent, but after his death omitted certain of them from the inventory filed by her as executrix, on the ground that her father had given them to her, and at the audit presented instruments transferring the same to her. Their sufficiency was denied on the ground that he was not mentally competent to make a valid gift. Held, that the orphans' court was without jurisdiction to determine such issue so raised, and should direct an issue to the common pleas, under Act March 29, 1832 (P. L. 190).

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 479; Dec. Dig. § 200½.*]

Appeal from Orphans' Court, Berks County. In the matter of the estate of James Cutler, deceased. From a decree of the orphans' court, dismissing exceptions to an adjudication, Jennie M. Stroup appeals. Reversed.

Argued before FELL, BROWN, MESTRE-ZAT, POTTER, and STEWART, JJ.

Jeff. Snyder and Ira P. Rothermel, for appellant. Cyrus G. Derr and Stephen M. Meredith, for appellees.

STEWART, J. For some years before his death the testator, James Cutler, by reason of the infirmities of age, was unequal to the active management of his estate. He intrusted the control of his business to his son, J. Howard Cutler, and committed to him the safe-keeping of his securities. Upon the death of the son, the latter's executors turned over to the appellant the securities belonging to the testator, aggregating upwards of \$6,000, taking a receipt therefor, in which the securities were specifically enumerated and described. The appellant was then a married woman, and the testator made his home with her; she being his only surviving child. The will, executed before the death of the son, appointed son and daughter executors; but, the former having died in the lifetime of his father, appellant became sole executrix. A number of the items which she had receipted for to the executors of the son as property belonging to her father were omitted from the inventory she filed. A citation was issued at the instance of the children of J. Howard Cutler, deceased, calling upon the executrix to show cause why she should not be required to file an additional inventory. To this she made answer that the testator in his lifetime had parted with the securities omitted from the inventory, and prayed that the citation be dismissed. Issue being joined, the matter was inquired into, but without definite result. Later on, when appellant filed her account as executrix, exception was tak-

herself with these securities; and it was agreed that the evidence taken in the citation proceeding should be considered as taken under this exception. Appellant's contention was that the omitted items were her own individual property; that the money and securities involved had been given her by the testator in his lifetime; and in support of her claim she presented several written and sealed instruments transferring the property to her by way of gift. The genuineness of the signature of James Cutler to these several papers was not questioned, but their sufficiency was denied on the ground that Mr. Cutler was not mentally competent to make a valid gift at the time. And this states the issue that was tried before the auditing judge. He sustained the exceptions and decreed a surcharge to the extent of the omitted items. The appeal is from this de-

There is but a single feature of the case that calls for present consideration: Had the orphans' court jurisdiction to determine the issue thus raised? Its authority is challenged by the seventh assignment of error. It is a familiar doctrine, too familiar to call for any citation of authorities, that the orphans' court is a court of limited jurisdiction, exercising only such power as is given it by statute, expressly or by necessary implication. Except as the authority exercised by the court below in the present case can be derived from the act of June 16, 1836 (P. L. 784), it is safe to conclude that it nowhere exists; for while by subsequent legislation the jurisdiction of this court has perhaps been widened, as its power has certainly been enlarged, it is not pretended that with respect to such controversies as the present any change has been effected. Our inquiry involves only a consideration of the act referred to, and only so much of that as is to be found in the eighth paragraph of section 19, wherein it is provided that the jurisdiction of the several orphans' courts shall extend to "all cases within their respective counties wherein executors, administrators, guardians or trustees may be possessed of, or are in any way accountable for, any real or personal estate of a decedent," with the further provision that "such jurisdiction shall be exercised under the limitations and in the manner provided by law." We need not stop to inquire into the distinction here made between property in possession of an executor and property for which the executor is accountable. The latter is the more general term, and together they embrace all that was owned by the testator at the time of his death. In either case ownership by the testator at the time of his death is antecedently implied, and where such ownership can be affirmed with respect to any property the executor is chargen on the ground that she had not charged ed with accountability the efor, whether in

For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

or out of his possession, and the jurisdiction to defeat a claim of jurisdiction by way of of the proper orphans' court over both is complete.

It is a doctrine equally familiar that, once the jurisdiction attaches, the court has full power to inquire into and determine all questions standing directly in the way of a conversion and distribution of the property; that is, the property of the decedent. Stated conversely, the jurisdiction of the orphans' court is limited to the estate of which the testator died seised. With respect to such estate it has full jurisdiction; but this marks its ultimate limit. Whether a specific article of property belongs to the estate is a question standing in limine. If it does not, the executor is not accountable therefor, and it is beyond the power of the court to control it in any way or charge liability on any one in connection therewith. Presumably every item of property an executor has included in his inventory belongs to the estate, and for all such he must account. The inventory is an admission on his part that the property embraced in it came into his possession as the legal representative of the testator. it be claimed that testator owned other property which either came or should have come into the hands of the accountant, the burden is upon the party so claiming to show first of all that the omitted property was the property of the testator. Where this is denied, and a claim of ownership in another is set up, may not the court inquire as to the fact in issue? Within certain limits unquestionably it may. If at testator's death the property is shown to have been in his possession, or if for any other reason it was presumptively his, a mere denial of his ownership, unsupported, will not oust the court of its jurisdiction; but the court may proceed with the investigation so far as to inform itself whether the denial is made in good faith and a substantial dispute exists. If the dispute be a substantial one, and the title be really involved, may the court further proceed to settle and determine the matter in dispute? Certainly no authority to do so can be found within the terms of the statute, and we think it quite as clear that it cannot be implied from anything in the act

Suppose the property to be in possession of a third party, who claims to have purchased it from the testator. Such person is not under the jurisdiction of the orphans' court, and that court has no process by which his appearance before it can be com-Neither is the property under its jurisdiction, and it is without process to enforce its surrender. Until a common-law court, through a jury, shall have decided against the adverse claimant in an action to which he has been a party, the latter may set at defiance any order or decree of the orphans' court affecting it. The mere fact that the orphans' court would be powerless

implication. But, it may be replied, here the executrix is in court, subject to its jurisdiction, and that this must be said as well of the property which is in her possession. True, as executrix she is in court; but as Jennie M. Stroup, individually, she is not. The orphans' court has jurisdiction over her in her representative character and over the property which she holds as executrix; but with respect to her individual rights of property she stands as clear of the power of the court as any third party. One of these rights that ought not to be questioned at this late day is the right to have her case tried by a jury—a right not subject to be defeated or abridged by legislative enactment. "No power in our government," says Mr. Justice Strong, in North Penna. Coal Co. v. Snowden, 42 Pa. 488, 82 Am. Dec. 580, "can take from the litigant the right to have his case tried by a jury substantially in the mode and with the same effect as that which belonged to jury trials in similar cases when the Constitution of 1776 was adopted." That early Constitution provided that "in controversies respecting properties, and in suits between man and man, the parties have a right to a trial by jury." and the provision in all our later Constitutions is that "trial by jury shall be as heretofore, and the right thereof remain inviolable." Nor can this right be taken away by implication. Nothing short of an express surrender of it will be allowed to defeat a demand for its exercise. Trimble's Appeal, 6 Watts, 138.

Now how stood this case? The exceptants showed that the securities for which a surcharge was asked had been received by the accountant as the agent of the testator a year before the latter's death. Presumably the relation of principal and agent had continued, and the burden was upon the accountant to show an accounting in the lifetime of the testator. She met and overcame the presumption against her by submitting written assignments of these securities to herself, sealed and executed by the testator. The genuineness of the assignments was conceded, and their sufficiency in law to accomplish a valid transfer of the property was not questioned, except on the ground that the testator, at the time he executed them, was not of sufficient understanding. muniments of title as those upon which this accountant here rested may be overcome, and oftentimes are; but the assault upon them cannot be carried on in the orphans' court. All that court can do, when a deed duly authenticated, regular upon its face, is impeached on the ground of fraud, or, as in this case, on the ground of incompetency in the maker, and the evidence in support makes out a prima facie case against the integrity of the instrument, is to send the question and the parties into that court to reach any result in such case is sufficient which alone has jurisdiction to determine

questions of title. We must assume that the evidence offered by the exceptants showed a substantial dispute as to the validity of the written assignments. The question thus presented was a preliminary one, on the determination of which the jurisdiction of the orphans' court depended. It was not a question standing in the way of distribution; for the property had not been recovered by the estate, and its ownership was in dis-When it is said that the orphans' court has jurisdiction to decide all questions standing in the way of distribution, the reference is to property which admittedly is the property of the estate, or has been so established.

Having once determined that a substantial dispute existed as to the ownership of these securities, because of the testator's condition of mind when he executed the assignments produced, the court should have at once directed an issue to the common pleas as it is empowered to do by the act of March 29, 1832 (P. L. 190). A verdict upon the issue would have been more than advisory. Unreversed, it would have been conclusive. "When, in the progress of an investigation like this, it becomes material to settle a doubtful fact, and an issue is made up for that purpose and tried, the verdict of the jury ought to be taken as conclusive, unless it was produced by the admission of illegal or the rejection of legal evidence." Wills' Appeal, 22 Pa. 325. Again, it is said in Craig's Appeal, 77 Pa. 448, a case where an issue had been directed: "The order for the issue was most discreetly made. case was one which peculiarly required the intervention of a jury of plain business men, and an investigation of the questions in dispute by them under the legal guidance of an experienced judge. There is no other form of inquiry so thorough, so unprejudiced, so accurate, and so safe. The verdict was allowed to stand, and it should have controlled the decree of the orphans' court." It is quite true that a verdict in the issue adverse to this appellant would not have brought within the jurisdiction of the orphans' court the specific property which was the subject of the contention; but that court, having jurisdiction over the accounts of the executor and accepting such verdict as conclusive of the question, could have decreed a surcharge against the accountant to the extent of its value, just as in the case where property of the estate is shown to have been lost through the neglect of an accountant. Instead, however, of directing an issue into the common pleas, the judge of the orphans' court proceeded to hear and adjudge finally the rights of the parties with respect to the property in dispute. In this he was exercising a jurisdiction which did not belong to the court over which he presided.

It comes to nothing that the appellant did not ask for an issue. Her title to the property was not endangered, except as an issue was granted. It was not for her to ask an issue; but it was the duty of the court, once convinced that the dispute was substantial, independently of both to direct it. It may be said with much confidence that not a case is to be found in our books recognizing any contrary doctrine to that we have here asserted. Certainly not one has been called to our notice that is even equivocal on the point here raised. It has never been regarded as an open question so far as concerns real estate: and no reason can be suggested why anything different should have been contemplated with respect to personal property. Both, as we have seen, are placed on the same footing in the act conferring jurisdiction upon the orphans' court.

The seventh assignment of error is sustained. A consideration of the other assignments is unnecessary.

The decree is reversed, and the record is remitted; the case to be proceeded with inthe manner indicated in this opinion.

(225 Pa. 204)

In re PAXSON'S ESTATE.

Appeal of FIDELITY TRUST CO.

(Supreme Court of Pennsylvania. June 22, 1909.)

1. COURTS (\$ 2001/2*)-ORPHANS' COURT-JU-

BISDICTION—OWNERSHIP OF PERSONALTY.

The orphans' court has jurisdiction to determine the ownership of a certificate of stock included in the inventory of an executor and accounted for since, the certificate being included in the inventory and accounted for, it is in gremio legis.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 479; Dec. Dig. § 200½.*]

APPEAL AND ERROR (\$ 66*)—REVIEW—FINAL

JUDGMENT—NECESSITY.
Act April 10, 1848, § 8 (P. L. 450), Stewart's Purdon, 1435 (P. L. 6), provides that, where a feigned issue is directed by the orphans' court, a writ of error shall lie in the same manner as where a feigned issue is directed by the common pleas. Act June 16, 1836, \$ 87 (P. L. common pleas. Act June 16, 1836, \$ 87 (P. L. 777), provides that a judgment upon issues in the common pleas shall be subject to a writ of error in like manner as other cases wherein such writs lie. Held, that a writ of error does not lie before judgment on a verdict on a feigned issue directed by the orphans' court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 840; Dec. Dig. § 66.*]

APPEAL AND ERROR (§ 1005*) — REVIEW — QUESTIONS OF FACT.

Where, upon a feigned issue directed by the orphans' court to the common pleas to determine the ownership of a certificate of stock claimed by a third person, the jury credited the wit-nesses in claimant's favor, the auditing judge was of the same mind, and the orphans' court upon a review approved the finding, it will not be disturbed by the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3948-3954; Dec. Dig. §

Court of Common Pleas, Philadelphia County. In the matter of the estate of Edward M. Paxson, deceased. From a decree of the orphans' court, dismissing exceptions to adjudication, and from certain rulings on evidence in the court of common pleas, the Fidelity Trust Company, as executor of Edward M. Paxson, deceased, appeals. Dismissed.

See, also, 221 Pa. 98, 70 Atl. 280. Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

John G. Johnson, Henry D. Paxson, and John Marshall-Gest, for appellant. Eugene Raymond and William W. Porter, for appel-

STEWART, J. In the case of Stroup's Appeal, Estate of James Cutler, Deceased (decided at this present term) 73 Atl. 1111, the effort was, through the medium of the orphans' court, to bring into an estate for the purposes of distribution property not included in the inventory or accounted for, but which the accountant claimed as her own. We there held that the court was without jurisdiction to determine the ownership of the property. Here the effort was to withdraw from the estate an item of property included in the inventory and fully accounted for. The distinction is to be noted. In the one case, except as the title was admitted to be in the estate, or was so established at law, the court could not distribute it. In the other, the property being presumptively an asset of the estate, in the hands of the executor, accounted for, and therefore in gremio legis, the court had full jurisdiction to adjudicate any question in regard to it which stood in the way of its distribution. It could even relinquish its control of the property if the legal right to it was with the claimant. Gaffney's Estate, 146 Pa. 49, 23 Atl. 163. The party claiming property in the custody of the law is the actor. He has a choice of forum and remedy. He can elect to proceed at common law for money had and received, or he may submit his claim upon distribution proceedings in the orphans' court, as was done in Gaffney's Estate, supra. If he elect to pursue the latter remedy, he voluntarily brings himself and his cause within the jurisdiction of the court. He is not thereby creating a jurisdiction where none existed before, but adopting one already established. The case is very different where the disputed property has never been within the grasp of the court, but is in possession of one claiming adversely to the estate. In the latter case the orphans' court has jurisdiction of neither person nor

At the time Judge Paxson died he was the holder of a certificate No. 1,860, for 100,000 shares of the capital stock of the in practice to enter judgment, but because

Appeals from Orphans' Court and from Aniparo Mining Company. His executor, the Fidelity Trust Company, succeeding to this certificate of stock, included it in the inventory of the assets of the estate and has accounted for it. In the adjudication of the account John R. Williams appeared and made claim to the stock, alleging that he had pledged it as his own property to Judge Paxson as collateral security for a debt of the Amparo Mining Company which, since the death of Judge Paxson, the Amparo Mining Company had fully paid and discharged. claimed the right to have the stock returned. Here was a case where the adverse claimant voluntarily elected his tribunal and submitted himself and his cause to its jurisdiction. That jurisdiction was complete as to the only question involved, viz., whether the stock should be surrendered, and that could be determined by the court upon its unaided investigation; that is to say, without the intervention of a jury. Whether a determination adverse to the claimant's contention would be conclusive against him is a question aside from the present inquiry.

The learned auditing judge, because the amount involved was very large, and the evidence conflicting, directed an issue to the common pleas to try the question of fact upon which the contention turned. We quite agree that the case was pre-eminently one which called for an issue; but the fact remains that the jurisdiction of the court in no wise depended on the granting of the issue. A verdict was rendered sustaining the claim made by Williams. The record of the trial, including the testimony and the charge of the court, having been certified back to the orphans' court, the auditing judge thereupon proceeded with the adjudication. His final conclusion was as follows: "Being aided in reaching a conclusion by the verdict returned by the jury in the trial of said issue, and in view of all the facts exhibited and arguments presented, the auditing judge concludes that John R. Williams was entitled to said shares of stock." A decree followed, directing the executor of the will of Judge Paxson to transfer and assign the stock to Jennie R. Graham, executrix of the will of John R. Williams, and that the executor of Judge Paxson should have a corresponding credit in its account. From this decree we have an appeal, and a writ of error to the common pleas as well.

The latter brings nothing before us for review. While there was a verdict in the issue, no judgment was entered thereon. It is said in appellants' brief that it is the correct practice not to enter judgment on. the verdict in such cases, for the reason that the judgment is not final; and for this Finney v. Moore, 8 Serg. & R. 345, is relied on. But that case furnishes no authority whatever for this view. There was a judgment in that case on the verdict, and it was reversed, not, however, because it was incorrect

it was contrary to the agreement of the parties to the submission. Our attention has not been directed to a case where a writ of error has been considered which was not based on a judgment. The language of Act April 10, 1848, § 8 (P. L. 450), Stewart's Purdon, 1435 (P. L. 6), is: "In all cases where a feigned issue has been or may be directed by the orphans' court, a writ of error shall lie in the same manner as in cases where feigned issues are directed by the court of common pleas." Turning to Act June 16, 1836, \$ 87 (P. L. 777); regulating issues in the common pleas, we find it there provided that "the judgment upon such issues shall be subject to a writ of error, in like manner as other cases wherein writs of error now lie." There can be no doubt as to the general rule. "Error does not lie before final judgment, and this rule is founded on great reason, because there would be no end to suits if they might be removed to the superior court on suggestion of error in every stage of the proceedings." Lewis v. Wallick, 3 Serg. & R. 410. There being no judgment, the effect is that there is nothing to review, and the verdict stands unappealed from.

Not only was there no judgment, but we fail to discover a single exception taken to any ruling upon the evidence. All the evidence offered by the defendant in the issue was received, and none offered by the plaintiff was objected to. The exceptions are to the charge of the court and the refusal to give binding instructions. These were certified over to the orphans' court with the record, and were for the consideration of the auditing judge in determining what weight he would give the finding of the jury. The exception to the refusal of the court to give binding instructions for the defendant could come to nothing, since binding instructions would have defeated the only purpose What the auditing judge of the issue. wanted was, not the opinion of another judge, but a finding by the jury on the controverted facts. With respect to the charge the clear inference is that the auditing judge saw no substantial error in it; otherwise another issue would have been directed or the verdict disregarded. However this may have been, the auditing judge makes it very clear that, while aided by the verdict, the finding of the jury accorded with his own conclusions, "upon review of all the facts exhibited and arguments presented." Sitting alone he had heard substantially the same evidence that was afterward submitted to the jury. He granted the issue because the evidence was conflicting, and because the case depended largely, if not wholly, upon the credibility of missed, at the costs of the appellants.

the witnesses called on part of the claimant. He was, as he says, aided by the verdict; but it is plainly manifest that the only aid he could have received from this source was the sanction given by the jury to the credibility of the witnesses, and it is not complained that this was influenced by the charge of the trial judge.

With a single exception all the assignments of error have regard to the trial of the feigned issue. In what we have said these have been disposed of. The first assignment complains of error in directing an issue; in other words, the contention here is that the evidence adduced on part of the claimant was insufficient to support a finding in his favor, and that the auditing judge should have so decided. The certificate was in the name of Judge Paxson and therefore imported ownership in him. Certain agreements and other documents in writing were relied upon as supporting this inference. It is argued that the case was precisely as though Williams had filed a bill to reform the written title to the stock, and had produced the same evidence in support of his claim. Assuming this to be so, there was quite enough in the evidence produced to sustain a finding in favor of the claimant. Two witnesses testified to distinct and unqualified admissions by Judge Paxson that he held the stock as collateral, and that it was to be returned to Williams upon the payment of the debt for which it was pledged. Respecting this testimony there could be no manner of doubt as to the stock and debt referred to. Both were fully identified, and the circumstances under which the alleged admissions were made were fully narrated. The testimony certainly met the requirements as to clearness and precision; and it became a question simply as to whether the witnesses spoke the truth. If what they testified to was true in fact, there could be no escape from the conclusion that honesty and good faith required a surrender of the stock. All that is required in such cases is that the witnesses should be found to be credible, that the facts to which they testify are distinctly remembered, that the details are narrated exactly and in due order, and that their statements are true. Spencer v. Colt, 89 Pa. 314. The jury accredited the witnesses, the auditing judge was of the same mind as the jury, and the orphans' court, upon a review of the exceptions filed, approved the finding. nothing in the case that would justify us in disturbing the result reached.

The writ of error, for the reasons above stated, is quashed, and the appeal is dis-

MEMORANDUM DECISIONS.

SHEARMAN et al. v. SHEARMAN et al. (Court of Appeals of Maryland. June 28, 1909.) Appeal from Circuit Court, Baltimore County; Frank I. Duncan, Judge. Action between Elmira Shearman and others. From the decree, Elmira Shearman and others appeal. Reversed and remanded. Argued before Boyd, C. J., and Briscoe, Schmucker, Burke, Worthington, Thomas, and Henry, JJ. James J. Lindsay and John F. Gontrum, for appellants. T. Scott Offutt, for appellees.

PER CURIAM. The court being of opinion that the amended bill of complaint was sufficient, the decree of the lower court will be reversed. An opinion will hereafter be filed, stating more fully the reason for the conclusion of the court. Decree reversed, and cause remanded for further proceedings; the costs in this court to be paid by the appellees, and the costs below to abide the result of the case.

ATWOOD v. BURT. (Supreme Court of New Hampshire. Grafton. June 26, 1909.) Transferred from Superior Court, Grafton County; Chamberlin, Judge. Assumpsit by W. B. Atwood against Fred Burt. Transferred from the superior court on an agreed statement of facts. Case discharged on the ground of insufficiency of statement. Eri C. Oakes, for plaintiff. George W. Pike, for defendant.

PER CURIAM. Case discharged.

GEORGE v. NEWMARKET MFG. CO. (Supreme Court of New Hampshire. Rockingham. June 26, 1909.) Transferred from Superior Court, Rockingham County; Pike, Judge. Action on the case by Henry C. George, administrator, against the Newmarket Manufacturing Company, for negligence causing death of plaintiff's intestate. There was a verdict for plaintiff, and the case was transferred to the Supreme Court on defendant's exception to the denial of its motion for a nonsuit. Exception overruled. Henry C. George and Eastman, Scammon & Gardner, for plaintiff. Kivel & Hughes and Edward C. Stone, for defendants.

YOUNG, J. It cannot be said that the danger incident to the condition of the defendant's premises, of which the plaintiff complains, was an obvious risk, or one of the ordinary risks of the business. Consequently it cannot be held that they were not in fault. Exception overruled. All concurred.

VALIRE v. LACONIA CAR CO. WORKS. (Supreme Court of New Hampshire. Belknap. June 26, 1909.) Transferred from Superior Court, Belknap County; Wallace, Judge. Action on the case by Peter Valire against the Laconia Car Company Works for personal injuries sustained by plaintiff while in defendant's employ. Transferred from superior court on plaintiff's exception to an order of nonsuit. Exception overruled. Shannon & Tilton, for plaintiff. Jewell, Owen & Veazey, for defendants.

PARSONS, C. J. The facts disclose no ground upon which the plaintiff can recover. Exception overruled. Judgment for the defendants. All concurred.

(77 N. J. L. 800)

BADEWITZ v. WEST JERSEY & S. R. CO. (Court of Errors and Appeals of New Jersey. June 16, 1909.) Error to Supreme Court. Action by Paul Badewitz against the West Jersey & Seashore Railroad Company. Judgment for plaintiff, affirmed on a writ of error to the Supreme Court (75 N. J. Law, 208, 67 Atl. 1067), and defendant brings error. Affirmed. See, also, 71 Atl. 248. Gaskill & Gaskill, for plaintiff in error. David O. Watkins, for defendant in error.

PER CURIAM. The judgment of the Supreme Court is affirmed, for the reasons given by Chief Justice Gummere in 75 N. J. Law, 268, 67 Atl. 1067.

(72 N. J. E. 950)

BROCKHURST v. COX. (Court of Errors and Appeals of New Jersey. June 17, 1907.) Appeal from Court of Chancery. Bill by Harry B. Brockhurst against John H. Cox and others. From a decree (71 N. J. Eq. 703, 64 Atl. 182), Elizabeth A. Brockhurst appeals. Affirmed. Adolph A. Engelke, for appellant. Merritt Lane, for respondent.

PER CURIAM. The decree appealed from will be affirmed, for the reasons stated in the opinion delivered by Vice Chancellor Garrison in the court below. 71 N. J. Eq. 703, 64 Atl. 182.

(77 N. J. L. 801)

COOKE v. INDEPENDENT TELEPHONE & TELEGRAPH CONST. CO. (Court of Errors and Appeals of New Jersey. June 14, 1909.) Error to Supreme Court. Action by Cornelius L. Cooke against the Independent Telephone & Telegraph Construction Company. A judgment for plaintiff was affirmed on error to the Supreme Court (68 Atl. 790), and defendant brings error. Affirmed. Collins & Corbin, for plaintiff in error. John W. Ivins and Aaron E. Johnston, for defendant in error.

PER CURIAM. The judgment of the Supreme Court is affirmed, for the reasons given in the opinion delivered by Mr. Justice Pitney, reported in 68 Atl. 790.

(72 N. J. E. 944)

In re FLAACKE'S ESTATE. (Court of Errors and Appeals of New Jersey. June 17, 1907.) Appeal from Prerogative Court. Judicial accounting by George W. Flaacke, as executor of the will of Frederick W. Flaacke. On appeal from a decree of the Prerogative Court (64 Atl. 1020), modifying an order of the orphans' court sustaining exceptions to the executor's account. Affirmed. Robert H. McCarter, Atty. Gen., for appellant. Charles H. Hartshorne, for respondent.

PER CURIAM. The decree appealed from will be affirmed, for the reasons set out in the opinion filed by the vice ordinary in the court below. 64 Atl. 1020.

(72 N. J. E. 943)

FREUND v. FREUND. (Court of Errors and Appeals of New Jersey. June 17, 1907.) Appeal from Court of Chancery. Bill by Mary Freund against Michael Freund. From the decree for complainant (71 N. J. Eq. 524, 63 Atl. 756), defendant appeals. Affirmed. Thomas

Anderson, for appellant. Moses J. De Witt, for respondent.

PER CURIAM. The decree appealed from will be affirmed, for the reasons set forth in the opinion delivered by Vice Chancellor Emery in the court below. 71 N. J. Eq. 524, 63 Atl.

HALEY v. GOODHEART et al. (Court of Errors and Appeals of New Jersey. June 17, 1901.) Appeal from Court of Chancery. Bill by Jermiah L. Haley against Fannie Goodheart and others. Decree for defendants (58 N. J. Eq. 368, 44 Atl. 193), and plaintiff appeals. Affirmed. Richard V. Lindabury, for appellant. Charles L. Corbin, for respondents.

PER CURIAM Affirmed.

PER CURIAM. Affirmed.

(77 N. J. L. 800)

HARRIS v. CONGRESS HALL HOTEL CO. (Court of Errors and Appeals of New Jersey. June 14, 1909.) Error to Supreme Court. Action by Edward Harris against the Congress Hall Hotel Company. Judgment for defendant, affirmed on certiorari (70 Atl. 330), and plaintiff brings error. Affirmed. John W. Westcott, for plaintiff in error. Carron & Kraft, for defendant in error.

PER CURIAM. The judgment under review will be affirmed, for the reasons stated in the opinion of Trenchard, J., delivered in the court below.

(75 N. J. E. 622)

HASKINS v. RYAN. (Court of Errors and Appeals of New Jersey. June 14, 1909.) Appeal from Court of Chancery. Suit by Harry C. Haskins against Thomas F. Ryan. From an order sustaining a demurrer to the bill (64 Atl. 436), plaintiff appeals. Affirmed. McCarter & English, for appellant. Lindabury, Depue & Faulks, for respondent.

PER CURIAM. The order appealed from will be affirmed, for the reasons stated in the opinion of Stevens, V. C., delivered in the court below. 64 Atl. 436.

(75 N. J. E. 606)

HEINISCH v. PENNINGTON et al. (Court of Errors and Appeals of New Jersey. June 14, 1909.) Appeal from Court of Chancery. Bill by Virginia Heinisch against William Pennington and others, executors of Jacob S. Rogers, on a claim against the testator in relation to the will of Thomas Rogers, the father of complainant and testator. Bill dismissed (68 Atl. 233), and complainant appeals. Affirmed. Aaron E. Johnson, for appellant. George Holmes and R. V. Lindabury, for respondents.

PER CURIAM. Our examination of this case leads us to the conclusion that the decree case leads us to the conclusion that the decree appealed from should be affirmed, and for the reasons given in the opinion of Emery, V. C., delivered in the court below, except that we have not found it necessary to consider the following question discussed in that opinion, viz., whether a promise made by a legatee to a testator that he will "provide well" for another legatee, and which promise induces the testator to refrain from altering his will for the purpose of tee, and which promise induces the testator to refrain from altering his will for the purpose of further providing for that other legatee, is enforceable after the death of the testator by the legatee for whose benefit it was made. We find it unnecessary, for the reason that the proofs will not, in our opinion, justify the conclusion that any such promise was made by the defendant's testator to his father. The decree under review will be affirmed. review will be affirmed.

(72 N. J. E. 945)

HELMUTH v. HELMUTH. (Court of Errors and Appeals of New Jersey. June 17, 1907.) Appeal from Court of Chancery. Bill by Henry Helmuth against Louise Helmuth Decree for defendant, and complainant appeals. Affirmed. Weller & Lichtenstein, for appellant. Harry W. Lange, for respondent.

PER CURIAM. The decree appealed from will be affirmed, for the reasons set forth in the oninion delivered by Vice Chancellor Bergen in the court below.

(72 N. J. B. 944).

JOHNSON v. HARDMAN RUBBER CO. (Court of Errors and Appeals of New Jersey. June 17, 1907.) Appeal from Court of Chancery. Bill by Cyril Johnson against the Hardman Rubber Company. Decree for complainant, and defendant appeals. Affirmed. Coult & Smith, for appellant. Chauncey G. Parker, for recordent for respondent.

PER CURIAM. The decree appealed from will be affirmed, for the reasons set out in the opinion of Vice Chancellor Stevens, delivered in the court below.

ROCHE et al. v. HOYT et al. (Court of Errors and Appeals of New Jersey. Nov. 18, 1907.) Appeal from Court of Chancery. Bill by Charles W. L. Roche and others against George Hoyt and others. Decree for complainants (71 N. J. Eq. 323, 64 Atl. 174), and defendants appeal. Affirmed. William A. Lord, for appellants. E. C. & A. W. Harris, for respondents. spondents.

PER CURIAM. The decree appealed from is affirmed, for the reasons stated in the opinion filed by the Chancellor in the court below. 71 N. J. Eq. 323, 64 Atl. 174.

(72 N. J. E. 948)

SCHIPPERS v. KEMPHES. (Court of Errors and Appeals of New Jersey. June 17, 1907.) Bill by Wilhelmina Schippers against Rheinhold H. Kemphes. Decree for complainant 67 Atl. 1042), and defendant appeals. Affirmed. Charles B. Dunn and Michael Dunn, for appellant. Robert E. Van Hovenberg, for reproduct. pondent.

PER CURIAM. The decree appealed from is affirmed, for the reasons stated by Vice Chancellor Stevenson in the opinion delivered by him in the court below. 67 Atl. 1042.

(72 N. J. E. 946)

SELIGMAN v. VICTOR TALKING MACH.
CO. (Court of Errors and Appeals of New
Jersey. June 17, 1907.) Appeal from Court of
hancery. Bill by Isaac Seligman against the
Victor Talking Machine Company. Decree for
complainant (71 N. J. Eq. 697, 63 Atl. 1093),
and defendant appeals. Affirmed. Norman
Grey and Horace Pettit, for appellant. French
& Richards for respondent. & Richards, for respondent.

PER CURIAM. The decree appealed from will be affirmed, for the reasons stated in the opinion delivered by Vice Chancellor Garrison in the court below. 71 N. J. Eq. 697, 63 Atl.

(72 N. J. E. 939)

SMALL et al. v. PRYOR et al. (Court of Errors and Appeals of New Jersey. June 17, 1907.) Appeal from Court of Chancery. Bill by Bridget Small and others against Catharine Pryor and others. Decree for complainants (69 N. J. Eq. 606, 61 Atl. 564), and defendants ap-



peal. lants.

PER ("TRIAM. The decree appealed from will be a ... rmed, for the reasons stated in the opinion filed by Vice Chancellor Emery in the court below. 69 N. J. Eq. 606, 61 Atl. 564.

(78 N. J. L. 560)

SUMMERTON et al. v. CITY OF ELIZA-BETH. (Court of Errors and Appeals of New Jersey. June 28, 1909.) Error to Supreme Court. Action by Walter A. Summerton and another against the City of Elizabeth. Judgment for defendant (73 Atl. 89), and plaintiffs bring error. Modified and affirmed. Frank P. McDermott, for plaintiffs in error. F. J. Faulks, for defendant in error.

Faulks, for defendant in error.

PER CURIAM. The judgment of the Supreme Court (73 Atl. 89) is affirmed, for the reasons stated in that court by Mr. Justice Bergen, whose opinion we adopt with one reasorvation, viz., that we do not decide that municipalities that bound upon a stream used by them for sewerage are not within the purview of the statute. A decision upon this point is not called for. We agree with Justice Bergen that the classification on which the statute is based is justified, and that it is not arbitrary or illusory; but, instead of placing its validity upon the fact. or even upon the assumption, that such classification excludes those cases in which a stream so used is the boundary between two municipalities, we prefer to put it in the alternative, and to say that municipalities so

Affirmed. Edward Nugent, for appelPatrick H. Gilhooly, for respondents.

("VRIAM. The decree appealed from filed by Vice Chancellor Emery in the below. 69 N. J. Eq. 606, 61 Atl. 564.

J. L. 560)

MERTON et al. v. CITY OF ELIZAI. (Court of Errors and Appeals of New June 28, 1909.) Error to Supreme Action by Walter A. Summerton and regainst the City of Elizabeth. Judgfor defendant (73 Atl. 89), and plaintiffs below.

MURPHY v. NORTH JERSEY ST. RY. CO. (Supreme Court of New Jersey. June 7, 1909.) Error to Circuit Court, Essex County. Action by Kate Murphy against the North Jersey Street Railway Company. From a judgment for defendant, plaintiff brings error. Affirmed. Argued February term, 1909, before the CHIEF JUSTICE, and SWAYZE and PARKER, JJ. Louis Hood, for plaintiff in error. Leonard J. Tynan, for defendant in error.

PER CURIAM. This case is very similar in its facts to the case of Baker v. North Jersey St. Ry. Co. (N. J.) 72 Atl. 434. We think the trial judge was entirely right in directing a verdict for the defendant, and the judgment is affected with costs.

END OF CASES IN VOL. 78.